September 25, 2001

Dear Mr. Sir:

You have the following questions:

1. Was the city's new charter, Private Acts 2001, Chapter 61, validly approved?

The answer is absolutely and positively yes.

2. What is the effect of the refusal of the secretary of the board of aldermen to sign the city's budget ordinance, which also fixes the tax rate?

The requirement in the city's charter that the secretary of the board of aldermen sign ordinances may be merely directory rather than mandatory. Alternatively, the secretary may have a ministerial duty to sign ordinances, in which case he is subject to being compelled to sign ordinances by a writ of mandamus.

Here some background facts are in order. The secretary of the board of aldermen refuses to sign the recently adopted budget ordinance that also contains the tax rate. He claims that the charter was improperly adopted in that Section 4 provides that the secretary of the board of aldermen is required to sign the certification of the approval of the act that is submitted to the Tennessee Secretary of State. Presumably, his position is that absent his signature on the certification, somehow the charter of the city is not valid, and for that reason the ordinance is not valid.

Analysis of Question 1

Section 4 of the new charter provides that:

> This Act shall have no effect unless it is approved by a two-thirds (2/3) vote of the Board of Mayor and Aldermen of the City of Humboldt at a regular or called meeting of the Board. Its approval or non-approval shall be certified by the Mayor and Secretary of the Board of Mayor and Aldermen to the Secretary of State.

Section 4 contains two parts: (1) Provision for approval by 2/3 vote of the board; (2) Certification to the Secretary of State. Under the plain language of Section 4, the approval of the act by the board is not dependent upon its certification. Indeed, under Article VI, Section 9, of the Tennessee Constitution, private acts are approved by one of the two methods prescribed in Article XI, ' 9: 2/3 vote of the board, or by a referendum. There is no dispute that the city's new charter passed by the proper 2/3 vote of the board.

A general law also prescribes how private acts are certified to the Secretary of State.

Tennessee Code Annotated, ' 8-3-201 et seq. provides that the certifying officer be the presiding officer of the governing body that approves the act. While local acts require local approval under Article XI, Section 9, the General Assembly has the authority to pass general legislation that applies to all municipalities or all municipalities within a certain class. Such general legislation is not a local matter. Tennessee Code Annotated, ' 8-3-201 et seq., is plainly general legislation, relating as it does to how private acts are certified, and applying as it does to "every" private act. [See Bozeman v. Barker, 571 S.W.2d 279 (Tenn. 1978).] For that reason, any charter provision to the contrary would be superceded by that act.

It is also clear from that statute that the certification has nothing whatever to do with the legality of a private act passed in accordance with Article XI, ' 9. The statute simply imposes a duty on the Secretary of State to ascertain the action on private acts, and where a private act does not specify a passage deadline, makes the deadline December 1 of the year in which it was passed.

Under Chapter 3, ' 6, of the charter, the mayor is expressly the presiding officer of the board. The city's certification to the Tennessee Secretary of State that Private Acts 2001, Chapter 61, was ratified, signed by the mayor as the presiding officer of the board of mayor and aldermen was plainly and clearly legal; it did not require the signature of the secretary of the board.

Analysis of Question 2

Chapter 2, '3 of the new City Charter provides that:

> ...further, that all ordinances, before becoming effective, shall be entered on the ordinance book of said city and *signed by the Mayor and Secretary of the Board of Aldermen*, and shall also be published for one issue in a newspaper in the said city...

At first glance, that provision gives both the mayor and the secretary of the board of aldermen at least temporary power of life and death over the city's ordinances. However, on second glance, there are two provisions in the charter that relate to the signature by the mayor and secretary of the board on ordinances. Chapter 2, ' 3, cited above, and Chapter 3, ' 7, as follows:

> The Mayor's secretary or other designee shall take and write the minutes of the meetings of the Board and enter all Ordinances and Resolutions in Ordinance and Resolutions books. Once entered, the Mayor and Secretary of the Board *shall sign and attest to them.* [Emphasis is mine.]

Chapter 2, ' 3, and Chapter 3, ' 7, relate to the same subject, and under the rules of statutory construction are read pari materia, to give meaning to, and reconcile both, of them. [American City Bank v. Western Auto Supply Co., 631 S.W.2d 410 (Tenn. Ct. App. 981); State

v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982); DePriest v. Puett, 669 S.W.2d 669 (Tenn. Ct. App. 1984); Dixie Rents v. City of Memphis, 594 S.W.2d 397 (Tenn. Ct. App. 1979).]

Read together, Chapter 3, ' 7, is an aid in the interpretation of Chapter 2, ' 3. It points to the conclusion that the purpose of having the mayor and the secretary of the board sign ordinances is attestation rather than approval. That is a critical difference. The cases are split on the question of whether statutory or charter provisions requiring ordinances to be signed are mandatory or merely directory. However, it is said in 5 McQuillin, Municipal Corporations, ' 16.37, that:

> There is a distinction between the mere signature of the mayor and his or her approval of municipal legislation The mere signature of the mayor or residing officer may be required simply as a ministerial act to furnish evidence of the authenticity of the enactment, without the idea of approval being in any way involved. In such case the requirement is directory only, and failure to comply does not invalidate the ordinance. However, the mayor's approval of an ordinance sometimes is regarded as legislative in character and essential to its validity...

With respect to the question whether a mayor's or other officer's signature requirement is mandatory or directory there is less of a split where the purpose of the signatures is attestation. Blacks Law Dictionary, 6th Ed., 1990, defines "attest" as:

> To bear witness to; to bear witness to a fact; to affirm to be true or genuine; to act as a witness to; to certify; to certify to the verity of a copy of a public document formally by signature; to make solemn declaration in words or writing to support a fact; to signify the subscription of his name that the signer has witnessed the execution of the particular instrument. [Citations omitted.] Also the technical word by which, in the practice of many states, a certifying officer gives assurance of the genuineness and correctness of a copy. Thus, an "attested" copy of a document is one which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it.

As far as I can determine, the Tennessee courts have never addressed the question of whether signature requirements on ordinances are mandatory or directory. However, a number of Tennessee cases have held that ordinance passage procedures prescribed by statute or charter are mandatory. [Wilgus v. City of Murfreesboro, 532 S.W.2d 50 (Tenn. Ct. App. 1975); Brumley v. Greeneville, 274 S.W.2d 12 (1954).] However, under State ex. rel. Wilson v. City of Lafayette, 572 S.W.2d 922 (1978), such procedures "...must be given a reasonable construction, one that does not result in frustrating the legislative process at the municipal level."

[At 924] The standard for reasonable construction adopted in that case was "substantial compliance" with ordinance procedures. But "substantial compliance" in that cases involved a quite narrow forgiveness for the city's failure to actually read an ordinance at all three readings. It does not inspire confidence that the courts will forgive the failure or refusal to sign an ordinance when the charter provision expressly says that the signature is a prerequisite to the "effectiveness" of the ordinance.

But the cases in other states provide support for the city's argument that the charter provisions in question are directory. In our sister state of Kentucky a statute provided that,

> Every ordinance shall be signed by the mayor attested by the clerk, and published pursuant to KRS chapter 424, and shall be in force from and after the publication.

The ordinance in question in that case had not been signed. In upholding the validity of the ordinance, in Foley v. Kinnett, 486 S.W.2d 705 (1972), the Court declared that:

> The court had the precise question before it in Commonwealth v. Williams, 120 Ky. 314, 86 S.W. 553 (1905). It was held that the signing of an ordinance by the mayor is directory. We said: "Its purpose is simply to provide an evidence of the authenticity of the ordinance by the signature of the mayor, and is as to this directory only." The holding in the Williams case was affirmed in Fields v. Town of Whitesburg, 195 Ky. 688, 243 S.W. 930 (1922). [At 706[

Our sister state of Arkansas adopted a similar position in Lewis v. Forrest City Special Improvement District, 246 S.W.867 (1923). There a statute provided that:

> All by-laws or ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council and the clerk... [At 869]

The mayor signed the ordinance, but not until he had left office. However, the ordinance was valid, held the Court, reasoning that:

> Counsel is mistaken in his assumption that the signature of the mayor to the ordinance is essential to its legal enactment, or that the signature of that officer to the record is essential to its proof. The mayor of a city has the authority under the statute [citation omitted] to veto an ordinance, but there is nothing in the statute requiring him to approve it or sign it before it becomes effective. The statute quoted above merely provides for a method of making a record of ordinance of a city or town similar to the record of

> enrolled bills enacted by the Legislature and deposited with the Secretary of State. The signature of the presiding officer of the council is merely for the purpose of making a record, but the failure to sign this does not defeat an ordinance which has been duly passed. [At 870]

The rationale for such cases is well-stated in Wheeling Trust and Savings Bank v. City of Highland Park, 423 N.E.2d 245 (1981). There, the Court upheld an ordinance against several challenges, including a challenge that the ordinance had not been signed by the mayor as required by statute. The Court declared that:

> The record further reflects that the mayor failed to sign the ordinance and that the clerk failed to record and publish it as required by section 4-5-12 (Ill. Rev. St., 1979, ch. 24, para. 4-5-12). These requirements however, are deemed directly only. (5McQuillin, Municipal Corporations, section 16.71 (3rd ed. 1969)). These requirements are merely administrative procedures which if strictly enforced, would be a delegation of authority in approving or disapproving ordinances to the administrative officers. (Whalin v. City of Macomb, (1875), 76 Ill. 49; cf. Moss-American, Inc. v. Fair Employment Practice Commission (1974), 22 Ill. App.3d 248, 317 N.E.2d 343)...Accordingly, because the city council voted to vacate Western Avenue, the ordinance was passed and effectively vacated Western Avenue despite the failure of the mayor to sign it and the clerk to record and publish it. The legislative requirements were substantially complied with. Rogers v. Mendota (1916), 200 Ill. App. 254. [At 250]

But as I indicated above, other cases have held signature requirements mandatory. Unfortunately, in spite of the distinction between statutory and charter provisions that relate to attestation and that relate to approval. Chapter 2, ' 3, and Chapter 3, ' 7, in the Municipal Code may be mandatory. The reason is that Chapter 2, ' 3, expressly says that, “all ordinances, *before becoming effective*, shall be.signed by the Mayor and the Secretary of the Board of Aldermen.” The “before becoming effective” language may put the signature in the mandatory column.

For that reason, it may be wise for the city to make an alternative argument that the mayor and the secretary of the board of aldermen have a ministerial duty, enforceable by mandamus, to sign ordinances. That conclusion appears to be supported by State ex. rel Ragsdale v. Sandefur, 398 S.W.2d 266 (1965). In that case, the Metropolitan Government charter of the City of Nashville-Davidson County, established an employee benefits board, and gave it the power to fix pension benefits. The charter also provided that pension payments be made “only on order of the board by a warrant to be signed by person designated by the Board and to be countersigned by the Metropolitan Treasurer.” Sandefur was the board’s secretary.

He refused to sign the warrant, and the Metro. treasurer refused to countersign it. Their position was that the Metro. charter also limited pension benefits, and that the pension board had made a pension award in excess of the Metro Charter to the plaintiff, Ragsdale.

The Tennessee Supreme Court held that Sandefur has no discretion as to signing the warrant, and that the Metro. treasurer had no discretion as to countersigning the warrant, that the charter vested the discretion over the award of pensions in the pension board, and that the duty of the secretary of the pension board and of the Metro. treasurer to sign, and countersign, respectively, the warrant, was a ministerial duty. It did not matter that the secretary of the board and the Metro. treasurer believed that the pension award was improper under the Metro. charter.

The Court first stated the general rule that:

> The writ of mandamus will not lie to control official judgment or discretion, *but it is the proper remedy where the proven facts show a clear and specific legal right to be enforced, or a duty that ought to and can be performed, and relator has no other specific or adequate remedy*. [Citations omitted.] [At 269] [Emphasis is mine]

The refusal of the secretary of the board of aldermen to sign the budget ordinance (which contains the city's tax rate) appears to fit those facts. In virtually all municipalities taxes for the current year are due beginning October 1, and are based on the city budget and tax rate. A city that has not adopted a budget by the beginning of the fiscal year has the authority under Tennessee Code Annotated, ' 6-56-210, to operate under its last year's budget. But Tennessee Code Annotated, ' 6-56-207, provides that:

> Except in cases of emergency as set out in ' 6-56-205, no levy of property taxes shall be made by any municipality unless and until a budget ordinance has been adopted and no appropriations of moneys or revenues shall be made for any purpose contrary to the estimates in the budget ordinance.

An emergency as defined in Tennessee Code Annotated, ' 6-56-205, "an actual emergency threatening the health, property or lives of the inhabitants of the municipality and declared by a two-thirds (2/3) vote of all members of the governing body present, when there is a quorum."

The city could shortly be in considerable budget turmoil if it does not have a valid budget ordinance and tax rate. The standard for an emergency is difficult to meet, and tax bills should shortly go out.

The claim of Sandefur and the Metro. treasurer that the pension awarded exceeded the pension board's authority did not vest either with discretion because:

> We think the board has the jurisdiction to construe the provisions

> of the charter relative to retirement benefits of metropolitan employees and fix or find the amount an employee is entitled where, as here, a controversy as to the amount exists. This being true, the finding of the Board cannot be said to be void. It is at best erroneous and voidable. [At 270]

The way the Court handled the Metro. treasurer's allegation that he could refuse to countersign warrants issued by the pension board is also instructive:

> Countersign means to sign in addition to another's signature, *to attest* the authenticity of that signature. Webster's New Collegiate Dictionary; Webster's New International Dictionary, Second Edition. Webster's New World Dictionary, College Edition defines the word to mean: "A signature added to a previously signed piece of writing in order to authenticate or confirm it." Therefor, Section 13.11 does not vest in the Treasurer the discretion of determining the validity of an employee's retirement benefit or grant to the Treasurer the authority to review the action of the Board in granting the benefit. The Treasurer's duty to countersign the warrants is a ministerial act. [At 270]

It appears to me that the Board of Mayor and Aldermen stands in a position analogous to the pension board, and that the secretary of the board of aldermen stands in a position analogous to the secretary of that board, in Sandefur. In fact, the secretary of the board of aldermen actually stands in a worst position than did the secretary of the pension board with respect to his refusal to sign an ordinance. Nothing in the Metro. Charter expressly required the secretary of the pension board to sign pension awards. But the City Charter, Chapter 2, ' 3, and Chapter 3, ' 7, both expressly and positively require the secretary to sign ordinances:

- Chapter 2, ' 3: "...all ordinances, before becoming effective, *shall* be entered on the ordinance book of said city and *signed by the Mayor and Secretary of the Board of Aldermen*..."

- Chapter 3, ' 7: The Mayor's secretary has the duty to enter all ordinances and resolutions in ordinance and resolution books, and "Once entered, *the Mayor and Secretary of the Board shall sign and attest to them*."

In both cases there is no room for discretion on the part of the mayor and of the secretary of the board of aldermen, except perhaps to insure that the ordinances are genuine. If they even have that discretion, once having exercised it, any discretion those officers may have, ends. Under Chapter 2, ' 3, and Chapter 3, ' 6, the legislative powers of the city to pass ordinances resides in the board of mayor and aldermen, by a majority vote of those voting. Under Chapter 3, ' 7, the secretary of the board of aldermen is a member of that board, and has the power to cast a vote the same as any other alderman, and no more. Under Chapter 3, ' 6, the mayor cannot even vote except in cases of a tie. To argue that either the mayor or the secretary of the board of aldermen can hold ordinances hostage by refusing to sign them is to

accord them a veto power that they do not have under the charter. In fact, it can be argued that the function of both the mayor and the secretary of the board of aldermen under Chapter 2, ' 3, and Chapter 3, ' 7, differs none from the function of the Metro. treasurer, which, as the Sandefur Court pointed out was to countersign the warrant, which meant "to sign in addition to another signature, to *attest* the authenticity of that signature..."

Incidentally, unless a statute or charter provides otherwise, the power to appoint an officer includes the power to remove the officer. Under Chapter 3, ' 7, of the City Charter, the secretary to the board is appointed by the board. He has no term under the charter, and for that reason he could be removed at the will of the board, and another appointed in his place. [Gamblin v. Town of Bruceton, 803 S.W.2d 690 (Tenn. App. 1990); Gillespie v. Rhea County, 325 S.W.2d 314 (1950); Brock v. Foree, 778 S.W.3d 314 (1934).]

Sincerely,

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