An Analysis of the 1953 Tennessee Home Rule Amendment (2nd Edition)

Victor C. Hobday

*Municipal Technical Advisory Service*

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AN ANALYSIS OF THE 1953 TENNESSEE HOME RULE AMENDMENT

BY: Víctor C. Hobday

The University of Tennessee
AN ANALYSIS OF THE 1953 TENNESSEE HOME RULE AMENDMENT

BY: Victor C. Hobday

BUREAU OF PUBLIC ADMINISTRATION
THE UNIVERSITY OF TENNESSEE
KNOXVILLE

MUNICIPAL TECHNICAL ADVISORY SERVICE
INSTITUTE FOR PUBLIC SERVICE
THE UNIVERSITY OF TENNESSEE
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PREFACE

Since the first edition of this work was published in 1956 a number of pertinent cases have been decided by the Tennessee courts. This edition includes these cases along with the original material still considered to be relevant.

Amendment No. 6 applies to all counties and cities, except those cities that elect to be covered by the optional home rule provisions of Amendment No. 7. Up to the present 13 cities have elected this option: Chattanooga (1972), Clinton (1954), East Ridge (1954), Etowah (1964), Johnson City (1955), Knoxville (1954), Lenoir City (1954), Memphis (1963), Oak Ridge (1962), Red Bank (1956), Sevierville (1954), Sweetwater (1955), and Whitwell (1958). Note that all except Memphis are in East Tennessee.

No city has held an election on repeal of home rule status, but the Chattanooga City Commission has approved the recommendation of a charter study committee to submit the question of repeal to the voters at the general election in November 1976.

If municipal officials have questions or problems not resolved by the material herein, please call on MTAS for any additional assistance needed.

Victor C. Hobday
CHAPTER I
INTRODUCTION

The people of Tennessee, on November 3, 1953, approved eight constitutional amendments, the first changes in the document since its adoption in 1870. Two of these amendments, numbers 6 and 7, are especially significant for the municipalities of Tennessee. The sixth limits the power of the State legislature to pass private or special legislation; the seventh is the "optional home rule amendment." The complete text of No. 6 will be found on p. 10 and No. 7 on pp. 32-33.

These two amendments were generally referred to in the Convention as the "Home Rule Amendments." There was general agreement on the provisions of Amendment No. 6 (approved by a vote of 85 to 5), but Amendment No. 7 was the most controversial issue in the Convention (approved by a vote of 55 to 36). The importance of the former was highlighted by the fact that it was the only issue mentioned by Chief Justice Neil, of the Tennessee Supreme Court, in an address to the Convention. ¹ The latter divided the delegates and provoked a great deal of thought and debate.² Materials

¹"I doubt the propriety of my undertaking to give any advice to the members of this body. . . . But I am frank to say that certain changes should be made. . . . Over the years there has been too much unwise local legislation in which the people affected by it were given little if any voice whatever. Many of these private acts had no merit other than to serve the basest ends in partisan politics." The Journal and Debates of the Constitutional Convention (Knoxville: Bureau of Public Administration, The University of Tennessee, 1953), p. 392. Hereinafter referred to as Debates.

²Mr. Fletcher: "... this question of home rule, I spent more study on it than on all the other five subjects before us, combined." Debates, pp. 949-950.

Mr. Hooper: "We are dealing with the biggest, broadest, most com-
and suggested drafts for an amendment were furnished by the Tennessee Municipal League, and its representatives maintained close working relationships with members of the Convention. Although its proposals were revised, the League unquestionably was a major influence in the deliberations of the Convention, and it contributed substantially in achieving acceptable compromises on very difficult issues.

In view of the interest of the League in this matter, the following statement was obtained from Herbert J. Bingham, the League's Executive Secretary:

City officials should proceed cautiously and only for good cause in considering whether to become a home rule municipality under Amendment No. 7. The pros and cons should be carefully weighed in relation to each city's own circumstances.

The League supported Amendment No. 7 as a means of enabling those cities that need to do so to escape harrassment by hostile political forces in control of local legislative delegations. Even though subject to local veto under Amendment No. 6, such delegations can still pass private acts that are narrowly partisan, punitive, and disruptive of sound local government. And they can absolutely block amendments to a city's charter by refusing to introduce private bills. In rare instances emergency amendment of a charter

plicated question that has been before this Convention. . . . It affects all the county governments and all the city governments, and you may say that it is not only new, it is rather novel to Tennessee." Debates, pp. 962-963.

Mr. Hill: "I am convinced that there is not a delegate on this floor sufficiently advised of all the complex and far-reaching implications of that most uncertain and illusive term 'home rule' to draft a broad and comprehensive amendment on the subject . . . the uncertain limits and broad implications of which no one has presumed to be able to describe with any degree of certainty." Debates, p. 964.

Pres. Cooper: "I think the Committee on Home Rule has had more dis-sention and more disagreement than any committee of the Convention. . . . They have had a far more complicated question, a question that involves far more information. . . ." Debates, p. 974.

may be needed before the next session of the General Assembly. Under such circumstances a city may be well-advised to go under Amendment No. 7. It may then amend its charter entirely by local action, subject to the limitations stated in the Amendment.

As I see it the principal disadvantage of electing to be covered by Amendment No. 7 is the inability of a city to secure amendments to its charter through private acts, especially with respect to taxing powers. Taxes on hotel accommodations in Gatlinburg, on cigarettes and liquor in Memphis, and on amusement admissions in Knoxville, are a few examples of such private acts. New taxing powers can be acquired very easily by private acts through a cooperative legislative delegation, but may be extremely difficult to obtain through general acts. Although this League, through the statewide cooperation of municipal officials, has been able to win from the General Assembly virtually every necessary authority for municipal governments, its two most notable failures came in efforts to expand the taxing power of municipalities.

The small city may find that going under Amendment No. 7 is the only way to obtain needed charter changes. The typical small town has less than one per cent of the total vote cast for its State Senator, and few cities have over 10 per cent. The voters in these towns and cities are thus completely helpless at the polls and cannot, with their few votes, insure election of legislators with a sound platform for their city or defeat those hostile to their city government. Some senators have as many as 15 towns and 6 counties in their district and can veto (by refusing to enact) a change in any or all of these local governments, however much it may be locally supported.

Short of adoption, Amendment No. 7 may be useful in securing prompt and fair consideration of municipal charter requirements from a local legislative delegation on the basis: if the local charter changes required are not enacted, a community can protect its interests through the adoption of optional home rule and charter change locally; faced with the possibility of thus losing control over a municipality, a legislative delegation might become more cooperative.

Any city should give this matter careful consideration before electing to go under Amendment No. 7. One good feature is that a decision is not irrevocable, as reverse action may be taken if experience under this Amendment is unsatisfactory—home rule status may be terminated by a majority vote in an election for this purpose.

Constitutional and statutory provisions quite often require judicial
construction. As stated by one authority, "in those states where home rule has failed, failure has resulted primarily from the attitude of the state courts." The Tennessee cases up to this time seem to indicate solid judicial support for the objectives and concepts of the constitutional convention.

CHAPTER II
FUNCTIONAL ADVANTAGES AND DISADVANTAGES

Amendment No. 6

This amendment applies to all municipalities except those that have voted to go under Amendment No. 7. A city should consider whether the degree of home rule that No. 6 affords is adequate before electing to be covered by No. 7.

Under Amendment No. 6 no private act may be passed "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 was selected."

Any other private act must contain a provision that it will not become effective unless approved by two-thirds of the legislative body or by a majority of those voting in an election, in the city or county affected. Numerous acts have been noted which circumvent this requirement through the device of a narrow population or other classification that includes only one city; if challenged in court most of these acts probably would be invalidated.

Advantages

1. Interference with the term or salary of any municipal officer by private act is prohibited. No such private act can be passed.

2. Needed charter amendments can be obtained by private act very simply through cooperative senator(s) and representative(s) in the General Assembly.

3. Taxing powers may be conferred on a city by private act. Little difficulty is usually encountered on such an act sponsored by a local leg-
islegative delegation, as contrasted with general tax laws that often provoke statewide opposition in the Legislature. Cities under Amendment No. 7 must rely on general tax laws.

4. The general public may be uninformed or apathetic on charter changes that are complicated and technical. In such cases more reasonable, intelligent action might be taken by a small group (legislative delegation and city legislative body) who can and will devote more time and study to such matters, as compared with the election procedure under Amendment No. 7.

Disadvantages

1. Private acts may be passed which affect the tenure or salaries of employees (as distinguished from officers); however, any such act would not be effective until given local approval as provided in the act, by one of the two methods prescribed in this amendment.

2. No charter amendment can be obtained if the local legislative delegation refuses to sponsor it. Cooperative relationships between a city administration and a legislative delegation will be necessary if legislation needed by the city is to be passed.

3. A legislative delegation could pass private acts which may create serious problems for a city. Poor legislation could result from an attitude that "the final decision is to be made by the city--let them worry about it." Multiple elections also could be required by the terms of private acts, which might create undue public controversy having unnecessarily divisive effects on a community.

4. The General Assembly could determine the salaries of municipal officers and employees by general acts, and any private acts inconsistent
therewith probably would be invalidated.

5. The possibility exists, though remote, that private bills sponsored by a cooperative legislative delegation would not be passed by the General Assembly or would be vetoed by the Governor.

6. Effecting charter changes through private acts will be viewed by some people as less democratic than the election method under Amendment No. 7 if the method of approval is by the legislative body.

7. The prohibition against removal from office or abridging the term of an officer, if literally applied, could block bona fide desirable reorganizations (such as changing the form of government).

Amendment No. 7

If this amendment is to apply a city must take the initiative by ordinance to call for an election on the question, "Shall this municipality adopt home rule?" If a city's charter provides for initiating ordinances, such an election could probably be called for by the petition procedure if the city legislative body does not act.

After a city has elected to go under Amendment No. 7, and until it elects to abandon home rule by an election, no private act of any kind may be passed for that city. The amendment requires the General Assembly to act with respect to the city "only by laws which are general in terms and effect." The possibility also exists, as under Amendment No. 6, of the so-called general act applicable by a narrow population classification to only one city which is in fact a private act, but it would seem to be unlikely that such an act would be sustained by the courts.

Advantages

1. No private acts of any kind may be passed. Therefore, a private
act affecting the tenure or salary of an employee, as well as that of an officer, is prohibited.

2. The city may amend its own charter, by popular vote, and is not dependent on the local legislative delegation in the General Assembly. The city legislative body can initiate changes by ordinance.

3. The General Assembly could fix the salaries of municipal officers and employees by general acts, but such general acts would apply in home rule cities only to the extent that they are not inconsistent with charter provisions.

4. Charter changes can be accomplished without requiring approval by the General Assembly and the Governor.

5. It can be said that charter changes are truly democratic, because they must be approved in elections open to all voters in a home rule municipality.

6. Reorganization of a municipal government could be accomplished by locally-approved charter changes, free of possible restrictions in Amendment No. 6 on removing incumbents or abridging terms of officers.

Disadvantages

1. The city loses the relatively simple procedure of securing desired charter changes through private acts.

2. Amendment of the charter is fairly cumbersome, especially if a charter commission is elected instead of proposal by ordinance.

3. A city's taxing powers may not be enlarged by private acts. For example, had Memphis been a home rule municipality the 1955 private act empowering that city to levy a 3 per cent tax on liquor and a cigarette tax of 1¢ per package could not have been enacted.
4. Public interest is notably apathetic in referendum elections on details of governmental operations. Frequent referendums and low voting percentages can permit special interest groups to dominate such elections.
CHAPTER III
SUMMARY AND ANALYSIS OF AMENDMENT NO. 6

The full text of this amendment is reproduced below. On the following pages its provisions are analyzed in detail, in the order in which they appear in the amendment.

Be it resolved, That Article XI, Section 9, of the Constitution of the State of Tennessee be amended by adding at the end of said Section as it now reads, the following:

The General Assembly shall have no power to pass a special, local or private act 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 was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

* * *

What is a municipality?

This amendment applies to "any municipal or county office" and to a "municipality or county." No questions should arise as to the meaning of "county office" and "county," but the words "municipal office" and "municipality" may be subject to interpretation. It may be assumed that a "municipal office" would exist only in a "municipality," so attention will be directed to the latter.

"A municipal corporation" has been defined as "a body corporate ... chiefly to regulate the local or internal affairs of the city, town, or
In a case arising under the Utility District Act of 1937, the court said: "It is elementary that the Legislature may call such bodies what it pleases. . . . Here it has chosen to make provision for the creation and operation . . . of a somewhat new and quite limited in scope corporate instrumentality." The City of Memphis is an example of how terminology can vary; as a municipal corporation it was abolished in 1879, but the next act of the same legislative session reconstructed it as a "taxing district." Subsequently it was re-designated as the "City of Memphis," and the usual powers of a municipality were granted by numerous private acts.

Cases in other states have held the following to be "municipalities" or "municipal corporations": sewer district, school board or district, housing authority, and utility district. The following have been held not to be in this category: drainage district, improvement district, irrigation district, school district, board of water commissioners, and board of park commissioners.

Two Tennessee cases indicate that the word "municipality" is likely to be construed to mean only incorporated cities and towns. In Fountain City Sanitary District v. Knox County Election Commission, 203 Tenn. 26, 308 S.W.2d 482 (1957), the court held that this amendment did not apply to that district, even though the creating private act called it "a municipality or public corporation in perpetuity" (the general law under which most utility districts are organized also declares that any "district so

5 State v. Knoxville, 115 Tenn. 175, 90 S.W. 289 (1905).

6 First Suburban Water Utility District v. McCanless, Com'r., 177 Tenn. 128, 146 S.W.2d 948 (1941).
incorporated shall be a 'municipality' or public corporation in perpetuity").

The court's opinion noted that the lead line of Article XI, Section 9, as reproduced in the Tennessee Code Annotated, includes "Home Rule for cities and counties," and that "unless there is to be ignored the word 'cities' in the lead line--and the court has no right to ignore it--the word 'municipality' used continuously in the body of the Act must be construed as meaning a municipality within the general understanding of what is a 'city.'"

Justice Swepston, in a concurring opinion, noted that in the Journal of the Constitutional Convention, from pages 1038 through 1059, "the word 'cities' and the word 'counties' are used throughout the discussion and the word 'municipality' appears only two or three times. There is not the slightest indication that there was any thought in the minds of the different speakers of any type of municipality other than a 'city' of one or the other class." One Justice dissented, expressing an opinion that the sanitary district should be regarded as a municipality within the meaning of the amendment.

In Perritt v. Carter, 204 Tenn. 611, 325 S.W.2d 233 (1959), the amendment was held inapplicable to a special school district, the court observing that although it was a public corporation "yet it was not a municipal corporation in the sense that it can be authorized to impose taxes."

* * *

The General Assembly shall have no power to pass a special, local or private act 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 was selected.

Denial of power

The Tennessee Supreme Court, in the case of Shelby County v. Hale, 200 Tenn. 503, 292 S.W.2d 745 (1956), emphasized that the key words of this amendment are "shall have no power," and that this prohibition extends to "legislation which has the effect of (1) removing an incumbent from a county or municipal office, (2) abridging the term of such officer or (3) altering the salary of such office during the term thereof." It struck down an act increasing the salaries of Shelby County commissioners during their terms which had been unanimously approved by the Quarterly County Court and had been sustained by two chancellors sitting in banc, commenting that "if we were to adopt this construction [that approval by the county court saved the act] . . . by learned and able Chancellors, we would in effect be wholly eliminating the words 'the General Assembly shall have no power . . .' from the section."

Who is a "public officer"?

The above provision applies to "any municipal or county office" and to "such public officer," meaning a person filling "any municipal or county office." In Ross v. Fleming, 211 Tenn. 255, 364 S.W.2d 892 (1963), holding that a county attorney is an officer under this amendment, the court quoted the following from Glass v. Sloan, 198 Tenn. 558, 281 S.W.2d 397 (1955):
In deciding whether a particular employment is an office within the meaning of the Constitution or statutory provisions, it is necessary that each case be determined by a consideration of the particular facts and circumstances involved; the intention and subject matter of the enactment, the nature of the duties, the method by which they are to be executed, the end to be attained, etc.

The line between the public office and the public employment is sometimes not too clearly marked by judicial decisions. One of the criteria of public office is the right of the officer to claim the emolument of said office attached to it by law. Another one of the criteria of public office is the oath required by law of the public officials, ... another the bond required by law of certain public officials. But in determining the question of whether or not this Act under consideration creates an office or employment it is not necessary that all criteria be present, however, it has been held on good authority that tenure, oath, bond, official designation, compensation and dignity of position may be considered along with many other things.

Questions may arise as to which persons in a municipal government are "public officers." The Tennessee courts have said that a mayor, a judge, a city physician, a city manager, a paymaster, and a marshal or constable are officers. At one time policemen were held to be "officers," but a later decision held that a "policeman is not an officer," and "certainly it cannot be said that a fireman is an officer." However, a chief of police is an officer.

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7 Wise v. Knoxville, 194 Tenn. 90, 250 S.W.2d 29 (1952).
8 State v. Thompson, 193 Tenn. 395, 246 S.W.2d 59 (1952).
9 Henniger v. Memphis, 120 Tenn. 555, 111 S.W. 1115 (1908).
10 Festerfield v. Vickers, 43 Tenn. 205 (1866).
11 Porterfield v. State, 92 Tenn. 289, 21 S.W. 519 (1893); Cornet v. Chattanooga, 165 Tenn. 563, 56 S.W.2d 742 (1933).
12 Wise v. Knoxville, supra.
From the foregoing it is apparent that it would be very difficult to devise a definition that would answer this question as applied to all positions. Probably most individuals working for a municipal government would be classified as "employees." "Employees and subordinates having no duties to perform other than those directed by the head of the department or chief officer . . . do not hold public offices, but their functions are rather in the nature of contracts of employment."14

May private legislation alter salaries of employees?

A common practice, in the years before this amendment, was the enactment of private legislation to increase the salaries of certain personnel, such as teachers, policemen and firemen, in a particular city. Would the language of this amendment prohibit such legislation?

The answer to this question would appear to be negative for personnel classified by the courts as "employees," as contrasted to "officers," within the meaning of this amendment. Most municipal employees do not serve definite "terms" but are employed under civil service regulations or serve at the pleasure of the appointing authority, and therefore the provision "altering the salary prior to the end of the term" would appear to be inapplicable. Any such act would, of course, be ineffective unless locally approved as the amendment requires.

The word "selected" encompasses popular election, appointment (or election) by a municipality's governing body, and appointment by a mayor or other official. Cases construing the meaning of "select" make it

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equivalent to "elect" and appoint."\textsuperscript{15} It was indicated in the convention that this was the intended meaning.\textsuperscript{16}

\textbf{Effect on reorganization or change in form of government}

Certain changes in the form or structure of a municipal government, which might otherwise be accomplished by a private act charter amendment, might be blocked by the prohibition against "removing the incumbent" or "abridging the term" of an officer "prior to the end of the term for which such public officer was selected." For example, would this provision prevent a change from commission to mayor-council government, prior to expiration of the commissioners' terms?

This would be an especially difficult problem where the commissioners, or other officers, serve for overlapping terms. Could a waterworks board be abolished and its functions be transferred to a board responsible for all municipally-owned utilities? If such a board is composed of five members serving overlapping five-year terms, would the effective date have to be postponed to the termination of the longest terms remaining to be served, and if so what would be the terms of other members during this time?

Would the freedom of choice formerly enjoyed by voters of a city, to change their form of government, be cancelled by the impossibility of doing so without affecting some officer's term of office? It is entirely possible that a literal, rigid application of this provision would have such an effect. Dicta in \textit{Shelby County v. Hale}, 200 Tenn. 503, 292 S.W.2d 745 (1956),


\textsuperscript{16}\textit{Debates}, pp. 926, 1122.
indicates that this provision might be so literally applied.

Consideration might be given to the possibility that the courts could consider "abridge the term" and "abolish the office" as two different actions, although the latter would have the effect of abridging the term. McQuillin says that a "valid removal may result from the abolition of an office, place or position... The abolition of an office has been said not to constitute a 'removal' of the incumbent." Against this view, however, is an opinion by the Tennessee Supreme Court sustaining a chancellor's holding that a private act violated Article XI, section 9, because it "abolishes the office of justices of the peace for those districts created by said 1953 Act and as a matter of law has the effect of removing said officers from office."  

It may be noteworthy that two early drafts in the Convention (Resolutions 29 and 59, the former by Mr. Pope, the chief architect of Amendment No. 6) limited the power to abolish only if another similar office were created by the same session or if the voters petitioned for a referendum. It may also be significant that later drafts dropped any references to "abolish" or "abolition"; perhaps this was considered superfluous, assuming that such action would be within the meaning of "having the effect." Many drafts were introduced, and only one after Resolutions 29 and 59 contained any reference to abolition of an office--this was proposed by Mr. Miller and Mr. Tipps and included the clause "which abolishes or creates an office."

Comments by two delegates in the convention, however, indicated that they viewed this language as a prohibition, under any circumstances, against abolition of an office before the end of the incumbent's term:

Mr. Dodson: And in these boards and commissions, as a general rule, the terms of the selected officers of those boards and commissions are staggered so that one will expire say in 1953, and another one in 1954, and another one in 1955, 1956, and 1957, and so on. Now, Sir, would the effect of this first paragraph be to freeze those men on those commissions and boards for the length of the longest term of the man on the board, or not?

Mr. Fletcher: In my opinion, it would.

Mr. Dodson: It would?

Mr. Fletcher: Yes, that is the difficulty. It is one that we saw no way to get around; I can only say this, that the general result of this provision will result in so much benefit that occasional difficulties, and there would be occasional difficulties in some particular city or county, would have to be borne. That is the only answer I can give.

Mr. Dodson: ... no city that adopted optional home rule could obviate that difficulty by making the adoption; is that right?

Mr. Fletcher: That would be my opinion. 19

Mr. Pope [explaining Amendment No. 6]: ... that resolution simply means this, that the legislature cannot under any circumstances pass an act abolishing an office, changing the term of the office or altering the salary of the officer pending the term for which he was selected; that is prohibited, and that kind of an act cannot be passed. ... 20

Viewed against the background of the private act system as it existed prior to 1953, described by former Chief Justice Neil of the Tennessee Supreme Court as "too much unwise local legislation in which the people affected by it were given little if any voice whatever. ... these private

19Debates, p. 1039.
20Debates, p. 1113.
acts had no merit other than to serve the basest ends in partisan poli-
tics, "21 it seems possible that the courts could make a distinction be-
tween such acts and those effecting a bona fide reorganization of a
municipal government, especially if the form of local approval is by pop-
ular referendum. The so-called "ripper bills" that the constitutional
convention sought to outlaw had been bills enacted by the General Assembly
with no local approval whatsoever, and generally such bills had been
aimed at particular individuals. 22

Effect on charter recall provisions

The question of whether this amendment outlaws charter recall provi-
sions was answered in the negative by the Tennessee Court of Appeals, the
court observing that the incumbent commissioner "has not been removed from
office by said recall petition [but] has merely been subjected to the
hazard of a new election, the risk of which he assumed when he accepted
office under the provisions of the Charter of Union City..." 23

A possible means of circumventing this provision

It should be noted that this prohibition is against passage of a
"special, local or private act." This would not prevent the classification
of municipalities according to population and the enactment of general

21 Debates, p. 392.

22 See Catherine Fox Siffin, Shadow over the City (The University of
Tennessee Record, Extension Series, Vol. XXVII, No. 3, June 1951). The
research was a project of U.T.'s Bureau of Public Administration.

legislation applying only to a particular class.\textsuperscript{24} However, there must be a reasonable basis for the classification.

In \textit{Frazer v. Carr}, 210 Tenn. 565, 360 S.W.2d 449 (1962), the court sustained the enabling act under which the Nashville-Davidson County Metro charter had been adopted, holding that the provision making it applicable only in counties with more than 200,000 population was valid "because we all know that it is in these large counties that the problem of the large cities as to the ever increasing population just beyond the corporate limits becomes more acute, complex and confusing." In the same case an amendment of 1961 to the Metro act which authorized establishment of a charter commission by private act, and a subsequent private act creating such a commission for Nashville and Davidson County, were sustained on grounds that the 1961 amendment was "applicable to every county which falls within an admittedly reasonable classification." The test is whether the class is reasonable, not that only one city or one county is affected.

An act amending TCA 6-202 applicable only to a "city having a metropolitan form of government" was attacked on grounds that it was a private act in effect because only Nashville had that form of government; in rejecting this challenge the court said, "it is quite apparent that this Act applies throughout the State to all those who desire to come within its purview."\textsuperscript{25}

The so-called "general" act, applying to a very narrow population bracket including only one city, is a familiar disguise for a private act,

\textsuperscript{24} \textit{Luehrman v. Taxing District}, 70 Tenn. 425 (1879); \textit{Cook v. State}, 90 Tenn. 407, 16 S.W. 471, 13 L. R. A. 183 (1891).

and has been sustained by the courts in the past (such acts have been published in the volumes labeled "Private Acts"). The Tennessee Supreme Court, in upholding a "general" act that by a population classification applied only to Montgomery County, said:

However far fetched might seem the rule, and however vicious may be considered the practice which produces laws through legislative courtesy by force of the will of the representatives for a single county, the doctrine that classification by reference to the Federal census if otherwise unobjectionable is permissible cannot be repudiated after long adherence of its application in adjudicated cases sustaining certain Statutes upon particular subjects. It could not be repudiated without producing more or less confusion in every county of the State. Personal and property rights would be measurably affected and the resultant confusion would be injurious to the State. The doctrine of stare decisis commands adherence to the rule.

In State v. Turnpike Co, 133 Tenn. 446, 181 S.W. 682 (1915), the court described as undesirable a situation that has become the pattern for most Tennessee cities (excluding those organized under general law charters): "If classification by population were deemed permissible of adoption for every purpose, each county and municipality may for its government be provided with a distinct code of laws, general in mere form, but specific or local in substance and fact."

This point is discussed in greater detail in the following analysis of Amendment No. 7 (see pp. 38-41; note also Lawler v. McCanless, briefed on pp. 23-24).

Salary changes

Past decisions have indicated that changes in salaries of officers could be effected only at the beginning of the next terms of office. In

Shelby County v. Hale, 200 Tenn. 503, 292 S.W.2d 745 (1956), the court held that a county officer's salary could not be changed during his term of office, even though the private act had been approved by the local governing body; the defense had argued that the latter part of Amendment No. 6 was an exception to the former part, but the Supreme Court held otherwise. However, this doctrine may be partially modified by recent legislation (not yet tested in court) providing for escalator increases for judges and other officials based on cost of living indices.

A question that may arise is whether the legislation must be enacted before an election is held, rather than after an individual has been elected to an office but before his term begins. In the latter case, technically the salary change would not take place during his term of office but it would obviously be for the benefit of a person already elected.

Another approach to this problem would be the omission of salaries from private act charters altogether and the delegation of this authority to a municipality’s governing body, coupled with a like restriction that no salary changes may be made during an officer's term of office. This would place the determination of salaries in the hands of the locally elected representatives of the citizens of a municipality. Some advantages that might be claimed for this approach would be greater flexibility, increased responsiveness to local public opinion, and more consistency with the principle of home rule. Furthermore, the General Assembly would be freed from the necessity of having to make numerous policy decisions as to salaries for a large number of municipal offices. Such an arrangement, however, would be subject to criticism that members of the governing body re-elected for new terms would have participated in setting their own salaries.
and any act of the General Assembly private
or local in form or effect applicable to a
particular county or municipality either in
its governmental or its proprietary capacity
shall be void and of no effect unless the
act by its terms either requires the approval
by a two-thirds vote of the local legislative
body of the municipality or county, or re-
quires approval in an election by a majority
of those voting in said election in the munic-
ipality or county affected.

Application

The effect of this provision is to give each county and municipality
a veto power (either by action of its governing body or by a referendum)
over any private legislation affecting it. It applies to all private
acts, including any of the type mentioned in the foregoing discussion.
For example, an act raising employees' salaries could become effective
only upon local approval by one of the two methods provided.

"in form or effect"

These are the crucial words of this clause (with probably the same
meaning as "in terms and effect" used in Amendment No. 7, discussed in
following pages). In passing on an act that purported to make the General
Sessions Court of Gibson County a State court by enlarging its jurisdic-
tion and paying a portion of the salary from the State treasury, the
court observed that it was an "amendatory Act applied, by population
classification, to Gibson County alone" (without any provision for local approval), and that because it was "local in effect" it "violates Article XI, Section 9, of the Constitution of our State and is void." 27

Delegate authority to city governing body

A city planning to continue to operate under a private act charter may be well advised to secure, whenever possible through friendly legislative delegations, the adoption of charter amendments phrased in general terms. If the powers are expressed in broad and general terms, if the determination of what offices are to be established and their salaries, functions, and the like are left to the governing body of the city, and if, in general, a minimum of restrictions are imposed and maximum authority is delegated to the city council, then the occasions for legislative enactments should be very much reduced. Once a city is in this position, it may resist future intrusions by unfriendly legislative delegations through the power of the legislative body or voters to disapprove private acts.

Alternative methods for local approval

This provision makes any private act for a particular city "void and of no effect" unless it requires approval (1) by "a two-thirds vote of the local legislative body" or (2) "in an election by a majority of those voting in said election." The method of approval must be specified in "the act by its terms," thus placing this responsibility in the General Assembly which, under the practice of "courtesy" followed so consistently, ac-

27Lawler v. McCanless, 220 Tenn. 342, 417 S.W.2d 548 (1967).
ually places it in the hands of the local legislative delegation. A county or city may request one or the other method, but it is solely within the discretion of the General Assembly (local legislative delegation) to decide.

In a few counties, as in Knox County, there has been some controversy as to the respective powers of a county commission established by private act and the quarterly county court. The convention debates indicate a clear intention that this authority would be vested in the quarterly county court; a proposal to change the term "local legislative body" to "local governing body" was voted down, and on this point Mr. Pope had this to say:

... we changed that word advisedly and carefully ... there is a real controversy in those counties like Hamilton, as to what is the governing body of that county; and the Supreme Court decision has been many times or several times that we know of, that the Quarterly County Court composes and makes up the legislative body for that county ... there would be a controversy in certain counties where they have both of these bodies, and there would be a question as to what was the governing body; and we think that clearly the word "legislative" ought to be written in it.28

What is meaning of "two thirds vote"?

The language, "two-thirds vote of the local legislative body," could mean: (1) two-thirds of the total number of places, including vacancies; (2) two-thirds of the existing membership, excluding vacancies; (3) two-thirds of the members present at a meeting, when one or more are absent but a quorum is present; (4) two-thirds of those voting when one or more present are recorded as not voting and the favorable vote is two-thirds of a quorum; or (5) two-thirds of those voting when one or more present

28 Debates, p. 1126.
are recorded as not voting and the favorable vote is less than two-thirds of a quorum.

Cases might be found to support any of the above interpretations. The Supreme Court of the United States, in a case involving the 18th Amendment and an interpretation of the constitutional provision that "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution," said: "The two-thirds vote in each House which is required in proposing an amendment is a vote of two-thirds of the members present--assuming the presence of a quorum--and not a vote of two-thirds of the entire membership, present and absent." 29

In the case of Doyle v. Torrence, 203 Tenn. 175, 310 S.W.2d 425 (1958), the Tennessee Supreme Court has given an interpretation of this provision. This involved a private act for the City of Nashville; 19 of the total membership of 21 were present, eight voted for the act, two against, and nine abstained. Noting that the Constitutional Convention had adopted Robert's Rules of Order as its governing parliamentary authority, the court referred to section 48, p. 204, and quoted the following:

Two-thirds Vote. A two-thirds vote means two-thirds of the votes cast, ignoring blanks which should never be counted. This must not be confused with a vote of two-thirds of the members present, or two-thirds of the members, terms sometimes used in by-laws. To illustrate the difference: Suppose 14 members vote on a question in a meeting of a society where 20 are present out of a total membership of 70, a two-thirds vote would be 10; a two-thirds vote of the members present would be 14; and a vote of two-thirds of the members would be 47.

The court observed that the case required interpretation of the language "two-thirds vote of the local legislative body," and concluded that

29 National Prohibition Cases, 253 U.S. 350, 64 L. Ed. 946, 40 S. Ct. 486 (1920).
this fell under the last example quoted above from Robert's Rules of Order, which in the instant case meant "two-thirds membership of the 'local legislative body' . . . would be 14." This decision was reinforced by the following:

It is noted that on pages 1121, 1122, 1123 and 1124 of the judicial proceedings of the Limited Constitutional Convention this question came up for discussion. In this discussion Mr. Pope was just as positive that the language was clear and unambiguous and meant "two-thirds vote by the Local Legislative Body, that means, and I don't think it could mean anything else than two-thirds of the full membership of that body." Others in the discussion at the Constitutional Convention had a different idea. It was finally concluded though, in this Constitutional Convention, that the provision as submitted to the people would not be changed or added to but that they would just agree after the discussion was had about it that it meant as Mr. Pope had interpreted it to mean.

Of course this discussion of the members of the Limited Constitutional Convention on this question is not binding on us but it has long been settled in this State that if there was any doubt about the meaning of the Constitution that those having doubt about it had the obligation first of examining the proceedings of the Constitutional Convention which has adopted this provision and see from the proceedings what the framers of the resolution intended it to be. The first case that applied this ruling was State v. Cloksey, 37 Tenn. 482, decided just one hundred years ago.

The Tennessee Court of Appeals has ruled on a case involving a private act for Henry County which received approving votes of 11 members of the Quarterly County Court; two passed, two were absent, and three positions were vacant. Reversing the chancellor, the Court of Appeals construed the language of this amendment as requiring approving votes of two-thirds of the total number of squires authorized for the Quarterly County Court (in this instance, 18), and held that the act was not properly approved because it failed to receive at least 12 affirmative votes. A petition for certiorari was denied by the Tennessee Supreme Court in a per curiam opinion which indicated support of the decision by the Court.
**Majority when a joint election is held**

The alternative to approval by a legislative body, which may be specified in the private act, is "approval in an election by a majority of those voting in said election in the municipality or county affected."

When such an election is held simultaneously with another election, the question might arise, as it has arisen in other states, whether this provision would require a majority of all the votes cast for candidates and/or on all issues on the ballot, or simply a majority of those votes cast on the question of approving the private act. Some cases can be found which might seem to lend some support to the former view, but they have involved unusual constitutional or statutory requirements in most instances. The weight of authority seems to be in favor of the latter view: that only a majority of the votes cast on the question of approving the private act would be required. The following discussion in the Convention also supports this view:

Mr. Miller: ... suppose the legislature submitted this bill for approval in a general election, under your wording would that not require a majority of all voting in that general election to approve, rather than a majority voting on a particular bill?

Mr. Pope: No, sir it would not; I don't think there is any doubt about that. . . .

Mr. Miller: Aren't we leaving a loophole for the court to construe that to mean you would have to have a majority of all voting in the election to approve the bill?

Mr. Pope: All I could say was if I was on the court

Action has been taken before publication of the bound volume of acts. The 1974 volume contained 11 such statements; seven for acts that set no deadline for local action, one set a deadline of September 1, 1974, and three called for referendums in the regular August 1974 election, on November 4, 1974, and on the third Tuesday in May 1975.
I certainly would not construe it that way, but I don't see how there can be any question when you say "said election," that is election to this same thing...

Mr. Miller: To clarify it, couldn't we say voting thereon...

Mr. Pope: Well, it wouldn't hurt, I think.

Mr. McGinness: Let's avoid cluttering it up now with little immaterial amendments... I don't think the suggestion he made is well taken; I think it is clear...

Section 157 of the Kentucky Constitution prohibits any city from incurring an indebtedness above its annual income "without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose." Construing this provision, the Kentucky Court of Appeals said: "It is conceded that the proposed bond issue received the assent of two-thirds of those voting on the question, but not the assent of two-thirds of those voting at the election. At first the court was inclined to the view that the assent of two-thirds of those voting at the election was necessary... But that and other cases announcing the same doctrine was subsequently overruled... and it now may be regarded as finally settled that the constitutional requirement is fully met by assent of two-thirds of those voting on the question."33

The Missouri court reached the same conclusion. "The first point urged is that two-thirds of all voters of Kansas City 'voting at an election to be held for that purpose' (Const. 1875, sec. 12, art. 10) failed and neglected to vote in favor of the issuance of the bonds... two-thirds of all persons who voted at the general election, held at the same

32 *Debates*, pp. 1122-1123.

time and places, did not vote to issue the bonds. . . . [held to] mean two-thirds of those who actually vote for or against the given proposition, whether such two-thirds be two-thirds or not of all the voters taking part in the election otherwise. . . ."34

The Kentucky and Missouri constitutions contain the phrase "to be held for that purpose," which is missing from the Tennessee provision. However, the context of the Tennessee amendment and particularly the words "in said election" would seem to indicate a very clear intention that an election would be held for such a purpose. The Kentucky and Missouri "voting at an election" is so close to the Tennessee "voting in said election" that no distinction in meaning would seem to be possible. As the Indiana court said: "If, from the language of the statute [or constitution], it is intended that a special vote shall be cast upon a proposition, and the law does not expressly require the majority of the votes cast at the general or regular election to adopt the measure, then it matters not whether the votes are cast at the same poll as is used for the election of officers. All that is necessary in such case is that the measure should receive a majority of the votes cast for or against it. . . ."35

34Kansas City v. Orear, 277 Mo. 303, 210 S.W. 392 (1919).

35South Bend v. Lewis, 138 Ind. 512, 37 N.E. 986 (1894).
CHAPTER IV
SUMMARY AND ANALYSIS OF AMENDMENT NO. 7

This is the "optional home rule amendment," reproduced in full below. On the following pages its provisions are analyzed in detail, in the order in which they appear in the amendment.

Be it resolved, That the Constitution of Tennessee be amended by adding to Section 9 of Article XI the following:

Any municipality may by ordinance submit to its qualified voters in a general or special election the question: "Shall this municipality adopt home rule?"

In the event of an affirmative vote by a majority of the qualified voters voting thereon, and until the repeal thereof by the same procedure, such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.

Any municipality after adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by General Act of the General Assembly. The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered.

A charter or amendment may be proposed by ordinance of any home rule municipality, by a charter commission provided for by Act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in two (2) years, in a municipal election pursuant to petition for such election signed by qualified voters of a home rule municipality not less in number than ten (10%) per cent of those voting in the then most recent general municipal election.
It shall be the duty of the legislative body of such municipality to publish any proposal so made and to submit the same to its qualified voters at the first general state election which shall be held at least sixty (60) days after such publication and such proposal shall become effective sixty (60) days after approval by a majority of the qualified voters voting thereon.

The General Assembly shall not authorize any municipality to tax incomes, estates, or inheritances, or to impose any other tax not authorized by Sections 28 or 29 of Article II of this Constitution. Nothing herein shall be construed as invalidating the provisions of any municipal charter in existence at the time of the adoption of this amendment.

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What is a municipality?

The preceding discussion of the meaning of "municipality" is also relevant to its meaning in this amendment. It appears fairly clear that it should be interpreted to include only incorporated cities and towns. Numerous references in the record of the convention support this view, and none can be found on the other side.\(^{36}\) It also seems fairly conclusive that the convention officially designated Amendment No. 6 as "Relating to Home Rule for Cities and Counties as to Local Legislation," and Amendment No. 7 as "Relating to Optional Home Rule for Cities."\(^{37}\)

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Any municipality may by ordinance submit to its qualified voters in a general or special election the question: "Shall this municipality adopt home rule?"

\(^{36}\)Debates, pp. 906, 914, 915, 919, 921, 927, 947, 950, 956, 1009, 1016.

\(^{37}\)Debates, p. 319.
Is legislation needed before holding such an election?

A difference of opinion has arisen among attorneys as to whether legislation is necessary to give effect to this provision. The majority opinion seems to be that the constitutional provision is self-executing; that is, no new legislation is needed because the existing election laws of the State are sufficient to regulate any elections held under this amendment.

Two delegates called to the attention of the Convention the need to provide self-executing constitutional provisions:

Mr. Miller: . . . Experience teaches us that the legislature cannot be depended upon to pass any law which would divest itself of its own authority; . . . the only way it can be done is to write it into the Constitution as a restraint upon legislative power, and that is what Resolution No. 105 would do. . . .

The argument has been made that we cannot legislate in this Convention, that we cannot do anything but authorize the legislature to act. That is certainly a strange argument to me, and I believe to the other members of this Convention. . . .

The reason for the length of Resolution No. 118 is to make it clear, and to make it unnecessary to have the workability of the plan implemented by legislation. In other words, it is to make it self-executing, so that the legislature would not have to pass an enabling act.

Mr. Sims: This Convention, my friends, was approved by the people of Tennessee who wanted home rule, the right to pass upon their local affairs, not by a people who wanted the veto power doled out to them under a vicious system that would retain the right of private legislation. . . . they didn't ask us to pass the buck to the General Assembly and give them the right to do that which we should do here today or tomorrow. . . . 38

The view that the provision is self-executing is supported by the case of Washington County Election Commission v. Johnson City, 209 Tenn.

38 Debates, pp. 915, 931, 932, 1044.
131, 350 S.W.2d 601 (1961), involving interpretation of a subsequent provision in this amendment for election of a charter commission.

**State laws on special elections**

State election laws seem to provide sufficient guidance to hold a home rule election as contemplated by Amendment No. 7. The Tennessee Supreme Court has held that the state election laws apply to municipal elections and the sweeping language of present State law (TCA 2-103), comprehensively revised in 1972, clearly includes such elections: "All elections for public office, for candidacy for public office, and on questions submitted to the people shall be conducted under this title."

Who may initiate a home rule election?

In view of the specification that the question of whether to adopt home rule is to be submitted "by ordinance," it would appear that the municipal legislative body (council, commission, board of aldermen, etc.) is the sole authority which may initiate an election. The only exception would seem to be that the people could do so when a city charter provides for initiating an ordinance by petition. The language of Amendment No. 7 is that "Any municipality may by ordinance..."; the amendment does not stipulate that "The legislative body of a municipality may by ordinance" submit the question. However, Mr. Sims, in explaining this provision to the Convention, said, "it means... an ordinance adopted by its legislative...

39: The election laws of the State... come within this class of general State-wide laws, applicable to municipalities, as well as other subdivisions and arms of the State government... To permit enactment of special election laws in the different municipalities of the State would utterly destroy the essential uniformity of our entire election system and machinery." Clark v. Vaughn, 177 Tenn. 76, 146 S.W.2d 351 (1941).
Frequency of holding elections

The amendment is silent as to the frequency of holding elections to vote on whether to adopt home rule. It might be said that a municipal governing body, or the people by initiative, could order such elections with excessive frequency to vote home rule in or out (the second paragraph provides for "repeal thereof by the same procedure"). The good sense of the citizens and governing body of a municipality, plus the expense of holding such elections, should be a sufficient guarantee against such abuse.

Meaning of "qualified voters"

Amendment No. 7 empowers a municipality to submit the question of adopting home rule "to its qualified voters." The words "qualified voter," used as a qualification of a candidate for office, do not mean the same as when used as a prerequisite to voting. In the former sense it has been held that a person need only meet the constitutional requirements and need not be a registered voter.41 The reference here obviously means the "qualified voters" who are entitled to vote in an election, and in this sense the Tennessee courts have ruled that a person must be a "registered voter."42 As in other elections, then, only "registered voters" would be permitted to vote on the question of adopting home rule.

* * *

In the event of an affirmative

40 Debates, p. 1010.

41 Trammel v. Griffin, 141 Tenn. 139, 207 S.W. 726 (1918).

42 State v. Weaver, 122 Tenn. 198, 122 S.W. 465 (1909).
vote by a majority of the qualified voters voting thereon.

There seems to be little doubt as to the meaning of this clause, and no possibility of disagreement as to its interpretation. The word "thereon" clearly refers back to "the question: 'Shall this municipality adopt home rule?'" Under the discussion of Amendment No. 6 cases were cited to the effect that only a majority of those voting on a particular question is needed, if the question is submitted at a general election in which candidates for office and possibly other questions are on the same ballot (see pp. 29-31). There should be no doubt that an "affirmative vote by a majority of the qualified voters voting thereon" can mean only a majority of those voting on this particular question.

* * *

and until the repeal thereof

by the same procedure,

This provision permits a city to terminate home rule by the same procedure previously outlined for adopting home rule; that is, submission by ordinance to the qualified voters at a general or special election on the question: "Shall this municipality repeal home rule." An affirmative vote of the qualified (registered) voters voting on this question would result in termination of home rule, and the provisions of Amendment No. 7 (except the three sentences to be noted later) would no longer apply to the municipality. Its charter would remain the same until amended, subject to the provisions of Amendment No. 6.

* * *

such municipality shall be

a home rule municipality.
After a favorable vote on the question of adopting home rule, and "until the repeal thereof," the status of the municipality is that of a "home rule municipality." As such it will be subject to, and will be entitled to, the rights and privileges of the provisions of Amendment No. 7 and any legislation thereunder.

** * * *

and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.

**Type of legislative action**

The words "shall act with respect to" would seem to be all-inclusive, covering any type of action. All legislation affecting a "home rule municipality" in any way, then, must be "general in terms and effect." These are the key words in the entire amendment, as to the means of legislative control over a "home rule municipality." It seems obvious that the intention was to prohibit private acts altogether. Whether this necessarily follows depends on the construction given by the courts.

The possibility of a legislature circumventing a prohibition against special legislation through the device of "general" legislation applying to very narrow population brackets has been discussed in the foregoing analysis of Amendment No. 6 (see pp. 19-21). As an example, an act might be drafted as a "general" act to apply to all municipalities having a population of 174,000 to 175,000, according to the 1970 or any subsequent Federal census. The population of Knoxville, according to the 1970 Federal
census was 174,587, and no other city would fall within this bracket. The act would be "general" in its "terms," because there would be no reference to the City of Knoxville, but the words "and effect" should invalidate the act.

Early in the home rule movement the New York Court of Appeals defined the critical role of the courts in this respect: "We must go farther and inquire whether [the act] is general or local 'in its effect.' Home rule for cities, adopted by the people with much ado and after many years of agitation, will be ... a form of words and little else, if the courts in applying the new tests shall ignore the new spirit that dictated their adoption. The municipality is to be protected in its autonomy against the inroads of evasion."43 In another case an act general in its terms, applying to all cities with a population over 1,000,000 (New York City only was affected), was declared invalid under the New York Home Rule Amendment because it was not "general both in terms and in effect."44

We have found only one case decided since adoption of the amendments in 1953 which gives a clue to the court's position on this point, and it is encouraging. An act which by a population classification applied only to Gibson County, and therefore was not made subject to local approval under Amendment No. 6, was thrown out because it was not general "in effect."45

Effect of classifying cities

We have taken note of the past practice of classification on a popu-

43 In re Elm Street in City of New York, 246 N.Y. 72, 158 N.E. 24 (1927).
45 Lawler v. McCanless, 220 Tenn. 342, 417 S.W.2d 548 (1967).
lation basis to make an apparent general act apply only to one city, and that this could be a device to circumvent the constitutional prohibition against special or private legislation. 46

Early in the Convention several proposals were made to prevent such subterfuges: by fixing the number of classes, the minimum number of cities in any class, or the population limits of the classes. These were not accepted, primarily because it was felt that this would have unduly circumscribed the discretion of the General Assembly. However, many delegates spoke against the practice, and none defended it, clearly indicating a consensus of the Convention that circumvention of this provision through the device of the single city population bracket should not be permitted.

Mr. Sims made this explanation to the Convention, with regard to withdrawal of restrictions on classification of cities:

... that particular part of the resolution was intended merely to prevent a subterfuge, and was completely ancillary to the prohibition of private legislation as affecting municipalities. ... the legislature has the right, and has been classifying cities. I felt we went too deeply into that, and this restores to the legislature its own judgment and leaves the question purely one to be determined by the court as to whether or not it is a private or general act... 47

It is possible that general laws, incorporating a bona fide classification of home rule municipalities on a population basis, could apply to one city only or to a very few cities in each class. This would be the result if a relatively small number of municipalities vote to become "home

46 Acts applying to counties with populations of 25,000 to 25,100, 12,980 to 13,000, and 25,907 to 25,909, respectively, were sustained in Murphy v. State, 114 Tenn. 531, 86 S.W. 711 (1904), Taylor Theater v. Mountain City, 189 Tenn. 690, 227 S.W.2d 30 (1950), and Wilson v. State, 143 Tenn. 55, 224 S.W. 168 (1919).

47 Debates, pp. 1010, 1014.
rule municipalities." For example, general legislation applying to "home rule municipalities" might be passed for those in population brackets of under 5,000, 5,000 to 15,000, 15,000 to 100,000, and over 100,000, according to the last Federal census or any subsequent Federal census; this would probably be a classification free of any taint of private legislation in disguise, but if only one city in any bracket had voted to become a "home rule municipality" it necessarily would be the only one affected. But it might be questioned that legislation applying only to "home rule municipalities" is "general" legislation. There could be no objection if general laws apply to all cities in a reasonable population bracket, instead of being restricted to "home rule municipalities."

The extent of protection against legislative action that would be afforded by electing to operate under Amendment No. 7 seems to depend on two factors: (1) whether the General Assembly is disposed to pass "general" acts that are actually private through the device of classification by population, and (2) whether the courts sustain such acts as being "general in terms and effect."

* * *

Any municipality after adopting home rule may continue to operate under its existing charter.

This language is clear enough. The existing charter is left undisturbed. An important point to note is that the existing charter may no longer be amended or repealed by a private act of the General Assembly, although it may have been a charter enacted by private act. Changes may take place only by action of the municipality under subsequent provisions of this amendment, or by general laws that supersede the city's charter.
(this point is discussed later on).

* * *

or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government.

This clause empowers a municipality, by following the procedure outlined in a subsequent section, to determine on its own initiative its "powers, duties and functions, and . . . form, structure, personnel and organization of its government." This is a broad grant of authority, and would seem to encompass any matters normally found in municipal charters, but it is subject to the important exceptions discussed under the succeeding two clauses. The sweeping nature of this grant was indicated by two Convention delegates:

Mr. McGinness: Now, a municipality has, as I have stated, only such powers as are expressly delegated to it; then, if this resolution be embodied in our Constitution, it would have all power except insofar as it might be restrained by general laws. This is not academic; it is fundamental. In my view, it is a dangerous innovation. . . . 48

Mr. Sims: After you get under the optional plan, you do not acquire any powers except those which are not contrary to the general acts or any future general acts of the legislature. . . . 49

48 Debates, p. 959.
49 Debates, p. 1012.
provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly.

General acts supersede charters of home rule municipalities

The above clause makes any general law prevail over a home rule municipality's charter to the extent that the latter is "inconsistent" with the former, "except with respect to compensation of municipal personnel." Thus the municipality's charter is supreme as to compensation but must defer to general laws on all other matters.

The reference is to "any general act" and not simply to general acts passed with respect to home rule municipalities. Nor is it limited to general acts passed after adoption of the amendment. Accordingly, it appears that the charter of a home rule municipality cannot be "inconsistent" with any provision of a general act adopted before or after the amendment became effective, except as to "compensation of municipal personnel."

Said Mr. Miller to the Convention: "I want to make it clear that no municipality can act in regard to any matter either of local or of statewide concern if the state itself has already entered the field by general law, and preempted that field by an inconsistent provision or regulation."50

The word "inconsistent" is subject to interpretation. Direct conflict with a general act would seem to be prohibited, but would a standard

50Debates, p. 1045.
in a private act, as in the field of public health, be "inconsistent" if more severe than the standard of a general act? If the general acts are silent on a particular point, may the point be covered by a home rule charter provision? May a new corporate power, such as power to own and operate a municipal bus system, be added?

In one case it was held that a city could not prevent the sale of milk that had passed minimum State tests. "Any ordinance which it may enact ... must be reasonable and not in conflict with the general law."\(^51\)

In another case, under a statute authorizing cities to impose higher than State standards on milk and milk products sold within their limits, the Court said:

An ordinance enacted in the exercise of police power is not necessarily inconsistent with a State law on the same subject because the city provides for greater restrictions or makes higher standards than is provided or made by statute. Walker v. Missouri Pac. R. Co., 95 Kan. 702, 149 P. 677. . . . But in doing so the city may not pass an ordinance which ignores the State's own regulatory acts, or deny rights granted by the State or grant rights denied by the State and thus in effect nullify the State law.\(^52\)

The City of Lincoln, Nebraska, governed by a home rule charter adopted under a constitutional grant which permitted it to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state," passed an ordinance prohibiting the sale of liquor to minors. A state law also prohibited such sales, but had the added qualification "knowing them to be such," so that a vendor might escape on a plea and proof that he did not know the buyer was a minor. The court held

\(^51\)Nashville Pure Milk Co. v. Shelbyville, 192 Tenn. 194, 240 S.W.2d 239 (1951).

that the two provisions were not inconsistent, that both were directed toward the same legislative purpose and the city ordinance was simply a "strict regulation," and that the word "inconsistent [as] used in a sense applicable to legislation [means] contradictory in the sense of legislative provisions which cannot coexist, not mere lack of uniformity in detail."53

An ordinance providing for city tax liens, adopted by Lubbock, Texas, under its home rule charter, was sustained as not being inconsistent with the general laws of Texas which provided for liens only for state and county taxes. As illustrations, the court said a city could adopt supplementary methods of collecting taxes, or could restrict motor buses to certain streets, or could fix telephone rates in the absence of a state law on this subject, but could not fix a different or more extensive penalty for crime than that fixed by general laws; the opinion defined "inconsistent" to mean "in conflict with" and "repugnant to."54 In another case from Texas, the Federal courts sustained a provision in Dallas' home rule charter which provided for tax liens to attach as of January 1 each year as not being in conflict with a general law providing that the attachment would occur at the time of assessment.55

A Florida case held that a general law authorizing the governing body of a municipality to issue bonds for street improvements simply by resolution was not "inconsistent" with a provision in the city's special act charter requiring a two-thirds favorable vote of the electors to approve

54In re Robertson, 20 F. Supp. 270 (1936).
any bond issue. 56

In passing on whether a provision in an act repealing all prior laws "inconsistent" therewith actually repealed a prior act on the same subject, the Supreme Court of New Jersey said:

The courts do not favor repealers by implication . . . when two entirely different schemes or methods or procedure are provided for by the two, it will be presumed that the Legislature was cognizant of that fact. . . . If it was intended . . . to destroy the one, it would have said so by express words. . . . The dictionary meaning of inconsistent is logically incompatible; contradictory; inharmonious. . . . The methods of procedure are not inconsistent. They are different, it is true, but they may exist side by side. 57

The supremacy of general acts under this clause would seem not to extend to those general acts which are optional for adoption by municipalities. In Mink v. Memphis, 222 Tenn. 216, 435 S.W.2d 114 (1968), the court held that a provision in an optional general law which required notice and a hearing to remove members of a housing authority board did not apply, but instead the provisions of the city charter would govern. On the other hand it seems unlikely that a city could adopt a different provision from that found in TCA 6-1003, requiring written notice within 90 days after an accident if a suit is to be brought against a city for injuries alleged to be incurred on account of negligent conditions of streets or sidewalks.

Very limited protection against general acts

This clause would enable the General Assembly to pass truly general acts that are not constitutionally prohibited, affecting home rule municipalities in any way except as to compensation of municipal personnel.

56 Lake Alfred v. Lawless, 102 Fla. 84, 135 So. 895 (1931).

Of course this would not be a result of becoming a home rule municipality, because the General Assembly may do likewise with a municipality that has not elected to come under Amendment No. 7. The home rule municipality would have the added protection that no general act could override a charter provision relating to compensation of its personnel, a benefit not enjoyed by the non-home rule municipality. Mr. Sims, in the Convention, gave this explanation: "... the legislature cannot under the amendment pass a law to force ... the city to pay minimum salaries to the employees that are hired by that particular city."58

It should be noted that it must be a charter provision to benefit from this protection—a general act could supersede an ordinance provision relating to compensation but it could not override a charter provision. A charter provision that all salaries shall be fixed by ordinance would probably assure protection against any general act interference, without actually fixing the amounts of compensation in the charter—generally considered to be an undesirable feature.

Meaning of "compensation"

The word "compensation" is universally interpreted to include salaries and wages. Does the term include "fringe benefits" such as retirement and pension plans, medical and hospitalization plans, group life and accident insurance, sick leave pay, and so on?

General Regulation No. 1 of the U. S. Wage Stabilization Board defined "wages, salaries or other compensation" to include "vacation and holiday payments, ... employer contributions to or payments of insurance or

58 Debates, p. 1011.
welfare benefits, employer contributions to a pension fund or annuity, payments in kind. . . ." Court cases have held the following to be compensation: an annual cash clothing allowance to firemen; the use of a car that may be withdrawn at the will of the employer; hospital, medical and surgical bills paid by an employer; funeral expenses; weekly payments for injuries or for total or partial disability; the right to receive hospitalization or medical treatment; and vacation leave with pay. Retirement and pension plans have usually been included in this term but occasionally have been excluded.

In a leading case involving group insurance, the Tennessee Supreme Court observed that a city without doubt has authority to increase its employees' salaries, and, "This, in effect, is what it did when it took out said policy of group insurance . . . there can be no objection if, as an economic measure, it is to the best interest of the municipalities to adopt it."59

In view of the foregoing it would seem likely that the courts would hold any such fringe benefits to be "compensation," including such items as uniforms and equipment furnished to city employees. If so, it would mean that charter provisions of a home rule municipality would prevail in the determination of salaries and any other remunerative benefits for city employees.

* * *

and provided further that the power

of taxation of such municipality

shall not be enlarged or increased

It is obvious that under this clause "the power of taxation" cannot be "enlarged or increased" by locally adopted amendments to the charter. This may be done only by general act, and we shall see that a subsequent provision in this amendment limits the power of the General Assembly in this respect, even by general act (see p. 62).

The General Assembly loses none of its power to control taxation by municipalities, but it is deprived of its power to do so by private acts with respect to home rule municipalities. This is a fairly significant difference, in that a few legislators almost invariably determine the fate of private bills, while general bills are subject to more thorough legislative consideration, the power of pressure groups, etc.

A city, in becoming a home rule municipality, would be giving up the capability of enlarging or increasing its powers of taxation by private act. Numerous private acts have been passed for this purpose in the past; a few will be mentioned by way of illustration. Four cities were authorized to levy a retail tax on beer sales by private acts; in the next session all cities were authorized to do so by general act. A 1955 private act authorized the City of Memphis to levy retail sales taxes on liquor and cigarettes. Gatlinburg and Sevier County were authorized by a 1953 private act to levy a tax up to two per cent on amounts paid for lodging accommodations at hotels and motels.

The private act system seems to have two virtues in this respect:

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60 Such power is complete and exclusively within the province of the General Assembly. *Luehrman v. Taxing District*, 70 Tenn. 425 (1879); *Railroad v. Harris*, 99 Tenn. 684, 43 S.W. 115 (1897).
(1) pioneering by a few cities may lead to a general act that could not be passed as a general act at the outset, and (2) it is adaptable to the peculiar circumstances of a city; the lodging accommodations tax in Gatlinburg, a tourist center, is a good example.

* * *

The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered.

Application to all municipalities?

The Constitutional Convention shifted gears at this point. The entire amendment, except this and two other sentences, by its terms applies only to "home rule municipalities." This sentence relates to "municipalities," and there is no qualifying language restricting its application to home rule municipalities. It might be contended that Amendment No. 7 was the "Home Rule Amendment" and that its provisions were intended to apply only to those cities electing to operate thereunder; however, the plain meaning of the words seems to be against such a view. The State Attorney General's office has given an opinion that this provision prohibits annexation by private acts.

In addition to the use of the word "municipalities" without the qualifying words "home rule," there is the fact that this sentence comprehends municipalities being "created." Obviously an existing municipality, eligible to become a home rule municipality, cannot again be "created." It could be "merged," "consolidated" or "dissolved," but it could not again
be "created." This application to municipalities not yet brought into existence, which obviously could not be "home rule municipalities," is some evidence that this sentence was intended to apply to all municipalities.

The Tennessee Supreme Court has declared that "the real intention will always prevail over the literal sense of terms." Therefore, analysis should go beyond the literal meaning of this sentence. Although agreement on intent is not clearly revealed, the Convention Debates provide some clues as to the thinking of a few delegates on this point.

The first home rule resolution (No. 18) that was introduced by Mr. Sims, the chief proponent of home rule, contained a provision that "municipal corporations . . . shall not be created by the General Assembly by special laws . . . [and] The General Assembly shall provide by general law the methods by which new municipal corporations may be formed, municipal boundaries may be altered, municipal corporations may be merged or consolidated, and municipal corporations may be dissolved."

Numerous resolutions on home rule were introduced and many of them contained language similar to the foregoing--no material change occurred--only a condensation to make the sentence shorter. Resolution No. 45, for example, read, "shall provide by law the methods," and otherwise was identical with the sentence finally adopted. The first majority report of the Committee on Home Rule included the same language as was finally adopted, and this sentence reappeared without change in numerous subsequent drafts that eventually became Amendment No. 7.

Mr. Sims, in a convention speech, made this statement:

to see if we have not ... given to the people in each municipality an exclusive method of handling their own affairs in that city, but leaving to the legislature the broader power of organizing municipalities, merging them, extending their boundaries."

Resolution No. 118, without any change, was eventually adopted by the Convention and by the voters as Amendment No. 7 for the first time incorporated the optional home rule in each municipality. It may be noteworthy that Mr. Sims, in his initial explanation that this resolution, creating, merging, consolidating, and dissolving cities of Tennessee the option of adopting home rule to regulate their own affairs, to amend their own charters, to create, dissolve, remove them, and in each municipality, and ... remove their ... city by the same process. . . ."

The proponents of Amendment No. 7 were chiefly concerned with setting up all private acts for cities; at least two of them, Miller, did not look with much favor on the local amendments to the General Assembly to deal with them by classification into four classes and not less than four permitted. When they shifted to the optional basis the whole plan then would apply only to home rule cities.

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62 Debates, p. 915.

63 Debates, p. 1010.
all kinds of private acts, including those annexing territory, were prohibited only with respect to such municipalities? Omission of the word "such" before "municipalities" may or may not have been intentional—it could have been an oversight. But this line of thinking leads to the incongruity of "creating" already existing home rule municipalities, as the word "created" also appears in this sentence.

A conclusion that the provision applies to all municipalities is supported by the Tennessee Supreme Court's holding in the case of Frost v. Chattanooga, 488 S.W.2d 370 (1972), in which a purported "general" act with a population classification making it applicable in Hamilton County only was invalidated because it "was not drafted to create a class of municipalities who had similar annexation-taxation problems with fringe population areas, but seeks to clothe a local act for Chattanooga in terms of a general act." The court noted that the "constitution in very clear language prohibits the Legislature from prescribing any method of altering municipal boundaries except by general law," and added, "we do not hold that the Legislature could not act to alter municipal boundaries by legislation valid as a general law under the classification doctrine, but we are not able to conceive of any circumstances where such would be valid."

**General acts available for incorporation**

The effect of this provision is that municipalities may be "created" (incorporated) only under existing or new general acts. At the present time three general laws are available: TCA 6-101 et seq., providing for a mayor-aldermen form of government, TCA 6-1801 to 6-2313, for a commission-manager form, and TCA 6-3001 to 6-3618, the "modified city manager-council
charter." The prevailing practice of past years, incorporation by private act, is no longer available.

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A charter or amendment may be proposed by ordinance of any home rule municipality.

This is the first of three procedures for proposing a new charter or an amendment to an existing charter. The governing body may do so by a duly enacted ordinance. The people could also do so if a charter provides for the enactment of ordinances under the initiative procedure.

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by a charter commission provided for by Act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon

The second procedure is the election of a charter commission "provided for by Act of the General Assembly." The word "Act" standing alone raises a question as to whether it could be a private act. Unquestionably the General Assembly could provide by general act for the election of charter commissions in all cities electing to follow this route, but could it pass a private act for a particular city? The language "a charter commission" and "a home rule municipality" might be construed in the singular, as an intention that such an act could apply to only one city, and that this was intended to be an exception to the preceding provision in this amendment that "the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect."

The last part of this clause would seem to require that any such act
of the General Assembly provide for election of charter commission members by a majority of the qualified (registered) voters voting thereon in the election—although "majority" is not spelled out it is clearly implied.

* * *

or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in two (2) years, in a municipal election pursuant to petition for such election signed by qualified voters of a home rule municipality not less in number than ten (10) per cent of those voting in the then most recent general municipal election.

This, the third procedure, may be used only "in the absence" of an act by the General Assembly providing for a charter commission; if the General Assembly passes an act this procedure would no longer be available.

The question of whether the whole of Amendment No. 7 can be placed into operation by a municipal election without implementing legislation by the General Assembly has already been considered. Of a similar nature is this provision authorizing local action to effect charter changes, and on this issue we have a clear ruling by the Tennessee Supreme Court that the provision is self-executing.64

64 Washington County Election Commission v. Johnson City, 209 Tenn.
The language seems to be self-explanatory. Action would be initiated by a petition signed by qualified (registered) voters of the city not less in number than 10 per cent of the total vote cast in the "then most recent general municipal election." The specification of "general municipal election" would seem to mean a regularly scheduled election, as provided in the charter, for the election of officers; it would appear to rule out any special election such as one to fill a vacancy or to vote on a bond issue, etc. "A regular or general election is one which recurs at stated intervals as fixed by law; it is one which occurs at stated intervals without any superinducing cause other than the efflux of time."65 "The words 'general election' ... when used with reference to city elections, without any qualifying words, must mean the election for municipal officers in general."66

The charter commission members would be elected "at large" (from the entire city instead of by wards or districts), in a "municipal election." A special election could be called for this purpose only (this was done in the Johnson City case), or they could be elected in a municipal election held for another purpose.

To whom would the petition be submitted? The amendment is silent on this point. Would the petition go to the city's governing body, which would in turn call on the county election commission to hold the election, or would the petition be presented directly to the county election commission? The latter procedure probably would apply. Upon submission of

131, 350 S.W.2d 601 (1961).


a proper petition (if no act has been passed by the General Assembly), the county election commission of the county in which the municipality is located apparently would be responsible for conducting such an election.

There is nothing in the amendment indicating that the petition should first go to the governing body of the municipality, and this would seem to be a wholly unnecessary procedure. Although this issue was not raised in the case, Washington County Election Commission v. Johnson City, supra, by implication seems to support this conclusion; in that case the city had asked for an injunction to restrain the election commission from holding the election.

* * *

It shall be the duty of the legislative body of such municipality to publish any proposal so made.

The legislative body (council, commission, board of mayor and aldermen, etc.) is required to "publish" whatever has been proposed by any of the three methods outlined above. If an entirely new charter has been proposed, it would be the duty of the legislative body to have it published.

What is the meaning of the word "publish"? "By reference to Webster's New International Dictionary, the definition of 'publish' is, in part, as follows: 'To promulgate or proclaim, as a law or an edict. To make public in a newspaper, book, circular, or the like.' . . . A book may be printed without being published. It is published only when it is offered for sale or put in general circulation."67 From another case: "The word

67 Buchanan v. Stamper, 272 Ky. 38, 113 S.W.2d 839 (1938).
'publish' means, primarily, to make known, and has the same significance as the word 'circulate.' Publication in a newspaper would appear to be the most certain way to meet this requirement. It might be possible to print the proposal as a newspaper insert which can be removed and retained in pamphlet form (if the amendment is extensive), with an extra quantity of the insert being printed for other distribution.

* * *

and to submit the same to its qualified voters at the first general state election which shall be held at least sixty (60) days after such publication

What must appear on ballot?

Although "same" refers back to "proposal," which would be the complete proposed amendment, this would not necessarily imply publishing the entire amendment on the ballot (obviously impossible for an extended amendment or new charter). It is customary to summarize on a ballot the matter to be voted upon, and quite often a law will prescribe the exact language; in the absence of any such prescription in this provision any reasonably clear summary of the proposed amendment should suffice. The ballot language could be included in an ordinance making the proposal, or could be drafted by a charter commission; otherwise apparently this would be a decision for a county election commission to make.

A key word here is "submit." One case holds that "a ballot title . . .

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68 State v. Elder, 19 N.M. 393, 143 Pac. 482 (1914).
is a clause which submits the proposed measure to the voters for their adoption or rejection. . . . To submit means to present and leave to the judgment of the qualified voters."69 From another case: "We get little help from cases . . . so far as the cited authorities are pertinent they support the idea that to 'submit' may include more than leaving the bare document to the will of the voters. For instance: In re Norton, 75 Misc. 180, 134 N.Y.S. 1030, 1032, says: 'In this election everything necessary to reach the judgment of the qualified voters is a part of the submission; that is, all the proceedings preparatory to the election day, including the count of ballots, and the return.'"70

The obvious purpose of publication in advance of the election is to inform the public. The complete text of an amendment on the ballot could not serve this purpose, and in the context of Amendment No. 7 it is obvious that this was not intended. Perhaps there could be added to the short ballot title something like the following: "as published in (name newspaper or other medium) on (date or dates)." This should establish beyond any doubt a tie between the ballot title and the complete proposal.

**Election at which to be submitted**

The proposal is to be submitted at the "first general state election" occurring at least 60 days after its publication. "The rule is to exclude the first day and to include the last day of the specified period,"71 for example, publication on September 3 would be 60 days ahead of an.

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69 Moland v. Hayward, 69 Colo. 181, 192 Pac. 657 (1920).
70 News Corp. v. Smith, 353 Mo. 845, 184 S.W.2d 598 (1945).
election on November 2 (27 days in September, plus 31 in October and 2 in November).

Another point to be noted is the meaning of "general state election." Party primaries may be immediately eliminated. At the time the amendment was adopted, State law (TCA 2-1201) defined "state elections" to include "any election held for the choice of national, state, county, or district officer or officers."

Elections of county officers and judges, held concurrently with primaries to nominate candidates for Governor, Public Service Commission, and members of the General Assembly, on the first Thursday in August would seem to qualify as "general state elections" when charter proposals can be submitted to the voters. November elections for Governor, Public Service Commissioners, and members of the General Assembly could also be used for this purpose.

Mr. Sims, in explaining this provision to the Convention, said "it further guarantees that amendments cannot be submitted more often than once in every two years, because that is when you have your general elections." In addition to "state election," this provision has the additional qualifying word "general." Although some cases construe a "general election" to be one open to all voters, even though to fill a vacancy or to vote on a particular question, the usual rule seems to be to classify

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72 "A primary election is not an 'election' within the common acceptation of that term." 29 C. J. S. 15. " . . . primaries are not in reality elections but merely nominating devices." Ledgerwood v. Pitts, 122 Tenn. 570, 125 S.W. 1036 (1910).

73 Debates, p. 908.
these as "special elections," as distinguished from regularly occurring "general elections." A conservative view would be to regard as "general state elections" only those occurring at stated time intervals for the election of the officers mentioned above, and to rule out all others as "special elections."

* * *

and such proposal shall become effective sixty (60) days after approval by a majority of the qualified voters voting thereon.

Only a simple majority of those "voting thereon" is required. It would be expected that many voters casting ballots in a "general state election" would not vote on a charter proposal, but a majority of the total vote would not be needed—only a majority of those voting on this particular question. As to counting the days, the same general rule as stated above would seem to apply; "generally, time 'after' an act is computed by excluding the day on which the event took place." 74

The question may arise as to when the 60 days begins to run. When does "approval"--the "event"--take place? On the day of the election, or when the vote is finally counted or officially canvassed? The answer would seem to be that "approval" takes place on the day of the election, and that the day following is the first of the 60 days. Construing an Oregon constitutional provision, under which an employers' liability act had been adopted by the initiative procedure, in a case involving an

74 52 Am. Jur. 352.
accident on the day following the election, a Federal court said:

A law proposed by the initiative . . . would take effect from and after the date of its approval, unless otherwise declared therein. . . . The law is adopted or rejected at the time the vote is cast, and not when the official canvass is made. It may be suggested that under this view a law may in fact be in force without those affected thereby being aware of it; but this may be and often is true of acts of Congress and other law-making bodies which take effect from and after the date of their passage.75

* * *

The General Assembly shall not authorize any municipality to tax incomes, estates or inheritances, or to impose any other tax not authorized by Sections 28 or 29 of Article II of this Constitution.

Application

This is the second sentence in the amendment that applies to all municipalities of the state. The language "any municipality" seems to be explicit enough. The Convention Debates also leave no doubt on this point. Nearly every draft contained such a provision, and every delegate who spoke on this point indicated a definite intention that no municipality should be permitted to levy such nefarious taxes. Said Mr. Manheim, referring to Mr. Pope's argument that the effect of Resolution No. 105 would be to empower the legislature to levy an income tax and to authorize any municipality to levy such a tax: "I assure you that none of us who signed Resolution No. 105 had the slightest intention of granting additional

75 Bradley v. Union Bridge & Construction Co., 185 F. 544 (1911). A similar holding is found in Elsas v. Missouri Workmen's Compensation Commission, 318 Mo. 1004, 2 S.W.2d 796 (1928).
powers of taxation to anybody. So, we can quickly dispose of this objection by redrafting the proposal in language that will leave no doubt whatsoever as to our intentions."76

What taxes may be levied under this limitation?

Sections 28 and 29 of the Constitution set absolute limits beyond which even the General Assembly cannot empower municipalities to tax. Section 28 authorizes taxes on the following: real, personal and mixed property; "Merchants, Peddlers, and privileges"; "Merchant's Capital used in the purchase of Merchandise sold by him to non-residents and sent beyond the State" (taxable at ad valorem property tax rate); and income from stocks and bonds. The only reference to a specific tax in Section 29 is that "all property shall be taxed according to its value." Any taxes not classified by the courts as falling under any of these categories may not be authorized by the General Assembly to any municipality.

Section 29 provides that the "General Assembly shall have power to authorize the . . . incorporated towns . . . to impose taxes for . . . corporation purposes . . . in such a manner as shall be prescribed by law." There are few cases in Tennessee challenging the delegation of the taxing power to municipalities, possibly because of the broad language "to impose taxes" without any qualification whatsoever of the word "taxes."

"The State . . . having full control of these agencies [municipalities] . . . may authorize such agents to levy a tax . . . "77 However, Amendment No. 7 now limits the legislative power of delegation to those taxes

76Debates, p. 947.
77Hill v. Roberts, 142 Tenn. 215, 217 S.W.826 (1920).
"authorized by Sections 28 or 29," with a further restriction that no municipality may be authorized "to tax incomes, estates, or inheritances."

The prohibition against a tax on estates or inheritances appears to be insignificant; probably no municipality in the United States levies such a tax. But removal of the authority "to tax incomes" could be more important. Would this prevent a Tennessee municipality from levying a "payroll tax" on all persons working within its city limits? In view of the fact that this type of tax has been imposed by many cities in other states and is viewed as an equitable, very productive source of revenue by many municipal leaders, this question will be analyzed at some length.

The language of Section 28 of Article II of the Tennessee Constitution is that "the Legislature shall have power to tax Merchants, Peddlers, and privileges, in such manner as they may from time to time direct." A long line of Tennessee cases have construed this provision as giving the General Assembly plenary power to tax "privileges." A few quotations will indicate this trend. "We take it the word privilege was intended to designate a larger, perhaps an indefinite class of objects . . . occupation . . . avocation, calling, or pursuit, all of which may be declared and have been so held privileges under our constitution."78 "At the least, any occupation, business, employment, or the like affecting the public, may be classed and taxed as a privilege."79 "A privilege is whatever the Legislature choose to declare to be a privilege and to tax as such."80 "The Legislature has unlimited, and unrestricted power to tax privileges, and

78 Phillips v. Lewis, 3 Shan. Cas. 230 (1877).
80 Kurth v. State, 86 Tenn. 134, 5 S.W. 593 (1887).
this power may be exercised in any manner or mode in its discretion."81

"In fact it has been said in two of our cases that, if thought proper, the
Legislature might make the business of farming a privilege. ... The
term 'privilege' embraces any and all occupations that the Legislature may
in its discretion choose to declare a privilege and tax as such."82 "The
power to tax privileges is not subject to any constitutional limitation
except that the tax levied must not be arbitrary, capricious or wholly
unreasonable."83 "Taxation of the privilege is upon the occupation,
or activity carried on amid the social, economic, and industrial environment,
under protection of the state."84 (underlining added).

However, both by terms of Amendment No. 7 and prior judicial rulings,
only the General Assembly may empower a municipality to tax privileges;
the Legislature alone can create a privilege and authorize its taxation,
and ... a municipal corporation cannot make any occupation a privilege,
or impose a tax upon it, unless it has first been so declared by the
Legislature."85

We have seen in the foregoing cases that the General Assembly may
tax as a "privilege," and may authorize municipalities to tax as a "priv-
ilege," any "occupation, avocation, calling, pursuit, business, employ-
ment, activity, or the like affecting the public," even the "business of

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81 Wilson v. State, 143 Tenn. 55, 224 S.W. 168 (1919).
82 Seven Springs Water Co. v. Kennedy, 156 Tenn. 1, 299 S.W. 792,
86 A. L. R. 496 (1927).
83 Hooten v. Carson, 186 Tenn. 282, 209 S.W.2d 273 (1948).
84 Bank of Commerce & Trust Co. v. Senter, 149 Tenn. 569, 260 S.W. 144
(1923).
85 Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S.W. 136 (1898).
farming," and "whatever the Legislature choose to declare to be a privilege." Under this broad construction of the taxing power may the General Assembly authorize a municipality to impose a privilege tax on all persons working in a city, measured by their income or earnings? Of course the question immediately arises, "Is this not a tax on incomes, prohibited by the explicit terms of Amendment No. 7?" This precise question was considered in a Kentucky case, in a manner so pertinent that it is quoted extensively below:

The Board of Aldermen of Louisville has imposed an annual tax or license fee for the privilege of engaging in any business, calling, profession or labor [actual wording of the ordinance: "occupation, trade, profession, or other activity"] within the city, with certain exceptions. . . . The major attack . . . stems from the fact that the measure of the tax is the earnings from the exercise of the privileges . . . being one per cent thereof.

The validity of the ordinance is principally questioned upon the ground that it imposes an income tax in fact although it designates the tax as a license fee. . . . the ordinance gathers within the sweep of its perimeter everybody who earns any money in any occupation, trade or profession or in the conduct of any business within the limits of the city. . . .

A municipality's power to tax is only that which the legislature has granted it. . . . Section 181 of the Constitution provides that the General Assembly may "delegate the power to . . . cities . . . to impose and collect license fees on . . . franchises, trades, occupations and professions." By an Act of 1948 . . . the General Assembly provided: "Cities of all classes are authorized to levy and collect any and all taxes provided for in Section 181 of the Constitution." . . . "trades, occupations and professions" . . . is as far-reaching and as sweeping as language could make it. It would be difficult to find three words that cover wider fields of employment. . . . that the right to earn a livelihood is an inalienable right guaranteed by the Bill of Rights of the Constitution . . . is true may be conceded by all. However, the Bill of Rights does not operate to relieve from taxation. . . .

. . . The principal storm center . . . is whether or not this ordinance imposes an income tax, the taxpayers'
argument being that the city has no authority to levy such a tax. We need not pass upon the question of the existence or absence of that power. Confusion in the case may arise from placing so much emphasis on the measure of the tax as to subordinate or lose sight of its true character. . . . Since the levy is primarily for revenue, to speak with technical accuracy, the tax imposed is an "occupation tax."

. . . This Louisville ordinance lays the tax upon the privilege of working and conducting a business within the city, and only measures the value of the privilege by the amount of earnings or net profits. It is contended that this is but a subterfuge [and] . . . it is but an income tax. . . . We . . . hold the tax is not an income tax. . . .

The Louisville tax was sustained as collectible from all employees of the Federal government working in the city, including those at a Naval Ordinance Plant owned by and under the exclusive jurisdiction of the United States. 87

If the foregoing line of cases is followed, the Tennessee Supreme Court could sustain a privilege tax on all businesses and persons working within a city, measured by net profits, income or earnings, on the grounds that such a tax would be a tax on the privilege and not on the income. On this basis it would not come within the purview of the words "to tax incomes" found in Amendment No. 7. Compare the following with the Kentucky case: "It [Chapter 31, Public Acts of 1923] is said . . . to impose a direct tax on the incomes of corporations. . . . the act imposes an excise tax [elsewhere in the opinion: "an excise tax is an indirect or privilege tax"] . . . the measure of the annual tax is a sum equal to 3 per centum of the net earnings for the preceding fiscal year. . . . the act is valid unless some other constitutional limitation has

86 Louisville v. Sebree, 308 Ky. 420, 214 S.W.2d 248 (1948).
been overstepped.\textsuperscript{88} "Section 30 [of Article 2 of the Constitution] . . . prohibits taxation upon the article manufactured of the produce of this State. . . . Section 30 does not inhibit the laying of a privilege tax upon the occupation of selling such articles."\textsuperscript{89} It may also be noted that State privilege taxes on insurance companies are calculated as percentages of their gross receipts.\textsuperscript{90}

Delegates in the Constitutional Convention expressed fears that dire consequences would flow from this amendment, and others tried to give reassurances. Opinions were so divided that perhaps a consensus of intention of this point was not established.

Mr. Pope thought that the clause, "the power of taxation of a municipality shall not be enlarged or increased except by general act," read in relation to the Article it would amend, would remove any prohibition on the Legislature "from passing an act levying an income tax on the people in municipalities, or authorizing them to do it, either one. . . . I don't think the gentlemen meant to do it, but it is in there, and it is clear."\textsuperscript{91}

Later, Mr. Pope observed, "They have undertaken to eliminate the objection by providing that the General Assembly shall not authorize any municipality to tax income, estates or inheritances, or to impose any other tax not authorized by Section 28 or 29 of Article II on the Constitution."\textsuperscript{92} Mr. Pope then quoted this part of Section 28:

\textsuperscript{88} \textit{Bank of Commerce \\& Trust Co. v. Senter}, supra.

\textsuperscript{89} \textit{Kurth v. State}, supra.

\textsuperscript{90} TCA 56-408 et seq.

\textsuperscript{91}Debates, p. 921.

\textsuperscript{92}Debates, p. 1020.
No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct.

And he followed with these comments:

Now, how has the Supreme Court of Tennessee construed that; the Supreme Court of Tennessee has said on numerous occasions that the legislature has the power and the authority to levy any tax that it sees fit on privileges, and we have a number of privilege taxes in Tennessee today, where the measure of the tax is the income of the individual tax [sic].

... there are a number of taxes in Tennessee exercised by the legislature as a privilege tax; one is called an excise tax. What is the basis, what is the measure of the assessment upon which that excise tax is fixed; it is the income of the party taxed.

... that is exactly what the excise tax is, it is levied upon the grounds of being a privilege, and the measure of the tax, the methods on which the tax is calculated can be the income of the party taxed under that excise law.

... although the Supreme Court of Tennessee had said the legislature could not levy the income tax, it did sustain this excise tax; it was three per cent upon the net profits of the Memphis Natural Gas Company; ... after the case had gone to the Supreme Court of the United States, and there affirmed, having been first decided by our Supreme Court.

Under this amendment, I say that the General Assembly of this State could authorize any town in the State coming under the home rule to enact, through its city council, an excise tax based upon a privilege, they could declare anything they wanted to be a privilege, according to the Supreme Court of Tennessee; ... anything, the Supreme Court said, can be levied as a privilege tax because the Constitution does not prohibit it, and while it is not called an income tax ... because the measure of the tax is the income and of course the same applies to any other taxes, like sales taxes, and so forth.93

Another delegate, Mr. Miles, agreed: "Mr. Pope has talked considerably about the taxation feature of this proposed Sims amendment; I shall

93 DeBates, pp. 1020-1021.
not undertake to repeat, except to say that I believe that Mr. Pope is right in every statement that he has made."

Two other delegates, however, disagreed:

Mr. Ogle: Now, I am not an authority on taxation, and I don't purport to be, but I don't think that the evil he is trying to inject, or the fear that he is trying to inject, into this Committee relative to taxes exists; and I don't think Mr. Pope deep down in his heart thinks it exists himself. I have talked to a few other people about the various evil taxes that could be imposed; these people are authorities in the field of taxation, and they have convinced me beyond a reasonable doubt that those evils would not be present if the Sims proposal were adopted.

Mr. Ambrose: I listened with great interest to the opponents of this measure yesterday, and they delineated all of this new taxation that was going to be imposed upon us . . . Now, they have been throwing the boogie-man in here; that has no place in this record.

To allay their fears, Mr. Miller said the following:

I would not support any plan of home rule which would make it possible for the legislature to vest in our cities any powers of taxation which it cannot vest in the cities today under the present Constitution. Resolution No. 118 [which later became Amendment No. 7] leaves to the legislature the right to give the cities additional powers of taxation from time to time only by general laws, whereas today additional powers of taxation can be given by special acts as well as by general law. That is an additional safeguard which we have in this resolution, and in addition, we have placed an absolute prohibition on certain kinds of taxes ever being vested in municipalities. For example, any income tax, regardless of what the Supreme Court later holds in regard to an income tax, that right could not be vested in a city in view of this prohibition.

The following exchange in the Convention might be construed as an intention to place inspection fees beyond the reach of this prohibition:

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94Debates, p. 1028.
95Debates, pp. 1029, 1040.
96Debates, p. 1045.
Mr. Smith: In the proviso against taxation, I know that you are and the delegates are familiar with inspection staffs which do not levy a tax, but collect the fee for inspectors, the police power, sanitation, garbage collection, and things of that sort; would that be construed as a tax, or is that an inspection fee that the city would have the right under its police power to exact?

Mr. Sims: Well, of course, every city has a right under its police power to provide for inspections; it cannot produce revenue through that means; but under this provision, if the city elected not to come under home rule, then it would continue under its charter just as it is, and its charter would determine its power to levy local taxes, subject to the general statutes of the State which prohibit the imposition of certain types of taxes by cities.

Mr. Smith: Well, am I correct that an inspection fee has been ruled not to be a tax?

Mr. Sims: An inspection fee for police purposes has been ruled not to be a tax.97

***

Nothing herein shall be construed as invalidating the provisions of any municipal charter in existence at the time of the adoption of this amendment.

Mr. Sims made this statement with respect to the foregoing: "That was intended to leave no doubt as to what the legal situation would be in your municipalities if this amendment to the Constitution was adopted; it will not invalidate any provision in your charter... that is now in existence. That was requested by the mayors of the cities."98 This apparently is also a provision applicable to all municipalities, not just those electing "home rule" status.

97 Debates, p. 1014.
98 Debates, p. 908.
At first glance this would appear to be a simple, unequivocal provision about which no question would arise. However, a specific situation has indicated that its effect may not always be clear. A city with a private act charter provision authorizing annexation by ordinance wanted to know whether this was superseded and invalidated by the 1955 annexation law. Does the operation of this clause sustain the private act, against the preceding clause in Amendment No. 7: "The General Assembly shall by general law provide the exclusive methods . . . by which municipal boundaries may be altered"?

In 1955 the General Assembly enacted a general annexation law (Chapter 113, Public Acts of 1955). If the foregoing part of this amendment is construed to make Chapter 113 truly "exclusive" as to how "municipal boundaries may be altered," in effect the charter provision for annexation by ordinance would be invalidated by a part of Amendment No. 7 (Chapter 113 declared a different legislative intention: "except as specifically provided in this Act, the powers conferred by this Act shall be in addition and supplemental to, and the limitations imposed by this Act shall not affect the powers conferred by any other general, special or local law."

Although a few such doubtful cases may arise, the general effect of this provision seems to have been clearly set forth in Mr. Sims' explanation. In general, municipal charters as they existed on November 3, 1953, should not be disturbed by any provision in this amendment.
CHAPTER V
CONCLUSIONS

The experience with Amendment No. 6 seems to have been very satisfactory. One would naturally expect that local officials would approve of the transfer of power effectuated by this amendment, and no complaints have been heard from them. No effort was made to determine whether State officials have any objections; the appearance of occasional bills aimed at curbing or directing actions of counties/cities is perhaps an indication of a residue of the prior system that lodged all power in the State legislature.

The accompanying table analyzes the acts of four sessions--two biennial in 1955 and 1965 (79th and 84th General Assemblies), and two annual in 1973 and 1974 (the 88th General Assembly); totals are shown for the latter two sessions, for comparison with the data of the biennial sessions. The number of acts for cities substantially dropped--81 in the two annual sessions combined, as compared with 211 in 1955. County acts showed a decline in 1965, but in the two annual sessions combined were higher (294) than the total of 271 in 1955. A very high proportion of the acts (85.6 to 97.6 per cent) called for approval by governing bodies, and most of them received favorable action (from 59 per cent for counties in 1955 to 94.3 per cent for cities in the same year); the approved number was proportionately higher for cities in every session. The experience with referendums was more divided--more county acts were disapproved in 1955, and more city acts were turned down in 1974 (all six were charter amendments for the City of Crossville).
ANALYSIS OF APPROVAL ACTIONS ON PRIVATE ACTS

<table>
<thead>
<tr>
<th>Governmental Unit and Type of Approval Action</th>
<th>79th %</th>
<th>84th %</th>
<th>Total %</th>
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<td>No action</td>
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<td>3</td>
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<tr>
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<td>195</td>
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<tr>
<td>Totals</td>
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<td>281</td>
<td>375</td>
<td>153</td>
</tr>
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</table>

To appraise the experience of the 13 cities that have adopted home rule status, 30 of their officials were contacted by telephone and asked to respond to five questions:

1. Why did your city elect home rule status?
2. Have you perceived any disadvantages of home rule status?
3. Has your city considered repeal of home rule status?
4. Do you recommend continuation of home rule status for your city?
5. Has your city experienced any problems with alleged general acts that were private in effect (affecting only your city)?

Seven mayors, fifteen city attorneys, four city managers (administrators), two members of governing bodies, and two city recorders; most of them have (had) had fairly long tenure.
Some officials could not respond to the first question because their
tenure began some time after adoption of home rule status. Of 18 who did
answer this question, two-thirds (12) said the primary reason was to ac-
quire local control of the charter drafting and amending process and to
avoid dependence on the State legislature. The other one-third (6) said
the purpose was to gain protection from adverse private acts; a few com-
mented that this purpose would have been served without electing home rule
status because of the local veto provisions of Amendment No. 14.

Sixteen felt that there are no disadvantages of home rule status,
while 13 had perceived one primary disadvantage: greater difficulty of
amendment by the referendum process. This disadvantage was viewed as
critical in several cities with charter provisions limiting the salaries
of top officials.

Five respondents would recommend repeal of home rule status, but 23
favored continuation. Two cities have considered repeal, but in only one
city has any formal action been taken; the Chattanooga City Commission,
following a recommendation by a Charter Study Committee, has called for a
vote in the November 1976 general election on whether to repeal home rule
status.

The responses indicated that four cities have had some problems with
adverse "general acts of local application" which were private in effect,
and it was reported that several such acts had been declared unconstitu-
tional by the courts. Three cities were not averse to accepting such
acts that were beneficial to them.

Although there are some negative aspects of home rule status, as
noted in the foregoing summary, on balance the experience of Tennessee
cities appears to be favorable. The principal problem seems to be one
inherent in the democratic process: persuading the voters to approve charter changes.