October 24, 2001

You have the following questions:

1. Where the city has passed a resolution to issue general revenue bonds under Tennessee Code Annotated, ' 9-21-201 et seq., and a petition for a referendum on that issue has been filed under Tennessee Code Annotated, ' 9-21-207 et seq., can the city intercept the referendum by repeal the resolution?

2. If the answer to the first question is yes, can the city immediately pass another identical resolution to issue general revenue bonds?

3. If the answer to the first question is yes, can the city immediately pass a resolution to issue capital outlay notes in place of the general revenue bonds?

The answer to the first question is probably yes.

The answer to the second question is probably no.

The answer to the third question is not clear, but I think the answer is probably no, unless the shift in financing mechanism reflects more than a cosmetic change in the project.

I will attempt to address all three questions together.

General

As far as I can determine, there are no statutes or case law in Tennessee that directly address your questions. However, similar questions have arisen in other states, including Kentucky. As you might expect, the cases go both ways, but the very heavy weight of authority is that in the absence of a constitutional or statutory limitation, a municipality can repeal an ordinance or resolution, including a bond resolution, that would otherwise be subject to a referendum.

Tennessee Code Annotated, ' 9-21-201 et seq., authorizes local governments to pass resolutions providing for the issuance of general obligation bonds. A referendum on the issuance of such bonds is provided for (except in the case of water works or sewer bonds) in Tennessee Code Annotated, ' 9-21-207. Based on the facts you related to me, the petition prescribed by that statute has been properly filed. I will also assume that the county election commission has made the certification of the petition to the city as prescribed by the same statute. Tennessee Code Annotated, ' 9-21-208, provides that following the certification, the city calls for the referendum:

> If it is necessary to hold an election on the proposition to issue general obligation bonds or if the governing body decides to hold an election to ascertain the will of the electorate even if no petition has been filed, then the election shall be called by the governing body of the local government. Such election shall be held as an election on the question by the county election commission pursuant to ' 2-3-204. The governing body shall adopt a resolution (herein called the “election resolution”) which shall supercede its adoption, and immediately upon its adoption, the initial resolution, if any...

It seems important that Tennessee Code Annotated, ' 9-21-208, does not automatically provide for an election upon a proper petition being filed by the requisite number of voters. The call for the election awaits a resolution of the governing body of the city. Undoubtedly, at some point after the certification of the petition by the county election commission is received by the city governing body, the latter is subject to a writ of mandamus to call the election. However, at least up to that point, and perhaps even after, the city probably has the right to repeal the resolution.

The Heavy Majority View

That conclusion is supported by Ginsburg v. Kentucky Utilities Company, 83 S.W.2d 497 (1935). There the Middlesboro, Ky., board of commissioners passed an ordinance providing for a loan agreement between the city and the United States covering a loan and grant for the construction of an electric system. A petition calling

for the board to reconsider or repeal the statute, and failing that, calling for a referendum on the agreement, was filed in accordance with a Kentucky statute. The board did nothing, and the petitioners obtained an injunction against the loan agreement unless approved by a referendum. After the injunction was handed down, the city repealed the ordinance providing for the loan agreement, and passed an ordinance removing all references to the loan agreement with the United States, and authorized bonds for sale by competitive bidding (which in facts of the case in a roundabout way indicate accomplished the city's loan agreement with the United States). No petition for an election on those bonds was filed. The petitioners cried foul, and asked the court to punish the board of commissioners for contempt and demanded a referendum on the original ordinance providing for the loan agreement.

The Court rejected their pleas and demand, declaring that:

> Unquestionably the board of commissioners had a right to repeal the loan agreement ordinances notwithstanding the order of injunction, and appellees cannot complain, since that is what they sought....The purpose of this suit, as is clearly manifested by the petition and relief prayed for, was to enjoin the carrying into effect of the loan agreement ordinance until it had been approved by a majority of the voters of the city at a referendum election and the chief ground of attack upon the loan agreement was that it cut off competitive bidding for the bonds. Those objections were removed when the ordinance was repealed and it thereof remains to be determined whether in passing the ordinance of June 19, and attempting to proceed thereunder, the board of commissioners violated the temporary injunction. In 32 C.J. 492 it is said: Where the enforcement of an ordinance has been enjoined on the ground that certain provisions of the ordinance are invalid, the passage and enforcement of a new ordinance on the same subject without such invalid provisions is not a violation of the injunction; but an attempt to evade an injunction by passing another ordinance similar to the one enjoined is a contempt. [Citations omitted]
>
> The same principle applies in this case as it does in cases where the city council has repealed and amended and enacted a new ordinance after a referendum has been asked on the previous ordinance. In such cases we find the general rule to be that where a referendum petition is presented to the city council and the ordinance is repealed, the council may not thereafter pass the same ordinance or

> one in all essential features like it and thus evade the referendum; but it may legislate on the same subject matter provided it acts in good faith and not with a purpose to evade the referendum and providing further that the new ordinance differs in essential features from the old one. In re Statham, 45 Cal. App. 436, 187 P. 986; State v. Meining, 133 Minn. 908, 57 N.W. 991, 992; 43 C.J. 594. [At 500-501]

In Eagle v. City of Corbin, 122 S.W.2d 798 (1938), the city adopted an ordinance to issue bonds, a petition for a referendum on the bond issue was properly filed, and the city failed to act on the petition. Two years later, the city passed another ordinance to issue bonds. That ordinance expressly repealed all conflicting ordinances. The plaintiffs, who opposed the issue of the bonds, argued that the referendum on the first bond issue could not be ignored, evaded or nullified by the enactment of essentially the same ordinance.

That was true in principle, agreed the Court, but rejected that argument in this case, declaring that:

> But the city legislative body is not prevented from legislating on the subject matter of an abandoned or dead ordinance if it acts in good faith. [Citing Ginsberg, above.] In this instance two years had elapsed. While the object of the new legislation was the same, and even the method of financing, yet it is made to appear that it is an entirely new plan of reconstruction and rehabilitation proposed, with two and one-half times as much money involved. [At 802]

While that case does not expressly say that the city could have repealed the first ordinance, it implies that the result would have been the same had it done so rather than legislated on an “abandoned or dead” ordinance.

Also in accord, is the Kentucky case of Selle v. City of Henderson, 218 S.W.2d 645 (1949)

Citing Ginsberg, the Utah Supreme Court in Keigley v. Bench, 63 P.2d 262 (1936), clearly declared that a city could repeal a bond resolution after a petition for a referendum had been properly filed. The city recorder in that case even twice refused to accept and file the petition for referendum certified by the county clerk. The board of commissioners of the city subsequently repealed the bond resolution. The plaintiffs argued that the referendum was required to be held on the resolution in spite of the repeal by the board of commissioners.

The Court did not agree, reasoning that while the recorder had a ministerial duty to accept the petition for a referendum on the bonds:

> The right of the plaintiffs to require the referendum election ceased, however, when the resolution of May 22, 1936, was repealed and the contract with Nuveen & Co. [the bonds purchaser] was cancelled by the resolution of July 13, 1936. Nothing could be accomplished by holding a referendum election for the approval or disapproval of that which had no legal existence...The purpose which plaintiffs apparently sought by the referendum was, for the moment at least, attained when the resolution of May 22, 1936 was repealed and the contract with Nuveen & Co. rescinded. Under such a state of facts no useful purpose will now be subserved, as far as it is made to appear, by requiring the defendant to accept and file the petition for a referendum. [At 265]

The plaintiffs also argued that their right to a referendum on the bond issue arose under the Utah statute that required a referendum upon the filing of a proper petition, and that the statute was not repealed by the resolution in question. The Court rejected that argument, declaring that:

> [C]ourts will not require a useless act. Moreover, the duty of the defendant to file the petition for referendum here in question does not exist solely because of the statute mentioned. On the contrary, defendant's duty in such respect came into existence by reason of the resolution. It ceased to exist when the resolution was repealed. In the absence of the resolution, there was nothing to approve or reject in the referendum election sought by plaintiffs. [At 266]

For those reasons, the plaintiff's prayer for a wit of mandamus requiring the election to be held was rejected.

A similar result was reached in Wicominco County, v. Todd, 260 A.2d 328 (1970). In that case, a peculiar statute allowed a Maryland county council to veto its own legislation within 45 days of its passage. In February 1969, the county council passed a resolution for the issuance of bonds. In March 1969, the county council vetoed the resolution, a few hours after a petition for a referendum on the resolution had been filed by the plaintiffs. In June 1969, the county council passed another bond resolution identical to the first. The county council's exercise of its veto power was

legal, held the Court.

Although the county's charter authorized the county council's veto of ordinances and resolutions, the Court strongly implied that the result would have been the same in the absence of the county council's express veto power:

> Various courts have held that the filing of a sufficient and timely referendum petition suspends the legislative enactment against which it is directed, and during such suspension the legislative body cannot pass a valid measure which is substantially the same as that referred. [Citations omitted.] Courts have found valid subsequent legislation on the same subject matter as that amended or repealed, if the legislative body acted in true good faith to accomplish proper and appropriate governmental aims. Good faith and proper purposes have been found where the later enactment carries changes calculated to meet objections that produced the referendum. [At 332] [Citing several cases, including Ginsberg.]

The second ordinance was passed in good faith, declared the Court, because only $49,000 of the $3,400,000 drew the ire of the citizens' group that filed the bond referendum petition, and the delay in the issuance of the bonds generated by a referendum would have had serious consequences for city facilities and services.

Finally, a similar rule was announced in In re Megnella, 157 N.W.2d 991 (1916) by the Minnesota Supreme Court with respect to an ordinance passed on May 5, 1916, regulating the business of carrying passengers "by auto cars." A legal petition for a referendum on the ordinance was filed, and on September 13, 1916, the city repealed the ordinance, and on the same date passed one almost identical to the first. In upholding the validity of the second ordnance, the Court said:

> On the assumption that the referendum petition was sufficient, the May ordinance was suspended. *The council could repeal it, and did so on September 13*. We think it correct that the council could not then give life to the dead ordinance by passing it over again, or by passing an ordinance in all essential features like the one against which the petition protested. This would plainly be to nullify the referendum provisions of the charter. But it is equally clear that the council is not prevented from legislating on the

> subject matter of the dead ordinance. It doubtless may, if it acts in good faith and with no intent to evade the effect of the referendum provision, pass an ordinance covering the same subject matter that is essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. [At 992]

The ordinances were "much alike," but different, in essential respects, concluded the Court. The Court mentioned only one difference: a slight difference in liability insurance requirements. The difference reflected a significant cost savings on the part of vehicle operators subject to the ordinance, and was one of the reasons for the "protest" against the first ordinance.

Three propositions can be gleaned from the above cases, and others cited therein:

First, generally, unless otherwise limited by statute, a local government has a right to repeal bond resolutions even after a petition has been filed for a referendum on the issue.

Second, generally, where a local government repeals a bond resolution, it cannot re-enact an identical or similar resolution for some period thereafter, unless it does so in good faith.

Third, the voters who file a petition for a referendum on a bond issue object to the bond issue.

It is noteworthy in connection with the first two propositions, to repeat what Wicomico County says: "Various courts have held that the filing of a sufficient and timely referendum petition *suspends* the legislative enactment against which it is directed, and during such suspension the legislative body cannot pass a valid measure which is substantially the same as that referred." [Emphasis is mine.] The legislation is suspended in the sense that it does not go into effect, the bonds cannot be issued, and the legislative body cannot amend or repeal the bond resolution to produce a substantially identical product. But nothing in that language or the language of any of the cases on your question, say the legislative body cannot simply repeal the first bond resolution. Indeed, Wicomico, goes on to say, "Courts have found valid subsequent legislation on the same subject matter as that *amended or repealed*, if the legislative body acted in true good faith..." [Emphasis is mine].

The third proposition is a common sense one. In theory, voters who file a petition for a referendum on a bond issue could merely wish to see the issue brought to a vote.

The reality the courts recognize is that those voters object to the issuance of the bonds for one reason or another.

The above cases lead to the conclusion that there is no issue of good faith where there has been only a repeal of a bond resolution. Keigley is particularly informative on that point, but so is Ginsberg and In re. Magnella. The question of whether there has been good faith appears to apply to the passage of a second resolution after the repeal of the first. It appears to be clear from all the above cases that if the City of McMinnville repeals the bond resolution in question its good faith is not an issue. But if the City immediately follows the repeal with an identical bond resolution, the passage of the second bond resolution, such an action would be probably seen as a patent attempt to evade a referendum on the first bond issue. [Although it is possible to envision rapid changes after the passage of the first bond resolution that would justify its repeal and the passage of a second identical resolution done in good faith in response to those changes.]

What constitutes "good faith" is critical to the question of whether the passage of a capital outlay note resolution immediately after the repeal of bond would pass muster under the good faith rule. The answer to that question is not clear from the cases. The Court declared in Ginsberg that the second ordinance was passed in good faith because it was "essentially different." The references to the loan agreement with the United States were taken out, and provisions calling for competitive bidding on the bonds were put in, even though apparently the two resolutions were substantively the same. In any event, the differences were enough to satisfy the good faith requirement. In Eagle, two years passed between bond resolutions, and while the second resolution contemplated the same purposes and financing scheme, proposed "an entirely new plan of reconstruction and rehabilitation," and involved 2-1/2 times as much money. Indeed, the facts show that the consulting engineers thought the first plan would be ineffectual and wasteful, and the federal government disapproved that project. Although the facts do not disclose how the second plan differed from the first, presumably, it addressed the problems with the first plan. In Wicominco County, only a very small amount of the total first bond resolution was an issue on the part of the group that filed for a referendum on the resolution, and delays in the bond issue would have stalled seriously needed city projects and facilities.

I have been unable to decide whether the distinction between general revenue bonds and capital outlay notes is sufficient to build a bridge of good faith between the first bond resolution and a capital outlay note resolution, but I suspect that a change in the financing instrument is not sufficient absent some changes in the project or circumstances surrounding it. Part of the bridge of good faith appears to be built on conditions other than the technical distinction between different bond instruments, including the effect delay would have on a contemplated project, the reasons why groups promoting the bond resolution referendum might have had for the promotion,

and variables related to the project itself.

Supporting Tennessee Cases

Although there are no Tennessee cases directly on your questions, with respect to the right of the City of McMinnville to simply repeal the bond resolution, it was said in Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga, 580 S.W.2d 322 (Tenn. 1979), that:

> It appears that other jurisdictions are divided on this issue, but the better view is that the legislature and the electorate are co-ordinate legislative bodies, and in the absence of special constitutional or charter restraint, either may amend or repeal an enactment of the other. [At 327] .

That language arose in the Court's interpretation of the meaning of a provision of Article XI, ' 9, of the Tennessee Constitution under which the General Assembly could pass acts providing for the consolidation of governments, with the approval of the voters in the governments to be consolidated. The Court declared that the provision applied only to the consolidation of governments, not acts amending or repealing a consolidation. However, it seems that the language also fits where a city has passed a bond resolution, the proper number of the electorate has filed a petition for a referendum on the bond issue, and the city repeals the revolution. Such actions are a function of co-ordinate legislative bodies, amend[ing] or repeal[ing] the actions of one another. In that case, there is no constitution provision or statute that would stand in the way of that activity.

It is also said in Patton v. Mayor of Lexington, 626 S.W.2d 5 (Tenn. 1981), that the power of a municipality to repeal an ordinance or a resolution is necessarily as broad as the power to enact it, except where the ordinance to be repealed "is contractual in nature, or where it is enacted under a limited grant of authority to do a single designated thing in the manner and at a time fixed by the legislature." [At 6] The right of a city to repeal an annexation ordinance *not yet operative* because a quo warranto proceedings has been brought challenging the legality of the ordinance was upheld in State ex rel. Schaltenbrand v. City of Knoxville, 788 S.W.2d 812 (Tenn. Ct. app. 1989). It seems to me where there is a bond resolution under which bonds have not yet been issued, a petition properly filed for a referendum on the bond issue, but the city has not yet passed a resolution calling for the referendum, is analogous to an annexation ordinance challenged by not yet operative. It is important to note here that Tennessee's Annexation Statute, found at Tennessee Code Annotated, ' 6-51-101 et seq., nowhere provides for the repeal of the annexation ordinance.

The reason that is important, is that the language cited in both Patton and Schaltenbrand for the proposition that an ordinance can be repealed except where it is contractual in nature or "where it is enacted under a limited grant of authority to do a single designated thing in the manner and at a time fixed by the legislature," is based on 62 C.J.S. Municipal Corporations, ' 435(b)(2) [presently 62 C.J.S. Municipal Corporations, ' 294 (b)]. At first glance the cases cited in support of that proposition appear to cut against the City of McMinnville's authority to repeal the bond resolution. But on second glance that is not so; otherwise the result in Schaltenbrand would probably have been different.

In a Kansas case, it was held that a municipality had no authority to repeal an ordinance establishing a city court. A state statute authorized the establishment of the city court, but did not provide for the repeal of the ordinance. The Legislature, said the Court, had given the city only the authority to establish the court, not to abolish it. But that case also reasoned that the limitation actually derived from the state constitution, which authorized the Legislature to establish various courts. [Brown v. Arkansas City, 11 P.2d 607 (1932).] An Ohio case held that a state statute that authorized a municipality to establish a policeman's pension fund and to impose a tax to finance the same, could not be repealed. The Court reasoned that the retirement system in question was not created by ordinance but by statute which reflected the state's complete statutory scheme on the subject, and that the function of the ordinance was merely to permit cities to join the system. [Thompson v. City of Marion, 16 N.E.2d 208 (1938). Followed in People v. Illinois Municipal Retirement Fund, 128 N.E. 923 (1955), for the same reasons, and which cited the same result in several other cases involving municipal retirement systems.] The purpose of retirement system legislation said the Court in the latter case, was to create a permanent retirement system.

In light of Schaltenbrand, it is difficult to believe that the logic of those cases would apply to prohibit the repeal of the city's bond resolution. The cases prohibiting the repeal of an ordinance under which a municipality joins a state retirement system are logical, but their logic undoubtedly derives, at least in part, from the economic consequences that would result from municipalities dropping out of such systems, and hardly applies to the repeal of bond resolutions.

It is true that Tennessee Code Annotated, ' 9-21-207, prescribes an election to be held on the bonds where there is a properly filed petition, and provides that the city by resolution call for a referendum. But as pointed out above, it is significant that the statute does not itself prescribe the referendum; rather, it requires the passage by the municipality of a resolution calling the election. In that respect, a repeal of the resolution would not create havoc with the statutory scheme for the issuance of bonds. In addition, the statute relies on no constitutional foundation.

The Minority View

The Maine Constitution provided for a referendum upon the petition of a certain number of voters. The Maine Legislature repealed an act which had the effect of eliminating the penalties for the transportation of liquor in the state unless the transport involved the legal sale of liquor. A proper petition was filed for a referendum on the act, and the legislature repealed the act. Apparently under the law in Maine, the Maine Supreme Court was allowed to render advisory opinions upon the request of the Legislature. In In re. Opinion of the Judges, 174 A. 853 (1933), the Court advised that once a petition for a referendum was invoked, the act could neither be amended nor repealed. It did not elaborate.

The same result was reached by the Oklahoma Supreme Court in In re. Referendum Petition No. 1, Ordinance 6-B, City of Sandy Springs, 220 P.2d 454 (1950). There the city passed an ordinance dealing with the installation and operation of parking meters. The required number of voters filed a petition for a referendum on the ordinance under a state statute, and the city council repealed the ordinance. The repeal was ineffective to stop the referendum, held the Court. Citing a Missouri case, State ex rel. Drain v. Becker, which involved a similar question with respect to the right of the state legislature's power to repeal or amend legislation subject to a properly filed petition for referendum, the Court reasoned that:

> There it is pointed out that the contention made (as it is in the instant case) is that the right of a reference reserved to the people may be forestalled or nullified by legislative action before the referred measure is voted upon. With reference thereto the court stated: "This contention is based upon the assumption that, despite the complete right of reference, there still remains in the General Assembly in some undefined form a residue of power which may be asserted in this manner. This is a mistake. The powers of the General Assembly are in no wise limited by the constitutional provision until the right of referendum has been invoked; thereafter it is divested of all power in regard to the matter referred until the action of the people has been exercised by a vote upon the same..." [at 459]

That was a 5-3 case, with a strong dissent. The dissent argued that the purpose of the referendum petition was to "presently suspend, and to ultimately repeal, the ordinance in question," that "The power reserved and to be exercised by the people in the *referendum* is the *veto power*. " [The Court's emphasis.] But, continued the dissent, where the city council itself had repealed the ordinance, there was nothing to veto.

Further, argued the dissenters:

> We observe the authorities holding that, pending referendum, those in authority may not repeal the ordinance and re-enact the law, thereby circumventing and defeating the referendum right. But no case is cited holding they cannot repeal outright. That does not defeat referendum. That grants everything sought by the referendum, and that too without the delay or expense of a referendum election.

The dissent in Referendum Petition No. 1, reflects the heavy majority view, and the common sense observation that if the ordinance in question is repealed, and cannot be re-enacted, the petitioners for a referendum have gotten what they asked for.

Sincerely,

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