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7-1-2004

Municipal Handbook 2003

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Recommended Citation
Hemsley, Sid; Huffer, Dennis; and Tallent, Mike, "Municipal Handbook 2003" (2004). *MTAS Publications: Full Publications.*
http://trace.tennessee.edu/utk_mtaspubs/172

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Chapter 8: Capital Funds

The Local Government Public Obligations Act of 1986 (codified in *T.C.A.* Title 9, Chapter 21) provides a "uniform and comprehensive statutory framework authorizing any local government to issue general obligation bonds and revenue bonds for public works projects, general obligation refunding bonds, revenue refunding bonds, bond anticipation notes, capital outlay notes, grant anticipation notes, and tax anticipation notes, and to authorize the destruction of bonds, notes, and coupons" (*T.C.A.* 9-21-102). A subsequent statute repealed most of the old authorizations for local government debt scattered throughout the code (Acts of 1988, Chapter 750).

The Local Government Public Obligations Act of 1986

The Local Government Public Obligations Act of 1986 is both comprehensive and flexible. It provides relatively straightforward procedures for local governments to borrow money for almost any reasonable public purpose. In addition to the general provisions in Part 1 and Part 4, the legislation contains the following parts relevant to cities:

- Part 1: General provisions applicable to all bonds and notes issued by local governments.
- Part 2: General Obligation Bonds–When issuing general obligation bonds, a governing body pledges the "full faith and credit" of the city. Bond buyers are promised that the taxes necessary to pay off the bonds will be raised.
- Part 3: Revenue Bonds–Revenue bonds do not pledge full faith and credit of the city. They promise bond holders payment from the income of a revenue-generating facility, such as a water system, or from an earmarked revenue source, such as a city's local option sales tax.
- Part 4: General provisions governing the issuance of all notes by local governments.
- Part 5: Bond Anticipation Notes–Notes are used for shorter term debt. Anticipation notes are issued when a city wants to delay issuing bonds until the costs of several projects can be added together into one bond issue or until the bond market changes and long-term interest rates decline.
- Part 6: Capital Outlay Notes–These notes are used to borrow money for intermediate periods of from one to 12 years.
- Part 7: Grant Anticipation Notes–Some federal grants require a city to spend its own money to carry out a project, then apply for reimbursement. These notes allow the city to borrow funds for the front-end costs.
- Part 8: Tax Anticipation Notes–Some jurisdictions that do not maintain adequate reserves have to borrow operating funds each year to get through the lean months before annual property tax payments are received.
- Part 9: Refunding Bonds–Sometimes cities have to sell bonds when interest rates are high. If rates drop significantly a few years after the bonds are sold, refunding procedures allow the community to issue new bonds at the lower interest rate and use money borrowed with the new bonds to pay off the old, high-interest debt.

Debt Limit

There is no debt limit under the act. "Bonds or notes may be issued under this chapter notwithstanding and without regard to any limit on indebtedness provided by law" (*T.C.A.* 9-21-103).

Allowable Projects

The definition section of the act has a long list of allowable public works projects, including everything from abattoirs to zoos. The list and the accompanying catchall provisions should cover most projects a community may want to fund (*T.C.A.* 9-21-105(21)).

If a city has used available funds to start a public works project, a bond issue may include money to replace those funds (*T.C.A.* 9-21-109).

Powers of Local Governments

The act includes a comprehensive list of local government powers to issue debt, use the borrowed money, and pay the obligation. Cities are authorized to undertake bond-funded projects with other local governments and with the state or federal governments. They may build projects up to 20 miles outside the city limits. They may levy taxes on only a portion of the city to finance a project that benefits only that portion of the community. They may establish fees, tolls, or other charges and promise their bondholders that the revenue will be earmarked to pay off the debt. The act also includes authority to lease public works projects. Cities may use this authority to structure public/private partnership agreements (*T.C.A.* 9-21-107, 214).

Limitations on Local Governments

The act provides that "no local government shall engage in the construction of a public works project wholly or partly within the legal boundaries of another local government except with the consent of the governing body of the other local government" (*T.C.A.* 9-21-107(1)).

Process for Issuing Debt

General Obligation Bonds

The city council adopts an initial bond resolution stating:

- The maximum dollar amount of bonds to be issued;
- The project for which the bonds are to be issued;
- The maximum interest rate the bonds will be allowed to bear; and
- A statement of revenues to be used to pay the bonds (*T.C.A.* 9-21-205).

The resolution may be adopted at a regular or a special meeting with only a majority vote. It takes effect immediately upon adoption and is not subject to veto (*T.C.A.* 9-21-108).

The city publishes the resolution with a notice advising the community that if 10 percent of the registered voters present a petition calling for a referendum within 20 days, an election will be held to authorize the bonds (*T.C.A.* 9-21-206). If a petition is presented to force a referendum, the bonds may not be issued unless a majority of voters approve the issue. However, there is one exception: if three-fourths of the governing body votes that an emergency requires issuing general obligation bonds for water or sewer purposes, then a petition may not force a referendum (*T.C.A.* 9-21-207).

The city council may act on its own to hold an election to determine if the voters want to issue general obligation bonds for a project (*T.C.A.* 9-21-208). The code establishes procedures for holding bond elections. If an issue is not approved by the voters, then the city must wait at least three months before raising the proposition again (*T.C.A.* 9-21-209–212).

In the process for the bond sale, the city prepares an official statement, which serves as a sales brochure for the debt issue and which normally is prepared with a financial adviser's help. The city decides whether it wants to pay

one of the national rating agencies, such as Moody's or Standard & Poor's, to issue a rating for the bonds and whether it wants to purchase bond insurance to further assure lenders they will get their money back.

The city adopts a final bond resolution authorizing the sale and a tax resolution affirming that annual taxes will be levied to pay bond principal and interest (*T.C.A.* 9-21-215). To assure potential lenders that all legal requirements have been met, cities employ lawyers who specialize in bond issues (bond counsel) to prepare resolutions and other legal documents associated with the issue.

The city advertises the bond issue five days before the sale date. If the bond issue is for more than $5 million, the sale must be advertised in the local newspaper and in a New York City-based financial paper with national circulation (*T.C.A.* 9-21-203).

General obligation bonds are sold by competitive bid (*T.C.A.* 9-21-203). Bonds may be issued for up to 40 years, but the length of the issue may not "exceed the reasonably expected economic life of the project being financed" (*T.C.A.* 9-21-213(a)). General obligation bonds must be sold for at least 98 percent of the face value of the indebtedness, known as "par" (*T.C.A.* 9-21-202).

Within 45 days following a general obligation bond sale or issuing any other debt for more than a year, the city must submit a report to the state director of local finance in the comptroller's office. This report must include:

- The issue and maturity date of the bonds;
- The amount borrowed and the interest rates;
- The debt issue's purpose and the security for the obligation;
- An itemization of the issuance costs, including financial adviser fees, legal fees, paying agent and registrar fees, trustee fees, bond insurance fees, liquidity fees, remarketing agent fees, rating agency fees, underwriters' discount, printing and advertising fees, and other similar expenses; and
- A copy of the official statement (*T.C.A.* 9-21-151).

Revenue Bonds

Issuing revenue bonds is similar to issuing general obligation bonds, but there are no general law provisions for petitioners to force a referendum on revenue bonds. They may be sold by bid or negotiation for at least 97 percent of par value (*T.C.A.* 9-21-302–303).

Lenders providing money through revenue bonds must look for repayment to the revenue produced by the public works being financed. Therefore, revenue bond covenants frequently include detailed promises about how the city will operate its revenue-generating investment and handle its finances. Cities have the authority to make covenants about insuring and maintaining a public works project, keeping city books, performing audits, and many other operational details (*T.C.A.* 9-21-306).

Notes

Bond anticipation notes may be issued for no more than two years from the date of issue. The state director of local finance must approve the issue and may approve two extensions of two years each for a six-year total. During such an extension period, the city has to begin retiring the debt (*T.C.A.* 9-21-501 et seq.).

Capital outlay notes also must be approved by the director of local finance. Several time frame options are available, including three-year notes with two three-year renewal periods, seven-year notes for purchasing land, and 12-year notes. Twelve-year capital outlay notes totaling less than $2 million must be sold at a competitive public sale or by an informal bid process. Twelve-year capital outlay notes totaling more

than $2 million must be sold at a competitive sale (*T.C.A.* 9-21-601 et seq.).

Grant anticipation notes may be issued for various public works projects. They are secured only by the pledge of grant funds under contract between the federal or state government and the city. However, the interest on such grant anticipation notes may be a general obligation of the city. Grant anticipation notes may be issued for three years or for seven years with the approval of the state director of local finance. Under certain conditions, they may be extended to 10 years (*T.C.A.* 9-21-701 et seq.).

Tax anticipation notes for up to 60 percent of a city's total appropriations for a current fiscal year are authorized subject to prior approval by the state director of local finance. These must be paid by the end of the fiscal year. If this is not possible, application for permission to issue funding bonds must be made to the state director "within 10 days prior to the close of the fiscal year" (*T.C.A.* 9-21-801–803).

"Any note or promise to repay money issued ... contrary to the requirements of Chapter 21 ... shall not constitute a legal obligation of the local government and shall be subject to the restrictions and penalties of *T.C.A.* 9-21-406." A lender holding such an invalid note may not collect interest on it until the act's requirements have been met and the obligation approved by the state director of local finance (*T.C.A.* 9-21-406).

To assure that no Tennessee local government slips into the habit of borrowing funds to pay annual operating expenses, any city issuing notes is required to send a balanced annual budget to the state director of local finance. If the director finds that the city is using unrealistic projections in its budget, he or she may require the governing body to adjust its estimates or increase its tax levy (*T.C.A.* 9-21-403).

Before notes may be issued to finance industrial parks, a city must obtain a certificate of public purpose and necessity from the Building Finance Committee in the Industrial Development Division of the Department of Economic and Community Development (*T.C.A.* 9-21-402, *T.C.A.* 13-16-207).

Refunding Bonds

Before issuing refunding bonds for either outstanding general obligation bonds or outstanding revenue bonds, the city's refunding plan must be submitted to the state director of local finance (*T.C.A.* 9-21-901 et seq., *T.C.A.* 9-21-1001 et seq.).

Utility Bond Law

The Revenue Bond Law of 1935 was not repealed. It allows issuing bonds secured by revenues to acquire, construct, reconstruct, improve, or extend parking facilities, water, sewer, gas, or electric systems within or without a city's corporate limits. No referendum is required, only approval by "a majority of all members [of the governing body] then in office." The maximum term is 40 years, and there is no interest rate ceiling. Revenue anticipation notes with terms of up to five years and refunding bonds also are authorized (*T.C.A.* 7-34-101–118).

Cash Basis Law of 1937

The Cash Basis Law of 1937 is another old bond law that has not been repealed. The law was enacted to help cities and counties cope with serious financial problems brought on by the Great Depression of the 1930s. It may be used to:

- Fund notes, warrants, or other debts not secured by bonds;
- Refund any existing bonds and accrued interest thereon; and
- Pay bond redemption premiums and other expenses deemed necessary by the governing body.

The governing body is specifically empowered to take final action at one meeting (one reading only) "notwithstanding the provisions of any public or private statute."

The bond order must include a pledge to levy property taxes sufficient to retire the bonds. It becomes effective on passage by the governing body. Publication of the bond order in a newspaper published in the city or county "once in each of two consecutive weeks" is required. Maximum terms are 20 years for funding bonds and 30 years for refunding bonds, but the state director of local finance may extend these terms by 10 years. Registered bonds are authorized as to principal only or as to principal and interest. No maximum interest rate is specified.

Prior approval of the state director of local finance is required for issuing bonds under this law; therefore, a detailed financial report must be prepared (*T.C.A.* 9-11-108). As long as any bonds issued under this law are outstanding, complete annual budgets for all city or county operations must be submitted to the state director of local finance at least three weeks before adoption. Each annual budget must have the director's approval before adoption. Bonds or notes issued under this statute are exempt from any other public or private law provisions (*T.C.A.* 9-11-101 et seq.).

Some cities used this law as they wrestled with serious debt problems, and a general belief prevailed that it would bring lower interest rates because of the state director's oversight and prior approval requirements. In the mid-1950s, at least 16 cities were subject to the law. As time passed, such bonds were retired. Cities discontinued using the law because of less financial pressure and the subordination of budget power to the state director of local finance. By 1987, no cities were under this law.

Registering Bonds

Procedures and requirements for registering bonds and other public obligations following the federal requirement that all municipal securities must be registered after July 1, 1983, are contained in *T.C.A.* 9-19-101 et seq. and T.*C.A.* 9-21-111.

Special Assessments

Cities frequently receive requests from neighborhoods for drainage projects, street improvements, or other public works construction that benefit only the requesting neighborhood. Instead of spending citywide funds for the project, the city may use a special assessment process in which the benefiting property owners pay part or all of the improvement costs. The state code provides two separate, yet similar, procedures for establishing special assessments, and some city charters include a local procedure.

Establishing Special Assessments: Procedure Number One

Any city, unless its private act charter provides otherwise, may use special assessments to pay for constructing or improving streets, alleys, or other public places. Assessments are calculated according to the frontage of the abutting lot or parcel to the street, alley, or other public place (front-foot basis). The improvement district is created by ordinance following a public hearing. Two-thirds of the project cost is paid by the neighborhood, and one-third is paid by the city. No property owner has to pay an assessment of more than 50 percent of the market value of his or her lot and the improvements.

If the owners of at least 75 percent of the front-footage in the benefiting neighborhood wish to relieve the city from bearing its burden to contribute toward the cost of the improvement, they may state in the petition their desire to pay 100 percent of the cost. However, in this event, the maximum assessment is still one-half of the assessed value of each lot.

T.C.A. 7-32-101(b) allows municipalities to make special assessments for flood control and water management against owners of property in a benefited flood plain. The municipality must assess at least two-thirds of the cost not paid by federal funds to the benefited owners.

The assessment becomes a lien against the property. Property owners may pay the assessment over five years at 6 percent interest (*T.C.A.* 7-32-101 et seq.). Cities may borrow money under the Local Government Public Obligations Act of 1986 to pay for the improvements (*T.C.A.* 7-33-101 et seq., *T.C.A.* 7-33-201).

Establishing Special Assessments: Procedure Number Two

Under this alternative procedure, cities may authorize special assessments for streets, sidewalks, other public ways, and sanitary sewers.

Charges for the improvements are allocated to property owners based on assessed values of their benefited properties instead of on a front-foot basis. The full cost of the project may be charged to the property owners if the city pledges the full faith and credit of the municipality to satisfy any deficiency in collections. Otherwise, 75 percent of the cost may be charged (*T.C.A.* 7-33-301 et seq.).

Churches and other tax-exempt properties are charged an assessment, but undeveloped areas may not be charged (*T.C.A.* 7-33-310). The law, somewhat ambiguously, seems to require the governing body to act if the owners of 51 percent of the total assessed value of the property to be benefited petition for an improvement (*T.C.A.* 7-33-303).

Public Building Authority

Any city and/or county may establish a Public Building Authority (PBA). The authority is a public, nonprofit corporation that can build and operate buildings used by one government, several governments, government organizations, and private businesses that lease space in such buildings. The authority's powers include any undertaking that can be financed by bonds, other municipal obligations, the state, or any agency that enters into an agreement with the authority (*T.C.A.* 12-10-101 et seq.).

The authority may issue revenue bonds to raise money to construct a building. Revenue from long-term leases of the space may pay the bonds. If the bonds or notes are issued in registered form, they must meet requirements established by the Tennessee Public Obligations Registration Act (*T.C.A.* 9-19-101 et seq.).

Any municipality may, by resolution, enter into leases, loan agreements, sales contracts, or operating agreements or contracts for financing certain projects. Such leases, loan agreements, sales contracts, or operating contracts with an authority are payable only from revenues from one or more city projects. After a city makes a commitment to lease space in an authority's building, it must make the necessary tax levies to meet the lease's payment terms, including the project's operating and maintenance expenses. Such a tax must be by resolution and is in addition to other taxes authorized by charter. Cities with taxing power that enter into any lease, loan agreement, or sales contract with a Public Building Authority must comply with the same resolution, notice, and election provisions the municipality must comply with in issuing general obligation bonds unless the lease, loan agreement, or sales contract retires or refunds existing debt (*T.C.A.* 12-10-101 et seq.).

T.C.A. 12-10-124(c) requires PBAs to publicly advertise and receive competitive bids for the construction of buildings or improvements costing more than $10,000 but less than $1,000,000. For buildings or improvements costing $1,000,000 or more, the authority must

use public advertisement or competitive sealed bids, a request for proposals with minimum required qualifications, or a request for qualifications, including minimum qualification requirements, in which multiple proposers are selected and prequalified to submit bids.

Municipalities, counties and metropolitan governments may invest loan proceeds from Public Building Authorities in guaranteed investment contracts chosen or established by the authority under restrictions set out in *T.C.A.* 12-10-111.

Wastewater Facility Grants and Loans

T.C.A. Title 68, Chapter 221, contains three different parts dealing with grants and loans for wastewater facilities:

- Part 2 authorizes loans called "repayable grants;"
- Part 8 authorizes wastewater treatment works construction grants; and
- Part 10 authorizes loans from a revolving loan fund. These loans are also available to intergovernmental entities created by cooperating local governments, such as water or wastewater authorities.

Although the state puts in some money, the vast majority of non-local funds for wastewater projects come from the federal government and have been allocated through the state. In the past, significant grant funds were available. With few exceptions, only loans are available now.

Repayable Grants

To provide these loans, a procedure for issuing state bonds is outlined in *T.C.A.* 68-221-201 et seq. A city receiving a loan agrees to a repayment schedule in a contract with the state and establishes sewer user fees to produce revenues to pay the debt service.

This statute also includes authority to:

- Require sewer connections wherever service is available;
- Refuse water service if such connections are not made;
- Impose connection charges; and
- Levy other charges necessary to raise funds for sewer system operations and maintenance.

Increases in the sewer user fee may not take place automatically when base water charges are increased. They must be separately adjudged reasonable and justified (*T.C.A.* 68-221-201–212).

To assure that the state gets its money back, the loans may be given only to cities receiving state-shared revenue. The annual loan payment may not exceed twice the unobligated state-shared taxes the city receives (*T.C.A.* 68-221-202).

Construction Grants

The Wastewater Treatment Works Construction Grant Act of 1984 provides grants to cities for constructing wastewater treatment works. Grants are allocated according to a statewide priority list maintained by the Department of Environment and Conservation.

Grants are for 55 percent of the eligible portion of the project. If innovative technology is used, grants are for 75 percent. The funds may be used for preliminary engineering and as matching funds for federal EPA grants. Municipalities receiving grants must maintain user rates that will fund operation, maintenance, principal and interest obligations, as well as an adequate depreciation account (*T.C.A.* 68-221-801 et seq.).

Revolving Loan Fund

The purpose of the Wastewater Facilities Act of 1987 is "to provide local governments in Tennessee with low-cost financial assistance relative to necessary wastewater facilities

through the creation of a self-sustaining revolving loan program."

The loan program is administered jointly by the Tennessee Department of Environment and Conservation and the Tennessee Local Development Authority. Cities in the "lower economic scale" may receive loans at lower interest rates than other jurisdictions. Cities receiving loans must agree to adjust their sewer fees periodically so that loan payments and operating costs may be "timely paid." They also must certify their compliance with an operating plan for their facility that has been approved by the Tennessee Department of Environment and Conservation. The plan must address the quality, compensation, and number of wastewater facility employees during the life of the loan. These loans also are available to intergovernmental entities created by cooperating local governments, such as wastewater authorities (*T.C.A.* 68-221-1001 et seq.).

Water Facility Loans

State loans funded by state bonds may be made to cities for constructing waterworks under the Waterworks Construction Loan Act of 1974. The provisions of the act are almost identical to those of the repayable grants for sewer construction described above. Water facility loans are administered by the state Department of Environment and Conservation, which is given authority to issue necessary rules and regulations and to enter into agreements with cities with respect to such loans (*T.C.A.* 68-221-501 et seq.).

Drinking Water State Revolving Fund

T.C.A. 68-211-1201 et seq. do the following:

- Create a Drinking Water State Revolving Fund in the state treasury;
- Provide for loans from the fund to water systems;
- Establish that water systems serving areas in the lower economic scale are eligible for lower interest rates on loans;
- Give priority to projects that address the most severe health problems;
- Provide for affordability criteria for loans based primarily on an area's per capita income and property values;
- Place certain restrictions on using revolving funds, including changes in the system's method of operation;
- Require the water system obtaining the loan to establish dedicated revenue sources to repay the loan, periodically adjust fees and charges, and maintain financial records in accordance with governmental accounting standards;
- Provide that the loans may be interest free; and
- Under certain conditions, allow extended terms for loans to disadvantaged communities.

T.C.A. 68-221-1007–1015 place water systems under the Wastewater Financing Board's jurisdiction. Loans under this program also are available to entities created by cooperating local governments, such as water authorities.

Housing Authority

Local housing authorities are authorized to purchase mortgages and make mortgage loans to nonprofit entities or corporations. To fund these undertakings, housing authorities may sell bonds by public or private sale. A maximum interest rate is not fixed (*T.C.A.* 13-20-104, 602). An industrial development corporation is empowered to provide multifamily housing facilities to be occupied by elderly, handicapped, or low- or moderate-income people (*T.C.A.* 7-53-101(11)(A)(x)).

T.C.A. 13-20-408 prescribes the appointment of a board of commissioners to govern the housing authority. Where the housing authority contains 300 or more units, at least one housing authority commissioner must be a resident of public

housing. The resident must be appointed to the first vacancy on the board that occurs after May 24, 2000.

Housing authority security officers have the same powers as law enforcement officers if they meet the same qualifications and training required of full-time police officers. However, security officers may make arrests only when offenses are committed on housing authority property (*T.C.A.* 13-20-419).

Local Development Authority

The Tennessee Local Development Authority was created in 1978 as a central state agency to handle a variety of state loans to city governments and other public entities.

The governor chairs the authority. Its members include the secretary of state, state treasurer, comptroller, commissioner of finance and administration, an appointee by the speaker of the Senate chosen from three people nominated by the Tennessee County Services Association, and an appointee by the speaker of the House of Representatives from three persons nominated by the Tennessee Municipal League.

The authority may make loans to counties, cities, metropolitan governments, and special districts to finance construction of sewage treatment facilities, waterworks, correctional facilities, and resource and energy recovery facilities. Although prior legislation authorizing other means of financing some of these projects has not been repealed, the legislature declared that this program should be used preferentially. The loan agreements are made between the Department of Environment and Conservation and the local governmental unit (*T.C.A.* 4-31-101 et seq.).

Economic Development

See Chapter 12, "Economic Development," for a discussion of capital funding for industrial parks, downtown redevelopment, and other economic development projects.

Unfunded Pension Obligations

Any local government may issue general obligation bonds for certain unfunded pension obligations if the state director of local finance recommends the issuance and the state Funding Board approves it. "Certain unfunded pension obligations" means pension benefits for local government employees whose jobs resulted from the local government taking over another local government's responsibilities (*T.C.A.* 9-21-127).

Zone Academy Projects

Counties, municipalities, and special school districts are authorized to borrow funds from the state School Bond Authority for "qualified zone academy projects." These projects are buildings, structures, improvements, or equipment for schools, and the county is not required to share the proceeds of the loan with the city school system (*T.C.A.* 49-3-1201 et seq.).

Restoration of Historic Theaters

T.C.A. 67-4-409(j)(2)(A) allows funds in the State Land Acquisition Fund to be used to restore historic theaters owned by municipalities and that are listed on the National Register of Historic Places.

Chapter 9: Fiscal Administration

Fiscal Administration in General

Most municipal charters contain some provisions about fiscal administration. However, some general laws have been enacted in this area. If these laws are more restrictive or comprehensive, they take precedence over charter provisions. For example, the general law requiring annual audits supersedes a private act requiring only biennial audits.

Budget, Appropriations, Publication Requirements

The Municipal Budget Law of 1982 applies to municipalities that do not have budget provisions in their charters requiring detailed estimates of proposed expenditures, expenditures for the preceding fiscal year, reasons for recommended departures, and estimates of anticipated revenue from all sources with comparative statements for the past, present, and next fiscal year.

Cities operating under general law charters and cities that do not have charter budget requirements, at least as detailed as the Municipal Budget Law of 1982 (*T.C.A.* 6-56-201 et seq.), must publish their annual operating budget, comparisons of the proposed budget with the actual budget for the prior year, and estimated expenditures for the current year. This must include:

- Revenues and expenditures for the general, public works, general purpose school, and debt service funds;
- Revenue sources for each fund broken down by local, state, federal, and other sources;
- Expenditures for each fund listed separately by salaries and other costs;
- Beginning and ending fund balances for each fund; and
- The number of full-time equivalent employee positions for each fund.

Publication must be in a newspaper of general circulation not fewer than 10 days before the meeting at which the governing body will consider final passage of the budget.

Appropriated Funds Required

A general law provides that "no person shall be entitled to have made available to them or otherwise be entitled to any program or any services ... unless funds remain available for such program or service from monies appropriated for that purpose by ... the appropriate governing body of a political subdivision" (*T.C.A.* 9-1-116). There are no exceptions to the rule that public funds in Tennessee may not be spent until a governing body has appropriated them.

Appropriations to Civic, Charitable, and Educational Organizations

Cities may make appropriations to charitable organizations and nonprofit civic organizations (organizations operating under 501(c)(4) or 501(c)(6) of the Internal Revenue Code), such as chambers of commerce and industrial promotion agencies. The city must prescribe guidelines directing how agencies may use the money. The agencies must submit an annual report and audit to the city. Advance newspaper notice is required for an appropriation to a nonprofit civic organization. Also, the state comptroller is required to issue regulations governing such appropriations (*T.C.A.* 6-54-111).

Municipalities are specifically authorized to donate public funds to public or tax-supported colleges and universities and even levy taxes for such donations (*T.C.A.* 49-7-108).

T.C.A. 12-8-103 authorizes counties and cities to work gratuitously for charitable, nonprofit organizations, including churches and schools. However, the validity of this statute is doubtful.

Loans to Other Entities

Cities may contract to make loans, grants, donations, and reimbursements to utility districts and other local governments for constructing public works projects (*T.C.A.* 9-21-107).

Accounting System

T.C.A. 9-2-102 requires the Department of Audit "... to prescribe a uniform system of bookkeeping ... in all state, county, and municipal offices." The uniform system for municipalities is prescribed in the *Internal Control and Compliance Manual for Tennessee Municipalities* (Comptroller of the Treasury, Division of Municipal Audit, April 1995). The manual itself declares that it must be used in conjunction with Chapters 1 through 12 of the Government Finance Officers Association's 1994 *Governmental Accounting, Auditing, and Financial Reporting* publication, commonly known as the "Blue Book." Together, these publications supersede the *Uniform Accounting Manual for Tennessee Municipalities*. However, the comptroller also may approve any "existing system, with the concurrence of the Commissioner of Finance and Administration."

Electronic Business Systems

The Uniform Electronic Transactions Act, *T.C.A.* 47-10-101 et seq., authorizes public officials, including those of municipalities and utility districts, to conduct business transactions by electronic means. Public officials may determine whether and to what extent they will send, accept, and rely on electronic records and electronic signatures.

Any municipal official who decides to implement an electronic business system that provides for sending and receiving electronic records that contain electronic signatures and/or authorizations must file a statement with the Comptroller of the Treasury at least 30 days before offering the service. The statement must contain:

- A description of the computer hardware and software to be used;
- A description of policies and procedures related to implementation of the system;
- Documentation of the internal controls that will ensure the system's integrity;
- A description of the public official's personnel who will be responsible for implementation of the system;
- A description of the types of records and transactions to be electronically communicated, as well as a description of the transaction and record authorization process, including a description of any electronic signature to be used;
- Estimated cost of the system, including development and implementation costs; and
- The expected benefits and/or estimated cost savings, if any, of conducting business by electronic means.

Within 12 to 18 months after implementation of an electronic business system, a municipal official must provide a post implementation review to the Comptroller of the Treasury. This review must contain:

- An assessment of the system by the official;
- Responses from a survey of users of the system; and
- Any recommendations for improvements to the system.

See Chapter 5 for open record implications of this statute.

Receipt of Funds

Municipalities are authorized to accept checks, money orders, credit cards and debit cards for taxes, licenses, fines, fees, and other money collected by the municipality (*T.C.A.* 9-1-108(a) and (c)(1)). If payment is made by a bad check, the municipality may impose a penalty of $20 or 1 percent of the amount of the check over $2000 (*T.C.A.* 9-1-109). If payment is made by a credit card or debit card, the municipality may collect a processing fee in an amount equal to the amount paid to the third party that processes the payment. This fee shall not exceed 5 percent of the amount of the payment. If payment is made by a credit card that is not honored by the credit card company, the municipality may collect a service charge equal to that charged for a check that is returned for insufficient funds. This charge shall not apply if an electronic device is used to conduct the credit card transaction and the card and cardholder are present when the municipal officer conducting the transaction learns that the credit card will not be honored. The municipal officer collecting funds through payment by a credit card or debit card shall state on any notice to the person owing the tax, fine, fee, etc., either the percentage of the processing fee, or the actual fee imposed for the use of a credit card or debit card (*T.C.A.* 9-1-108(c)(2)-(6)).

Investment (Deposit) of Municipal Funds

Funds temporarily not needed may be invested in a wide range of securities, including:

- U.S. treasury bills and notes;
- Nonconvertible securities of federal agencies such as the Federal National Mortgage Association;
- Secured certificates of deposit at state and federal chartered banks and savings and loan associations;
- Repurchase agreements of federal agency securities under procedures established by the state Funding Board if approved by the director of local finance;
- Money market funds made up of authorized securities if approved by the state director of local finance;
- Top-rated state and local government general obligation bonds–investment of proceeds of notes and bonds (*T.C.A.* 6-56-106);
- TVA obligations (*T.C.A.* 35-3-119);
- Public Housing Authority obligations (*T.C.A.* 35-3-115);
- Industrial building bonds (*T.C.A.* 7-55-114);
- Industrial development corporation bonds (*T.C.A.* 7-53-309); and
- Water Treatment Authorities (*T.C.A.* 68-221-611(h)).

Most investments are limited to a maximum of two-year maturities unless approved by the director of local finance (*T.C.A.* 6-56-106).

Investment Pool

An investment pool, administered by the state treasurer, is available for investing a local government's idle public funds. Local funds are consolidated with state funds, but accurate and detailed accounting records are maintained for each local government. The cost of the service is deducted from that government's *pro rata* earnings (*T.C.A.* 6-56-106 and 9-4-701–706).

Collateral

All cities may invest or deposit funds in state or federal savings and loan associations, providing certain collateral requirements are met for investments exceeding the $100,000 insured by federal bank insurance programs (*T.C.A.* 9-1-107). Funds in banks also must be collateralized (*T.C.A.* 6-56-106), and the collateral must have a market value equal to 105 percent of the government funds it secures (*T.C.A.* 9-4-105).

Collateral Pool

The Collateral Pool for Public Deposits Act of 1990 creates a system whereby any bank or savings institution designated as a qualified public depository guarantees public depositors against loss caused by the default or insolvency of other qualified banks or public depositories in the same pool. The act created the Collateral Pool Board, which is responsible for administering the system (*T.C.A.* 9-4-501 et seq.).

Audits

Each municipality's governing body is responsible for obtaining annual audits of "all departments, boards, and agencies under its jurisdiction that receive and disburse funds ... [including] general funds, highway funds, school funds, and public utilities." The audit must be completed "as soon as practicable after the end of the fiscal year" (*T.C.A.* 6-56-101).

Copies of the audit must be furnished to the mayor, the "chief executive officer," each member of the governing body, the comptroller, and "shall also be made available to the press" (*T.C.A.* 6-56-105). A copy is required to be placed in the main branch of the municipality's public library and also may be posted on the Internet (*T.C.A.* 6-56-104).

Such audits must meet minimum standards prescribed by the state comptroller and shall be approved by that office. The audits may be made by certified public accountants, public accountants, or auditors from the comptroller's office. If a city fails to have an audit, the comptroller may require one at the city's expense (*T.C.A.* 6-56-105).

The Department of Audit in the comptroller's office may establish minimum standards for audits by the internal audit staffs of local governments. The department also may require all such audits to contain a statement of compliance with those standards (*T.C.A.* 4-3-304(9)).

Comptroller Fees

T.C.A. 8-4-108 allows the comptroller to charge administrative fees for services requested by and provided to municipalities and other local governments.

Chapter 10: Purchasing

Municipal Purchasing Law of 1983

The Municipal Purchasing Law of 1983 establishes minimum requirements for all cities that do not have charter or private act provisions governing competitive bidding and purchasing.

The act requires public advertising and competitive bids for all purchases, leases, and lease-purchases except:

- Purchases through state contracts;
- Purchases from instrumentalities created by two or more cooperating governments;
- Goods and services purchased from nonprofit corporations formed to specifically serve municipalities;
- Purchases, leases, or lease-purchases of real property;
- Purchases, leases, or lease-purchases from other governments;
- When there is only one source of supply or proprietary product;
- Emergency purchases (complete documentation and a report to the municipality's governing body and chief executive are required for each emergency purchase);
- Leases or lease-purchase agreements requiring payments of less than $2,500 during a fiscal year;
- Purchases of perishable commodities when approved by the governing body and subject to certain documentation and reporting requirements;
- Fuel and fuel products, which may be purchased on the open market;
- Purchases, leases, or lease purchases of secondhand articles or equipment, etc., from federal, state, or local government units or agencies;
- Any contract for purchasing natural or propane gas for resale; and
- Purchases under $2,500, although cities may adopt an ordinance increasing the purchase amount to $10,000 before advertising and competitive bids are required.

Purchases between $1,000 and the amount established for advertising and competitive bids may be made without advertising on the open market but "wherever possible" shall be based on three competitive bids. Purchases of less than $1,000 do not require advertising or competitive bidding (*T.C.A.* 6-56-301 et seq.).

State Government and Local Purchasing

Purchasing through State General Services

Municipalities may take advantage of state prices regardless of any charter or general law requirements pertaining to competitive bidding. Additionally, aside from any local or private act or charter or general law restrictions, municipalities may buy any item from local sources if:

- Local sources offer the item at the same or a lower price than the state contracts; or
- The item is not available to local governments under the provisions of contracts or price agreements entered into by the state Department of General Services. Not all prices quoted to the state are available to local governments (*T.C.A.* 12-3-1001).

The items, prices, and vendor information are online at the Department of General Service's Purchasing Division site at www.state.tn.us/generalserv/purchasing/kont.htm.

Purchases from Other Governments
Any municipality may buy secondhand items or equipment or other materials, supplies, commodities, and equipment from any other government. These purchases may be made without competitive bidding and public advertising, regardless of charter requirements (*T.C.A.* 12-3-1003).

Purchases for Other Local Governments
A local governmental entity may buy supplies, equipment, and services for any other local governmental body at the latter's request. Examples of governmental entities include municipalities, counties and utility districts.

The acquisition must be made according to the purchasing entity's terms. The entity for which the purchase is made bears the acquisition cost.

The requesting entity meets all of its competitive bidding and public advertisement requirements if the purchasing body complies with its own buying requirements. When buying services (not supplies or equipment), it is a good idea for the purchasing entity to identify the requesting entity in the bid (*T.C.A.* 12-3-1004).

Property Purchases at Public Auctions; Reporting
T.C.A. 12-3-1006 authorizes cities to establish written procedures governing purchases at publicly advertised auctions and sets reporting requirements for the purchasing official.

Regulations for Competitive Bidding
T.C.A. 12-3-1007 outlines regulations governing competitive bidding for municipalities with populations exceeding 150,000.

Transferring Personal Property Among Governments
T.C.A. 12-3-1005 authorizes counties, municipalities, and metropolitan governments, upon approval of their governing bodies, to purchase, trade, or receive as a gift any used or surplus personal property from another such government, the state of Tennessee, the federal government, and any division of such governments, regardless of any laws regulating competitive bidding and public advertisement. By resolution or ordinance of its governing body, any county, municipality, or metropolitan government may establish a procedure for disposing of its surplus personal property by selling, giving, trading, or bartering. Recipients include counties, municipalities, metropolitan governments, the state of Tennessee, the federal government, other states or their political subdivisions, the divisions of any of the foregoing, or other governmental entities. Any other law concerning selling or disposing of used or surplus personal property may be disregarded.

T.C.A. 12-3-1010 authorizes municipalities, counties, and metropolitan governments to transfer the ownership of assets for fire protection purchased with federal, state, or local grants to volunteer fire departments within any such government. The volunteer fire department must be registered as a nonprofit organization with the Tennessee Secretary of State. This act must be approved locally before it becomes effective.

T.C.A. 49-6-2006 authorizes local boards of education to transfer surplus real or personal school property "to the county or to any municipality within the county for public use without competitive bidding or sale."

Products from State Agencies

The Tennessee prison system operates several workshops that manufacture products useable by city governments (*e.g.*, office furniture and equipment, street signs, paint, envelopes, and letterhead stationery). A catalog of such products is available from Tennessee State Industries in Nashville.

A general law mandates cities and towns to purchase articles "produced or manufactured" in prison industries if the Board of Standards certifies that the articles' quality is satisfactory, the prices are reasonable, the goods are available, and the materials meet the purchasing municipalities' requirements (*T.C.A.* 41-22-119 – 120)

A similar general law says that political subdivisions must purchase "... all services or commodities required ... from qualified nonprofit work centers for the blind or severely handicapped ... provided the articles are certified by the Board of Standards and are available" (*T.C.A.* 71-4-703).

Purchasing TRICOR Products

T.C.A. 41-22-116 allows the Tennessee Rehabilitative Initiative in Correction Board to develop policies for the sale of TRICOR products to municipal employees.

Surplus State Property

The State Surplus Personal Property Act of 1976 permits the sale or transfer of certain state surplus personal property to municipalities and other specific entities when the transaction is a:

- Sale to political subdivisions of the state, governmental entities, and nonprofit corporations approved as authorized donees under the federal Surplus Property Program and sale to nonprofit, federally financed, rural electrical corporations;
- Sale for fair market value to non0 profit volunteer fire, police, and rescue organizations operated for a public purpose;
- Sale or transfer connected with transferring associated real property to a local government, and the sale or transfer is in the interest of the state;
- Sale or transfer without cost to local governments, provided the property was initially acquired from the federal government for civil defense purposes, and the sale or transfer is in the interest of the state; or
- Transfer, without cost, of surplus computer equipment to local educational agencies, provided that such property is suited for those purposes, and the transfer is in the interest of the state.

The sale or transfer of such property is subject to approval by the Commissioner of General Services, other state officials, and the Board of Standards under various rules and regulations.

For all surplus property, governmental entities and other authorized donees must retain possession of the property for one year unless the Board of Standards authorizes earlier disposal (*T.C.A.* 12-2-401 et seq.).

Professional Services

Bids Prohibited for Professional Services

Taking bids is prohibited "for legal services, fiscal agents or financial advisers or advisory services, educational consultants, and similar services by professional persons or groups of high ethical standards." Contracts for such services "shall be awarded on the basis of recognized competence and integrity." The statute specifically permits "interviewing eligible persons or groups to determine the capabilities of such persons or groups" (*T.C.A.* 12-4-106).

Fiscal Agent Services Contracts
When issuing bonds, many cities employ a financial adviser or fiscal agent for advice on the issue's structure, timing, terms, etc. State law requires a written contract with the fiscal agent that covers services to be rendered, costs, and expenses. If the fiscal agent wishes to bid directly or indirectly on the debt issue, he or she must have the city's written permission (*T.C.A.* 12-4-106).

Miscellaneous Purchasing Provisions

Electronic Bidding and Contracting
T.C.A. 12-3-704 allows municipalities to satisfy any mailing requirement by electronically distributing invitations to bid, requests for proposals, and other solicitations. Cities also may receive bids, proposals and offers electronically. However, cities shall not require small businesses and minority-owned businesses to receive or respond to invitations to bid, requests for proposals, or other solicitations electronically.

The "Uniform Electronic Transactions Act," *T.C.A.* 47-10-101 et seq., provides that for parties who agree to conduct business in electronic form, signatures and contracts may not be denied legal effect solely because they are in electronic form.

Purchases of Certain Insurance
Cities may purchase tort liability insurance without public bidding if the insurance is purchased through a plan authorized and approved by an organization of governmental entities representing cities and counties, including the Tennessee Municipal League Risk Management Pool (*T.C.A.* 29-20-407).

Cooperative Purchasing Agreements (State)
T.C.A. 12-3-216 authorizes the commissioner of general services to enter into cooperative purchasing agreements with local governments provided that each contract is established through the use of competitive, sealed bids.

Cooperative Purchasing Agreements (Local)
T.C.A. 12-3-1009 authorizes any local government to participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any supplies, services, or construction with one or more other local governments in accordance with an agreement entered into between the participants.

Prohibited Vendors
It is unlawful for people convicted of violating the Sherman Antitrust Act, mail fraud provisions, and other criminal laws to solicit state or local government contracts if they are engaged in the criminal activity after May 22, 1981 (*T.C.A.* 12-4-601, *T.C.A.* 12-4-605).

"Buy America" Restrictions
A municipality is prohibited from buying materials for highway or roadway construction, resurfacing, or maintenance from any foreign government or company that is wholly owned and controlled by a foreign government unless satisfactory American-made materials are not available in sufficient quantities or if using American materials would increase the overall project cost by 5 percent or more (*T.C.A.* 54-5-135).

Purchasing Motor Oil
Specifications for purchasing motor oil by competitive bids must include re-refined or recycled lubricating motor oil unless documentation is provided that the city's equipment requires specialized treatment. Invitations to bid must be sent to all businesses on the Department of General Services' list of businesses that distribute such oil (*T.C.A.* 12-3-531).

Life-cycle Costing
"Except where private act or state law prohibits," cities are required to incorporate in their procurement policies the energy-efficiency standards and life-cycle costing used by the state in its procurement policies unless a city desires to use higher standards (*T.C.A.* 12-3-601–612).

Long-term contracts and lease purchases
Agreements for up to 40 years may be made to lease-purchase real or tangible property having a useful life of one year or more for a governmental purpose. A contract for up to five years may be approved by resolution or ordinance. If the contract is for more than five years, a published notice of the meeting held to consider it is required seven days prior to the meeting. This section includes explicit authority to contract for the lease-purchase, construction, operation, and/or management of sewage treatment facilities (*T.C.A.* 7-51-901–908).

Contractors' Bonds
Before letting a public works contract, a city is required to have contractors post a bond to the effect that they will pay for all labor and materials used by them or any "immediate or remote subcontractor under them" for 25 percent of any contract in excess of $100,000. In lieu of such a bond, the following may be substituted: U.S. treasury bonds, notes or bills, general obligation bonds of Tennessee, certificates of deposit, a bank's letter of credit, or cash. In addition, certain other conditions are attached to the last three alternatives. Letters of credit and certificates or other evidences of deposit in state and federal institutions with their principal office in Tennessee or their principal office in another state but with at least one (1) branch in Tennessee qualify. All letters of credit must be accompanied by an authorization of the contractor to deliver retained funds to the institution issuing the letter. The requirement for the bond must be included in the advertisement for the project (*T.C.A.* 12-4-201).

In addition, prior to awarding a contract for the services of a construction manager, a city must require either a bid bond equal to 10 percent of the value of services proposed and the value of the work to be managed, or a performance bond equal to the combined value of services and work to be managed (*T.C.A.* 62-6-129).

Drug-free Workplace Requirements
T.C.A. 50-9-113 requires private construction companies with five or more employees that contract with a city to submit an affidavit that they have a drug-free workplace to the extent required of local governments. Cities may not contract with a contractor who does not comply with this statute. Municipalities must include the following in any bid or procurement specifications for construction services:

- A statement of whether or not the municipality has a workplace drug testing program;
- A statement that describes the program if it has one; and
- A statement that any bidder must have a testing program at least as stringent as the municipality's program (*T.C.A.* 50-9-114).

Contractors' Licenses, Bids
Contractors and electrical, plumbing, and HVAC subcontractors who do jobs costing $25,000 or more must be licensed by the state (*T.C.A.* 62-6-102, *T.C.A.* 62-6-111). Officials issuing a permit or work order to an unlicensed contractor are guilty of a Class A misdemeanor (*T.C.A.* 62-6-120).

The name, license number, license expiration date, and classification of contractors applying to bid on jobs must appear on the bid envelope when the bid is more than $25,000. If the bid is less than $25,000, only the name of the contractor must appear on the outside of the envelope. Upon opening the envelope, if the bid exceeds $25,000, the bid is automatically

disqualified (*T.C.A.* 62-6-119(b)). The name of a prime contractor who does electrical, plumbing, heating, ventilation, and air conditioning must appear on the outside of the envelope. Failure of a bidder to comply voids the bid, and it may not be opened. It is a Class A misdemeanor for any person to disregard the above requirements.

Municipalities may not impose additional licensing requirements on state-licensed contractors (*T.C.A.* 62-6-111(i)(2)(c)).

Exemption from Gasoline Taxes

Gasoline, diesel, and certain other fuels purchased for a local government's exclusive use are exempted from federal excise tax. The vendor, rather than the local government, seeks a refund of excise taxes from the IRS. The vendor must be a "registered ultimate vendor," and the local government must supply the vendor with an "exemption certificate" (26 U.S.C.A. 6416 and 6427).

Municipalities are exempt from state taxes on gasoline and other motor vehicle fuel purchased in the following ways:

- Delivered in 500-gallon quantities into city-owned or leased tanks within 72 hours. (Multiple fuel purchases of smaller quantities may be combined only during that period);
- Delivered by a wholesaler through a customer-controlled pump connected to a storage tank. The pump may not be located on a retail station island nor may any person associated with a retail station have any part in the sale or dispensing of fuel products from the pump. The pump shall have the ability to identify each customer separately, and only the customer matching the identity shall be allowed to purchase fuel; and
- From retail stations through a fleet credit card issued by the oil company to a government agency.

The fuel must be used exclusively for government purposes in equipment owned or leased by a government agency and operated only by government employees. To qualify for this exemption, a city must apply to the state Commissioner of Revenue for a two-year, numbered tax-exemption certificate (*T.C.A.* 67-3-150).

Public advertising and competitive bidding are not required for any contract for purchasing natural or propane gas for resale and/or municipal use (*T.C.A.* 7-51-910).

Chapter 11: Personnel

Public Officials

Judicial Ouster

Some Tennessee city charters include ouster provisions, but the only general law procedure for removing elected officials from office is judicial ouster. Cities are entitled to use their municipal charter ouster provisions, or they may proceed under state law.

The judicial ouster procedure applies to all officers, including people holding any municipal "office of trust or profit." (Note that it must be an "office" filled by an "officer," distinguished from an "employee" holding a "position" that does not have the attributes of an "office.") The statute makes any officer subject to such removal "who shall knowingly or willfully misconduct himself in office, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state, or who shall in any public place be in a state of intoxication produced by strong drink voluntarily taken, or who shall engage in any form of gambling, or who shall commit any act constituting a violation of any penal statute involving moral turpitude" (*T.C.A.* 8-47-101).

T.C.A. 8-47-122(b) allows the taxing of costs and attorney fees against the complainant in an ouster suit if the complaint subsequently is withdrawn or deemed meritless. Similarly, after a final judgment in an ouster suit, governments may order reimbursement of attorney fees to the officer targeted in a failed ouster attempt (*T.C.A.* 8-47-121).

The local attorney general or city attorney has a legal "duty" to investigate a written allegation that an officer has been guilty of any of the mentioned offenses. If he or she finds that "there is reasonable cause for such complaint, he shall forthwith institute proceedings in the Circuit, Chancery, or Criminal Court of the proper county." However, with respect to the city attorney, there may be an irreconcilable conflict between that duty and the city attorney's duties to the city, the mayor, and the rules of professional responsibility governing attorneys. Also, an attorney general or city attorney may act on his or her own initiative without a formal complaint (*T.C.A.* 8-47-101–102). The officer must be removed from office if found guilty (*T.C.A.* 8-47-120).

Employee Protection

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) (42 U.S.C. 12101 et seq.) contains five titles, each of which generally prohibits a broad range of discriminatory activities by public and private entities against persons with handicaps. Title I applies to private employers with 15 or more employees. Title II applies to *all* state and local government programs, services, facilities, and activities, including employment. Title III applies to public accommodations. Title IV applies to services provided by telecommunications companies. Title V provides for the adoption of accessibility standards and awarding of attorney fees; expressly applies the ADA to the states; provides that federal, state, and local laws stricter than the ADA are preserved; and provides that illegal drug use is not a disability under the ADA. Generally, all the ADA provisions that apply to an activity or function that has a counterpart in state and local governments apply to those governments through Title II.

The ADA imposes stringent requirements on state and local governments in two main areas, the first of which is **employment**. State and local governments must make "reasonable accommodation" for handicapped persons who are otherwise qualified for the job and who must be able to perform the essential functions of the job either before or after the accommodation.

The second area is **program accessibility**. State and local governments must make their programs accessible to handicapped persons. The meaning of accessibility in a particular case usually will depend on a number of factors, including the type of program, whether the program is offered in new or existing facilities, the ability of the program to be moved or modified to make it more accessible, etc.

The ADA is extremely complicated and vague in many places. In addition, Tennessee's handicapped discrimination statute interplays with the ADA (*T.C.A.* 8-50-103; *Cecil v. Gibson*, 820 S.W.2d 361 (Tenn. Ct. App. 1991); *Thorpe v. Alber's Inc.*, 992 F.Supp. 84 (E.D. Tenn. 1996)), as do the Family Medical Leave Act and the Workers' Compensation Law. The body of litigation interpreting and applying the ADA is still in its infancy and has not yet addressed even fundamental questions, such as "What is a handicapped person within the meaning of the ADA?" For those reasons, questions involving a city's responsibilities under the ADA, particularly in individual cases, should be approached only with the aid of sound legal and practical advice. Many publications on the ADA are available, but due to the rapid development of the law on that subject, only current ones should be consulted.

Handicapped People

T.C.A. 8-50-103 declares: "There shall be no discrimination in the hiring, firing, and other terms and conditions of employment of the state of Tennessee or any political subdivision of the state against any applicant for employment based solely upon any physical, mental, or visual handicap of the applicant unless such handicap to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved. Furthermore, no blind person shall be discriminated against in any such employment practices because such person uses a guide dog. A violation of this provision is a Class C misdemeanor."

The definition of "handicap" includes people with contagious diseases, presumably including acquired immune deficiency syndrome (AIDS).

Workplace Violence

Employers, including local governments, that have an employee who has suffered workplace violence may seek restraining orders and injunctions against further violence by the subject individual against the employee while the employee is in the workplace or performing work (*T.C.A.* 20-14-101 et seq.).

Whistle-blower Protection

Cities are prohibited from discharging an employee solely for refusing to participate in or remain silent about illegal activities. An employee who prevails in a retaliatory discharge lawsuit against an employer may recover reasonable attorney fees and costs (*T.C.A.* 50-1-304).

Tennessee Anti-Slapp Act

The Tennessee Anti-Slapp (Strategic Lawsuits Against Political Participation) Act of 1997 grants immunity to individuals who, in good faith, report wrongdoing involving a public or government issue to the appropriate local, state, or federal government entity. The act's purpose is to protect concerned individuals and the information they provide, which is vital to effective law enforcement and efficient government operation.

This act allows the appropriate government agency to intervene in a lawsuit brought against a person because he or she communicated the information. Immunity does not apply if the person knew the information was false, if the informant recklessly disregarded the information's falsity, or if the information pertained to a person or entity other than a public figure. The winner in a case based on the immunity defense is entitled to recover costs and reasonable attorney fees (*T.C.A.* 4-21-1001 et seq.).

Employee's Right to Contact Elected Officials
Disciplining or discriminating against a public employee for communicating with an elected public official is prohibited, with triple damages permitted for violations. However, an employer may correct or reprimand an employee "for making untrue allegations concerning any job-related matter" (*T.C.A.* 8-50-601–604).

Civil Service Boards
Most local government civil service provisions are in the individual charters or municipal codes. No general laws require Tennessee cities to have civil service systems, and only a few general laws apply to existing systems.

Civil Service Board members are prohibited from engaging in business with the city or with its employees. Members must be residents of the city for one year before appointment (*T.C.A.* 6-54-114).

Expense Reimbursements, Travel, and Vehicle Use Policies
Municipalities are authorized to reimburse expenses related to the office of the mayor; members of the governing body, boards, commissions, or committees; and any official or employee whose salary is set by charter or general law. To reimburse such expenses, a city must:

- Pass an ordinance authorizing a written expense reimbursement policy, which must be filed with the comptroller's office unless the city adopts MTAS's model policy;
- Require the chief administrative officer or his or her designee to prescribe expense forms, examine expense reports, and determine reimbursability; and
- Adopt a written vehicle use policy separate from the travel and expense policy.

Cities may pay travel expenses directly to the provider rather than to the official or employee. Municipalities with a population of greater than 100,000 are exempt from these provisions (*T.C.A.* 6-54-901 et seq.).

If officials or employees are overcompensated for an expenditure, the overage is considered salary. Such a payment could exceed salary limitations set in the charter, and this could violate *T.C.A.* 39-16-402(a)(5). Receiving any benefit not otherwise authorized by law is a Class E felony.

Health Insurance

Group Health Insurance
Municipalities have supplementary authority to establish group insurance plans (life, hospitalization, disability, or medical) for officials and employees after the governing body:

- Appoints a committee to recommend a contract with an insurance company authorized to do business in Tennessee;
- Approves the contract by a majority vote (the council may later modify the contract); and
- Provides an election so employees and officials may accept or reject such coverage.

The city may pay all the costs or may pay a portion of the costs and deduct the remainder from employees' paychecks. Such a plan may be discontinued with at least a three-month notice to the participants (*T.C.A.* 8-27-601–607).

State standards for a group health plan require coverage for:

- Mammography screenings if the benefits include mastectomies (*T.C.A.* 56-7-2502);
- Reconstructive surgery if mastectomies are provided (*T.C.A.* 56-7-2507);
- Speech and hearing benefits (*T.C.A.* 56-7-2603);
- Prostate cancer screenings ordered by a physician (*T.C.A.* 56-7-2354); and
- Mental health treatment to the same extent as medical or surgical benefits (*T.C.A.* 56-7-2360).

State Group Health Insurance

Cities may join the state's group health insurance program, which provides group health benefits for local government employees (*T.C.A.* 8-27-207). A similar program is provided for school system employees (*T.C.A.* 8-27-301 et seq.).

COBRA

"COBRA" stands for Consolidated Omnibus Budget Reconciliation Act of 1985 (29 U.S.C. 1161–1168 and 42 U.S.C. 300bb-1–300bb-8). Upon occurrence of a qualifying event, this federal law requires municipalities with 20 or more employees to continue health overage, at the employee's expense, for a certain period at the group rate. A qualifying event includes, but is not limited to:

- Termination of employment (except for gross misconduct);
- Death of the covered employee;
- Reduction in work hours; and
- Divorce.

Once the qualifying event occurs, the employee or qualified beneficiaries must be given at least a 60-day notice to elect continuation of health care coverage. The period for which coverage can be continued varies, depending on the qualifying event. The notice must advise the ex-employee of assistance available from the state Department of Social Services (*T.C.A.* 4-3-1404).

Health Insurance Act of 1996

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides, among other things, improved portability and continuity of health insurance coverage.

The act is designed to protect workers from losing their health insurance coverage in cases where they lose their jobs, change jobs, or become self-employed. It does so by placing new restrictions on pre-existing condition exclusions, coverage termination, and limitations based on health status.

The act is applicable to group health plans, including government and church plans, that cover two or more employees. HIPAA coverage applies to any health insurance coverage offered in connection with a group health plan, including limited-scope dental and vision benefits, long-term care benefits, medical supplement plans, and specific disease or illness policies.

In general, group health plans are sponsored by employers, employee organizations, or both. HIPAA improves the availability and portability of health coverage by:

- Limiting exclusions for pre-existing medical conditions;
- Providing credit for prior health coverage and notifying new group health plans of previous coverage;
- Providing new enrollment rights to individuals who lose other health coverage or have a new dependent;
- Prohibiting discrimination in enrollment and premiums based on health status;
- Guaranteeing renewability of health insurance coverage; and
- Preserving the state's traditional role in regulating health insurance.

Opt-out Option

The act also establishes a provision allowing state and local governments with fully or partially self-funded programs to "opt out" of the requirement. However, there still are rules a city must follow if its opts out. The act also modifies COBRA rules affecting individuals with disabilities, newborns, and newly adopted children, permitting them an additional 11 months of coverage. (Individuals must pay 150 percent of the premium during the extension.) Excluded from the definition of group health insurance are:

- Coverage only for accidents, including accidental death and dismemberment;
- Disability income insurance;
- Liability insurance, including general liability and automobile liability insurance;
- Coverage issued as a supplement to liability insurance;
- Workers' compensation or similar insurance;
- Automobile medical payment insurance;
- Credit-only insurance (*i.e.*, mortgage insurance); and
- Coverage for on-site medical clinics.

Exemption

Cities with fully or partially self-funded programs may elect to be exempt from certain requirements of the law. The exemption remains in effect for a single plan year. Cities may elect to be exempt from the following requirements:

- Limitations or pre-existing condition exclusion periods;
- Special enrollment periods for individuals (and dependents) losing other coverage;
- Prohibitions on discriminating against individual participants and beneficiaries based on health status;
- Standards relating to benefits for mothers and newborns; and
- Parity in the application of certain limits to mental health benefits.

A city that makes the exemption election must notify the participants individually of the election and explain its consequences. This notice must be provided to each participant at the time of enrollment under the plan and to all participants annually.

The notice must include at least the following information:

- A statement that, in general, federal law imposes requirements on group health plans concerning pre-existing conditions, special enrollment periods, discrimination, benefits for mothers and newborns, and parity for mental health benefits (which must be individually described in the notice);
- A statement that federal law gives the plan sponsor the right to exempt the plan in whole or in part, and that the plan sponsor has elected to do so;
- A statement identifying which parts of the plan are subject to the election and each of the requirements from which the plan sponsor has elected to be exempt; and
- If the plan chooses to provide any of the protections voluntarily, or is required under state law to do so, a statement identifying which protections apply.

The requirements of this exemption are considered to have been met if the notice is prominently printed in the summary plan or equivalent document and each participant receives a copy of that document at the time of enrollment and annually thereafter.

Notwithstanding an election under this section, a city's plan must provide for certification and disclosure of creditable coverage to participants and their dependents. Failure to comply with this requirement invalidates an election made under this section.

The election of exemption must be in writing. It must include an attached copy of the notice to participants of the exemption election. It must state the name of the plan and the name and address of the plan administrator. It must either state that the plan does not include premium-funded health insurance coverage, or it must identify which portion of the plan is not funded through insurance. Additionally, the election must be made in conformance with all of the plan sponsor's rules, including any required public hearings. Also, the election document must certify that the person signing it, including, if applicable, a third-party plan administrator, is legally authorized by the plan sponsor to do so. Finally, the election document must be signed by the person legally authorized by the plan sponsor to do so.

Since most city plans are not subject to collective bargaining agreements, the election must be sent to the Health Care Financing Administration (HCFA) by the day preceding the beginning date of the plan year. HCFA may extend the deadline for good cause.

If the city fails to file a timely exemption election, the plan is subject to the requirements of the act for the entire plan year. If filed appropriately, the exemption may be extended through subsequent elections.

Upon a finding by the HCFA that a city's plan has failed to comply with the requirements of the act and has failed to correct the noncompliance within 30 days, HCFA will notify the city that its election has been invalidated and that it is subject to the requirements of the entire act. A plan that fails to comply with the requirements is subject to federal enforcement by HCFA, including appropriate civil money penalties. The maximum penalty may not exceed $100 for each day for each responsible entity for each individual to whom such a failure occurs. (See MTAS Hot Topic *Health Insurance Portability and Accountability Act of 1996*, Richard Stokes, 1999.)

Other Employee Benefits

Deferred Compensation

Cities may set up deferred compensation programs so that officials and employees can meet IRS requirements to defer federal income taxes (*T.C.A.* 8-25-101–108). A profit sharing or salary reduction plan to meet requirements of Section 401(k) of the Internal Revenue Code also may be established by ordinance or resolution (*T.C.A.* 8-25-301–304).

Cafeteria Benefit Plan

As permitted by Section 125 of the federal Internal Revenue Code, political subdivisions of the state may make cafeteria benefit plans available to their employees. Day-care services may be provided under the plan, and the plan may be administered internally or by contract (*T.C.A.* 8-25-501).

Family and Medical Leave

Federal Family and Medical Leave Act

The federal Family and Medical Leave Act (FMLA) (29 U.S.C. 2601 et seq.) generally covers private employers with 50 or more employees and "all" public agencies, regardless of the number of employees. 29 C.F.R. 825.108(c)(1) says that "A state or a political subdivision of the state constitutes a single public agency, and, therefore, a state is a single employer, a county is a single employer, and a city or a town is a single employer." However, application of the FMLA to local governments, regardless of their number of employees, apparently has a limited meaning. 29 C.F.R. 825.108(d) says, "All public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies

must meet all the requirements of eligibility, including the requirement that the employer (*e.g.*, state) employ 50 employees at the worksite or within 75 miles."

In addition, "29 C.F.R. 825.110 says (a)n 'eligible employee' is the employee of a covered employer who:

(1) Has been employed by the employer for at least twelve months, and
(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite."

Eligible public employees are entitled to 12 weeks of unpaid leave for childbirth, placing a child for adoption or foster care, a serious health condition that makes the employee unable to perform job duties, and a serious health condition of a spouse, son, daughter, or parent.

The U.S. Sixth Circuit Court of Appeals held in *Rollins v. Wilson County Government*, 154 F.3d 626 (1998), that an employee of Wilson County, Tennessee, for eight months and an employee of the Wilson County School Board for four months could not aggregate the two terms of employment for the purpose of meeting the 12-month employment requirement for eligibility for FMLA leave because the two entities were separate public agencies.

Rules governing the conditions under which leave must be granted, the length of leave under certain conditions, and the rights of the city and the employee when the latter returns to work are complicated and frequently involve questions that have implications for both parties under Tennessee's Maternity Leave Act (*T.C.A.* 4-21-408), the Americans with Disabilities Act, and the Workers' Compensation Law. A number of publications analyze the law under the FMLA, but only the most current ones should be consulted.

State Maternity Leave Act

Cities with more than 100 full-time employees are required to grant up to four months of maternity leave to females who have been employed full time for at least 12 consecutive months. At the city's discretion, maternity leave may be with or without pay, but the leave cannot affect the employee's right to receive vacation time, sick leave, seniority, length-of-service credits, and other benefits. Except in the event of a medical emergency, the employee is required to give a three-month advance notice of her intent to take maternity leave (*T.C.A.* 4-21-108).

Retirement

Multiple Memberships Prohibited

"(N)o public official or employee shall have multiple memberships in any retirement program(s) ... financed from public funds, whereby such official or employee obtains or accrues pensions or retirement benefits based upon the same period of service to the state ... or any of its political subdivisions." This section does not exclude participation in defined contribution plans established under Sections 401(k)c and 457 of the Internal Revenue Code as amended, subject to certain limitations. All 401(k), 403(b), and 457 plans established by public employers participating in TCRS in which employer contributions are made must be approved by the director of the state retirement system (*T.C.A.* 8-35-111).

Mandatory Retirement for Police Officers and Firefighters

Municipalities may establish by resolution a mandatory retirement age for police officers and firefighters. The mandatory retirement age shall not violate the federal Age Discrimination

in Employment Act. The age must be uniform for all affected employees and be not less than 60 years old.

The mandate is effective on the first day of the month after an employee reaches the required age, and allows a supplemental bridge benefit if the retirement age is too young for employees to receive Social Security benefits.

The bridge benefit is three-quarters percent of an employee's average compensation multiplied by the years of service. This benefit does not apply to police or fire department supervisors or administrators who spend less than 50 percent of their time performing the daily duties of police officers or firefighters. Such persons may work until age 62 if they file a waiver with the Retirement Division for retirement and bridge benefits before the first day of the month they reach 60.

State Retirement System, Membership
Any Tennessee municipality may elect to cover its employees under the Tennessee Consolidated Retirement System (TCRS). The option to participate is exercised by a resolution of the governing body. The state Division of Retirement will furnish a draft resolution. The resolution may exclude certain employment positions, which can be included later. A city council may also elect to make its members participants in TCRS (*T.C.A.* 8-35-226). After a political subdivision elects to participate in the state retirement system, and such election is approved by the Board of Trustees, all eligible current employees may participate as provided in Chapters 34-37 of Title 8 of *T.C.A.* However, membership in TCRS is mandatory for all eligible employees entering service of the employer after the date of approval is given (*T.C.A.* 8-35-201–232).

A municipality may withdraw from the system by a two-thirds vote of its governing body and by giving a one-year written notice. A number of specific conditions are prescribed for such an action (*T.C.A.* 8-35-218).

T.C.A. 8-34-605(b)(2) has been amended to increase the period for retirement credit for military service in Vietnam from August 5, 1964, to May 7, 1975. The new period is February 28, 1961, to May 7, 1975.

Increases in Benefits and Earnable Compensation
Yearly increases in earnable compensation will be continued indefinitely for noncontributory employees. The local governing body must authorize and accept by resolution the liability for such increases (*T.C.A.* 8-34-101(4)(B)).

Increases in retirement benefits are based on increases in the U.S. Consumer Price Index when the index is at least 0.5 percent. These increases are optional for local governments (*T.C.A.* 8-36-701).

Police and Fire Minimum Retirement Allowances
A municipality with its own retirement system may elect to be covered by a state act that prescribes minimum retirement pay for police officers and firefighters with 25 or more years of service. Under the act, pensions are 2 percent of the highest salary multiplied by the years of service up to 30 years. Pensions may not be less than 50 percent or more than 60 percent of the employee's highest monthly salary plus annual increases not exceeding 3 percent based on the Consumer Price Index. Any such adoption "shall be permanent and such action may not be repealed." This law may not be used if the city is under the Tennessee state retirement system or has a system "in which members' or beneficiaries' benefits are computed in conjunction with or reduced by Social Security benefits" (*T.C.A.* 6-54-801–803).

Police and Fire: Return to Service
Any municipal police officer or firefighter who

retired under the state retirement system may return to work with a different municipality and continue to draw retirement benefits under certain circumstances (*T.C.A.* 8-36-820).

Reports on City Retirement System

If a city is liable for a local retirement plan, it must file an annual report on or before November 1 with the secretary of the Council on Pensions and Insurance. The report must include:

- Year-end financial statements for the most recent plan year ending on or before the preceding June 30;
- The system's most recent actuarial valuation made by a professionally qualified actuary; and
- Publications by the plan's administrator to the members and/or other interested parties.

The report is to be filed on forms prescribed by the council (*T.C.A.* 3-9-201–204).

Social Security

Any city may submit to the state Old Age and Survivors Insurance Agency a plan for participating in the federal Social Security program. For many municipalities, participation is mandatory. To find out which cities must participate, contact the state Department of Employment Security. When approved, the plan is administered under the federal law and an agreement between the federal and state governments. Every political subdivision in the Tennessee Consolidated Retirement System must participate. No such plan may be terminated, either in its entirety or as to any coverage group, after the effective date of the Social Security Amendments of 1983. A 1985 amendment made it optional for political subdivisions to share the cost of state administration of this program (*T.C.A.* 8-38-101 et seq.).

Workers' Compensation

City governments are among the few employers that do not automatically have to provide workers' compensation to employees. Cities may voluntarily agree to come under the state's Workers' Compensation Law. Coverage becomes effective 30 days after a city files a written notice with the Commissioner of Labor. A city may choose to provide workers' compensation coverage only to certain departments (*T.C.A.* 50-6-101 et seq.). Effective July 1, 2000, employers with more than 250 employees must file employee information on magnetic media (*T.C.A.* 50-7-404 (c) (3)-(4)).

If a city elects to provide workers' compensation and a claim is filed, the employer is required to submit a wage statement to the court within 60 days of answering the complaint. The statement must detail the employee's wages for the previous 52 weeks unless the employer stipulates that the maximum rate applies (*T.C.A.* 50-6-225(c)).

Actions for recovery are limited to one year from the date of the accident unless the employer makes voluntary payments within that period. In that event, an action for unpaid compensation may be filed one year from the last medical treatment resulting from the accident or from the date of the last voluntary payment, whichever is later (*T.C.A.* 50-6-203).

Coverage may be canceled at any time by giving written notice. Designated city departments or divisions may be covered or canceled on a selective basis (*T.C.A.* 50-6-106(5)).

The Tennessee Municipal League Risk Management Pool operates a workers' compensation insurance pool for member cities.

Unemployment Compensation: Penalties for Failure to Pay

T.C.A. 50-7-101 et seq. prescribe the state's unemployment compensation program. Information concerning the application of this program to Tennessee municipalities can

be obtained from local offices of the state Department of Employment Security. The statute contains a number of remedies available to the state for collection of unpaid premiums (*T.C.A.* 50-7-401 et seq.).

Health and Safety

Tennessee Occupational Safety and Health Program

Under the Tennessee Occupational Safety and Health Act (*T.C.A.* 50-3-405(a)), all cities must comply with occupational safety and health standards or regulations promulgated by this act (*T.C.A.* 50-3-910). The law requires employers, including local governments, to "... furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm ..." and to comply with certain other requirements (*T.C.A.* 50-3-105). Cities may elect to be treated as private employers or to establish their own safety and health training programs consistent with state regulations.

A program must inform employees of state regulations applicable to their work environments and instruct them to recognize and avoid unsafe conditions. If a city establishes its own program, civil penalties will not be imposed against the local government for violations. The state Department of Labor merely inspects for compliance and reports noncompliance to the governor and the General Assembly (*T.C.A.* 50-3-911).

Special federal requirements have recently been enacted regarding employees, such as sewer operators and paramedics, who work in "permit-required confined spaces." Cities must assure that emergency medical technicians (EMTs), public works employees, water and wastewater workers, and others at "high risk" are protected from toxic, explosive, or asphyxiating atmospheres and possible engulfment from small particles such as liquids, grain, or sawdust (29 C.F.R. 1910.146).

Cities also must adopt and administer an infection control program to eliminate, or at least minimize, worker exposure to bloodborne pathogens, such as the hepatitis B virus and the human immunodeficiency virus (HIV) (29 C.F.R. 1910.1030). To meet these federal requirements, cities must:

- Establish and adopt a written exposure control plan;
- Adopt a universal precautions policy (a strategy that assumes every direct contact with body fluids is infectious);
- Provide protective equipment where there are exposure hazards;
- Ensure that the workplace is clean and sanitary;
- Properly dispose of contaminated waste;
- Provide training for "high-risk" employees;
- Provide hepatitis B vaccinations and post-exposure evaluations/ follow-up; and
- Establish and maintain accurate records.

Special Personnel Provisions for Police and Fire Employees

Police and Firefighter Pay Supplements

Subject to annual appropriations, the state provides yearly pay supplements to police officers and firefighters who meet specified training and/or certification requirements. The fire supplement is administered by the Commission on Firefighting Personnel Standards and Education and is funded by a portion of the state premium tax on fire insurance (*T.C.A.* 56-4-205). The police supplement is contingent on police officers completing 40 hours of in-service training each year (*T.C.A.* 38-8-111).

Police and Fire Employee Death from Lung or Heart Disease

If the city has a compensation plan for line-of-duty injuries or deaths, these provisions apply to law enforcement officials in a "regular law enforcement department" or firefighters in a "regular fire department." The act establishes a presumption that "hypertension or heart disease" of police employees and "disease of the lungs, hypertension, or heart disease" of fire employees were "suffered in the course of employment." This presumption does not apply, however, to workers' compensation benefits for firefighters. The officer is eligible for on-the-job injury benefits unless the presumption can be overcome by "competent medical evidence." The presumption does not apply unless a pre-employment physical showed no evidence of such disabilities (*T.C.A.* 7-51-201).

Fire employee benefits for hypertension and heart disease apply to emergency medical service employees in counties with more than 400,000 people, but another statement of legislative intent says the section "... permit(s) and require(s) any such municipal corporation or political subdivision of the state ... to be covered by its provisions" (*T.C.A.* 7-51-201(c)(2)).

Police Bill of Rights

The Police Bill of Rights (*T.C.A.* 38-8-301) gives police officers certain minimum rights in these areas:

- Investigations that are likely to lead to personnel actions against the police officer;
- Compelled or requested disclosure of the police officer's income and other financial information;
- The right of the police officer to receive notice of charges against him or her and a right to respond to those charges, including the right to counsel at the police officer's own expense; and
- The right of the police officer to a post-personnel action hearing and the rules governing that hearing. The police officer still may be suspended without pay under certain circumstances.

The Police Bill of Rights applies only to municipalities that provide a property interest in employment for police officers but do not have established procedures governing an officer's dismissal, demotion, suspension, or transfer for punitive reasons (*T.C.A.* 38-8-301 et seq.).

Political Activity by Police Officers

T.C.A. 38-8-351 provides that no law enforcement officer shall engage in political activity or support or oppose any candidate, party, or measure in any election when on duty or when acting in an official capacity. However, when off duty and acting as a private citizen, no officer shall be prohibited from engaging in political activity or compelled to engage in political activity. This provision is contained in the same statute as the Police Bill of Rights but probably applies to all police officers rather than only those police officers in municipalities where police officers have a property right in their employment. For a general authorization for municipal employees to engage in political activity, see *T.C.A.* 7-51-1501. See also "Political Activities by Municipal Employees" later in this chapter.

Firefighters' Dues

Cities are required to provide payroll deductions for firefighter association membership dues upon request of their full-time employees if 40 percent of the employees are association members (*T.C.A.* 7-51-204).

Jury Duty for Police and Fire Employees

All members of fire companies and full-time law enforcement officers have a limited exemption from jury duty. Upon receipt of a summons to serve, such employees must notify the court clerk of a seven-day period within the next 12 months when they are available to serve.

They will be required to serve on only one jury during the seven days (*T.C.A.* 22-1-103(c)).

Employment Rights of Volunteer Firefighters
T.C.A. 50-1-307 grants certain employment rights to volunteer firefighters. Among other things, it prohibits terminating a firefighter solely because he/she is absent from work because of an emergency. It also creates a civil cause of action for the firefighter terminated in violation of the provisions of this law.
The provisions of this section do not expressly apply to a municipality as an employer of a volunteer firefighter.

Miscellaneous Personnel Provisions

Personnel Policy Requirements
All municipalities incorporated before June 13, 1997, that did not already have a personnel policy were required by July 1, 1998, to adopt such a policy by ordinance, resolution, or otherwise. Municipalities incorporated after June 13, 1997, have two years after incorporation to adopt and implement a personnel policy.

A city may use the model personnel policy developed by MTAS or draft its own. The personnel policy must apply "fairly, impartially, and uniformly to the extent practicable to each department of the municipal government." Among other things, the policy should outline:

- Hiring procedures;
- Benefits and personnel rules and regulations;
- Fair and reasonable complaint conference and hearing procedures for dismissed, demoted, or suspended employees;
- Procedures for compliance with relevant federal laws, such as the Fair Labor Standards Act and the Americans with Disabilities Act;
- Drug and alcohol testing procedures; and
- Sexual harassment regulations.

The law mandates that the policy may not grant a property right or contract right to the job to any employee.

A copy of the resolution or ordinance (or the caption) adopting the policy must be published in a newspaper of general circulation in the municipality prior to its adoption. Also, a copy of the personnel policy must be kept in the city recorder's office and made available to employees upon request (*T.C.A.* 6-54-123).

Drug Testing
Many municipalities have adopted regulations that provide for drug and/or alcohol testing of their employees. The testing of some municipal employees is required under the Omnibus Transportation Employee Testing Act of 1991. Cities must conduct pre-employment, reasonable suspicion, random, return-to-duty, and follow-up drug and alcohol testing on city employees who are required to obtain a commercial driver's license and who drive:

- Vehicles with a gross weight of more than 26,000 pounds;
- Trailers with a gross weight of more than 10,000 pounds;
- Vehicles designed to transport more than 15 passengers, including the driver; or
- Any vehicle with placards that hauls hazardous materials.

The definition of "driver" includes regular and part-time employees, occasional drivers, leased drivers, and independent contractors. Emergency vehicle drivers are exempt.

Similar testing requirements apply to certain gas utility employees (49 U.S.C.A. 31306; 49 C.F.R. Part 40, 199, 382; *T.C.A.* 55-50-401 et seq.).

In 1996, Tennessee adopted the Drug-Free Workplace Programs Act (DFWPA). This authorizes, but does not require, employers in Tennessee to adopt drug and alcohol testing programs that conform to the DFWPA and to rules adopted by the Tennessee Department of Labor in accordance with that act (*T.C.A.* 50-9-101 et seq.; Rules of the Department of Labor, Division of Workers' Compensation, Chapter 0800-2-12, Drug-Free Workplace Programs). Employers who adopt such programs are eligible for reduced workers' compensation premiums. In addition, where an employee is injured in the course of his or her employment and tests positive for certain drugs at a prescribed level, a rebuttable presumption is created that the injury was occasioned primarily by the presence of the drug or drugs. Such a worker may be disciplined up to and including termination and forfeits his or her eligibility for workers' compensation medical and indemnity benefits.

In addition to requiring, and in some instances permitting, certain drug tests of employees under prescribed circumstances, the DFWPA requires employers to perform pre-employment drug testing of all job applicants. But it expressly provides that "for public employees, such testing shall be limited to the extent permitted by the Tennessee and federal constitutions" (*T.C.A.* 50-9-104(a)).

Both the DFWPA and the Department of Labor Rules provide in detail:

- The purpose, scope, and policies reflected in the DFWPA and the tests implemented under the Drug-Free Workplace Program;
- Definitions that apply to the interpretation and application of the DFWPA;
- The contents of the notice and policy statement required to be provided by the employer to employees and job applicants prior to drug and alcohol testing;
- The types of testing allowed and required (job applicant testing, routine fitness-for-duty testing, follow-up testing, and post-accident testing);
- The consequences to the employee or applicant for refusing to test;
- The test itself;
- Drug and alcohol sample collection procedures;
- Procedures for reporting and reviewing test results;
- Employee protections;
- Substance abuse education and awareness requirements;
- Confidentiality of information and documents gathered in drug and alcohol testing programs, including the tests; and
- The employer's application form to the Workers' Compensation Division of the Department of Labor to adopt the Drug-Free Workplace Program.

Drug and alcohol testing covered by the DFWPA appears to include the testing of city employees according to procedures required under federal laws and regulations.

Criminal Background Checks

Cities may require potential employees to agree to release criminal background information to the city, to supply a fingerprint sample, and to submit to a criminal records check by the TBI and the FBI. Costs of the background check must be paid by the city but may be passed on to the successful applicant. The city may designate job titles or classifications to which this would apply. However, these classifications would not supersede any state requirements for a particular job (*T.C.A.* 6-54-129).

Military Service

Municipal employees are among the public employees guaranteed re-employment rights

after active or reserve military service (*T.C.A.* 8-33-101–108). Members of reserve components of the U.S. armed forces (including the National Guard) are entitled to leaves of absence while engaged in "duty or training in the service of this state, or of the United States, under competent orders." They must be given such leave with pay not exceeding 15 working days in any one calendar year, including weekends if regularly scheduled for work (*T.C.A.* 8-33-109). The intent of the pay provision is to allow employees to receive their regular pay, in addition to military pay, for two-week summer training camp and/or for weekends an employee is regularly scheduled for work but has military duty. In addition, this section allows public employees to provide partial compensation to employees while serving under competent orders, in addition to the 15 days of compensation referred to above.

Smoking Rights
A municipality is prohibited from discharging an employee for using tobacco as long as the employee abides by the employer's work rules regarding tobacco use (*T.C.A.* 50-1-304).

Jury Duty
Local governments are among the employers that must give employees time off with pay for jury services (*T.C.A.* 22-4-108).

Child Support
A court may assign a municipal employee's income for child support. Any disciplinary or discharge action against the employee for this reason is prohibited (*T.C.A.* 50-2-105).

Automobile Insurance
An accident by a municipal employee while driving a city-owned vehicle shall not increase that person's personal automobile insurance premiums (*T.C.A.* 56-7-1108).

Political Activities by Municipal Employees
A local government employee has the same rights as other citizens of Tennessee to participate in political campaigns and run for certain elected offices. A city employee has the right to take an active part in local and state campaigns while off duty. However, a city employee is not qualified to run for election to the local governing body unless otherwise authorized by law or local ordinance (*T.C.A.* 7-51-1501). (For political activity by police officers, see *T.C.A.* 38-8-351 and "Political Activity by Police Officers" earlier in this chapter.)

Convict Labor
Municipal offenders confined or subject to confinement in a county or municipal jail may be sentenced to public service work for the municipality. The statute exonerates the municipality, its officers and its employees from liability to the offender, his or her family, or other persons for acts of the offender if the municipality exercised due care in supervising the offender (*T.C.A.* 41-3-107).

A city also may apply to the state Department of Corrections district work project coordinator for probationer labor for a specific work project. There is no liability for injury to a probationer so involved if due care was taken in his or her protection and supervision (*T.C.A.* 41-9-101 et seq.). A city also may apply to the county community work project coordinator for county probationer labor on specific projects (*T.C.A.* 41-9-202).

Under another statute, a city may apply to the Commissioner of Corrections to use convicts on public works projects, which the commissioner may allow if required conditions are met and the governor approves (*T.C.A.* 41-22-127). A city's chief executive and the sheriff may make agreements for the city to use certain prisoners under city supervision "for such duties and manual labor as the municipality deems appropriate" (*T.C.A.* 41-22-123(b)(2)). Convicts may also renovate substandard housing for

low-income people (*T.C.A.* 41-22-129) or perform work for a charitable or nonprofit corporation (*T.C.A.* 41-22-148).

A juvenile court may order a child who is found delinquent to perform community service work for a municipality. *T.C.A.* 37-1-131(a)(7) exonerates the municipality and its officers and employees from liability resulting from the juvenile's work if the municipality exercised due care in supervising the juvenile.

Payment of Professional Privilege Tax

T.C.A. 67-4-1709 allows municipalities to pay the professional privilege tax for their employees subject to the tax.

Chapter 12: Economic Development

Appropriations to Advertise and Promote a City to Attract Tourism

Spending municipal funds for advertising to attract new industries and tourists to a community is authorized by *T.C.A.* 6-504-201–203. A city may make general fund appropriations up to $30,000 annually ($60,000 if involved in a joint effort with a county, presumably $30,000 from each, but this is not stated explicitly). Additionally, a municipal governing body may levy a tax up to 2 cents to create a special fund for such purposes. An advertising tax in excess of that amount requires a referendum upon a petition signed by 5 percent of a city's registered voters.

Convention Center and Tourism Financing

A municipality may create a tourism development zone in an area in which a public use facility is located or planned. The zone may not exceed one mile in radius from such facility, and the facility must have more than 250,000 square feet and cost more than $75 million. The benefit of creating a zone is that the city will receive from state and local sales and use taxes an amount equal to the incremental increase in such taxes resulting from the facility. The municipality may enter into structured lease agreements relative to these facilities. The increase continues until the debt on the facility is paid off or it ceases to be used for public purposes (*T.C.A.* 7-88-101 et seq.).

Economic and Community Development Board

T.C.A. 6-58-114 mandates that each county shall set up a board to advance economic and community development. All municipalities in the county are required to participate on this board, and the mayor or city manager of each municipality in the county is an *ex officio* member. The board must be established by interlocal agreement under *T.C.A.* 5-1-113. The board is funded based on the per capita population of each participating governmental entity. When applying for any state grant, a city or county shall certify its compliance with the requirements of this statute.

Appropriation of Funds for a Nonprofit Corporation

A city may appropriate money to any nonprofit charitable or civic organization "which provides year-round service benefiting the general welfare" (*T.C.A.* 6-54-111). Nonprofit civic organizations are exempted from taxation pursuant to Section 501(c)(4) or (c)(6) of the Internal Revenue Code. Organizations falling in this category include chambers of commerce and other organizations that promote, maintain, and increase employment by promoting industry, trade, commerce, tourism, and recreation by inducing manufacturing, industrial, governmental, educational, financial, and other enterprises to locate in the city. Any appropriation under this statute must meet guidelines issued by the state comptroller's office.

Hotel/Motel Tax

Many cities fund tourism promotion programs with a hotel/motel tax. Home rule cities are authorized to levy a tax of up to 5 percent (*T.C.A.* 67-4-1401–1425). General law and private act charter cities must have special acts to authorize the tax. (See Chapter 7, "Municipal Revenues," for further discussion of this tax.)

Regional Tourism Funding

The state provides a $2 match for each $1 (up to $35,000 in annual local expenditures) spent on regional tourism promotion (*T.C.A.* 4-3-2207(b)).

Industrial Parks and Buildings

The state code includes four provisions municipalities may use to develop industrial parks:

- Industrial Building Bond Act (*T.C.A.* 7-55-101–116);
- Industrial Building Revenue Bond Act (*T.C.A.* 7-37-101–116);
- Industrial Development Corporation Act (*T.C.A.* 7-53-101–311); and
- Industrial Park Act (*T.C.A.* 13-16-201–207).

Industrial Building Bond Act

The Industrial Building Bond Act is highly restrictive. Cities may issue bonds and construct industrial buildings under this act, but the bonds must be approved by a three-fourths affirmative vote in a referendum (*T.C.A.* 7-55-107).

The building may be up to 10 miles from the city limits. The bonds may be secured only by rentals from the building, or the city may additionally pledge its full faith and credit.

To proceed with the project, the city must get a certificate of public purpose and necessity from the Building Finance Committee in the Industrial Development Division of the Department of Economic and Community Development. The committee is empowered not only to issue the certificate, but to determine:

- The amount of bonds to be issued;
- The property to be acquired and acquisition terms;
- The expenditures that may be made in constructing and equipping the building; and
- The method of leasing the building.

The committee also has to require the maximum economically feasible use of solar heating systems and solar water heaters. If the city council refuses to follow all the committee's requirements, then any councilmember voting for the refusal is personally liable for any loss the city sustains (*T.C.A.* 7-55-105–106).

Industrial Building Revenue Bond Act

The Industrial Building Revenue Bond Act is for issuing industrial revenue bonds not backed by the city's full faith and credit to build industrial buildings. It requires a three-fourths majority vote in a referendum (*T.C.A.* 7-37-101–116).

Industrial Development Corporation Act

The Industrial Development Corporation Act allows creating a nonprofit corporation with broad powers to acquire and develop buildings and sites for economic development. Eligible projects for the corporation include everything from railroad lines to planetariums.

The act prescribes a detailed process for creating the corporation. Three or more people who are both city electors and city taxpayers may obtain a charter of incorporation from the secretary of state after their application has been approved in a resolution of a city's governing body. The resulting corporation must have at least seven directors who are elected by the city's governing body for staggered six-year terms. The directors must be both city electors and city taxpayers. No director may be a city officer or city employee.

Typically, the industrial development corporation recruits a company to build a plant in the community. To fund the construction, the development corporation sells industrial revenue bonds. The company uses the bond proceeds to build the plant. However, on paper, the development corporation holds title to the plant. The company runs its plant and gives the corporation annual payments to cover the bond principal and interest.

Since the loss of the federal income tax exemption for this type of industrial development bond, some industrial development corporations have issued taxable industrial development bonds as a legal way to give property tax breaks to new companies.

A city may not back the corporation's bonds with its full faith and credit unless a certificate has been issued by the Building Finance Committee of the Industrial Development Division of the state Department of Economic and Community Development, and a three-fourths majority approves the question in a referendum.

A city may give property, assets, and loans to the corporation. A city may also develop infrastructure (power lines, water, sewer, etc.) in an industrial park and sign leases with the corporation.

Properties held by the corporation are tax exempt. The city may delegate authority to the corporation to negotiate in-lieu-of-tax payments from businesses using the corporation-owned properties (*T.C.A.* 7-53-305).

Industrial Park Act

The Industrial Park Act permits cities to build industrial parks and related economic development facilities without passing a three-fourths majority referendum to approve bonds. Pledging the full faith and credit of the city requires a referendum. But with state approval, a city council may act on its own to issue bonds pledging fees, rents, tolls, and other charges connected with an industrial park (*T.C.A.* 13-16-203(2)).

The city is still required to obtain a certificate of public purpose and necessity, but the Building Finance Committee's role is expanded. The committee has to determine that "the project is well conceived and has a reasonable prospect of success" and that "there is a good probability that the project will be self-sustaining." In making the "self-sustaining" determination, the committee counts not only revenues from selling and leasing land in the park, but also utility revenues, increased *ad valorem* taxes, and other tax revenues resulting directly from the industrial park.

If the committee approves the project, then the city may secure its bonds with pledges of proceeds from sales of municipal property, any or all utility revenues, any or all tax revenues, and any other revenues from fees, rents, and charges. The committee has to approve both the amount of bonds issued and the security pledged.

The city may use eminent domain to acquire industrial park property. It may develop and operate an industrial park itself or turn the responsibility over to an organization, such as an industrial development corporation. It may join with other local governments to develop and operate its industrial parks (*T.C.A.* 13-16-201–207).

A municipality also may issue bonds for construction of a business park as long as the development is larger than five acres, the bonded indebtedness will not exceed 10 percent of the assessed value of the property in the community, and the project is well conceived and will not become a burden to the taxpayers. The procedure for issuing such bonds is

the same as that for an industrial park (*T.C.A.* 9-21-105 (21)(B)(i), *T.C.A.* 9-21-402(B)).

Industrial Highways

Municipalities are authorized to participate with the state and county in constructing and maintaining highways to secure an industrial site or park or to relieve related traffic congestion. The city will be responsible for the local share of the cost of such highways inside its jurisdiction. Any funds available to the city may be used for this purpose. The state Department of Transportation may use any funds not "specifically allocated by legislative action to other categories of highway construction and maintenance" (*T.C.A.* 54-5-401–406).

Private-Purpose Utility Projects Prohibited

Cities are prohibited from constructing water and sewer projects for private purposes. Such purposes include any commercial project, commercial subdivision, private residence, or privately owned residential subdivision. It also includes constructing individual water and sewer lines beyond a meter that measures service or on private property where the municipality does not have an easement (*T.C.A.* 7-35-401).

Parking Authority

In counties with a population of more than 50,000, a public corporation (designated a "Parking Authority") may be formed by the county or a city to construct and operate off-street parking facilities. The authority is under the control of a board of not fewer than five directors appointed by the mayor or county executive with the governing body's approval. A governing body may amend the certificate of incorporation by resolution. If bonds extend beyond an authority's duration, the municipality shall assume their obligations. Revenue bonds with up to 40-year terms may be issued and additionally secured by mortgages on facilities and/or on-street parking meter revenues. This act is not applicable in counties with a metropolitan form of government (*T.C.A.* 7-65-101–124).

Central Business Improvement Districts

There are four ways under two statutes that a city can create a central business improvement district. *T.C.A.* 7-84-101–120 et seq. authorize the creation of a central business district by ordinance upon:

- A petition signed by a numerical majority of the owners of real property who own two-thirds of the assessed value of the real property in the proposed district; or
- A city's own initiative by resolution.

The actual organizational details, including those associated with funding the district, must be created by ordinance (*T.C.A.* 7-84-202, *T.C.A.* 7-84-207). Written protest against the creation of the district by this method by the owners representing more than one-half of the assessed value of the property to be included in the district will block the creation of the district. However, the municipality can amend the protestors out of the district's boundaries.

T.C.A. 7-84-501 et seq. authorize creating a central business improvement district by ordinance passed by a majority vote of the city's governing body present and voting, upon:

- Petition of a numerical majority of the owners of real property who own at least two-thirds of the assessed value of the real property in the proposed district; or
- The city's own initiative by resolution.

See previous note regarding the resolution and ordinance (*T.C.A.* 7-84-511 and *T.C.A.* 7-84-515). The creation of the district may be blocked, and the municipality can remove the block in the

same manner that applies to a district created under *T.C.A.* 7-84-101–120.

Under *T.C.A.* 7-84-501 et seq., the city creates a "district management corporation," which may be either a new or an existing body. The district management corporation acts as an advisory body "for the purpose of making recommendations for the use of special assessment revenues and for the purpose of administering activities within the district, the making of improvements within and for the district, and the provision of services and projects within and for the district." The extent of the district management corporation's powers is determined by ordinance. The city may contract with the district management corporation for services. The speakers of the Senate and of the House each appoint to the district management corporation's board of directors an *ex officio* representative and senator from the House and Senate districts in which the majority of the central business improvement district lies. (An alternative arrangement is made for Shelby County.)

Both laws give cities broad powers to make various improvements in central business improvement districts and the power to levy special assessments on property within such districts to finance improvements therein. The laws also prescribe methods of assessment.

Connecting CBIDs

The governing bodies of two or more municipalities may enter into an agreement to connect their central business improvement districts. The connected district is subject to all provisions that apply to a single district (*T.C.A.* 7-84-209). See also *T.C.A.* 7-84-103(3).

Inner-City Redevelopment Districts

T.C.A. 7-84-601, et seq., authorizes any municipality by ordinance to create a self-financing inner-city redevelopment district. These districts may not overlap CBIDs. The ordinance may be initiated by petition of owners of two-thirds of property to be included or by resolution of the governing body. The municipality may borrow money for public works improvements in the district and use special assessment revenues to pay it back. The authority to provide public works may be delegated to the governing body of the district.

Redevelopment Authority

Housing Authorities may serve as Redevelopment Authorities. Such authorities are empowered to undertake urban renewal projects and issue tax increment bonds to finance redevelopment projects. Blighted property may be acquired, cleared, and assembled for redevelopment. Under tax increment financing, the new tax revenue resulting from a successful redevelopment project is earmarked for public investments that made redevelopment possible. County approval is required unless county taxes are exempted from the tax increment provisions (except in Davidson and Shelby counties) (*T.C.A.* 13-20-202–216).

Local Development Authority: Industrial Development Loans

The Tennessee Local Development Authority has authority to issue notes or bonds whose proceeds may be used for loans to cities to finance constructing sewage treatment facilities, waterworks, correctional facilities, and resource and energy recovery facilities. The loan agreements are between the Department of Environment and Conservation and the city (*T.C.A.* 4-31-101).

The state Funding Board and the Tennessee Local Development Authority are authorized to approve an application to the Department

of Economic and Community Development for a loan of up to $250,000 to a city of less than 25,000 population or to a county with no city of more than 50,000 population. Each must have had an unemployment rate for 12 months higher than the state average or an average per capita income below the state average for the previous 12 months. The loan's primary purpose must be to increase the number of manufacturing jobs. It may be used for water and sewerage facilities, land acquisition, site preparation, extending utilities, road access, and environmental monitoring equipment (*T.C.A.* 4-31-301).

Fraud Relative to Minority, Disadvantaged, and Small Business Programs

It is unlawful for a person to knowingly commit or engage in false or fraudulent conduct in order to qualify, assist another to qualify, or participate in a program for minority, disadvantaged, and small businesses administered by or through a state or local agency intended to enhance and encourage economic development.
Such offenses are punishable according to the value of the property or services obtained (*T.C.A.* 39-14-137).

Local Enterprise Zones

Home rule municipalities are authorized to create an Enterprise Zone Management Board with authority to designate enterprise zones. Home rule municipalities wanting an enterprise zone within their jurisdiction must apply to this board. To be designated an enterprise zone, an area must be in poverty and consist of underutilized or vacant lands. If a zone is designated, the local government may establish a nonprofit enterprise zone development corporation empowered to own property, solicit and accept grants, and make loans and grants. Various incentives can be provided that encourage enterprise zone development (*T.C.A.* 13-28-201–211).

Disclosure of Economic Development Agreements; Conditions and Term of Agreements

All economic development agreements granting property tax incentives must be submitted in writing to the chief executive officer of each jurisdiction in which the property is located and to the state comptroller. The agreement must be submitted within 10 days after execution. To determine the exempt status of property subject to the agreement, the parties may petition the local and state Boards of Equalization for adjudication in the manner required for filing local assessment appeals (*T.C.A.* 4-17-301 et seq.). Lessees must make annual reports to the state Board of Equalization on property leased and in-lieu-of-tax payments made (*T.C.A.* 7-53-305(e)).

T.C.A. 7-53-305(b) requires each agreement to have a cost-benefit analysis attached as required by the Commissioner of Economic and Community Development. Agreements are limited to 20 years, including extensions, unless both the Commissioner of Economic and Community Development and the Comptroller make a written determination that the agreement is in the best interest of the state.

Chapter 13: Business Regulation

Adult-Oriented Businesses

Three state laws regulate adult-oriented businesses:

1. *T.C.A.* 7-51-1101 et seq. (Adult-Oriented Establishment Registration Act of 1998). Counties are authorized (but not required) to adopt by a two-thirds vote the Adult-Oriented Establishment Registration Act of 1998. That act expressly preserves the right of municipalities to adopt and enforce "other lawful and reasonable restrictions, regulations, licensing, zoning, and other criminal, civil, or administrative provisions concerning the location, configuration, code compliance, or other business operations or requirements of adult-oriented establishments" (*T.C.A.* 7-51-1121). The act defines and covers adult bookstores, adult mini-motion and motion picture theaters, adult cabarets, escort agencies, sexual-encounter centers, massage parlors, rap parlors, saunas, and similar businesses. In any county that has adopted the act, such businesses must obtain a license from the county. The act prescribes the rules and regulations that adult-oriented businesses must follow, and the Adult-Oriented Establishment Board (created by the county) is empowered to adopt additional rules and to suspend and revoke the licenses of adult-oriented businesses. In addition, offenders may be fined up to $50. This statute was upheld in the unpublished case of *American Show Bar Series Inc. v. Sullivan County*, 2000 WL 277178 (Tenn. Ct. App. March 15, 2000).

   Municipalities that disqualify persons with criminal records from operating or performing in these establishments are required to conduct a criminal records check on applicants through the TBI and FBI. The city must require two sets of fingerprints, which must be sent to the TBI. Costs must be paid by the city but may be added to the application fee (*T.C.A.* 7-51-1122). *T.C.A.* 27-9-111 makes mandatory the judicial review of decisions of boards and commissions that revoke, suspend, or deny permits or licenses required for engaging in adult businesses. The court must hear and decide the matter within 40 days of the date the court granted *certiorari*.

2. *T.C.A.* 57-4-204. This statute prohibits certain sexual and pornographic conduct in establishments that sell intoxicating liquor. Generally, the Alcoholic Beverage Commission is the agency designated to enforce the statute. However, the statute expressly provides that "Each county, city, or metropolitan government is empowered upon approval by a two-thirds vote of its legislative body to authorize its law enforcement officers to conduct investigations into alleged violations of subsections (a)-(d) [which contain the prohibited conduct], and such law enforcement officers shall report such violations to the commission for appropriate action by such commission" (*T.C.A.* 57-4-204(e)).

3. *T.C.A.* 39-13-511. This statute prohibits public indecency, the definition of which includes various kinds of sexual

activities. Its definition of "public place" includes streets, sidewalks, parks, beaches, and business and commercial establishments of various kinds. It preserves the right of local governments to regulate "any activity where alcoholic beverages, including malt beverages, are sold for consumption" (*T.C.A.* 39-13-511(a)(6)). First and second offenses are Class B misdemeanors carrying a fine of $500. A third or subsequent offense is a Class A misdemeanor with a fine of $1,500 and a jail term of up to 11 months, 29 days.

Many municipalities also have ordinances regulating adult-oriented businesses. At both the state and local levels, the most successful approach to the regulation of such businesses generally has been based upon the regulation of their "secondary effects." (See U.S. Supreme Court cases *Renton v. Playtime Theaters Inc.*, 475 U.S. 41 (1986); *Barnes v. Playtime Theaters Inc.*, 501 U.S. 560 (1991); and *City of Erie v. Pap's A.M.*, tbda "Kandyland," 130 S.Ct. 1382 (2000)). Competent legal advice should be sought and the federal and state cases interpreting the above and similar statutes in other jurisdictions should be read before a municipality adopts or enforces either a state law or municipal ordinance regulating adult-oriented businesses.

Antique Dealers' Records

Antique dealers are required to keep records containing specified information for any item they purchase "exceeding the value of $50" and to preserve (no time period is specified, so presumably permanently) such records for inspection at any time by any city or county police officer (*T.C.A.* 62-22-101). Dealers in antique, used, or scrap jewelry and precious metals must keep certain records and deliver daily to the police chief copies of logs containing specified information (*T.C.A.* 38-1-201 et seq.).

Pawnbrokers

Cities may adopt state provisions regulating pawnbrokers and other regulations they "may deem right and proper." Cities may not regulate interest, fees, insurance charges, hours, types of pawn transactions, or license requirements, nor may cities make requirements other than those under the state statutes. A law enforcement official of a city may not charge a pawnbroker for receiving or processing daily reports or pawn tickets or any other information required by the law enforcement official. The state code intimates that even though a city may not license pawnbrokers, a city may suspend or evoke a pawnbroker's license if the owner, major stockholder, or managing partner is convicted of violating the state statute. Upon request, pawnbrokers must furnish law enforcement agencies with the names of suppliers from whom they bought merchandise for resale (*T.C.A.* 45-6-201 et seq.). Pawn shop operators in Knox and Shelby counties must obtain the thumbprint or fingerprint of the pledger (*T.C.A.* 45-6-209).

Beer

A city may, by ordinance, prohibit beer sales within the city, or it may, by ordinance, prescribe regulatory measures not conflicting with state laws. These measures may include:

- Fixing a maximum number of permits;
- Restricting beer permittees to certain zones;
- Establishing distance regulations from residences, schools, churches, and other public gathering places;
- Establishing opening and closing hours; and
- Setting other rules to protect the "public health, morals, and safety."

One exception is found in *T.C.A.* 57-5-109, which prohibits cities from denying a beer permit to a business based on proximity to a school, residence, church, or other place of public gathering if a permit had been issued to a business on that same location as of January 1, 1993. The statute defines "on that same location" as being within the parcel or tract the business was located on as of that date.

To enforce these regulations, a city must establish a board to issue beer permits. The governing body may constitute itself as a beer board for this purpose. Applicants who meet all conditions prescribed by state law and city ordinances must be issued a permit. If they are refused, they may seek a trial *de novo* in a Circuit or Chancery Court.

Municipalities may have different permit classes. For example, cities may allow on-premise consumption or restrict permits to package sales.

A city may prohibit sales at places where they would cause traffic congestion. Municipalities must prohibit sales to minors. No applicant or any person employed by an applicant shall have been convicted of any liquor law violation or a crime involving moral turpitude within the previous 10 years.

A permit may be revoked or suspended by a beer board for failure to comply with any state law or city regulation, including the failure to pay the privilege tax and provide information required by the city. Appeal of such a decision may be taken to a Circuit or Chancery Court. In lieu of revocation or suspension, a beer board may impose a civil penalty not exceeding $1,500 for each offense involving sales to minors, or it may levy a penalty not exceeding $1,000 for any other offense. Acceptance of a civil penalty by a city prevents the city from imposing any other punishment or penalty for that offense (*T.C.A.* 57-5-101–109).

Beer boards are required to consider repeated violations of any local ordinance or state law related to prohibited sexual contact on the premises of adult-oriented establishments when considering suspending or revoking a permit (*T.C.A.* 57-5-108(c)).

A city may not impose training or certification requirements on employees of a permittee if the employees have server permits issued by the Alcoholic Beverage Commission (ABC) (*T.C.A.* 57-5-106(a)).

Sale of Intoxicating Liquors

Regulating the liquor industry is primarily a state function, but counties and cities may adopt regulations that do not conflict with those of the state. Package stores and the sale of liquor-by-the-drink must be approved by referendum, an option open to cities that have been incorporated for five or more years with a population of 925 or more people (except in four excluded counties). Banning such stores can likewise be accomplished by referendum (*T.C.A.* 57-3-106, *T.C.A.* 57-4-103).

Applicants for a package store license from the state must first obtain a certificate signed by the mayor or a majority of the city governing body stating that:

- The applicant(s) to be in actual charge or the corporation officers (or those in control) have not been convicted of a felony within 10 years preceding the application date;
- A business site that meets all local requirements has been acquired; and
- The application conforms to any limit established on the number of retail licenses.

Failure to act within 60 days on an application for such certificates shall constitute approval. Cities and counties are authorized to control the location and number of licenses as long as they

do not "unreasonably restrict the availability of alcoholic beverages" to their residents. An appeal of a certificate denial may be taken to a Chancery Court within 60 days (*T.C.A.* 57-3-208). State law regulates hours during which sales may be made for consumption on the premises, but the ABC may expand those hours. Cities may opt out of or into the hour expansion adopted by the Alocholic Beverage Commission (ABC) (*T.C.A.* 57-4-203(d)).

An elected or appointed public officer may not hold a liquor license or have any interest in any wholesale or retail liquor business (*T.C.A.* 57-3-210).

T.C.A. 57-3-707 allows servers in liquor-by-the-drink establishments to work 61 days after being hired without a server permit.

The law permits a city to impose the following annual privilege taxes on places serving drinks for consumption on the premises:

- $300 for a private club;
- $600 to $1,000 for restaurants, according to seating capacity;
- $1,000 for a hotel or motel;
- $1,500 for a premiere-type tourist resort; and
- Other amounts for several other classifications (*T.C.A.* 57-4-301).

Cities may levy, by ordinance, inspection fees on retail liquor licensees (package liquor stores) based on wholesale liquor prices not exceeding 8 percent in counties with a population of less than 60,000 and in counties in which a premier tourist resort city is located, and not more than 5 percent in other counties. Population is to be taken from the most recent federal census (*T.C.A.* 57-3-501).

State highway patrol and Alcoholic Beverage Commission officers and agents are empowered to help local law enforcement personnel enforce liquor statutes in cities that have not authorized liquor sales by local option elections (*T.C.A.* 57-3-412(b)).

Closing-out Sales

A city may elect to regulate "going-out-of-business" sales by requiring licenses and verifying the authenticity of such sales (*T.C.A.* 6-55-401–413). Failing to comply with municipal regulations of liquidation sales is an unfair or deceptive trade practice under *T.C.A.* 47-18-104.

Fire and Burglar Alarms

The Alarm Contractors Licensing Act of 1991 prohibits municipalities and counties from offering services as an alarm system contractor except for facilities wholly owned by the municipality or county. Municipalities may provide monitoring and response service to alarm systems if:

- No charge is made for the service;
- Using the local government service is not mandatory; and
- Response by law enforcement officials, firefighters, and other emergency personnel is not conditioned on using the service.

No municipality may enact any regulations relating to licensing alarm businesses after July 1, 1991. Any municipal regulation requiring certification or licensing of alarm businesses or their employees is superseded.

A municipality may impose a fine not exceeding $25 for each false alarm unless the false alarm is due exclusively to a violent act of nature.

A municipality may require alarm businesses and agents to register their names, addresses and license certificate numbers. A city may not impose a fee or require an application for this registration (*T.C.A.* 62-32-301 et seq.).

Fire Extinguisher Firms

Regulating fire extinguisher firms is exclusively a state function except that a municipality may require permits for installing fire extinguisher systems and require that the installation of such systems conform to applicable building codes and requirements (*T.C.A.* 62-32-201 et seq.).

Junkyards

Restrictions have been imposed on junkyards located within 1,000 feet of an interstate or primary highway. They are enforced and implemented by the Tennessee Department of Transportation. "Junkyard" includes a place where 10 or more abandoned motor vehicles are stored and any place that stores, buys, or sells junk (*T.C.A.* 54-20-101 et seq.), but it does not include recycling centers as defined in *T.C.A.* 54-20-103(4) or solid waste facilities registered under *T.C.A.* 68-211-106. Otherwise, the definition of "junk" includes a wide variety of materials. A municipality is empowered to enforce regulations at least as stringent as those established under this statute for city streets that are in the state highway system (*T.C.A.* 54-20-103 et seq.).

Automobile Graveyards

For city streets that are not a part of the state highway system, a municipality is empowered by ordinance to license and regulate "any lot or place which is exposed to the weather" where more than five motor vehicles, not economically practical to make operative, are located (*T.C.A.* 7-51-701).

Penalty for Harassment

If a city brings a civil action against a small business and does not prevail, and the business demonstrates that the city's actions were arbitrary, capricious, or brought in bad faith to harass, then the court may award the business reasonable fees and other expenses up to $10,000 (*T.C.A.* 29-37-101–106).

Sale of Fireworks

The state requires anyone manufacturing, distributing, selling, or displaying fireworks to have a permit issued by the state fire marshal. An application for a retailer's permit must be accompanied by a statement from the chief executive of the county or municipality in which the fireworks are to be sold that selling fireworks within such county or municipality is permissible. It is illegal to sell any fireworks in a county or municipality where sale has been made illegal by ordinance or law. It also is illegal to ship fireworks for sale at retail into one of those municipalities or counties (*T.C.A.* 68-104-105).

In counties where sales are not prohibited, a city may by private act or ordinance regulate, restrict, or totally prohibit the sale of fireworks within the city (*T.C.A.* 68-104-116). Public displays are allowed where sales are permitted. But within such a city, a display permit application must bear the "signed approval of the chief supervisory official of the fire and police departments" (*T.C.A.* 68-104-107). Retail sales of Class C common fireworks are prohibited in any county of more than 200,000 population except in any city therein with a population of 600 to 620 that permitted such sales before 1984 (*T.C.A.* 68-104-112(a)(4)).

Regulation of Taxicabs and Similar Vehicles

Municipalities are empowered to license, control, and regulate taxicabs by ordinance or resolution. The statute outlines the scope of this authority and extends to a municipality the full extent of antitrust immunity accorded to the state as sovereign under state and federal laws. Governmental entities in a county of 287,700

to 287,800 (Hamilton County) are exempted from this law. Governmental entities in counties with more than 500,000 population (Shelby and Davidson) also may regulate limousine, sedan, shuttle, and taxicab services (*T.C.A.* 7-51-1001–1007). *T.C.A.* 6-54-128 requires a criminal records check on cabdrivers through the TBI and FBI by municipalities in counties with over 100,000 population that choose to license and regulate persons operating vehicles for hire and disqualify those convicted of specified crimes.

Regulation of Towing or Wrecker Companies

Federal law (49 U.S.C. 14501(c)) restricts municipal regulation of towing and wrecker companies. Under the noted federal statute, which deregulated the motor carrier industry, including towing companies, it appears that municipalities may do only the following relative to towing and wrecker companies:

1. Regulate the price of non-consensual tows;
2. Establish standards for towing businesses that perform work for the city itself as a market participant; and
3. Regulate safety aspects of the towing business where this authority is delegated by the state.

All other business regulation of towing companies appears to be preempted. See *Petrey v. City of Toledo*, 246 F. 3d 548 (6th Cir. 2001) and *City of Columbus v. Ours Garage and Wrecker Service*, 122 S. Ct. 2226 (2002).

False Claims

T.C.A. 4-18-101 et seq. make any person or entity that makes a false or fraudulent claim against the state or any municipality liable for three times the amount of damages. In addition, the person or entity is liable for court costs of a civil action to recover these damages and for a civil penalty of not less than $2,500 nor more than $10,000.

Manufactured Homes

State law provisions regulating the installation of manufactured homes preempt any local ordinances that regulate their installation (*T.C.A.* 68-126-412).

Price Gouging During States of Emergency

T.C.A. 47-18-5101 et seq. and 47-18-104 make it unlawful for businesses to charge excessive prices for essential goods during states of emergency. Local ordinances prohibiting and penalizing similar conduct are not preempted.

Chapter 14: Environmental Quality

Solid Waste

Solid Waste Management Act of 1991

The Solid Waste Management Act of 1991 outlines a comprehensive process for dealing with Tennessee's municipal solid waste. Counties must have created solid waste regions and established a Solid Waste Regional Board by December 1992 (*T.C.A.* 68-211-813). The act encourages forming multicounty regions, but a single county may constitute a region. Cities that collect and dispose of solid waste have a right to appoint representatives to the region's board. Through regional plans, regional boards have the authority to approve applications for new or expanded landfills or incinerators in their territory and to restrict waste coming in from outside the region (*T.C.A.* 68-211-813–814, *T.C.A.* 68-211-817).

Each region shall have a plan for a 10-year disposal capacity and for achieving 25 percent waste reduction by December 31, 2003, based on 1995 levels of waste going to landfills and incinerators. The counties may create a Solid Waste Authority to implement the regional plan, or the region's board may assign responsibilities to existing governmental entities (*T.C.A.* 68-211-814, *T.C.A.* 68-211-861, *T.C.A.* 68-211-902).

The act also authorizes the region to impose and collect a solid waste disposal fee. Funds from these fees are to be used to establish and maintain solid waste collection and disposal services, including convenience centers and collection centers for whole waste tires, lead-acid batteries, and/or used oil. Cities and counties must use a uniform solid waste financial accounting system developed by the state comptroller (*T.C.A.* 68-211-835, *T.C.A.* 68-211-866, *T.C.A.* 68-211-874).

Every development district was required to submit a solid waste needs assessment for each county in the district by September 1992. The needs assessment must have been revised to reflect changes in the district by April 1, 1999. It must be revised every five years thereafter (*T.C.A.* 68-211-811).

All landfills accepting municipal solid waste must pay a surcharge to the state. The surcharge is 75 cents per ton from July 1, 1998, through June 30, 2004. The surcharge applies only to Class I solid waste disposal facilities and incinerators (*T.C.A.* 68-211-835).

The act makes it unlawful to deposit solid waste into the waters of the state and to burn solid waste except in accordance with state regulations. It also is unlawful to construct or alter a solid waste processing or disposal facility or to transport, process, or dispose of solid waste in violation of rules and regulations established by the Commissioner of Environment and Conservation or the Solid Waste Disposal Control Board (*T.C.A.* 68-211-104). The state also exercises general supervision and regulation over all solid waste disposal facilities in the state, including the authority to review and approve federal grants or loans to cities for constructing or modifying such facilities (*T.C.A.* 68-211-105–109).

Closed Trucks

Refuse, garbage, etc., must be hauled in a closed-body truck or covered securely with a tarpaulin. In addition, all trucks hauling litter to an energy recovery facility and having a gross weight of less than 16,000 pounds must carry the litter in an enclosed space unless the truck has a hydraulic lift system (*T.C.A.* 39-14-501–503).

Resource Recovery Facilities

T.C.A. 68-211-501–505 empower any city to construct and operate an "energy or resource recovery facility ... within its corporate limits or within the limits of the county wherein it is located," and a 1974 act authorizes state loans for such purposes. A 1976 act intending primarily to permit local governments to participate in a TVA-sponsored plan for using solid waste as fuel empowers cities and counties to join in any such enterprise. The act is sufficiently general to permit participation in any such plan, not necessarily only those sponsored by TVA. The act would apply to any facility with a primary objective of recovering energy and a secondary objective of recovering recyclable materials (*T.C.A.* 7-58-101–110).

Contracts for using solid waste for resource and fuel recovery or among counties and cities for cooperative solid waste operations may not exceed 40 years (*T.C.A.* 7-58-103–104).

Used Oil Collection Act of 1993

The Used Oil Collection Act allows the Tennessee Department of Environment and Conservation to make grants or loans to cities to establish and operate used oil collection centers. Grants and subsidies may also be available to local governments to buy equipment that burns used oil as fuel. In awarding the latter grants, priority will be given to local governments that have created used oil collection centers. The grants are funded by a 2 cents per quart fee on automotive oil, paid by distributors. The act contains extensive regulations governing used oil collection centers (*T.C.A.* 68-211-1001 et seq.).

Hazardous Waste

Hazardous Waste Permit

When the state considers an application to permit a hazardous waste site within a municipality or within a mile of a municipality, the city council must vote within 90 days to accept, reject, or modify the application. The city must send the state a report that addresses a series of questions. The questions ask whether the facility:

- Minimizes incompatibility with the surrounding area and its effects on the value of the area;
- Minimizes the impact on traffic flow; and
- Meets zoning requirements for hazardous solid waste facilities.

Before issuing or denying the permit, the state Commissioner of Environment and Conservation must affirm, reverse, or modify the decision of the local government (*T.C.A.* 68-212-108).

Applicants for hazardous waste storage or disposal facilities must hold a public meeting and complete a community impact statement before submitting a permit application (*T.C.A.* 68-212-108). *T.C.A.* 68-212-105 makes it unlawful to place a new commercial hazardous waste facility closer than 1,500 feet to residential, day-care, church, park, or school property.

Hazardous Waste Plans and Reports

The Tennessee Hazardous Waste Reduction Act of 1990 requires hazardous waste generators to classify themselves as large or small, prepare hazardous waste reduction plans, and file annual reports with the state (*T.C.A.* 68-212-301–312).

Superfund and Hazardous Waste Sites

The Commissioner of Environment and Conservation is required to notify the register of deeds in each county in which property has been placed on the list of inactive hazardous substance sites. The register must record a notice that the property has been so listed. This notice effectively freezes any loan for development of the site until the environmental problem is addressed and the notice is removed.

Local governments are not liable for cleanup of hazardous waste sites if they acquire ownership through tax delinquency, bankruptcy, abandonment, or similar circumstances. This exemption does not apply if the government contributed to releasing hazardous materials or if liability has been otherwise adjudicated (*T.C.A.* 68-212-101–302).

Local Air Pollution Regulations

The state is responsible for a comprehensive state program to minimize air pollution. Municipalities and counties are empowered to enact regulations that are not less stringent than the state's regulations, which shall prevail so long as a certificate of exception granted by the Air Pollution Control Board is in effect. Periodic review by this board is required to determine whether such exemption should be continued. Certificates are issued for periods not to exceed two years (*T.C.A.* 68-201-115). Such local air pollution regulations are not applicable to "any air contaminant source ... which burns wood waste solely for the disposition of such wood waste" (*T.C.A.* 68-201-115(c)). The $25,000 per day state penalty also is applicable to violations of municipal regulations. Municipal penalties are cumulative and in addition to state penalties (*T.C.A.* 68-201-116).

Boat and Marina Sewage

It is unlawful to operate a boat with a marine toilet that discharges untreated sewage into the waters of the state. Commercial boating facilities that house vessels equipped with toilets must provide facilities for sanitary pumping and disposal from the boats' holding tanks, or they must have an agreement with a marina that is so equipped (*T.C.A.* 69-10-102, *T.C.A.* 69-10-216(g)).

Underground Storage Tanks

Cities with underground storage tanks for petroleum must comply with state and federal monitoring and replacement requirements. The state Underground Storage Tank Board oversees enforcement and levies a $125 per tank annual fee on all tanks to pay for the regulatory program (*T.C.A.* 68-215-101 –128). *T.C.A.* 68-215-110(h) provides for appropriations of environmental taxes and fees to the Local Development Authority to pay debt service on bonds and notes the authority issues to clean up underground tanks.

Pesticides

Municipalities are prohibited from regulating the sale and use of pesticides. Also prohibited is regulation of registration, notification of use, advertising, marketing, distribution, applicator training or certification, storage, transportation, disposal, disclosing confidential information, or product composition. The statute does not limit a city's authority to zone for storage or designate sites for disposal, regulate discharge to sanitary sewers, or implement a pest management plan required by the Safe Drinking Water Act. The state may enter into an agreement with cities with a population of greater than 250,000 to enforce the provisions of the Tennessee Insecticide, Fungicide, and Rodenticide Act (*T.C.A.* 43-8-114–115, *T.C.A.* 62-21-118, *T.C.A.* 62-21-129).

Caves

It is a criminal offense to deface or destroy caves and caverns or to force open a gate guarding a cave entrance (*T.C.A.* 11-5-108).

Environmental Protection Fund

An environmental protection fund provides additional funding for the state Department of Environment and Conservation. Revenues from fees, civil penalties, and damages are used to

improve the state's performance in permitting, monitoring, investigation, enforcement, and department administration.

Fees are charged to municipalities that submit applications and/or plans to build or modify municipal water, wastewater, and solid waste disposal operations. In addition, some annual maintenance fees are charged to municipalities for state oversight of these facilities (*T.C.A.* 68-203-101–105).

Brownfields

T.C.A. 68-212-224–226 create a voluntary brownfield redevelopment program. Under this program, the Commissioner of Environment and Conservation may make grants and loans to local governments from federal and state funds for cleanup of disposal sites or brownfields.