MISSOURI CIRCUIT COURT
TWENTY-THIRD JUDICIAL CIRCUIT
JEFFERSON COUNTY

Jim Lamprecht,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 12 JE-CC00227
	)	
Tiara at the Abbey Homeowners Association,	)	
	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

I. Findings of Fact.

1. Plaintiff, Jim Lamprecht, owns a home located in the City of Pevely, Jefferson County, Missouri, which is subject to the covenants of Tiara at the Abbey Homeowners Association. *Joint Stipulations,* at ¶ 1.

2. Defendant, Tiara at the Abbey Homeowners Association, is an association of homeowners that has the authority to enforce its covenants. *Id.*, at ¶ 2.

3. Lamprecht desires to engage in political speech by placing signs in his own yard. *Id.*, at ¶ 12.

4. When Lamprecht has placed a political sign in his yard in the past, a Trustee of Defendant has informed him that he was violating a restrictive covenant. *Id.*, at ¶¶ 4-5, 9-12.

5. The covenant mandates that "no sign of any kind shall be displayed to the public view," yet makes limited enumerated exceptions for some commercial signs, including:

   a. "one sign of not more than five (5) square feet advertising the property for sale" and
   b. "signs used by a builder or remodeler to advertise the property during the construction or remodeling period."

Id., at ¶¶ 5-6.

6. Additionally, Defendant has a longstanding but unwritten practice of also allowing security company signs. *Id.*, at ¶ 8.

7. Political signs are completely banned. *Id.* at ¶¶ 5, 9 (including Ex. A at p. 11, and Ex. C and Ex. F).

8. Lamprecht has been chilled from expressing his support for candidates by placing a political sign in his yard because of what he reasonably perceives as a threat to use legal process to enforce the covenant. *Id.*, at ¶ 10.

II. Conclusions of Law.

A. Introduction.

Because the parties have asked this Court for a bench trial on stipulated facts, this "[C]ourt shall render the judgment it thinks proper under the law [from the facts stipulated]." Mo. R. Civ. P. 73.01; *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 337 (Mo. banc 2007).

Pursuant to the Declaratory Judgment Act, Plaintiff has standing to challenge whether Covenant No. 25"s prohibition against political signs and its enforcement violates his rights under the Missouri Constitution and this Court has jurisdiction over such a challenge. *Charron v. State*, 257 S.W.3d 147, 151-52 (Mo. App. W.D. 2008); *see also Camden County ex rel. Camden County Comm'n v. Lake of Ozarks Council of Local Governments*, 282 S.W.3d 850, 856 (Mo. App. W.D. 2009).

B. Count I (Mo. Const. Art. I, § 8).

1) Overview.

Plaintiff contends that the free-speech provisions of the Missouri constitution are more expansive than the First Amendment to the federal Constitution and, thus, do not require direct state-action before expressive activity on one"s own property can be protected. The threatened

enforcement of Covenant No. 25"s prohibition against political signs triggers the protections of the Article I, § 8. [1] In addition, given the chilling effect of Covenant No. 25, Plaintiff asserts that Missouri Revised Statutes § 478.070 violates the Missouri Constitution as applied here when it makes available to Defendant the coercive power of the government to enforce it and the application of the statute constitutes state-action.

2) Covenant No. 25's prohibition against political signs violates Mo. Const. Art. I, § 8.

The Supreme Court of Missouri has held that "provisions of our state constitution may be construed to provide more expansive protections than comparable federal provisions." *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996) (emphasis added). *See also PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 79-81 (1980) (noting that although the First Amendment did not grant the right of free expression in shopping centers, states may adopt greater speech rights including the limiting of private property rights in service of free speech). Political speech receives added protection under the Missouri Constitution than under the federal Constitution because it is a fundamental right. *See, e.g., Etling*, 92 S.W.3d at 774 (holding "[f]undamental rights [under Missouri Constitution] include the rights to free speech [and] to vote"); *see also Riche v. Dir. of Revenue*, 987 S.W.2d 331, 336 (Mo. banc 1999); *Cf. Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. banc 2006) (holding "voting rights are an area where our state constitution provides greater protection than its federal counterpart").

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[1] This case is distinguishable from each of the covenant cases cited by Defendant. First, none of the three Missouri covenant cases cited by Defendant touch upon signs or homeowner speech. Second, unlike the non-Missouri sign covenant cases cited by Defendant, Covenant No. 25 restricts political speech, which is a fundamental right under the Missouri Constitution. *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003). Finally, each of the Defendant"s non-Missouri sign covenant cases was a challenge based on the United States Constitution, not a state constitution. For these reasons, this case does not present a mere contract dispute.

Missouri"s free-speech provision has been interpreted expansively. *See, e.g., State v. Van Wye*, 37 S.W. 938 (Mo. 1896); *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391 (Mo. banc 1902); *Ex Parte Harrison*, 110 S.W. 709 (Mo. 1908); *Wolf v. Harris*, 184 S.W. 1139 (Mo. 1916). More recently, the Supreme Court of Missouri has explained that what was determinative in these older cases was that they addressed content-based restrictions on speech. *BBC Fireworks, Inc. v. State Highway & Transp. Comm'n*, 828 S.W.2d 879, 881 (Mo. banc 1992). "[A] restriction on speech is content-based when the message conveyed determines whether the speech is subject to the restriction." *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1403-04 (8th Cir. 1995) (finding an ordinance restricting political yard signs is content-based).

Because Covenant No. 25"s prohibition against political signs *is* content-based and encroaches upon constitutional rights the Missouri Supreme Court has deemed "fundamental" this Court declines to simply apply contract law and ignore the violation of such a right.[2]

The right of free speech under our constitution is not only secure from interference by governmental or public bodies, but under certain circumstances from interference by private actors as well. On the other hand, because the restriction is imposed by covenant, analysis is less-strict than the standard that would apply if a government entity had imposed the restriction directly. Unlike restrictions imposed by a state statute or city ordinance, courts should balance the speech-rights of homeowners to post political signs on their own property against the property rights of a homeowners" association, to ascertain whether a covenant is reasonable and enforceable. *See For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060 (N.J. 2007).

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[2] Covenant No. 25, as it is applied to and enforced against non-political signs, is not at issue here and is not affected by this Court"s judgment.

The parties agree that there are no Missouri cases on point to guide this Court in conducting such balancing. This Court finds persuasive the reasoning of the Supreme Court of New Jersey, which has applied its state"s state constitutional protections of speech in this and similar contexts. *See Green Party of New Jersey v. Hartz Mountain Indus., Inc.*, 752 A.2d 315 (N.J. 2000). That court has developed a legal test "to be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate these rights." *State v. Schmid*, 423 A.2d 615, 630 (N.J. 1980). Under *Schmid*, courts consider the following:

> (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public"s invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

Id. The *Schmid* test was refined in *New Jersey Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, to add a "general balancing of expressional rights and private property rights." 650 A.2d 757, 775 (N.J. 1994). Most recently, in a case nearly identical to this one, the Supreme Court of New Jersey applied the balancing test to find that a homeowners" association covenant that banned all signs, except for-sale signs, "is unreasonable and violates the State"s Constitution, [so] the covenant that memorializes it is unenforceable." *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 46 A.3d 507, 522 (N.J. 2012). The Court will apply the same balancing test here.

The first factor to consider is "the nature, purposes, and primary use of the property." *Schmid*, 423 A.2d at 630. For purposes of this case, the second factor –examination of "the extent and nature of the public"s invitation to use the property"– is closely related. *Id.*; *see Khan*, 46 A.3d at 517 (considering the first two *Schmid* factors together in determining validity of a covenant barring political signs). Lamprecht challenges Covenant No. 25"s prohibition on the

placement of any political sign on his own property while allowing certain commercial signs. The nature, purpose, and primary use of Lamprecht"s real property are for his own private and residential purposes. *Khan*, 46 A.3d at 517(noting that private homeowner "is not an outsider or visitor like a leafletter visiting a university campus or a shopping mall. He owns the private property where he wishes to speak."); *Twin Rivers*, 929 A.2d at 1072 (finding property within Twin Rivers to be "common interest" but noting the covenant"s "restrictions on conduct both on the private housing association"s [common] property and on the homeowners" properties"). Generally, individuals have a right to engage in expressive activity of their choosing on their own private property. It is true that the property is residential and the public is not invited to use it; however, "the extent of the public"s invitation to use the property becomes less relevant when viewed through [homeowner]"s eyes because he is the property"s owner and not an invited guest." *Khan*, 46 A.3d at 517. When it comes to signs on the property of homeowners, "it is the private homeowner"s property and not that of the Association that is impacted." *Khan*, 46 A.3d at 516 (quoting *New Jersey Coal*, 650 A.2d at 757); *see also Twin Rivers*, 929 A.2d at 1073. For these reasons, the first two factors do not favor an absolute prohibition on placing a political sign on one"s own property. *See Khan*, 46 A.3d at 517. These factors favor Lamprecht.

The third factor "concerns the purpose of the expressional activity in relation to both the private and public use of the property. This part of the test requires [examination of] the compatibility of the free speech sought to be exercised with the uses of the property." *Twin Rivers*, 929 A.2d at 1073 (citation omitted). It is with this factor that Covenant No. 25 is most extreme. Unlike the restrictions at issue in *Twin Rivers*, for instance, Covenant No. 25 completely prohibits political yard signs. In other words, the covenant is not merely a numerical, size, location, or temporal restriction on political yards signs. As Defendant admitted at oral

argument, the covenant prohibits placing *any* political sign on one"s own property entirely, while allowing other types of signs.

Defendant has "restricted political speech, which lies „at the core" of our constitutional free speech protections." *Khan*, 46 A.3d at 517 (citations omitted). "As the United States Supreme Court has recognized, „residential signs have long been an important and distinct medium of expression" –„a venerable means of communication that is both unique and important."" *Id.* at 518 (quoting *City of Ladue v. Gilleo,* 512 U.S. 43, 54–55, 114 S. Ct. 2038, 2045, 129 L. Ed. 2d 36, 47 (1994)). Such signs are important for the additional reason that "„[p]recisely because of their location," they connect the message directly to the speaker and thus add to the words on display. *Id.* Political yard signs are not incompatible with a residential neighborhood.

Defendant could adopt restrictions so long as they are reasonable as to time, place, and manner and serve its interests. *See Khan*, 46 A.3d at 519; *Twin Rivers*, 929 A.2d at 1074 ("[a]t a minimum, any restrictions… must be reasonable as to time, place, and manner."). In *Twin Rivers*, for example, a homeowners" association limited the location of residential signs. 929 A.2d at 1064. Reasonable limits might also be placed on the number and size of signs. *Khan*, 46 A.3d at 519. Instead, Defendant has imposed a total ban on political signs, while exempting other types of signs from restriction. A complete ban on political signs cannot be considered a minor restriction. *See Khan* 46 A.3d at 518 (holding "[a] near-complete ban on residential signs, which bars all political signs, cannot be considered a minor restriction[.]"). The third factor also favors Lamprecht.

The more general balancing test from *New Jersey Coalition* compels the same result. Indeed, "[a] more general balancing of expressional rights and private property rights offers one

advantage here because that test does not pit one person"s property rights against another person"s right to free speech. Instead, it allows for consideration of three relevant interests: the Association"s property interest in managing a private development; [the homeowner]"s property rights in his own unit; and [the homeowner]"s free speech rights in his home." *Khan*, 46 A.3d at 520. As in *Kahn*, "[t]he same factors discussed above fit more easily within the flexible balancing test and lead to the same result: that the free speech right [the homeowner] sought to exercise from his own home –is not outweighed by the Association"s property interests." *Id.* The result is even more apparent here because Defendant"s property interest in Lamprecht"s property and home is less than in *Khan*, assuming there is any interest at all. Based on the foregoing, this Court concludes that Covenant No. 25"s prohibition against political yard signs is unreasonable and violates Article I, § 8 of Missouri"s Constitution and thus its enforcement is unconstitutional. Therefore, judgment is entered in favor of Plaintiff.

3) Use of Missouri Courts, pursuant to Mo. Rev. Stat. § 478.078, to enforce Covenant No. 25's prohibition against political yard signs is unconstitutional.

In addition, Missouri Revised Statutes § 478.070 violates the Missouri Constitution as applied here because it makes available to Defendant the coercive power of the government to enforce Covenant No. 25"s prohibition against political yard signs. Defendant conceded at trial that the covenant is enforceable only through the courts. "State action... refers to exertions of state power in all forms." *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). In the narrow context of this case, where the state has made available to Defendant the government"s coercive power to enforce Defendants" content-based prohibition of political signs, the covenant has the force of law. Likewise, the threat of judicial enforcement of the covenant, enabled by § 478.070, constitutes state action. The Court reaches this conclusion because the covenant restricts what the

Supreme Court of Missouri has identified as a fundamental right. By analogy, there is little doubt that a contract prohibiting a homeowner from voting in elections, another fundamental right in Missouri, would be unenforceable through the courts.

Having concluded that mechanism through which Covenant No. 25 is enforced creates state-action in this context, the content-based prohibition on political speech is unconstitutional. The burden of proof is always on the proponent of state-action that restricts expressive activity. *See Phelps-Roper v. Koster*, 713 F.3d 942, 949 (8th Cir. 2013). The burden is especially steep here because "[w]ith rare exceptions, content discrimination in regulations of the regulations of the speech of private citizens on private property ... is presumptively impermissible, and this presumption is a very strong one." *Gilleo*, 512 U.S. at 59; *see also Ocello v. Koster*, 354 S.W.3d 187, 200 (Mo. banc 2011) (noting that content-based restrictions on speech are presumptively unconstitutional). Covenant No. 25 is a classic example of a content-based restriction because its prohibition applies, or not, depending on what a sign says. *See Whitton*, 54 F.3d at 1404; *see also Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011). Considering identically placed and sized "for sale" and political sign, the covenant permits the former and prohibits the latter. Defendant offers no evidence or argument to overcome the presumption that its content-based restriction and enforcement would violate Article I, § 8 of Missouri"s Constitution. For this additional and independent reason, judgment is entered in favor of Plaintiff.

C. Count II (Mo. Const. Art. I, § 2).

Mo. Const. art. I, § 2 provides "that all persons are created equal and are entitled to equal rights and opportunity under the law[.]" Equal protection analysis requires a two-step inquiry. *Etling*, 92 S.W.3d at 774. First, courts determine if the classification "operates to the

disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Id.* (quoting *In re Marriage of Kohring*, 999 S.W.2d 228, 231-232 (Mo. banc 1999) (citations omitted)). Second, if the classification either hinders a suspect class or impinges upon a fundamental right, courts apply strict judicial scrutiny to decide whether the classification and differential treatment serves a compelling state interest. *Id.* (quoting *In re Marriage of Kohring,* 999 S.W.2d at 232).

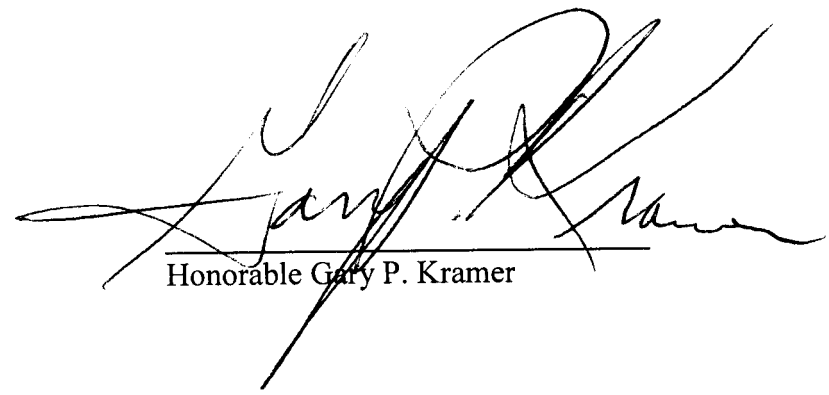
Under Missouri"s Constitution, the right to free speech is a fundamental right. *Etling*, 92 S.W.3d at 774. Defendant"s enforcement of its content-based restrictive covenant with respect to political signs, solely through the coercive power of the state courts (or the threat thereof), treats Lamprecht"s political speech differently than other speech. Because this Court must apply strict judicial scrutiny and because Defendant has no evidence of any interest, compelling or otherwise, advanced by the disfavored treatment of political speech, Lamprecht is denied the equal protection required by the Missouri Constitution. Judgment is entered in favor of Plaintiff.

D. Relief.

Plaintiff is entitled to declaratory judgment that enforcement of the covenant with respect to prohibiting political yard signs violates the Missouri Constitution; declaratory judgment that § 478.070 violates the Missouri Constitution, as applied, where it makes available the coercive power of the government to enforce a content-based prohibition on political speech; the issuance of a permanent injunction prohibiting enforcement of the covenant as it pertains to political signs, and the award of nominal damages. *See Heuer v. City of Cape Girardeau*, 370 S.W.3d 903, 916 (Mo. App. E.D. 2012) (holding plaintiff is entitled to nominal damages where he has not proven the amount of damages but has shown a violation of his rights). Judgment in the amount of $1.00 is entered in favor of Plaintiff against Defendant.

So Ordered.

10-3-2013
Date



Honorable Gary P. Kramer