



The University of Tennessee Municipal Training

Legal Issues for Municipal Officials



Sponsored by The University of Tennessee's Center for Government Training
and Municipal Technical Advisory Service
In cooperation with Tennessee Municipal League and its affiliate groups

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The Center for Government Training (CGT) is The University of Tennessee's training and professional development agency for state and local government officials and managers. For more than two decades, CGT has helped government leaders keep up-to-date on changing trends and technologies and develop their most important resource—their staff.

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LEGAL ISSUES FOR MUNICIPAL OFFICIALS

Presented by

THE UNIVERSITY OF TENNESSEE
CENTER FOR GOVERNMENT TRAINING

May 1989

PARTICIPANT MANUAL

LETTER TO PARTICIPANTS

Welcome! We are pleased that you are participating in this training program sponsored by The University of Tennessee's Center for Government Training. You are to be commended for your interest in improving your job skills through continuing education.

The field of local government is a challenging one. It requires current job knowledge and constant skill refinement in order to provide the public with the best service possible. This training will provide beneficial information and you will leave better equipped to meet the demands of your position.

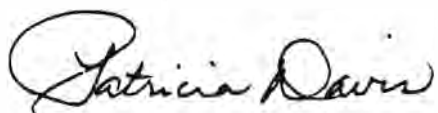
In addition to this course, the Center for Government Training offers a variety of programs and seminars throughout Tennessee for local and state government officials. Two certificate training programs form the key components of our local government training effort. These programs are designed specifically for county officials or municipal officials. I encourage you to learn more about these certificate training programs and to consider what they have to offer. Not only do the courses in these programs help to keep you informed about recent developments, increase your understanding of local government issues and sharpen your specific job skills, they also provide an opportunity to discuss issues and share ideas with other local government officials.

The Center for Government Training stresses quality education and practical training to help you in your daily operations. In order to better serve your needs, we solicit your input. Your comments and suggestions are important to us. We also welcome your suggestions on topics for future courses.

Our sincere appreciation is extended to Mr. Jim Murphy, Attorney for the Metropolitan Government of Nashville-Davidson County, Tennessee, who developed the material for today's course.

Education is a life-long process. We applaud your efforts and your commitment to professional development.

Sincerely,



Patricia C. Davis
Executive Director

LEGAL ISSUES

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I. INTRODUCTION

Overview

This course in the Municipal Officials' Certificate Training Program is designed to provide information regarding a broad range of legal issues which will confront municipal officials. A large portion of the course will deal with the legal foundations for municipal government, the structure of municipal governments in Tennessee, the powers vested in municipal governments and the methods for exercising those municipal powers. This course will also review the basic qualifications for municipal officials as established by state law and ethical considerations for municipal officials. This course will review issues which confront municipal officials frequently such as public access to municipal records, open meetings of municipal officials, personnel matters and the liability of municipalities and municipal officials under state and federal law.

Learning Objectives

Goals

1. Provide municipal officials with a basic knowledge of the legal foundations of municipal government and operations.
2. Provide municipal officials with a basic knowledge of the legal restrictions under which municipal governments operate.
3. Provide municipal officials with a basic knowledge of legal requirements and restrictions applicable to municipal officials.
4. Provide municipal officials with a basic knowledge of current legal issues of concern to municipalities in general.

Objectives

- Help municipal officials recognize and respond to legal questions and problems that relate specifically to the legal existence, structure and organization peculiar to their respective municipal governments.
- Help municipal officials recognize and respond to restrictions that limit contemplated municipal action (or inaction) in their respective municipal governments.
- Help municipal officials recognize, respond to or avoid legal restrictions applicable to municipal officials.
- Help municipal officials recognize and anticipate legal issues creating concern in their municipalities before they become problems in their respective municipal governments.

II. LEGAL FOUNDATIONS FOR MUNICIPAL GOVERNMENT

Constitution

A municipality is a governmental entity created by the Tennessee General Assembly.¹ Although the Tennessee Constitution does not specifically authorize the General Assembly to create municipalities, there is no doubt that such power exists.² The General Assembly may vest a municipality with such authority as does not violate the federal or state constitutions.³ Municipalities are subject to the control of the General Assembly which can, at its pleasure, provide for the creation or prohibition of a municipality, dictate the terms of a municipal charter and confer such powers and duties and impose such burdens and restrictions as are deemed expedient.⁴

Although the creation of municipalities is not expressly authorized, the language of Article II, Section 29 closely indicates that the General Assembly has the power to establish municipal governments. Article II, Section 29 empowers the General Assembly to authorize municipalities to levy taxes, and prohibits municipalities from loaning their credit for private purposes, or from becoming stockholders as joint owner of any company, association or corporation for a private purpose without the approval of three-fourths of the voters.

The legislature governs cities and towns through general laws which apply to all cities and towns (and sometimes only to all cities and towns within a certain class, such as all cities and towns of a certain population), and through private acts which apply only to particular cities and towns. Before Amendments 6 and 7 of the 1953 Amendments to the Tennessee Constitution were adopted, the legislature could (and often did) pass private acts as well as general laws without consulting with or obtaining the approval of the affected cities and towns. Neither Amendment 6 nor 7 disturbed the rights of the legislature to pass general laws, but did have a considerable impact on private acts.

Amendment 6 to the 1953 Amendments to the Tennessee Constitution altered the General Assembly's powers over local governments as follows:

- (1) Prevented private acts from becoming effective until they obtained approval by a two-thirds vote of the municipal (or county) governing body or by the majority of those voting in a referendum held for that purpose. The private act itself must specify by which of the two methods local approval can be obtained.
- (2) Prohibited entirely private acts "having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such

public officer is selected." Private acts call "Ripper Bills" had done those things in many cities and counties without local approval prior to 1953.

Amendment 7 to the 1953 Amendments to the Tennessee Constitution, also known as the home rule amendment, altered the powers of the General Assembly as follows:

- (1) Gave municipalities the option of adopting home rule and provided that the legislature could pass no private act of any kind applying to home rule municipalities. Home rule cities or towns could then adopt and amend their own charters without the approval of the legislature.
- (2) Prohibited the further incorporation of private act cities and towns and restricted new incorporation of cities and towns to incorporation under existing or future general laws.

However, Amendment 7 did not disturb the right of existing private act cities and towns to continue and amend their charters by private acts.

Municipal Charters

The General Assembly has provided for the incorporation of municipalities by the adoption of private act charters (prior to 1953) and the adoption of general law charters. The charter of a municipal corporation is the constitution of the local government, granted by the General Assembly, and the powers granted thereby must be consistent with the Tennessee Constitution.⁵

The General Assembly has approved four general act charters. These charters are found in the Tennessee Code Annotated as follows:

- (1) Mayor-Aldermanic Charter (6-1-101 et seq.)
- (2) Uniform City Manager-Commission Charter (6-18-101 et seq.)
- (3) Modified City Manager-Council Charter (6-30-101 et seq.)
- (4) Metropolitan Government Charter (7-1-101 et seq.)

Private act charters can be located by reference to the volumes of the Private Acts of Tennessee, which can be found in many law libraries in the State of Tennessee. All of the various private acts applicable to the municipality must be consulted to ascertain the complete terms of any private act charter.

Public or Private Acts

As discussed above, the powers and duties of municipalities are subject to the control of the General Assembly. By the adoption of public acts, the General Assembly can vest whatever powers it deems appropriate upon

municipalities of the state, or limit or eliminate any powers which were vested in municipalities by public act, private act or the charter of the municipality.

The General Assembly is also authorized to adopt private acts applicable to any particular municipality, but, as discussed above, no such private act may take effect until it is approved by a vote of 2/3rds of the membership of the legislative body of the municipality, or approved by a majority of the votes in a referendum conducted to ascertain the wishes of the voters of the municipality.

Since the General Assembly is authorized to adopt legislation which can alter the structure of a municipal government, careful reference to the Tennessee Code Annotated and the Private Acts of Tennessee applicable to a municipality must be consulted in order to ascertain the legal foundation of a municipality government.

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1. Shelby County Civil Service Merit Board v. Lively, 692 S.W.2d 15 (Tenn. 1985).
 2. 19 Tennessee Jurisprudence, Municipal Corporations, Section 5, p. 123 (1985).
 3. Holly v. City of Elizabethton, 193 Tenn.46, 241 S.W.2d 1001 (1951).
 4. State v. Frost, 103 Tenn. 685, 54 S.W. 986 (1900).
 5. East Tenn. University v. Mayor of Knoxville, 65 Tenn. 166 (1873).

III. STRUCTURE OF MUNICIPAL GOVERNMENTS

Basic Forms of Municipal Government

There are three basic forms of municipal government in the United States:

- (1) Mayor-Council
 - (a) Strong mayor
 - (b) Weak mayor
- (2) Commission
- (3) Council-Manager

The mayor-council form of government must be further subdivided into the weak mayor type and the strong mayor type. Under the weak mayor type, the mayor is a weak mayor with few functions beyond that as the ceremonial head of the municipality and as the presiding officer of the council. Under the strong mayor type, the mayor has significant operational functions, including some or all of the following functions: employment and removal of personnel, budget preparation and execution, supervision and direction of employees, and veto power. Many mayors run for office without having learned beforehand whether the office of mayor is a strong or a weak mayor, and are surprised after taking office that their powers are extremely limited.

The main characteristic of the commission form of government is that the members of the municipal legislative body are the heads of municipal departments. The mayor in the "commission" form of government is usually selected by the commissioners from among their membership.

The last basic form of municipal government is the council-manager form. The major feature of this form of municipal government is that a city manager appointed by the city council is the chief administrative officer of the city. The city manager is directly responsible to the city council for the operation of the city, and the city manager, rather than the city council or the mayor, has the authority to appoint, supervise and remove all or most city employees and to conduct the daily affairs of the city. The mayor usually has no administrative or executive powers but serves as the ceremonial head of the city.¹

Municipal Governments Under General Law Charters

Mayor-Aldermanic. Under the general law mayor-aldermanic charter, the mayor is a weak mayor. The mayor's legislative authority is limited to the right to vote on all matters coming before the board of mayor and aldermen. The administrative authority and duties of the mayor include:

- (1) Taking, information, recommendations and statements of the financial condition of the city before the board.
- (2) General supervision of all municipal officers and the right to suspend any city officers for misconduct or dereliction of duty in office, provided that a report of such action, including the reasons for it, is submitted in writing to an immediate meeting of the board.
- (3) Making temporary appointments for administrative city officers in case of sickness, absence or other temporary disability under such restrictions as the board may direct.
- (4) Calling special meetings.
- (5) Acting as city judge (with jurisdiction concurrent with that of a sessions court judge).
- (6) Countersigning all warrants drawn upon the treasury and municipal contracts. (6-1-406)

The board of mayor and aldermen is the governing body of the municipality. As such, it is empowered to exercise the corporate powers of the municipality not expressly vested or set out in the duties of some other official. The board of mayor and aldermen is required to read ordinances appropriating or receiving money or levying taxes on three separate days, passing the ordinance on third reading by a majority of the membership of the board, by calling for a vote of aye or no. All other ordinances must be read on two separate days. All votes of aye or no on all ordinances must be recorded. After an ordinance is adopted on final reading, a summary or caption of the ordinance must be published in a newspaper of general circulation. No ordinance shall take effect until this publication occurs. Also, all ordinances must be codified at least once every ten years. (Tennessee Code Annotated Section 6-2-102).

The recorder is appointed by the board of mayor and aldermen. The charter does not expressly so provide; however, Tennessee Code Annotated Section 6-1-401 provides that the "officers of each municipality shall consist of a board of mayor and aldermen", and such offices as they may deem necessary for the proper administration of municipal affairs. These officers are to be selected by the board of mayor and aldermen.

The charter contains two direct references to the recorder.

- (1) Tennessee Code Annotated Section 6-1-406 provides that the mayor "shall countersign all amounts drawn upon the treasurer by the recorder or secretary..."

- (2) Tennessee Code Annotated Section 6-2-403 provides that "The recorder or other properly designated officer shall be vested with concurrent jurisdiction with Judge of the Court of General Sessions, in all cases of violation of the criminal laws of the state, or of the ordinances of the municipality..."

It is therefore apparent that the recorder is a position which must be established under the mayor-alderman charter.

The recorder is subject to the ultimate control of the board of mayor and alderman under the mayor-aldermanic charter, but the mayor also is vested with the authority of the "general supervision of all officers of the municipality..." Pursuant to Tennessee Code Annotated Section 6-1-406, this supervisory authority would include the general supervision of the recorder.

The recorder can apparently be suspended by the mayor pursuant to Tennessee Code Annotated Section 6-1-406 which gives the mayor the "power to suspend any city officer for misconduct or dereliction of duty in office..." But note that the suspension is based on misconduct and dereliction in office. In addition, the same section provides that the mayor must report the suspension with the reason in writing to an immediate special meeting of the board.

Although Tennessee Code Annotated Section 6-1-406 provides that the mayor shall be vested with the powers of a justice of the peace (now a judge of general sessions), Tennessee Code Annotated Section 6-2-403 provides that the recorder, or other properly designated officer shall be vested with concurrent jurisdiction with judges of general sessions in all cases involving the violation of criminal laws of the state or ordinances of the municipality. These provisions would therefore authorize the mayor or recorder to serve as the city judge to consider violations of the criminal laws of the state or ordinances of the municipality.

In addition to the recorder, the charter implies that the municipality operating under the mayor-aldermanic charter must also have a treasurer. As with the recorder, the treasurer is appointed by the board of mayor and aldermen. The treasurer is responsible for reporting to the board of mayor and aldermen at every meeting as to the financial condition of the city, by providing an itemized accounting of receipts and disbursements, certifying the availability of funds to the board whenever an order or ordinance involving the expenditure of money or the creation of a debt shall be presented to the board of mayor and aldermen, setting aside funds to be used after any appropriation of money is made by the board of mayor and aldermen. (Tennessee Code Annotated Sections 6-2-301 and 6-2-307).

Uniform City Manager. The uniform city manager general law charter is obviously a council-city manager form of municipal government. The mayor under the general law uniform city manager-commission charter is elected by the board of commissioners for a two year term (6-22-201). The mayor is the presiding officer of the board (6-20-209 and 6-20-213), and can call

special meetings of the board upon giving each commissioner, the city manager, recorder, and city attorney twelve (12) hours written notice of the meeting (6-20-208). The mayor has a vote on matters presented to the board, but no veto (6-20-213). Beyond that authority, the charter provides only that the mayor has the power and duty to "perform all acts that may be required by any ordinance duly enacted by the board of commissioners, not in conflict with any of the provisions of the charter" (6-20-219). The mayor or any other commissioner or employee can be removed from office by the board of commissioners "for crimes or misdemeanors in office, for grave misconduct showing unfitness for public duty, or for permanent disability, by a majority vote of the other members of the board voting for removal." However, the removal must be accompanied by notice of charges and an opportunity for a hearing (6-20-220).

The city manager under the general law uniform city manager-commissioner charter, is the administrative head of the city, under the direction and supervision of the board of commissioners (6-21-107). The authority and duties as administrative head of the city are as follows:

- (1) To see that the laws and ordinances are enforced, and upon knowledge or information of any violation thereof, to see that prosecutions are instituted in the city court;
- (2) Except as is otherwise set out in the charter, to appoint and remove all heads of departments and subordinate officers and employees, all appointments to be made upon merit and fitness alone;
- (3) To supervise and control the work of the recorder, the chief of police, the city attorney, treasurer, and all other officers, and of all departments and divisions created by the charter or which are created by the board of commissioners;
- (4) To see that all terms and conditions imposed in favor of the city or its inhabitants in any public utility or franchise are faithfully done, kept and performed, and, upon knowledge or information of any violation thereof, to call the same to the attention of the city attorney;
- (5) To attend all meetings of the board of commissioners, with the right to take part in the discussion, but not to vote;
- (6) To recommend to the board of commissioners for adoption such measures as the city manager may deem necessary or expedient;
- (7) To act as budget commissioner and to keep the board of commissioners fully advised as to the financial condition and need of the city;
- (8) To act as purchasing agent for the city and to purchase all material, supplies and equipment for the proper conduct of the city's business.

The board of commissioners shall prescribe by ordinance the maximum expenditure which the city manager may make without specific authorization of the board, and shall prescribe rules for competitive bidding, but no purchase shall be made at any one time in an amount which in the aggregate will exceed one thousand dollars (\$1,000), unless bids shall have been requested through advertisement and award made to the lowest bidder; and

- (9) To perform such other duties as may be prescribed by the charter or required of him by resolution or ordinance of the board of commissioners (6-21-108).

The charter further provides that the city manager appoints the police and fire chiefs and such other members of the police and fire departments "as may be provided by ordinance" (6-21-701), and that the city manager may appoint or remove the recorder, chief of police, treasurer, city attorney and all other officers, agents, and employees (6-21-102).

An additional element of the city manager's authority and duties is that he has the "full power to manage and control the public or the city schools (6-21-108), and, in accordance with that authority and duty, has broad personnel power over the school superintendent and other school employees (6-21-802), and over the erection and maintenance of school buildings and the purchase of school equipment and supplies (6-21-803 and 6-21-804).

The city manager is appointed by, and serves at the pleasure of, the board of commissioners except that the city manager cannot be removed from office within twelve months of appointment except for incompetence, malfeasance, nonperformance or neglect of duty. Removal within twelve months gives the city manager the right to demand written charges and a public hearing prior to the removal (6-21-101). This twelve month protection was obviously designed to allow the city manager a period of time to operate the affairs of the municipality without threats of removal from the board of commissioner, who disapprove of the management activities of the city manager.

The board of commissioners is the legislative body vested with the legislative powers and all other governmental powers of the municipality except as otherwise provided in the charter (6-20-205). The board selects the mayor who presides over the meetings of the board. The board also selects the vice mayor to act for the mayor when the mayor is absent or unable to act. The powers of the board must be exercised in the sessions duly assembled, with the sessions open to the public (6-20-206, 6-20-212). A majority of all the members of the board shall constitute a quorum which is needed to take action by the board (6-20-210). All ordinances of the board must begin with the phrase "Be it ordained by the city of _____ as follows:", must be read on three different days and not less than one week shall elapse between first and third reading (6-20-214, 6-20-215). All

ordinances except emergency ordinances shall not take effect until fifteen days after the first passage thereof. Emergency ordinances must contain a statement that an emergency exists and specify in detail the facts and reasons constituting the emergency, and shall be adopted only upon the unanimous vote of the board. An emergency ordinance shall take effect upon the day of its final passage (6-20-215).

The votes of the board on all ordinances shall be by yeas and nays, with the vote of each member voting for or against an ordinance being entered into the journal (6-20-216). Each ordinance which is adopted shall be numbered, copied in an ordinance book and filed and preserved by the recorder (6-20-217). Ordinances or a caption and summary thereof must be published in a newspaper of general circulation in the municipality before they become effective (6-20-218).

Under the uniform city manager-commission charter, the recorder is appointed by the city manager and may be removed by the city manager at any time (6-21-101). The recorder may apparently be removed by the board of commissioners under Tennessee Code Annotated Section 6-20-220 which provides that:

The mayor or any commissioner or any employee may be removed from office by the board of commissioners for crime or misdemeanor in office, for grave misconduct showing unfitness for public duty, or for permanent disability by a majority vote of the other members of the board voting for such removal.

However, removal under this section also gives the accused certain elaborate rights including specific written charges and a hearing.

The authority, duties and responsibilities of the city recorder under the uniform city manager-commission charter are principally contained in Tennessee Code Annotated Section 6-21-401 through 6-21-405. The recorder has a seat and voice, but no vote, on the board of commissioners, (6-21-401), heads the department of finance, (6-21-401), attends and keeps a record of all meetings of the board of commissioners, (6-21-403), has the custody of and preserves all municipal records (6-21-404) and performs any of the duties imposed by the charter or by ordinance (6-21-401).

The city manager has the authority to appoint the recorder as the treasurer (6-22-119). Tennessee Code Annotated Section 6-22-101 describes in explicit detail the fiscal duties and responsibilities of the recorder as head of the department of finance. The work of the recorder is done under the supervision and control of the city manager (6-21-108). In addition, the recorder serves as city judge where the office has not been filled by the appointment of another person by the board of commissioners (6-21-501).

In a few municipalities as identified by population classes, the city judge has jurisdiction concurrent with that of the courts of general sessions, and in these municipalities the city judge must be an attorney, must be appointed by the board of commissioners and serves at the will of the board

(6-21-501).² In the remaining municipalities, the city judge has jurisdiction only over those cases arising under municipal ordinances and laws. The qualifications for the city judge, if one is appointed by the board, must be specified in an ordinance adopted by the board. The duties of the city judge and the operation of the city court under the uniform city manager-commission charter are set out in considerable detail in Tennessee Code Annotated Sections 6-21-502 through 6-21-508.

The appointment of a city attorney is not expressly required under the uniform city manager-commission charter, however the charter does contemplate such an official, since Tennessee Code Annotated Section 6-21-102 provides for the qualifications of the city attorney, and Tennessee Code Annotated Section 6-21-202 provides for the duties of the city attorney. The city attorney is under the supervision of the city manager, who can also remove the city attorney at any time (6-21-108, 6-21-102).

The uniform city manager-commission charter also provides for the establishment of a department of finance under the recorder (6-21-401), and departments of public safety, public works, welfare and education (6-21-301). These departments and other departments as created by ordinance are under the supervision and control of the city manager (6-21-302, 6-21-303).

The charter also provides for the appointment by the city manager of a chief of police and other members of the police force as are provided for by ordinance to perform the duties set out at Tennessee Code Annotated Section 6-21-602 (6-21-601). The city manager is required to appoint a chief of the fire department and other members as may be provided by ordinance so as to prevent and suppress fires (6-21-701, 6-21-702). The city manager must also appoint and establish the salary and duties of the superintendent of education and all teachers and other personnel of the department of education (6-21-802). The city manager is also authorized to appoint a treasurer, however the recorder may be appointed as treasurer (6-22-119).

Modified City Manager-Council. As with the uniform city-manager-commissioner form, the modified city manager-council form of municipal government is a council-manager form of government.

The mayor under the modified city manager-council charter is elected by the council (6-32-106). The mayor is the ceremonial head of the city and signs ordinances and other city documents (6-32-106). The mayor also has the authority, as do the city manager and any of the council members, to call special meetings of the council (6-32-102). However, the mayor "shall not have any regular administrative duties, and shall perform only such duties as shall be specifically conferred or required by law." (6-32-106).

The city manager is the administrative head of the city, responsible for carrying out the policies of the city council under the general law modified

city manager-council charter. The council must deal with the administrative officers and employees of the city solely through the city manager "except for the purpose of inquiry." In other words, the council cannot give orders to the city manager's subordinates or interfere with the city manager's administration of the city (6-35-703).

The city manager's specific authority and duties include:

- (1) Law enforcement and public safety and health (6-35-204).
- (2) Purchasing (6-35-205)
- (3) Management of all city property (except school property). (6-35-301)
- (4) Collection of taxes (6-35-301).
- (5) Administration of finances (6-35-302).
- (6) Budget preparation and administration (6-35-304, 6-35-310).
- (7) Appointment, removal and supervision of all city personnel, subject to a merit system for which the city manager is also responsible (6-35-402, 6-35-406).
- (8) Compensation of city officers and employees (6-35-407).

However, unlike the general law uniform city manager-commission charter, an elected school board, and not the city manager, is responsible for the operation of the school system (6-36-101). The council elects the mayor and who presides over the meeting of the council (6-32-106). The council also elects a mayor pro tem to act in the absence of the mayor (6-32-107). The council must hold regular meetings twice monthly and may hold special meetings upon the request of the mayor, the city manager or any two council members (6-32-101, 6-32-102). The council must exercise its powers only at public meetings (6-32-103), and at least one half of the membership of the council constitutes a quorum necessary for the council to conduct business (6-32-104). The council has the power to compel attendance at its meetings by council members or other city officials (6-32-105). The affirmative vote at one-half of the membership of the council is necessary to appoint or remove any official, but any other action except for calling a special meeting or adjourning a meeting may be accomplished by a vote of a majority of those members present and constituting a quorum (6-32-108). The vote on any proposed ordinance must be by ye or nay, with the vote of each council member entered into the journal which must be maintained for all proceedings of the council (6-32-108). A summary of all proceedings of the council shall be published within fifteen days after the meeting in a newspaper of general circulation which has been designated as the official city newspaper (6-32-108, 6-33-112). The council is also authorized to subpoena and examine witnesses, order the production of books and papers, and punish witnesses for contempt (6-32-109).

All regulatory or penal action, revenue measures, or other action required by the charter to be accomplished by ordinance, may only be accomplished by the adoption of an ordinance. The ordinance must encompass only one subject which shall be expressed in its title. The enacting clause of any ordinance must state: "Be it ordained by the Mayor and Councilmen of the City of _____ (6-32-201). Other actions may be accomplished by motion or resolution. All ordinances, motions or resolutions considered by the council must be in written form prior to their introduction (6-32-201).

All ordinances shall be read at two meetings not less than one week apart, and except for emergency ordinances, shall take effect ten days after the adoption. Emergency ordinances which contain a full statement of facts and reasons for the emergency, may be made effective upon their adoption if approved by a majority of the members of the council on two readings, on successive days. The title and brief summary of all ordinances except emergency ordinances must be published in the official city newspaper at least one week before final passage (6-32-202). Any ordinance granting a permit or right to use public property for any purpose or granting a franchise or exclusive contact must remain on file with the clerk for public inspection for at least two weeks prior to its final adoption (6-32-203).

All ordinances must be maintained in the "ordinance book" by the clerk with a separate book for all resolutions, and at least an abstract of all essential provisions of each ordinance shall be published in the official city newspaper within ten days of its adoption (6-32-204). Also, all ordinances must be codified within one year of the adoption of the charter and every ten years thereafter (6-32-205).

There is no reference to a recorder in the modified city manager-council charter. However, Tennessee Code Annotated Section 6-35-401 provides that the city manager "shall" appoint a city clerk responsible for keeping and preserving the city seal, and all records of the council; attending meetings of the council and keeping a journal of proceedings at such meetings; preparing and certifying copies of official records in the clerk's office and performing all other duties as are prescribed by the council or city manager.

The clerk may be removed by the city manager under Tennessee Code Annotated Section 6-35-402, but it must be done in accordance with the merit system outlined in Tennessee Code Annotated Sections 6-35-403 through 6-35-411.

The general law modified city manager-council charter requires that the city judge be a licensed attorney and be elected by popular vote for a four-year term. The city council fills vacancies in the office of city judge between elections. The city judge has jurisdiction concurrent with that of judges of courts of general session (6-33-102). While the city council "shall by ordinance establish and provide for the administration of a city court," the city judge has broad personnel authority over the city court employees (6-33-102, 6-33-103).

The charter also requires the council to create a personnel advisory board and authorizes the creation of other such advisory boards, with the council to prescribe in each case the number of members, appointment, length of term, and advisory duties of these boards (6-33-105). The council is also required to establish a planning commission to exercise the authority in the fields of planning, zoning and subdivision control as set forth under the general laws of the state (6-33-106).

The council is also required to appoint a city attorney and such assistant city attorneys as the council determines to be required (6-33-113). The duties of the city attorney are set forth at Tennessee Code Annotated Section 6-33-113 (b).

The charter also provides for the establishment of a three member equalization board by the council to review tax assessments made upon property within the city (6-34-101, 6-34-102).

Metropolitan Government Charters

The provisions of Tennessee Code Annotated Section 7-1-101, et seq., which authorize the creation of consolidated city-county governments into a metropolitan government, permit the charter commissioner which drafts the charter for the metropolitan government to set forth the appropriate structure for the metropolitan government (7-2-101). The required components of the charter of such a metropolitan government are set forth at Tennessee Code Annotated Section 7-2-103.

Municipal Governments Under Private Act Charters

It is difficult to speak with precision about the authority and duties of municipal officials under private act charter because each charter varies to some extent. For example, under some private act charters, the mayor is a strong mayor who exercises considerable administrative authority, including the veto power over ordinances. Under other private act charters, the mayor is a weak mayor whose only authority beyond that exercised by other city council members is the authority to preside over council meetings, act as the ceremonial head of the city and perhaps make temporary appointments to city offices. Even the city manager under some private act charters does not have all the authority traditionally granted to city managers under most city manager-council forms of government, or the charter authorizes the city council to limit or expand the authority of the city manager at its pleasure. Since each private act charter is a separate and distinct document, close scrutiny of the entire charter is necessary to determine the structure of the municipality created by such a private act charter.

¹ See Forms of Municipal Government (The Bureau of Public Administration, The University of Tennessee, Knoxville, October 1973); Tennessee Municipal Handbook Fourth Edition (Municipal Technical Advisory Service, The University of Tennessee, 1987).

² See Summers v. Thompson, 764 S.W. 2d 182 (Tenn. 1988). The Supreme Court held that only city judges who did not exercise constitutional judicial power served at the will of the board.

IV. LEGAL REQUIREMENTS FOR MUNICIPAL OFFICIALS

Qualifications

The general qualification requirements for officeholders apply to municipal officeholders. These general qualifications permit the holding of office by all persons over the age of eighteen years¹ who are citizens of the United States and Tennessee, and who reside within and are qualified voters of the state, county, district, or circuit for the period required by law,² are qualified to hold office, except:

1. Those convicted of offering or giving a bribe, or larceny, or any other offense declared infamous by law, unless those persons have been restored to citizenship;
2. Those against whom there is an unpaid judgment for moneys received by them in an official capacity, due to the United States, Tennessee, or any county;
3. Those who are defaulters to the treasury at the time of election (such an election is void);
4. Soldiers, seamen, marines, airmen, in the regular United States Navy, Army, or Air Force; and
5. Members of Congress and persons holding any office of profit or trust under any foreign power, other state, or the United States.
(8-18-101)

A crime declared infamous by law is a felony, or a crime which is partially punishable by disenfranchisement (loss of the right to vote). Also, any person previously convicted of a misdemeanor in office (39-5-401 et seq.), is forever barred from holding office. Any disqualified person who takes office is guilty of a misdemeanor. (8-18-102)

In addition to these general qualifications, municipal officials under the mayor-aldermanic charter must comply with the requirements of Tennessee Code Annotated Sections 6-1-401 and 6-1-402, municipal officials under the uniform city manager-commissioner charter must comply with the requirements of Tennessee Code Annotated Sections 6-20-101, 6-20-103 and 6-20-104, and municipal officials under the modified city manager-council charter must comply with the requirements of Tennessee Code Annotated Sections 6-31-101 and 6-31-105. Municipal officials under the metropolitan government charter and private act charters must comply

with whatever qualification requirements for municipal officeholders which are contained in those charters.

Bribery for Votes. It is unlawful for any candidate for the election to a municipal office to expend, pay, promise, loan, or become pecuniarily liable in any way for money or any other thing of value, either directly or indirectly, or to agree to enter into any contract with any person to vote for or support any particular policy or measure, in consideration of the vote or support, moral or financial, of such person (2-19-121). This is the prohibition against bribery for votes (2-19-126). However, this does not render it illegal to make expenditures to employ clerks or stenographers in a campaign, for printing and advertising, for actual travel expenses, or for certain other allowed expenditures (2-19-124). Voters likewise are prohibited from accepting bribes, and betting on elections is also prohibited (2-19-129 through 2-19-131). There are also prohibitions on bribery for votes found in the uniform city manager-commission charter, (6-20-108) and the modified city manager-council charter (6-31-109).

In a case involving whether the district attorney abused his discretion in refusing to bring a quo warranto proceeding against the Mayor of Nashville-Davidson County as requested by an unsuccessful candidate for that office,³ the Tennessee Supreme Court considered the question of bribery in violation of the bribery statutes and Article 10, Section 3 of the Tennessee Constitution, which states:

Any elector who shall receive any gift or reward for his vote, in meat, drink, money or otherwise, shall suffer such punishment as the law shall direct. And any person who shall directly or indirectly give, promise or bestow any such reward to be elected, shall thereby be rendered incapable, for six years, to serve in the office for which he was elected, and be subject to such further punishment as the Legislature shall direct.

The allegations of wrongdoing on the part of the Mayor involved distribution of free cheese and butter to low income groups through the Metropolitan Development and Housing Agency, and a barbecue and watermelon feast sponsored by the Mayor's re-election committee.

In rejecting the bribery claim, the Supreme Court held:

A quo warranto proceeding is not maintainable at the instance of a private citizen. (citation omitted). However, if the District Attorney should act arbitrarily or capriciously or should be guilty of a palpable abuse of his discretion in declining to bring such action or in authorizing its institution, the Courts will take jurisdiction upon relation of a private citizen, in the name of the State of Tennessee.' (citation omitted). The burden of proof is on the party having the affirmative of an issue and this burden never shifts. (citation omitted). The burden of proving that the District Attorney acted arbitrarily or capriciously or was guilty of palpable abuse in declining to proceed is upon the private citizen who seeks to rectify the alleged public wrong without approval of the District Attorney General.

The prohibition of the Constitution and the statute involved here is directed to the giving or promising of rewards such as meat, drink, money, or things of value for a vote to be elected to public office. Ms. Anderson and her

attorney did not provide the District Attorney with a single instance wherein it was factually asserted that Mayor Fulton had given anything of value in exchange for a promise to vote for him in the Mayoral election. Implicit in the District Attorney General's letter of May 17 was the observation that the serving of food at a traditional political rally promoting a candidate for election to public office, to which the general public is invited, lacks the essential element of bribery, to-wit: that a voter is given food in exchange for his vote, which element was also not present in the distribution of butter and cheese.

Oaths of Office

Municipal officeholders under the mayor-aldermanic charter, the uniform city manager-commission charter, metropolitan government charter or private act charters which do not specify the content of the oath for municipal officials must take oaths to support the constitutions of Tennessee and the United States (required by Article 10, Section 1, Tennessee Constitution) and for the faithful performance of the duties of the office. These oaths are:

"I, _____, do solemnly swear that I will support the Constitution of this State and of the United States."

*"I do solemnly swear that I will perform with fidelity the duties of the office to which I have been elected (or appointed, as the case may be) and which I am about to assume."
(8-18-111)*

These oaths may be administered by any officer legally authorized to administer an oath, which generally includes notaries, judges, and clerks. The oath must be written and subscribed to by the person taking it. A certificate must accompany the oath, executed by the officer taking the oath. It must specify the day and the year the oath was taken (8-18-107).

The oath must be filed in the archives of the city under the mayor-aldermanic charter (6-1-404); with the recorder under the uniform city manager-commission charter (6-21-103); or in the office designated by the metropolitan government charter or private act charter.

Municipal officials under the modified city manager-council charter must take the following oath:

"I solemnly swear (or affirm) that I possess all the qualifications prescribed for the office (or position) of _____, as prescribed by this charter, and that I will, in all respects, observe the provisions of the charter and ordinances of the city of _____, and that I will faithfully discharge the duties of the office (or position) of _____."

A copy of this oath must be filed in the office of the city clerk (6-31-112).

Disclosure Requirements

Campaign Financial Disclosure Act of 1980. Certain requirements relative to campaign contributions and expenditures apply to elected municipal officials. Contributions can be loans, loan security, promises, or other obligations, whether or not legally enforceable, but do not include volunteer services, nonpartisan activities designed to encourage persons to vote, the use of real or personal property, and the cost of invitations, food, and beverages not exceeding \$100, voluntarily provided at an individual's residence. Each candidate for local public office must file with the county election commission a statement that neither receipts nor expenditures exceeded \$1000, or an itemized statement showing total contributions received and expenditures, with amounts over \$100 itemized. These disclosures must be filed not later than seven days before a primary election and a general election. A statement covering dates from that report, and the next 45 days, is due 48 days after the election (2-10-101 et seq).

Conflict of Interests Disclosures. Candidates or appointees to municipal offices which are filled by a vote of the public are required to file conflict of interests disclosure statements with the county election commission within ten days after the qualifying deadline for the election. Persons appointed to such a municipal office must also file the disclosure statement within 20 days after the appointment (8-50-501 et seq). These forms are available in the county election commission office and are prescribed by the Secretary of State. These forms are also required to be filed by the above-mentioned municipal officials each year by January 15th. If no information on the previous year's statement has changed, the county election commission may be notified that none of the information has changed. Failure to file these disclosure forms is punishable by a fine of up to \$1000. These forms, once filed, are public records.

Ouster of Municipal Officials

Tennessee Code Annotated Section 8-47-101 provides that municipal officials may be ousted from office for:

1. Knowingly or willfully engaging in misconduct while in office;
2. Knowingly or willingly neglecting to perform duties required by law;
3. Being intoxicated in a public place;
4. Engaging in gambling; or
5. Committing any act violating any penal statute involving moral turpitude.

Deciding what is a crime involving moral turpitude must be made on a case by case determination. Generally, a crime involving moral turpitude involves

a crime that reflects upon the moral fitness of a person, such as a crime involving dishonesty, murder, sale of drugs, and possibly, any crime involving intentional and serious bodily harm to others. Many of the cases involving determinations of whether crimes are ones of moral turpitude are those involving fitness for the granting of a license, such as a beer permit. For instance, the case of Gibson v. Ferguson⁴ involved the question of a person's fitness for a beer permit. The case held that the offense of "rolling high dice for a Coke", and the offense of failing to immediately release seventeen bluegill fish, were not crimes of moral turpitude.

In addition to these grounds for removal, the criminal statutory provisions provide grounds, other than those in an ouster suit, for removal of public officials. Any official who is convicted of a misdemeanor relative to the operation of his or her office will be punished, in addition to the criminal punishment for the offense, by removal from office. Examples of misdemeanors in office are neglect of duty (39-9-402), drunkenness, preventing proper discharge of the duties of office (39-5-403), and receiving a greater commission than legally allowed (39-5-406). Persons removed from office under these provisions are forever disqualified from holding office in the state (39-5-401).⁵ Generally, an official cannot be removed for a misdemeanor offense not a crime of moral turpitude and not a misdemeanor in office.

Ouster proceedings are civil proceedings and may be instituted by the attorney general, district attorney general, county or city attorney, who may institute such ouster proceedings on their own initiative. It is the duty of these attorneys to investigate all written complaints of misconduct by an official in their jurisdiction. If after investigation, the attorney decides reasonable grounds for the complaint exist, that attorney should institute court proceedings (8-47-103).

Citizens may also file ouster proceedings (8-47-110). Ten citizens and freeholders are required to institute such proceedings, posting security for the costs of the lawsuit, and, upon request by the citizens, the attorneys named above must provide assistance to these citizens (8-47-107). Upon a finding of good cause, an official may be suspended from office by the judge pending the final hearing of the case (8-47-117). If a municipal official is suspended, a vacancy is created, which is filled as any other vacancy. Either party to an ouster proceeding may appeal to the Tennessee Supreme Court. Such an appeal will not operate to suspend or vacate the trial court's judgment or decree, which remains in force until vacated, revised, or modified by the Supreme Court (8-47-123).

A municipal official who successfully defends an ouster suit will be restored to office, will be allowed court costs, and will be paid the salary of the office during the time of any suspension (8-47-121).⁶ Persons filling an office during a suspension receive the same compensation as that of the regular officeholder.

A conflict of interests violation (12-4-101) can also result in a municipal official being ousted and ineligible to hold office for ten years.

¹ Attorney General's Opinion 84-203 dated June 21, 1984 regarding having the birthday required to qualify for an office twelve days after the election.

² Attorney General's Opinion 86-03 dated January 14, 1986 relative definitions of the terms "residents" and "citizens".

³ State ex rel. Anderson v. Fulton, 712 S.W.2d 90 (Tenn.1986).

⁴ Gibson v. Ferguson, 562 S.W.2d 188 (Tenn. 1976).

⁵ Attorney General's Opinion 85-263 dated October 18, 1985.

⁶ Marshall v. Sevier County, 639 S.W.2d 440 (Tenn. Ct. App. 1982).

V. ETHICAL CONSIDERATIONS

Financial Conflict of Interests

The general law municipal government charters contain provisions regulating financial conflict of interests which confront municipal officials who approve, overlook or superintend any municipal work or contract. (6-2-402, 6-20-205 (b), 6-35-412). Municipal officials under metropolitan government or private act charters are subject to any conflict of interests provisions contained in the charter for the municipality.

In addition to these conflict of interests statutes, municipal officials are subject to the basic conflict of interests statute, Tennessee Code Annotated Section 12-4-101, which states:

It shall not be lawful for any officer, committeeman, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility districts, human resource agencies, and other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official himself or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" shall include the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.

It shall not be lawful for any officer, committeeman, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation county, state, development districts, utility districts, human resource agencies, and other political subdivisions created by statute shall or may be interested, to be indirectly interested in any such contract unless the officer publicly acknowledges his interest. "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county.

First, it is interesting to note that the statute only prohibits conflict of interests when the municipal official has a financial interest and will be voting for, overlooking, letting out, or in some manner superintending the work or contract. For example, a municipal official could probably bid on providing ambulance service for the municipality if that municipal official would not be voting for or overlooking such contract in any manner. The penalty for violation is as follows:

Should any person, acting as such officer, committeeman, director, or other person referred to in 12-4-101, be or become directly or unlawfully indirectly interested in any such contract, he shall forfeit all pay and compensation therefor. Such officer shall be dismissed from such office he then occupies, and shall be ineligible for the same or similar position for ten (10) years. (12-4-102)

The above statute only prohibits pecuniary interests. If a municipal official receives no direct pecuniary interest, but is interested in a contract from another standpoint, that interest would not be prohibited, so long as the municipal official gained no personal financial benefit from the contract. An example would be a municipal official hiring a friend to work for the municipality. Since the municipal official would gain no financial benefit, no prohibited conflict of interests exists.

The question often arises as to whether it is proper for a municipal official to have authority on a matter that will have a direct financial benefit to a relative, such as purchasing copying equipment from a nephew. The question becomes more complex when the person who will receive the direct financial benefit is the spouse of a municipal official. The Attorney General has opined that if the spouses commingle assets, a member of a legislative body voting on the budget of the board of education which employs the spouse of the legislative board member has an indirect conflict of interest and must publicly acknowledge the conflict (and also recuse himself from voting on the matter, which was then required by statute for an indirect conflict of interests). If the spouses do not commingle assets, it was the opinion of the Attorney General that the board member should recuse himself as a matter of public policy.

The disclosure of indirect interests is required by the statute which calls for "public acknowledgement" of such interests. What is necessary for public acknowledgment is unclear, especially in the context of an official such as the city manager who does not have an opportunity to acknowledge such conflict when the legislative body votes on the matter. Municipal officials should therefore be careful in indirect conflict of interest situations to provide public notice of these interests prior to taking any action. For example, if a municipal official purchases supplies from a corporation in which he or she owns a small minority (not plurality) interest, this must be disclosed publicly. As the municipal official may lack a natural public forum for such disclosure, some form of written public notice, via bulletin boards in the courthouse or other public place and notice in a newspaper of general circulation in the municipality, might be appropriate.

It is important to note that none of the conflict of interests statutes make any distinction based on amount of money involved. Therefore, any direct financial interest is prohibited. However, the Attorney General has indicated that a significant interest might be required, as opposed to a de minimus interest. Since it would be very difficult to determine what court might hold to be significant, and since the penalty for violation of the conflict of interests statute is so severe, municipal officials would be well advised to consider any interest as significant.¹

In addition to the basic conflict of interests provision, municipal officials are also subject to the conflict of interests prohibition found at Tennessee Code Annotated Section 6-54-107, which states as follows:

No person holding office under any municipal corporation shall, during the time for which he was elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any other direct interest in such a contract. "Direct interest" means any contract with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" shall include the individual with the ownership of control of the largest number of outstanding shares owned by any single individual or corporation.

No officer in a municipality shall be indirectly interested in any contract to which the municipality shall be indirectly interested in any contract to which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality.

Conflict of Interests Based on Incompatible Offices

Municipal employees, otherwise qualified, are authorized to serve on the municipal legislative body unless expressly prohibited by the charter of the municipality.² However these municipal officials, while serving on the municipal legislative body, must comply with the aforementioned conflict of interests provisions by abstaining from voting on the budget of the department or agency in which he or she is employed, or in any manner in which he or she is directly interested.³ The Attorney General has also opined that such a municipal legislative body member must abstain from voting when the member has an indirect conflict of interest, even though amendments to the municipal conflict of interests statute would seem to permit such voting by such a member of the legislative body.⁴

Although not expressly prohibited by the municipal charter, a municipal official cannot hold two incompatible municipal offices.⁵ The determination of incompatibility is based on whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other. In State ex rel. v. Thompson,⁶ the court held that a member of the board of commissioners could not also serve as city manager because the board of commissioners determined whether the city manager could be discharged, or whether to accept, reject, or modify the recommendations of the city manager and directed and supervised the city manager in the administration of the city.⁷

Perks and Bribes

The Tennessee Constitution and general law prohibits offering bribes for votes. Generally, it is also a criminal offense for any elected official to accept any bribe (39-5-104). The Constitution and statutes prohibit offering bribes for votes.⁸ Bribery, as commonly understood, is the act of giving or receiving a gift for the purpose of affecting the improper discharge of a public duty. A "kickback" is a bribe involving the payment of money or

property to an individual for causing the county to buy from, to use the services of, or to deal otherwise with, the person making the payment. A kickback is often viewed as a specific inducement for a particular sale, or as a reward for accomplishing a particular purpose.

Bribery is a felony and any municipal official convicted for bribery will be punished by imprisonment for not less than three nor more than 21 years. Persons convicted of attempting to bribe a public official will also be subject to punishment. The law that applies to municipal officials states:

Any executive, legislative, or judicial officer who corruptly accepts, or agrees to accept, any gift or gratuity, or thing of value, or any promise to make any gift, or do any act beneficial to such officer, under an agreement or with an understanding that his vote, opinion, or judgment is to be given in any particular manner, or upon any particular side of any question or proceeding which is, or may by law be brought, before him in his official capacity, or that, in such capacity, he is to make any particular appointment, shall, on conviction, be punished by imprisonment in the penitentiary for not less than three (3) nor more than twenty-one (21) years. (39-5-103)

The classic kickback situation, on a municipal level, involves a municipal official who is approached by a sales agent and is offered 10% of the purchase price if the municipality purchases his equipment. The official is influential in the subsequent purchase of the equipment and receives his "cut". Both parties are guilty of bribery. It does not matter which party initiated the illegal transaction. Further, if the municipal official solicited the kickback, the municipal official would be guilty of bribery regardless of whether the sales agent agreed to pay the bribe. While bribery in terms of money is the most frequent and the most prosecuted form, other business practices that involve the giving of other amenities must be carefully scrutinized.

Perks, which are usually small benefits that have no promise to act in any manner connected with them, are not a violation of the general law. However, as the difference between a perk and a bribe can be a subtle difference in intent, the municipal official should be careful in accepting gifts or other benefits. It is possible that gratuities or perks, such as free food, lodging, and transportation given to a municipal official by private parties with whom the official conducts municipal business may be considered a bribe. The greater the value of the perk or gratuity, the more difficult it would be to overcome the public's idea that "you don't get something for nothing".

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- ¹ Attorney General's Opinion 84-67 dated February 16, 1984.
- ² Attorney General's Opinion 87-66 dated April 13, 1987; Attorney General's Opinion U87-78 dated July 28, 1987.
- ³ Attorney General's Opinion 87-66 dated April 13, 1987.
- ⁴ Attorney General's Opinion 88-122 dated July 13, 1988; Attorney General's Opinion 87-66 dated April 13, 1987.
- ⁵ State ex rel. v. Thompson, 193 Tenn. 395, 246 S.W. 2d 59 (1952); Attorney General's Opinion 84-209 dated June 27, 1984; Attorney General's Opinion U-87-78 dated July 28, 1987.
- ⁶ 193 Tenn. 395, 246 S.W. 2d 59 (1952)
- ⁷ 193 Tenn. at 400; State ex rel. Bugbee v. Duke, Tenn, August 29, 1988. See also Attorney General's Opinion U87-78 dated July 28, 1987 in which the Attorney General opined that the position of Chairman of the Board of Commissioners and Chief of Police of the City of Burns were incompatible offices.
- ⁸ Clariday v. State, 552 S.W.2d 759 (Tenn. Ct. App. 1976); State v. Prybil, 211 N.W.2d 308 (Iowa 1973).

VI. SOURCE AND EXERCISE OF MUNICIPAL POWERS

Sources of Municipal Powers

General Assembly. Subject to any constitutional provision, the power of a municipality can be limited at will by the legislature. The classic statement of the municipality's relationship to the state was stated by Judge John F. Dillon speaking for the Iowa Supreme Court in City of Clinton v. Cedar Rapids and Missouri Railroad Company, 24 Iowa 455 (1868):

Municipal corporations owe their origin to, and derive their powers from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it created, so it may destroy. If it may destroy, it may abridge the control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations of the state, and the corporations could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.

Tennessee follows the general rule set down by Dillon. Luehrman v. Taxing District of Shelby County, 70 Tenn. 425 (1879); Smiddy v. City of Memphis, 140 Tenn. 97 (1918); Barnes v. City of Dayton, 216 Tenn. 400 (1964). In Smiddy v. City of Memphis, the Supreme Court of Tennessee held that simply because the legislature conferred upon a municipality a particular right at some time did not mean that right was vested in the municipality; the legislature could take it away at will. What the legislature giveth, the legislature can taketh away.

2 McQuillin, Municipal Corporations Section 4.04, p. 15-16 (3d Ed. 1988) provides as follows:

In accordance with the settled doctrine that municipal corporations of all kinds, including incorporated cities, towns, villages and boroughs, are creatures, agencies, instrumentalities, departments, auxiliaries, or politically subordinate subdivisions of the state government, the legislature, unless restrained by the constitution, in conferring powers and imposing obligations on municipal corporations, may within its discretion designate limitations thereon.

Dillon's Rule

Judge Dillon didn't stop with saying that municipal corporations are "mere tenants at will of the legislature," he also set out what is known as Dillon's Rule:

It is a general and undisputed proposition of law that a municipal corporation possess and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily

or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Dillon, Law of Municipal Corporations, 448-449 (5th Ed. 1911).

Under the criminal and other branches of the law one can do what is not prohibited. However, under municipal law, a municipality can do only what it is permitted to do. The municipality seeking to take some action must find a grant of power someplace in the state constitution or from the state legislature which permits it to act. Where does it find those powers?

- (1) Those granted in express words.
- (2) Those powers implied in the express grant.
- (3) Those essential to the accomplishment of the declared objects and purposes of the corporation.

Dillon's Rule also provides that the courts will resolve any "fair, reasonable, substantial doubt concerning the existence of the power" against the municipality.

Delegated Powers

Dillon's Rule is no cause to board up city hall and go home. Municipalities have been around for a long time since Dillon uttered his famous rule. Numerous powers, express, implied, and essential, have been delegated to cities and towns. Among those powers are the following:

- Part of the Police Power of the State
- Condemnation of Property
- Creation of Municipal Officers
- Enactment of Ordinances
- Establishment of Hospitals and Other Public Health Institutions
- Municipal Ownership of Public Utilities
- Special Assessments and Bond Issues
- Creation, Regulation and Control of Streets and Other Public Ways and Places
- Taxation
- Enactment of Building and Similar Codes
- Public Improvements
- Zoning
- Interlocal Agreements

The Police Powers

Among the above-mentioned powers, the police power is particularly important because it is extremely broad and is the basis for most municipal regulation of business and industry.

What is the police power? No mention of it is found in the Tennessee Constitution and it is apparently mentioned in no other state constitution. It is inherent in the state.

The police power has been defined as follows:

The police power is not susceptible of exact definition, there should, indeed, be no specific definition of it, and in truth, the extent of the power has never been defined with precision. The power knows no definite limitations, since in its widest sense it is the power "to govern men and things..." The police power is dynamic in character...it must be considerably elastic within limits in order to offset the changing and shifting conditions which, from time to time arise through the increase and shift of population and the flex and complexity of commercial and social relations... [The Police Power] is the broadest of government powers since it is the government power over all matters affecting the peace, order, health, morals, convenience, comfort, and safety of citizens and other subjects. It is the power to establish social order, to protect the life and health of persons, to secure their existence and comfort and to safeguard them in their employment of private and social life and the beneficial use of property. (Emphasis added) 6A McQuillin, Municipal Corporations Section 24.03, p. 14-15, Section 24.04 pp. 17-18 (3d Ed. 1988).

The Supreme Court in Porter v. City of Paris, 154 Tenn. 556 (1947), when presented with a challenge to the installation of parking meters on the grounds that their installation was a municipal tax not authorized by the city charter and against public policy, held as follows:

The police power of a state or a municipality as an arm of the state, extends to the making of such laws and ordinances as are necessary to secure the safety, health, good order, peace, comfort, protection and convenience of the state or municipality.

But as broad as the police power is, it has limits. In H & L Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444 (Tenn. 1979), the Supreme Court of Tennessee held that an ordinance violated both the First Amendment to the Constitution of the United States and Article 1, Section 19 of the Tennessee Constitution because it unduly restricted the distribution of handbills within the city. The city had a uniform city manager commission charter, which authorized the city:

To define, prohibit, abate, suppress, prevent, and regulate all acts, practices, conduct, businesses, occupations, callings, trades, use of property, and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience, or welfare of the inhabitants of the city and to exercise general police powers. (Emphasis added)

The court said that "The right to exercise the police power is an attribute of sovereignty, necessary to protect the public safety, health, morals and welfare, and is of vast and undefined extent. In exercising this right, municipalities have wide discretion and broad powers." (Emphasis added). Regulating litter on city streets and in public places is a permissible and public purpose and an ordinance to accomplish that objective furthers an important governmental interest, said the Court, but, "its purpose must be unrelated to the suppression of free expression." Constitutional guarantees are superior to the police power.

Exercise of Municipal Powers by Ordinance. Usually anything a city or town says which is intended to have a continuing or permanent affect or contains a penalty is spoken by ordinance. According to McQuillin, "the passage of an ordinance is, of course, a legislative act, a legislative function and equivalent to legislative action." McQuillin goes on to say that an ordinance is of greater dignity than a resolution or motion and "must be invested, not necessarily literally, but substantially, with the formalities, solemnities and characteristics of an ordinance as distinguished from a simple motion or resolution." 5 McQuillin, Municipal Corporations Section 15.01, p. 34-35, Section 15.02, p. 37-39 (3rd Ed. 1981).

Ordinances basically fit into four types:

- (1) Penal Ordinances. These are ordinances which prescribe certain rules of conduct and penalty for their violation. The violator may be brought before the municipal court and, if found guilty of the charge against him/her, may be fined according to the law. The maximum fine which may be imposed by a municipal court is \$50.00. That is true even if your charter says otherwise.
- (2) Administrative Ordinances. These are ordinances which guide and regulate municipal offices in the conduct and administration of municipal business. These ordinances may be of long term or permanent effect such as an ordinance establishing and prescribing rules for the operation of the municipal court, or they may be temporary, such as an ordinance authorizing the mayor to execute a contract for the sale of certain city property.
- (3) Franchise Ordinances. These are ordinances which grant special privileges within the municipality, such as a cable television franchise.
- (4) Improvement Ordinances. These are ordinances which authorize and specify the terms of financing for public improvements of various kinds.

5 McQuillin, Municipal Corporations Section 15.09, p. 60 (3rd Ed. 1981).

An ordinance, and not resolution or a motion, is used to establish rules and regulations, the violation of which carries a fine or a penalty. An ordinance must also be used where the charter or general law requires it. Ordinances are always in writing. According to McQuillin, "an ordinance must be reduced to writing before action to pass it can occur; the legislative will can be expressed in no other manner." 5 McQuillin, Municipal Corporations Section 16.11, p. 137 (3d Ed. 1981).

There is no general law in Tennessee establishing procedures for enacting ordinances; each city or town must look to its own charter for the procedure. If the charter is silent on that subject, McQuillin says that no particular formality needs to be adopted to enact an ordinance. McQuillin continues that where no form is prescribed "...any form which clearly signifies the corporate will that the ordinance or by-law be enacted, exists or will become effective on a certain date and that plainly indicates what the terms and objects of the ordinance suffices." 5 McQuillin, Municipal Corporations Section 16.11, p. 137 (3rd Ed. 1981).

However, most charters prescribe the procedure for enacting ordinances and a few even prescribe the form to some extent. If a procedure for an ordinance is prescribed, substantial compliance with the procedure is required. An ordinance not signed by the mayor as prescribed by the charter was declared invalid by the Supreme Court of Tennessee in Memphis Street Ry. Co. v. Rapid Transit Co., 138 Tenn. 594 (1917). A zoning ordinance was held invalid by the same court in Lightman v. City of Nashville, 166 Tenn. 191 (1932), because the city failed to hold a public hearing and obtain a report from the Zoning Commission prior to passing the ordinance as was required by charter. In City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988), the Supreme Court of Tennessee refused to enforce a contract which had not been adopted in compliance with the charter of the City of Lebanon.

The city or town must also find authority to support the ordinance. To find that authority one must refer to the charter and to the general laws. Remember that the authority does not have to be express; it may be implied authority or authority essential to the objects and purposes of the municipal corporation.

Ordinances cannot conflict with the Constitution of the United States, the Tennessee Constitution or general law or be repugnant to the general policy of the state. In H & L Messengers, Inc. v. City of Brentwood, 577 S.W. 2d 444 (Tenn. 1979), the Supreme Court of Tennessee invalidated an ordinance prohibiting the distribution of handbills in certain places on the premise that it violated both the free speech provisions of the First Amendment to the Constitution of the United States and Article I, Section 19, of the Tennessee Constitution.

The Court of Appeals of Tennessee resolved a conflict between state statutes designed to help remove obstacles to handicapped people living in family-like settings and a local zoning ordinance in favor of the state

statutes. In Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13 (Tenn.Ct.App. 1982) the court was required to interpret Tennessee Code Annotated Section 13-24-102, which provided that for the purposes of any zoning law in Tennessee, the classification "single-family residence" would include any home in which eight or less unrelated mentally retarded or mentally or physically handicapped people and up to two houseparents or guardians resided, and Tennessee Code Annotated Section 13-24-103, which provided that Tennessee Code Annotated Section 13-24-102 took precedence over any local zoning ordinance or law to the contrary. The city's zoning ordinance permitted single family dwellings in R-1 residential districts, and defined a family as "one or more persons occupying a single dwelling unit, provided that unless all members are related of blood or marriage, no such family shall contain over five (5) persons..."

The plaintiffs argued that the legislature in passing the statutes in question, usurped local zoning powers. To that argument the Court responded:

We reject this contention, however, for the reason that municipalities in Tennessee have no authority other than that granted by the legislature and the legislature may remove or alter that authority as it chooses. It is elementary that statutes prescribing how delegated police power may be exercised by municipalities are mandatory and exclusive. Municipal authorities cannot adopt ordinances which infringe the spirit of state laws or are repugnant to the general policy of the state.

An interesting aspect of this case from a police powers standpoint is an argument used by the plaintiffs that the statutes in question violated the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 8 of the Tennessee Constitution which prohibit, in almost identical terms, the taking of life, liberty and property without due process of law. The plaintiffs were residents in the R-1 district in which the home for handicapped people was located, and no doubt their property values were reduced as a result. They argued that the reduction in the value of their property stemmed from the statutes and represented an arbitrary and capricious taking of their property.

The Court rejected that argument as follows:

The public powers of the legislature include the power to restrict the use of private property and to cause diminution of its value so long as the legislative measures are reasonably related to protecting the public health, safety, comfort, welfare and morals.

The legislature may impose any limitation upon the use of property which it may deem necessary or expedient to promote and protect the safety, health, morals, comfort and welfare of the people, provided only that the power shall not be exercised arbitrarily; that is, without reasonable connection or relation between the limitation imposed and the public safety, health or welfare...

The court concluded that the integration of physically and mentally handicapped people into society was a reasonable exercise of the legislature's police power.

This case illustrates once again that the police power belongs to the state and is extremely broad. It may be delegated to a city or town but it resides in the state. The state may exercise it as well as delegate it, and the state's exercise may limit municipal authority. Its exercise may also diminish property values and otherwise interfere with and restrict the use of property. This is true even when a municipality exercises its delegated police powers.

In Miller v. City of Memphis, 181 Tenn. 15 (1943) the court upheld a challenge to a city's regulation of juke boxes which the city based on a charter provision giving the board of commissioners the "authority to prohibit and regulate by ordinance the making of unnecessary noises...of any automobile...bus...or by any radio, phonograph, musical instrument, or other sound devices..." The fact that the charter provision did not mention juke boxes did not bother the Court, which held that:

A municipality has no inherent authority to enact ordinances whose validity and enforcement rests upon general police powers. All powers of a municipality are derived from the State, but it cannot be doubted that the State may delegate its authority, or some portion of it. "The police power primarily inheres in the state, but if the state constitution does not forbid, the legislature may delegate a part of such power to the municipal corporations of the state, either in express terms or by implication..."

A case which illustrates authority essential to the objects and purposes of the municipal corporation is Penn-Dixie Cement Corporation v. Kingsport, 189 Tenn. 450 (1949). That case involved the right of a municipality to enact an ordinance for the abatement of smoke and dust from manufacturing plants. A state statute gave cities and towns authority as follows:

To define, prohibit, abate, suppress, prevent, and regulate all acts, practices, conduct, business, occupations, callings, trades, uses of property and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city, and to exercise general police powers.

Limit occupations liable to become a nuisance. To prescribe limits within which business occupations and practices are liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may be lawfully established, conducted or maintained.

The Court declared that these general law provisions were part of the city's charter (which contained similar provisions).

The plaintiff argued that because neither the city's charter nor the general law expressly gave the city the authority to abate smoke and dust, the city's ordinance was void. The Court agreed, holding that (a) "municipality has no inherent authority to enact ordinances whose validity rests upon general police powers," but that power can be implied, "where it is essential to the objects and purposes of a municipal corporation." The court also held that one of the chief purposes of a municipal corporation is the, "protection of the public health and safety of its inhabitants".

There must be a reasonable connection between the limitations imposed by the ordinance and its purpose. In H & L Messengers, Inc. v City of Brentwood, 577 S.W. 2d 444 (Tenn.1979), the court was concerned that the purpose of the ordinance in question was to prevent littering, but while it prohibited the distribution of commercial handbills, it exempted the distribution of political and religious material. The Court observed that:

With respect to each of these sections containing exemptions in favor of ideological speech, we point out that it is indisputably true that religious tracts or political leaflets cast upon a citizen's property constitutes litter to precisely the same extent as circulars advertising groceries. The exemption not only destroys the indispensable content neutrality of the ordinance, but leaves it standing upon a precarious position from a standpoint of its purposes. (Emphasis added)

All ordinances must be examined in that light. Look with extreme care at exemptions from the application of the ordinance which leave in existence the same problem you seek to eliminate.

Ordinances must be definite and certain. Fortunately, definite and certain sometimes means something different than good draftsmanship. Poor ordinance draftsmanship is common in Tennessee and elsewhere, but the issue is not necessarily whether the ordinance is poorly drafted but whether it is definite and certain enough to give those affected by it notice of what limitations it imposes and that it is in operation. However, it is almost unnecessary to say that poor ordinance draftsmanship and the lack of ordinance clarity frequently go hand in hand.

Definitiveness and certainty is particularly important in the drafting of penal ordinances and ordinances which impose a tax or a licensing requirement. Ambiguous penal ordinances or ordinances which impose a tax or a licensing requirement are construed against the city. In City of Kingsport v. Jones, 196 Tenn. 544 (1953), the Supreme Court of Tennessee interpreted an ordinance which made it, "unlawful for any person, firm or corporation to transport, sell, store, distribute, receive or possess for sale within the City and/or manufacture beer...within the City..." The Court held that the ordinance did not make it unlawful to store beer within the city for sale outside the city! The Court concluded as follows: "A penal statute or ordinance will not be enlarged by implication or intendment beyond the fair meaning of the language used, and will not be held to include these offenses other than those which are already described."

An ordinance in City of Greenfield v. Collins, 195 Tenn. 285 (1953), imposed a vehicle license fee in the following language:

Every person, a resident of the city, who owns or operates a motor vehicle in the city, and, every person a non-resident who comes regularly within the city in pursuit of some business or occupation and who operates regularly within the city in pursuit of some business or occupation and who operates regularly an automobile or other motor vehicle within the city...shall, within five days after receiving a state license and number for

operating the motor vehicle, under the laws of the State of Tennessee, or within five days after he shall begin such operation, annually register his motor vehicle with the city clerk, giving the name of the car,...and for such registration, shall pay an annual fee of \$3.00. (Emphasis added)

A woman who was charged with violating the ordinance lived in the county outside the corporate limits but had a job in the city and drove there everyday in an automobile owned and licensed in the name of her husband. It was in his car that she was cited for failing to have a vehicle license.

The court held that the woman had not violated the ordinance because the phrase "his motor vehicle" in the ordinance restricted its application to the owners of motor vehicles. Then the Court went on to say that:

Clearly, if it had been the legislative intent to extend the operation of automobiles...city council would have used appropriate language to effect that result and would have employed the phrase "the motor vehicle." (Emphasis added)

Resolutions

Resolutions are not ordinances. Unless there is some express requirement otherwise, they are usually less solemn and formal than ordinances. As might be expected then, they usually need to be in no particular form, although virtually all of them are written. Resolutions usually are not subject to the same procedural requirements as ordinances; they do not have to be passed on a certain number of readings, be signed by the mayor, be passed over a mayor's veto, or be published in order to become effective unless, of course, the charter or a general law requires otherwise.

Resolutions are not legislative acts; they speak the "opinion or mind" of the municipal governing body on a subject or issue before it. They are not used to establish rules and regulations, the violation of which carries a fine or penalty.

However, be careful on this point! Resolutions may create rights in people against the municipality and against municipal officials as individuals. For example, many municipalities have personnel policies and procedures established by resolution; perfectly acceptable unless the charter or general law provides otherwise. Those resolutions do not make municipal officials subject to a fine if they fail to obey those personnel policies and procedures. But, those policies and procedures may create rights in municipal employees, and the failure of the municipality and municipal officials to observe these rights may subject both the municipality and the municipal officials as individuals to liability under various laws. Do not presume that a resolution, because it is a resolution and not an ordinance, does not create rights and liabilities.

Generally, resolutions can be used for all municipal actions unless the charter or general laws prescribes the contemplated action be done by

ordinance. If an ordinance is prescribed by the charter or general law, a resolution is not legally sufficient. If in doubt, act by ordinance.

Motions

A motion is usually less formal than either an ordinance or resolution. Generally, it relates to the doing of one thing, and when that one thing is done, the motion has no further effect. For example, a motion to pay Podunk Motors \$2,387.00 for a used dump truck purchased by the Town of Turtle Creek, has no further effect than authorizing the payment of that amount of money to that business. Most motions are not written and require no particular form or procedure to make them effective except their approval by the municipal governing body.

VII. LIABILITY PROBLEMS

Municipal Liability

Tennessee Governmental Tort Liability Act.¹ Prior to 1973, Tennessee municipalities were subject to the state's sovereign immunity for governmental acts, but could be held liable for proprietary acts. Governmental acts were those activities that were peculiar to governments, or activities only governments could provide, such as police protection, fire protection, education, or tax collection. Proprietary activities were those that could be provided by private as well as governmental entities, such as water and sewer service, electrical services, and mass transit. In 1973, the Tennessee General Assembly enacted the Tennessee Governmental Tort Liability Act (29-20-101 et seq.) which provides that a municipality is immune from all suits arising out of its activities, either governmental or proprietary, unless immunity is specifically removed by the Tennessee Governmental Tort Liability Act. Federal law may preempt such immunity and state statutes cannot exempt local governments and officials from liability under federal causes of action.

Areas in which the act removes governmental immunity are:

1. claims arising from the negligent operation of motor vehicles;
2. claims arising from negligently constructing or maintaining streets, alleys, or sidewalks;
3. claims arising from the negligent construction or maintenance of public improvements; and
4. claims arising from the negligence of municipal employees.

There are still further exceptions to these areas where immunity is removed. These are activities for which the government retains immunity and include:

1. claims arising from the exercise of discretion by a municipal employee, even if this discretion is abused;
2. claims arising out of false imprisonment, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contractual rights, infliction of emotional distress, invasion of privacy, and violation of civil rights;
3. claims arising out of the issuance of permits or licenses or the failure to issue such permits or licenses;
4. claims arising from the failure to inspect, or negligent inspection;

5. claims arising from the institution of judicial or administrative proceedings;
6. claims arising from negligent or intentional misrepresentation;
7. claims arising from mob actions or riots; and
8. claims arising from the assessment or collection of taxes.

The Tennessee Governmental Tort Liability Act provides certain liability limits which limit the municipalities' potential liability, which are the greater of (a) the municipality's insurance limits or (b) the following amounts:

1. Personal Injury in a Non-Automobile Case: \$130,000
2. Property Damage in a Non-Automobile Case: \$ 20,000
3. Personal Injury in an Automobile Case: \$350,000
4. Property Damage in an Automobile Case: \$ 50,000

The Tennessee Governmental Tort Liability Act provides that in cases where the municipality is liable, the municipal employees are immune. In situations where the municipality is immune under the Tennessee Governmental Tort Liability Act, the municipal employee will have the liability limits set forth above, except for medical malpractice clauses.

Non-Tort Liability Under State Law. The Tennessee Governmental Tort Liability Act does not apply to worker's compensation actions, inverse condemnation, breach of contract actions, and other non-tort actions. Municipalities and municipal officers still remain liable, and the liability limits of the Tennessee Governmental Tort Liability Act have no applicability to these actions.

Worker's Compensation. Worker's compensation is a statutory scheme for compensating employees who suffer injuries in the scope of their employment.² This scheme uses a schedule of determined amounts for particular types of injuries. Municipalities may exempt themselves from providing worker's compensation benefits pursuant to this statutory scheme (50-6-106), but the liability status of a municipality so opting when faced with a claim by an injured employee suffered in the scope of employment has not been clearly established by the courts.³

Inverse Condemnation. Inverse condemnation or reverse condemnation actions are authorized by Tennessee Code Annotated Section 29-16-123 to provide a remedy for property owners whose property is taken by a municipality for a public purposes without the property owner receiving just

compensation. The extent of liability in such an action would be the fair market value taken by the municipality plus any incidental damages incurred by the property owner.

Breach of Contract. Municipalities are responsible for the breach of a contract entered into by the municipality as would any private individual. The extent of liability in such a contract action would depend on the terms of the contract and the damages suffered by the parties. Also the municipality could be required by a court to perform according to the terms of the contract.

There are other non-tort areas of liability for municipalities such as public records violations, open meetings violations and numerous others. Your city attorney should be consulted anytime issues concerning any of these matters should arise.

Federal Rights of Actions. Except for the limited protection provided by the Eleventh Amendment to the Constitution of the United States, federal law overrides, or preempts, state law. Federal causes of action are based on the Constitution of the United States or its amendments, or various federal statutes. Actions based on 42 U.S.C. § 1983 or federal civil rights actions, can now be brought in state court.

Any action, including hiring, firing, awarding contracts, promotions, or other actions similar in nature, which are motivated by discriminatory intent or which have discriminatory effect, or which deprive a person of due process of law must be carefully avoided by municipal officials as they open the door for the municipality and municipal officials to be held liable based on the Constitution of the United States and various federal statutes.

Personal Liability

There are several areas, including various federal and state actions, where a municipal official could be held personally liable. Some actions have a good faith defense and others do not. Under present state law, employees are totally immune when the municipality is liable under the Tennessee Governmental Tort Liability Act, except for medical malpractice claims, unless the act or omission was willful, malicious, criminal, or performed for personal financial gain. In situations where the municipality is immune, the municipal employee's liability is limited to that of the municipality as explained above.

¹ Pivnick, Tenn. Circuit Court Prac. (2nd Ed.) Section 32 (1986).

² Title 50, Chapter 6, Tennessee Code Annotated.

³ Attorney General's Opinion 86-113 dated June 24, 1986, provides that the municipality would be liable for such a claim under the Tennessee Governmental Tort Liability Act.

⁴ Poling v. Goins, 713 S.W.2d 305 (Tenn. 1986).

VIII. MISCELLANEOUS ISSUES

Open Records

All records of the offices of the municipality are open to the public for public inspection and copying unless specifically made confidential by statute (10-7-503). If a municipal official refuses to allow members of the public access to any record which is a public record, the person so denied access can file a petition in the chancery court to obtain access to these records (10-7-505).

A recent amendment to the Open Records Act provides that a party who is wrongfully denied access to the public records and who obtains access to the records by order of the chancery court can recover his or her attorney's fees from the municipality. This amendment was adopted to prevent municipal officials from refusing access to public records except when ordered to grant access by the chancery court. Such a practice can now result in significant financial liability to the municipality.

Disposition of Records

A large number of records are required to be maintained by municipal officials, and therefore, storage problems usually occur which require municipal officials to seek a method to dispose of old and obsolete records. Since many of the records maintained by the many municipal officials are historically significant, great care must be taken in the storage and/or disposition of old or less frequently utilized records.

In recognition of the problems that municipalities encounter with records disposition, the General Assembly has created a statutory framework for the storage or disposition of municipal records (10-7-401 et seq.). Each county is required to establish a County Public Records Commission to oversee the storage or disposal process for all public records, including municipal records, as original permanent records which have been reproduced or microfilmed cannot be legally destroyed without approval of the Commission (10-7-404). After the County Public Records Commission approves of the disposition of municipal records, the municipal legislative body must concur in the disposition of the records (10-7-405).

Sunshine Act

The Sunshine or Open Meetings Act, Tennessee Code Annotated Section 8-44-101, et seq., requires that all legislative body meetings or meetings of any governing body be open to the public. When the body holds its regular meetings or special meetings, it must give adequate notice to the public of those meetings.

"Governing body" is defined by the open meetings law as "the members of any public body which consists of two or more members with authority to make decisions or recommendations to a public body on policy or administration." "Meeting" is defined as "the convening of a governing body of a public body for which a quorum is required in order to make decisions or to deliberate toward decisions on any matter."

In Fain v. Faculty of College of Law of Univ. of Tennessee, 552 S.W.2d 752 (Tenn.Ct.App.1977), the Court of Appeals of Tennessee held that a committee of faculty members and students created to assist the dean in decision-making did not constitute a "governing body" pursuant to the Sunshine Act because such a committee made recommendations to the dean as opposed to any public body.

The requirements for "adequate public notice" are not specified in the law, and the courts have interpreted that requirement to require such notice based on the totality of the circumstances as would fairly inform the public.¹ In Bilbury v Burgess, Tenn. App., Mid.Section, April 1, 1977, the court upheld the posting of a sign in the window of the city recorder's office of an emergency meeting of the Board of Aldermen later that same afternoon when the newspapers in the county attended the meeting and witnesses testified that they had observed the sign in the window of the recorder's office.

As a general rule, the more formal the meeting, the more stringent the notice requirements. For example, a committee meeting of three municipal legislative body members meeting to formulate a recommendation on a minor city decision may obtain "adequate public notice" by simply posting notice of their meeting in public places, while a meeting of the city budget committee might achieve "adequate public notice" only through newspaper publication. Common sense is the best rule when attempting to determine the form of adequate public notice for a meeting.

There had been considerable controversy concerning the definition of a meeting, and whether a quorum is required, and other questions about what type of meeting must be open to the public. A narrow exception has been judicially established regarding discussions concerning pending litigation with the county attorney.²

Federal Fair Labor Standards Act

On February 19, 1985, the United States Supreme Court, in Garcia v. San Antonio Transit Authority, overruled the National League of Cities v. Usery case decided in 1976, and held that the provisions of the Federal Fair Labor Standards Act, 29 U.S.C. 201 et seq., hereinafter "FLSA", are applicable to state and local government employees.³ On November 19, 1985, Congress responded to the Garcia case by passing the Fair Labor Standards Act Amendments of 1985, which had the effect of granting local governments

a grace period until April 15, 1986, from application of the overtime provisions of the FLSA. The amendments also made special provisions for compensatory time used by local government employees and made other significant changes. The grace period has now expired, and the municipalities of Tennessee and other states must be in full compliance with the amended provisions of the FLSA, including minimum wage, overtime and recordkeeping provisions. The Department of Labor has issued regulations that are to be used in interpreting the amendments and the FLSA's applicability to municipalities.⁴

The FLSA requires that the minimum wage be paid to all employees, regulates the employment of minors, requires that employers keep certain records, and requires overtime pay for covered employees. The FLSA does not require vacation, holiday, severance, or sick pay, does not require meal or rest periods, holidays off, or vacation time off, does not limit the number of hours an employee over 16 years of age may work (it only requires overtime compensation for covered employees), does not require premium pay for weekend or holiday work, does not require pay raises or fringe benefits, and does not require a discharge notice, reasons for discharge, or immediate payment of final wages.

Municipal officials must consider FLSA implications on personnel decisions and work in cooperation with the municipal legislative body to implement policies and agreements with the employees to meet the requirements of the FLSA so as to utilize the provisions that require affirmative policies, such as compensatory time, if desirable.

Exemptions. The simple payment of a salary in lieu of an hourly wage has no bearing on whether an employee is exempt from the provisions of the FLSA. However, there are certain persons to whom the provisions of the FLSA do not apply. These include true "independent contractors".

There are also other employees who are exempt from the overtime provisions. Among others not noted here, these exemptions include:

1. Elected public officials, who are not subject to civil service laws of the state, county or agency.
2. "White collar" exemptions, including executive, administrative, or professional employees.
3. Volunteers who may receive nominal pay and actual expenses.
4. Seasonal employees.

White Collar Exemptions. The "white collar" exemptions mentioned above provide a "safe harbor" test, or short test, for employees receiving a salary of greater than \$250 per week. For an executive employee meeting this salary requirement to be exempt, the employee's duties must primarily consist of the management of the employing enterprise or a recognized

department thereof, with two or more full time employees under that employee's direction. To meet the administrative exemption, the same salary threshold applies and the employee's duties must primarily consist of the performance of office or non-manual work directly relating to the management or operation of the employing enterprise, or performance of administrative functions, or teaching in an educational establishment, and the employee must regularly exercise discretion and independent judgement.

The tests for meeting these "white collar" exemptions for employees who do not meet the salary threshold still require a minimum salary of \$155 per week and more stringent tests regarding duties.

Compensable Hours. The statutory definition of the term "employ" under the FLSA is "to suffer or permit to work". Compensable hours of work include all times during which the employee is on duty or on the employer's premises under conditions which prevent the employee from using the time for personal activities. Work not requested or required by the employer, but allowed or permitted, is work time under the FLSA, even if performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that work is being performed, the work must be counted as hours worked.

Breaks. Generally, periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes are not hours worked. Rest periods of short duration, running from 5 minutes to about 20 minutes, must be counted as hours worked. Meal periods of at least 30 minutes or more, where an employee is completely relieved from duty, are not included as hours worked. It is not necessary that an employee be permitted to leave the premises during a meal period, so long as he or she is otherwise completely freed from duties.

Minimum Wage Provisions. Every covered, non-exempt employee is entitled to a minimum wage of not less than \$3.35 per hour for every hour worked. An employee may be paid on a weekly, monthly, or some other basis. If an employee is paid on a weekly basis but works fluctuating hours, compliance with the minimum wage requirements will be determined by dividing the weekly wage by the number of hours worked in a particular week.

Deductions. Deductions made from wages for such items as cash shortages may not reduce the wages of employees below the minimum wage or cut into overtime compensation required by the FLSA. Likewise, deductions made from wages to fund mandatory retirement and insurance plans cannot reduce the wages of an employee below the minimum wage. If an insurance or retirement plan is completely voluntary on the part of the employee, then the deductions can be made regardless of the fact that such deduction will reduce the wage to below the required minimum hourly wage.

Overtime. The FLSA requires that overtime must be paid for hours worked over 40 in a week. This requirement may not be waived by any agreement between the employer and employees. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, will not limit the employer's liability for the overtime work which the employer "suffers or permits" employees to work over 40 hours per week. The FLSA generally requires that municipal employees who work overtime be paid time and one-half for all hours in excess of 40 by their employer.

Compensatory Time. Employees of a municipality may receive, in lieu of overtime compensation, compensatory time (comp time) off at a rate not less than one and one-half hours for each hour of overtime pursuant to an agreement or understanding. The regular practice in effect on April 15, 1986, with respect to comp time shall constitute the understanding and remain in effect (in noncollective bargaining situations). New employees should be given notice of the practice. The employer can use a combination of comp time and wages so long as the time-and-a-half requirement is met.

There are limits to the amount of comp time which may accrue or be "banked". After the maximum number of hours has accrued, the employee must be paid overtime compensation.

Payment for Comp Time. If compensation is paid to an employee for accrued comp time, such compensation is paid at the regular rate earned by the employee at the time the employee receives such payment. An employee who has accrued comp time upon termination of employment is paid the greater of:

- (1) the average regular rate the employee received during the last 3 years, or
- (2) the final regular rate of pay received by the employee.

Limitations on the Use of Comp Time. An employee who has requested the use of accrued comp time must be permitted to use such time within a reasonable period after making the request, if the use does not unduly disrupt the operations of the municipality.

Calculating Overtime Pay. Overtime pay is calculated by multiplying the employee's "regular rate of pay" by one and one-half times the number of overtime hours worked. The regular rate is defined as the rate per hour paid for normal non-overtime work. In cases in which the employee is paid on a weekly basis, the regular rate is determined by dividing the weekly salary by the number of hours in the employee's regular workweek. Payments which are not part of the regular rate include reimbursement for expenses incurred on the employer's behalf, premium payments for

overtime work and the premium portion that is not less than time and one-half the regular rate paid for work on Saturdays, Sundays, and holidays; and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

The FLSA does not require employers to pay employees on an hourly rate basis. Their earnings may be determined on a daily rate, salary, commission, or some other basis, but in such case the overtime pay due must be computed on the basis of the hourly rate derived from such earnings. The regular hourly rate of pay of an employee is determined by dividing the total remuneration for employment (except the statutory exclusions) in any workweek by the total number of hours actually worked in the workweek.

If an employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate". For overtime hours, the employees must be paid, in addition to the straight-time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked over 40 in the week. If, for example, the hourly rate is \$4 and an employee works 46 hours in a week, the employee would be entitled to receive \$196 (46 hours at \$4 plus 6 hours at \$2), or stated another way, 40 hours time \$4 plus 6 hours times \$6 (time and one-half).

If an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate. For example, if an employee is hired at a salary of \$164.50 and if it is understood that this salary is compensation for a regular workweek of 35 hours, or \$4.70 an hour, when overtime is worked the employee is entitled to receive \$4.70 for each of the first 40 hours and \$7.05 (time and one-half) for each hour thereafter. If an employee is hired at a salary of \$164 for a 40 hour week the regular rate is \$4.10 an hour.

Where the salary covers a period longer than workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary can be converted to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is converted to its equivalent weekly wage by multiplying by 24 and dividing by 52.

Fixed Salary for Fluctuating Hours. The FLSA authorizes the payment of a fixed salary for fluctuating hours. The fixed salary can cover hours in excess of 40 hours a week, provided the employee has a clear understanding that the salary constitutes straight-time pay for all hours worked and the straight-time pay is equal to or exceeds the required minimum wage of \$3.35 per hour.

The regular rate of an employee whose hours of work fluctuate from week to week, who is paid a fixed salary with the clear understanding that the salary constitutes straight-time pay for all hours worked, whatever their

number and whether few or many, will vary from week to week. The regular rate is obtained for each week by dividing the fixed salary by the number of hours worked in that week, but cannot, of course, fall below the required minimum hourly wage in any week. Since straight-time compensation has already been paid for all hours worked through the fixed salary, the employee is entitled to receive overtime pay for each hour worked over 40 in the workweek at a rate of not less than one-half this straight-time compensation.

A fixed salary for a regular workweek longer than 40 hours does not discharge the statutory obligation of an employer to pay overtime. For example, an employee may be hired to work a 44-hour workweek for a weekly salary of \$200. In this instance the regular rate is obtained by dividing the \$200 straight-time salary by 44 hours, which results in a regular rate of pay of \$4.55. The employee is then due additional overtime computed by multiplying the 4 overtime hours by one-half the regular rate of pay (\$4.475) or \$9.10.

Determination of the Applicable Workweek or Work Period. For regular employees, the maximum number of allowable hours which may be worked before overtime must be paid is 40 hours per workweek. The workweek, as defined by the FLSA, is a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods. The workweek need not coincide with the calendar week but may begin on any day and at any hour of the day. A single workweek may be established for all employees, or different workweek is established, it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the FLSA.

The FLSA requires a single workweek as its standard and does not permit averaging of hours over two or more weeks. For example, an employee who works 30 hours one week and 50 hours the next must receive overtime pay for the hours worked beyond 40 in the second week, even though the average number of hours worked in the two weeks is 40. This is true regardless of whether the employee works on a standard or swingshift schedule and regardless of whether payment is made on a daily, weekly, bi-weekly, monthly, or other basis.

Occasional or Sporadic Employment. If a municipal employee undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the municipality in a different capacity than the employee's regular employment, hours worked in performing the different employment do not have to count toward calculation of overtime hours.

Swapping Time. If a municipality's employees agree, with the approval of the municipal official supervising said employees, but solely at the option of the employees, to swap scheduled work hours in the same job capacity, the

hours worked as a substitute do not have to be counted for the calculation of overtime hours. Employers do not have to keep records of the substituted work.

Records. There are certain recordkeeping provisions of the FLSA. Each municipal official responsible for personnel and payroll records should check to ascertain that all the information required is contained in the records. Municipal officials must keep records of wages, hours, and other conditions and practices of employment involving his or her employees under the Fair Labor Standards Act.⁵ These records should be kept in the office which acts as the employer. All interested parties have a duty under federal law to comply with the rules and regulations under the FLSA.

Enforcement and Penalties. Employers who willfully violate the minimum wage or overtime provisions of the FLSA may be fined up to \$10,000, and if the employer has been convicted on a prior occasion, may also be imprisoned up to six months. Also, when an employee sues for violation of the minimum wage or overtime provisions, the employer may have to pay the unpaid minimum wage or overtime, as well as an equal amount for liquidated damages, attorney's fees, costs, and other relief, such as promotions and reinstatement. The U.S. Department of Labor may also initiate legal action against an employer.

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- ¹ Memphis Publishing Co. v. City of Memphis, 513 S.W. 2d 511 (Tenn. 1974); Bilbrey v. Burgess, Tenn. App., Mid. Section, April 1, 1977.
- ² Smith County Educ. Association v. Anderson, 676 S.W.2d 328 (Tenn. 1984).
- ³ Garcia V. San Antonio Transit Authority, 105 U.S. 2061 (1985).
- ⁴ 29 C.F.R. Part 553; Federal Register 13402-13421 (April 18, 1986).
- ⁵ Attorney General's Opinion 85-164 dated May 17, 1985.

The University of Tennessee does not discriminate on the basis of race, sex, color, religion, national origin, age, handicap, or veteran status in provision of educational opportunities or employment opportunities and benefits.

The University does not discriminate on the basis of sex or handicap in the education programs and activities which it operates, pursuant to the requirements of Title IX of the Education Amendments of 1972, Pub.L. 92-318; and Section 504 of the Rehabilitation Act of 1973, Pub.L. 93-112; respectively. This policy extends to both employment by and admission to the University.

Inquiries concerning Title IX and Section 504 should be directed to Ms. Mary H. Taylor, Assistant to the Vice President, 109 Student Services and Administration Building, Knoxville, Tennessee 37996-0212, (615)974-6622. Charges of violation of the above policy should also be directed to Ms. Taylor.

INSTITUTE FOR PUBLIC SERVICE

In 1971, the UT Board of Trustees created the Institute for Public Service (IPS) to coordinate and promote public service activities throughout the University system, excluding services provided through the Institute of Agriculture.

The basic goal of the university public service effort continues to be to bring to the citizens of Tennessee—their business, their industry, and their government—the problem-solving capabilities uniquely embodied within their statewide university system.

Public service includes all services offered to those outside the University, including teaching in certain non-degree situations, technical assistance, and applied research which are conducted specifically at the request and for the benefit of non-University organizations in Tennessee.

IPS provides (1) a systemwide focal point for urban and public service, (2) a means to coordinate the various system-level public service activities, and (3) an organizational base for communication and program development that relates to both outside service clientele of the University and the campuses of the University system.

The operating units of the Institute and their dates of creation are: Center for Government Training (1967), Center for Industrial Services (1963), County Technical Assistance Service (1973), Municipal Technical Advisory Service (1949), and Center for Telecommunications and Video (1989).