August 27, 2002

Dear Council Member:

You have three questions based on what I understand to be the following facts:

- The mayor submitted his annual proposed budget ordinance to the city council which included a line item appropriation of $1,920,000 for the purchase of 80 police cars.

- The budget ordinance passed on first reading.

- On the second reading of the budget ordinance, the city council amended the budget "to keep 20 'replacement' police cars and remove 60 'take home' police cars from the Capital Budget." At some point unknown to me, but apparently after second reading of the budget, an additional line item for an appropriation of $480,000 for the purchase of 20 police cars was inserted into the budget.

- The city council passed the budget and sent it to the mayor.

- The mayor approved the budget ordinance, but sent two separate veto messages (several days apart) to the city council, which collectively vetoed two line items in the budget, one of which was "1. Deletion of 60 new police cars from the capital budget."

- The city council in a vote taken for that purpose failed to override the mayor's veto.

- The mayor withdrew his veto.

Let me say here that I think the controversy over the result of the mayor's veto appears to be confusion on the part of both the mayor and of the city council of exactly what the mayor vetoed. The reasons are not difficult to understand. The mayor's line item veto power contained in ' 15 of the City Charter is slightly confusing, and the case law governing a chief executive's line item veto power is surprisingly difficult. Moreover, while the Governor of Tennessee has line item veto power under Article III, ' 18, of the Tennessee Constitution, as far as I can determine there has never been a Tennessee case specifically involving the limit or extent of that power. Finally, it does not appear to me that the line item budget adoption process with respect to the police cars was an ideal model. In spite of that, the minutes of the July 2 meeting of the city council reflect a clear intent of the city council to reduce the mayor's request for an appropriation for 80 police cars/$1,920,000 to an appropriation for 20 police cars/$480,000. But it seems to me that exemplifying the height of the confusion over the veto process, at least on the part of the city council after the mayor's veto, is the fact that the city council even attempted to

override the veto.

Questions and Answers

1. What was the effect of the mayor's veto? Specifically, did the veto have the effect of restoring the line item of $1,920,000 for 80 police cars?

Based on the pages in the FY 03 budget relating to the police cars, the minutes of the July 2, 2002 city council meeting at which the budget passed on second reading, and the mayor's two veto messages, the city council intended at the July 2, 2002, city council meeting to reduce the mayor's request for 80 police cars to 20 police cars. On the FY 03 budget pages pertaining to the police cars, there appear two line items for police cars, one for 80 cars carrying an appropriation for $1,920,000, and one for 20 cars, carrying an appropriation for $480,000. I do not know when the line item for 20 police cars/$480,000 actually appeared on the above FY 03 budget pages, but it probably was inserted after the July 2 city council meeting, to reflect the fact that the city council's amended the line item for 80 cars/$1,920,000 by reducing the number of cars and the appropriation to 20/$480,000. But even if that is not true, the July 2 city council meeting minutes still indicate that intention on the part of the city council. The result is that when the budget was adopted, there was no real line item for 80 police cars/$1,920,000 for the mayor's veto to restore. ***For that reason when the mayor vetoed the line item that reduced by 60 the number of police cars, he vetoed the only real line item that existed at the time: the line item for 20 police cars/$480,000, the outcome of which was that the city's budget contained 0 police cars/$0.***

Even if it could be successfully argued that the mayor's line item veto actually vetoed only the *reduction* by the city council of 60 police cars, his veto would be what is known as a "partial veto." The rule regarding the veto power is that it is "always negative and destructive, never creative." When a chief executive officer attempts to partially veto a line item, it violates that rule, the partial veto is invalid, and the appropriation made by the legislative body is restored. The only exceptions to that rule involve constitutional or statutory provisions governing the line item veto that give the chief executive officer the express power to adjust "items" and "parts," or to veto "items" and "parts." No such power is found in ' 15 of the City Charter. The mayor's veto being invalid, the city council's appropriation for 20 police cars/$480,000 would stand.

I emphasize that I do not believe a good argument can be made that the mayor's veto was a partial veto, although that may be what he intended. I spend considerable time on that subject below, but only because that under the facts of the veto controversy, the 80 police car argument must be based on a partial veto, (although it would be an unusual partial veto in that every case dealing with such vetoes involve attempts to decrease appropriations), and would be an invalid veto.

2. What is the effect of the mayor's withdrawal of his veto after the city council's veto override attempt failed?

The answer is that when the city council's vote on the override of the mayor's veto failed, the legislative action on the veto was complete, and the mayor's withdrawal of his veto was null and void. The obvious irony is that had the city council's veto override succeeded, it would have restored the line item for police cars as it existed at the time the budget was passed, which was for 20 police cars/$480,000. As it stands now, the line item in the city budget for police cars is 0/$0.

3. Under Tennessee Code Annotated, ' 6-56-201, does last year's budget line item for police cars apply to this fiscal year?

The answer is that under Tennessee Code Annotated, ' 6-56-201, last year's budget line item for 20 police cars does *not* apply to this fiscal year.

Charter Provision and Documents Bearing on Questions

Charter provision

Section 15 of the City Charter gives the mayor a line item veto power in the following language:

> Each council member shall have one (1) vote on any matter before the council with a simple majority needed for passage. The mayor is empowered to approve ordinances by subscribing to them or to disapprove ordinances, *including the power to approve or disapprove line items in the budget* submitted, within ten (10) business days of receipt from the council. If approval is not acted upon within ten (10) business days, an ordinance shall become effective according to its terms. If disapproved by a veto, an ordinance shall be *accompanied by written message indicating the reasons for disapproval*. An ordinance vetoed shall become effective only after readapted by roll call vote of a two-thirds (2/3) majority of the council membership, not a two-third (2/3) majority of the council present and voting.

Documents

I have the following documents pertinent to the veto:

- The minutes of the July 2, 2002, city council meeting.

- Two pages from the city's FY 03 Capital Outlay Budget:

The first page contains these two line items:

- "549 Police Vehicles (80)" for $1, 920,000.

-"551 Police Vehicles (20)" for $480,000.

The second page contains a line item as follows: "321 Additional Money for Amphitheater and Centennial Park," for $415,000. Because there appears to be no major dispute over this line item I am not going to spend any time on it, except insofar as it helps resolve the questions surrounding the veto pertinent to the police cars.

The fourth document is an undated memorandum from the Mayor to the city council, entitled "Re: Budget Ordinance." It declares that "Please be advised that, pursuant to Section 16 of the City Charter, I shall veto the *budget ordinance*, for the following reasons...."

1. " Deletion of 60 new police cars from the capital budget."

2. "The agreement reached between the five Council members with purports to borrow money for Centennial Park in anticipation of reimbursement from grants."

The fifth document is a memorandum from the Mayor to the City Council dated July 11, 2002, entitled "Line Item Veto." The first sentence of the memorandum says, "I am hereby officially vetoing two line items in the budget approved by the council on July 2nd, for the reasons outlined to you in my memo of that date." I assume the "memo of that date" has reference back to the first memorandum, which was sent to the city council on July 2, 2002.

Preliminary Matters and Questions

The mayor's veto power

In ' 15 of the City Charter, the Mayor is "empowered to approve ordinances by subscribing to them or to disapprove ordinances, including the power to approve or disapprove line items in the budget submitted, within ten (10) business days of the receipt of the council." At first glance, an argument can be made that the mayor's line item veto power applies to line items in the budget even before the budget ordinance is passed. But that is not a logical reading of that provision. The entire subject of ' 15 past the first sentence is the mayor's approval and disapproval of ordinances, and the process by which the city council can override of the mayor's disapproval. For that reason, the language "including the power to approve or disapprove of line *items in the budget submitted*" means the *budget ordinance submitted*.

The mayor's two veto messages

The July 2, 2002 minutes of the city council indicate that on that date the FY 03 city budget passed on second and final reading. For that reason, I am not sure why the Mayor sent two veto messages to the city council, one on July 2; the other on July 11. The answer may be

that his memorandum of July 2, was not an actual veto message, but a warning or promise of a future veto of the budget ordinance, hoping to obtain a reconsideration from the city council. ("Please be advised that....I *shall* veto the budget ordinance....") If that is so, there was certainly nothing wrong with his action. The mayor is entitled to "fire a warning shot across the bow" of the city council to achieve the legislative product he desires. But if the mayor's intention was that this July 2 memorandum be an actual veto, he vetoed the entire budget.

Whatever the case there, the Mayor's memorandum of July 11, appears clearly to be a veto message pertaining to *two line items*. The fourth paragraph of the mayor's July 11 memorandum says, "....I am attaching hereto a copy of the Capital budget noting the *line items* which I have vetoed." The fifth paragraph says, "To reiterate the reasons for the veto, I am attaching hereto a copy of my first notification to you." Finally, the last paragraph says, "The budget which you approved on July 2 is the budget under which the City is being operated, except for the items vetoed."

The mayor was also entitled to retrieve his veto of the entire budget, and to change his veto to two line items in his July 11 memorandum, if that was the purpose of that veto message. Under ' 15 of the City Charter; he had 10 business days to exercise his line item veto, and he still retained control of the budget document. In Cammack v. Harris, 29 S.W.2d 567 (1930), the Governor of our sister state of Kentucky sent a veto message that bore the date of March 20, but the bill to which the veto pertained was not delivered to the secretary of state until March 21. The date of the governor's disapproval of the bill was immaterial, said the Court:

> The document was under his control until midnight of the 21st, or until it was officially returned either to the House before final adjournment or delivered to the secretary of state after adjournment. He might have erased the entire statement and written another one on the 21st had he chosen. Thus it is said in Cooley's Constitutional Limitations, p. 323: AThe Governor's approval is not complete until the bill has passed beyond his control by the constitutional and customary mode of legislation; *and at any time prior to that he may reconsider and retract any approval previously made*. [At 570]

The veto override attempt

In August, after the mayor's approval of the budget and his veto with respect to the police cars and the Amphitheater and Centennial Park, an attempt by the city council to override the mayor's veto failed. As I have pointed out above ad nauseam, it appears to me, based on the city council's action on second reading of the budget ordinance reducing the mayor's request for 80

police cars/$1,920,000 to 20 police cars/$480,000, that the latter is the appropriation that existed at the time the budget passed, and the mayor approved the budget, except for the two line items indicated in his veto message of July 11. That being the case, if the veto override had succeeded, the city council would have restored the line item for 20 police cars/$480,000!

Analysis of Question 1

The intent of the city council prevails

The mayor's July 11 veto message says, "I am hereby vetoing two line items..." without mentioning which line items. The same veto message refers the reader back to his veto message of July 2 for the reasons for his veto. His July 2 veto message advises that "I shall veto the budget ordinance passed this morning for the following reasons":

1. "Deletion of 60 new police cars from the capital budget."

2. "The agreement reached [pertaining to the Amphitheater and Centennial Park]....."

I am not sure how the budgetary process works in the City, but ideally, when a governing body of a government at any level determines to change a line item appropriation in a budget submitted by the chief executive, it actually lines through or otherwise marks the numbers in the line item it wishes to change, and replaces those numbers--higher or lower--with those that reflect the changes. (The same is true of any language that might accompany or affect the numbers, but such language is not an issue in the case of the mayor's veto). The changed numbers (or language) become an amendment to the budget. A new line item reflecting the change made in the line item by the governing body is not usually created. Ideally, in the case of

the police cars at issue, the City Council would have changed "Line Item 459 Police Vehicles (80)/$1,920,000" to "Line Item 459 Police Vehicles (20)/$480,000." Instead, at some point a *new line item 451* Police Vehicles (20)/$480,000 was added. Whether it was added before or after the second reading of the budget ordinance, the minutes of the July 2 city council meeting indicate that the intention of the city council was to *amend* Line Item "459 Police Vehicles (80)/$1,920,000" so that it read Line Item "459 Police Vehicles (20)/$480,000."

On its face, the FY 03 budget ordinance is ambiguous ambiguity with respect to how many police cars are contained in the budget upon its passage. Two line items for police cars remain, one for 80 police cars, one for 20 police cars. Ambiguities in ordinances can be cleared up by resort to the rules of statutory construction. The cardinal rule of statutory construction is the intent of the legislature. The easiest way for a court to reach the intent of a city council body when an ordinance is ambiguous as to any amendments is through the city council's minutes.

The July 2, 2002, City Council minutes reflect that on the second reading of the budget ordinance:

> One council member made a motion to amend the budget to keep 20 "replacement" police cars and remove 60 "take home" police cars from the Capital Budget. The motion was seconded by a second Council member and passed 5-4.

The same minutes indicate that "the Budget Ordinance as amended, was approved, 8-1...."

The mayor requested 80 police cars in the FY 03 capital budget. Newspaper articles and other persons with whom I talked about the City veto controversy indicate that the reason the mayor wanted an appropriation for 80 police cars was so that the city could institute a police car "take home program." The city council was obviously aware of that when it voted to "amend the budget to keep 20 'replacement 'police cars and to remove 60 'take home' police cars from the Capital Budget." The inescapable conclusion to which the city council minutes of July 2 lead is that the city council intended to reduce Line Item 549 from 80 to 20 cars/$1,920,000 to $480,000. Whether or not there was a separate Line Item 551 for 20 police cars at that point or after, does not impact that conclusion; it does not independently exist. The mayor's two veto messages collectively support that conclusion. In his July 11 memorandum he vetoed "two line items in the budget approved by the Council on July 2nd, for the reasons outlined to you in my memo of that date." His memorandum of July 2 says that "I shall veto the budget ordinance passed this morning for the following reasons":

1."Deletion of 60 new police cars from the capital budget."

On July 2 when the FY 03 budget ordinance passed the mayor knew what the city council had done-kept 20 replacement cars in the budget, and removed 60 take home cars from the budget. *However, by vetoing line item," Deletion of 60 new police cars from the capital budget," it may be that the mayor intended to partially veto a line item: the reduction by 60 of the number of police cars appropriated by the city council, in effect the amendment in the appropriation for police cars the city council made in the July 2 city council meeting.*

Ideally, the city council would have accomplished its intent by amending the figures for the number of cars and appropriations in Line Item 549, but its failure to do so is not fatal to its action. It is said in State v. Bush, 626 S.W.2d 470, (Tenn. Cr. App. 1981), that:

> We must also observe that actions of quarterly County Courts and other bodies that are administered by men unlearned in the technical requirements of the law should not be strictly construed. The minutes of such bodies will be looked on with indulgence, and though unskillfully drawn, will be legally sufficient if their meaning can be ascertained by a fair and reasonable interpretation....The premier and dominant rule in construing these entries is to ascertain and give effect to the intent of the Quarterly County Court. [Citation omitted.] *The intent of the County Court will prevail over the literal meaning of the words or terms found in*

> *the minute entry*. [Citation omitted.] When the court can gather paramount intent of legislative action, such intention will be given effect, although there exist some obstacles. [Citations omitted.] [At 474]

The partial veto argument

Let us assume for the purpose of analyzing the argument that the mayor actually vetoed only a *decrease in 60 police cars (in effect the amendment adopted by the city council on the second reading of the budget ordinance to "keep 20 'replacement' police cars and remove 60 'take home' police cars from the Capital Budget,"* and that the veto had the effect of restoring the appropriation to 80 police cars. That result would give the mayor the power to achieve by a partial veto what the city council would not give him. Could the Mayor of the City have used his veto power to achieve such a result? Most of the cases on that question deal with instances where the chief executive officer has *reduced* appropriations through the exercise of his line item veto. However, those cases are even more compelling where the chief executive through the exercise of his line item veto seeks to *increase* appropriations.

The limits on the creative use of the veto are outlined in State v. Blankenship, 214 S.E.2d 467 (1974) (which clarifies Browning v. Blankenship, 175 S.E.2d 172 (1970), and State ex rel. Brotherton v. Blankenship, 207 S.E.2d 421 (1973)). The facts and arguments in that case are strikingly similar to the facts and arguments that pertain to the 80 police car argument. There the Governor of West Virginia derived his budgetary veto powers from a comprehensive provision in the West Virginia Constitution that prescribed in detail the budgetary process in that state, and under which the Governor had the exclusive authority to propose a budget. Under that provision, "The Governor may veto the bill, or he may disapprove or reduce the times or parts of items contained therein." The Governor proposed a budget of $194,000,000 in Account 295 for school purposes, and the Legislature increased that appropriation to $198,000,000. The Governor vetoed the entire appropriation of $198,000,000 in Account 295, and in his veto message inserted in Account 295 line items similar to those in his original Account 295, and totaling $193,000,000.

In holding that action illegal, the Court reasoned that while the Governor's veto power was extremely broad both before and after the passage of the budget, he could not use the veto to legislate an amount the Legislature had not approved. Looking at what the Governor had done, the Court declared that:

> ...we are confronted with a novel approach in the exercise of the veto power. As was indicated in the early case of State v. Mounts, 36 W. Va. 179, 14 S.E. 407 (1892), the executive's power to veto laws passed by the Legislature is generally thought to be negative in nature rather than affirmative. While that principle has been somewhat abrogated by the broad grant of powers given the Governor in relation to appropriation measures and specifically to

> the Office of Governor in Article VI, the Legislative Article of the West Virginia Constitution [The Modern Budget Amendment], the principle of State v. Mounts, supra, retains some life. The Governor has not been given the power to affirmatively legislate in the Modern Budget Amendment As the Legislature is limited in its ability to amend the budget Bill submitted to it by the Governor in Section 5(B) of the Modern Budget Amendment, the Governor is likewise limited in his ability to amend the Budget Bill after its introduction for consideration by the legislative bodies....Consistent with the general law of State v. Mounts, supra, the Governor was not given authority by the Modern Budget Amendment to legislate on a subject or amount not previously made law by approval of both houses of the Legislature. If such power had been intended, it would have been granted by the people to the Governor explicitly. Such power was not extended to the Governor by the people. [At 490-91]

The Governor had the power in the Modern Budget Amendment, concluded the Court, to

> ....reinsert amounts up to and equal to sums appropriated by the Legislature in the Budget Bill and contemplates, as well, the reinsertion of language or parts thereof provided for in the Budget Bill as submitted. The "reinsertion" principle, however, does not contemplate or permit of the Governor, affirmative language amendment to the Budget Bill after its submission without prior approval by the Legislature, nor does it contemplate "appropriation," by the Governor through veto exercise in monetary amounts in excess of that previously approved by the Legislature in the enactment of the Budget Bill. [At 490-91]

Under ' 15 of the City Charter the mayor does not have the power of a line item veto of *amendments or parts of amendments* to the budget ordinance. But even if he did, Blankenship stands squarely for the proposition that the mayor could not use that power to resurrect a line item for 80 police cars, because the city council did not intend to give him 80 police cars.

An old, but still legally solid annotation on cases involving line item appropriation adjustments appears in 35 ALR 592. The cases therein, particularly those referred to in ' VI, point to the law on this question up to 1924, including what even today appears to be the lead case, Mills v. Porter, 222 P.428 (1924) ("The Veto Case"). In that case, the Montana Constitution provided that:

> The Governor shall have the power to approve of any item or items of any bill making appropriations of money, embracing distinct

> items, and the part or parts approved shall become a law, and the items or items disapproved shall be void [unless the governor's veto is overridden].

The governor of Montana reduced by percentages line item appropriations for salaries and expenses of certain state officers. In holding that the governor's reduction of the line items was illegal under the Montana Constitution, the Court declared that:

> The veto is distinctly a negative, not a creative power. *The general rule is that the Governor may not exercise any creative legislative power whatsoever;* and it is so in Montana.... 'The executive in every republican form of government has only a qualified and destructive legislative function and never creative legislative power. [Citations omitted.] [430]

The Court concluded that was the rule in every state, except one, that had line item veto provisions similar to the one in the Montana Constitution, and that had passed on the same question. The exception, said the Court, was Commonwealth v. Barnett, 48 A. 976 (1901), and that case "has not been followed by any court." [At 432]

The Court appears to have been correct up to the point of The Veto Case. [See Fergus v. Russel, 110 N.E. 130 (1915) (Illinois); Lukens v. Nye, 105 P. 593 (1909) (California); Fairfield v. Foster, 214 P. 319 (1923) (Arizona); Nowell v. Harrington, 89 A., 1098 (1914) (Maryland); Fulmore v. Lane, 140 S.W. 405, (1911) (Texas); State v. Holder, 23 So.643 (1898) (Miss.); Pickle v. McCall, 24 S.W. 265 (1898) (Texas); Strong v. People, 220 P. 999 (1923) (Colo.) Peebly v. Childers, 217 P. 1049 (1923) (Oklahoma); State ex rel. Jamison v. Forsyth, 133 P. 521 (1913) (Arizona); Callahan v. Boyce, 153 P. 773 (1915) (Arizona).]

In the exception, Commonwealth v. Barnett, the Pennsylvania Constriction provided that:

> The governor shall have power to disapprove of any *item* or *items* of any bill making appropriations of money embracing distinct items, and the *part* or *parts* of the bill approved shall be the law and the *item or items* of appropriations disapproved shall be void, unless re-passed according to the rules and limitations prescribed for the passage of other bills over the executive veto. [At 977]

The governor approved a general appropriation bill, one section of which provided an $11,000,000 appropriation for schools, required that the City of Philadelphia receive its proper portion of that appropriation, and required that of the city's proper portion, the city spend, respectively, $3,000, $3,000, and $10,000, on three certain school-related entities within the city. The governor's veto read as follows:

> I approve of so much of this item which appropriates five million

> dollars annually, making ten million dollars for the two years beginning June 1, 1899, and withhold my approval from five hundred thousand dollars for the two school years beginning the 1st day of June, 1899.

The Court upheld his veto It reasoned that the $11,000,000 appropriation consisted of four separate line items (the $11,000,000 itself, and the three sums of money that the City of Philadelphia was required to spend from its portion of the $11,000,000), and the terms "item and items" and "part and parts" in the Pennsylvania Constitution were interchangeable.

As far as I can determine, Barnett was not followed by any courts up to the time of The Veto Case in 1926, and a number of cases expressly rejected or distinguished it. In Fergus v.Russel, cited above, the governor of Illinois attempted to scale several line items under a constitutional provision providing that with respect to appropriations bills:

> ...if the governor shall not approve any one or more of the items or sections contained in any bill, but shall approve of the residue thereof, it shall become a law as to the residue in like manner as if he had signed it. The Governor shall then return the bill with his objections to the items or sections of the sections of the same not approved by him.... [At 147]

Holding the governor's attempt to scale the line items illegal, the Illinois Supreme Court reasoned that:

> The Legislative branch of the government is vested with the discretion to determine the amount which should be appropriated for any particular object. The Governor, as the chief executive officer of the state, is given the right to approve or disapprove of the action of the Legislature in making such an appropriation. He may disapprove of it for the reason that in his judgment no appropriation shall be made for such a purpose, or for the reason that the amount appropriated is too large, or for any other reason satisfactory to him, but he has not the right to disapprove of a certain portion of an item appropriated and approve of the remainder, and thus perform a function which belongs exclusively to the legislative branchBthat of using the discretion necessary to determine the amount which should be appropriated for any particular object.' [At 431]

Commonwealth v. Barnett, did not apply because:

> .... the holding is based upon a provision of the Constitution of

> Pennsylvania which is construed to use the words "item" and "part" interchangeably and in the same sense....[O]ur constitution permits of no such construction, as the words "item" and "sections" alone are used as signifying the portions of an appropriation bill which may be approved or disapproved. [At 148]

The Supreme Court of Colorado in Strong v. People, 220 P. 999 (1923) conceded that the line item veto provision in the Colorado Constitution was almost identical to the same provision in the Pennsylvania Constitution, but also refused to follow Commonwealth v. Barnett. In Strong, the Governor of Colorado reduced the appropriation for a line item for the salary of a certain official in a state agency, which line item was part of a section in a general appropriation bill. The Court reasoned that while it agreed with the reasoning of Commonwealth v. Barnett that an ominous appropriation for a department or purpose was a line item subject to the governor's line item veto, "he [the Governor of Colorado] has no power to veto a portion of a separate, distinct, and individual item such as the one here under consideration." [At 1003] The Oklahoma Supreme Court in Peebly v. Childers, 217 P. 1049 (1923) reached a similar result. On the same grounds.

Most of the cases decided after The Veto Case to the present day have also found illegal the partial veto of line items. The exceptions are few, and will be considered later. But the line item veto language found in ' 15 of the City Charter is narrower than that found in either the state constitutions at issue in those cases.

In Wheeler v. Gallett, 249 P. 1067 (1926), the Governor of Idaho sought to scale down a certain appropriation from $101, 250 to $80,700. The line item veto provision of the Idaho Supreme Court, read:

> "The governor shall have no power to disapprove of any item or items of any bill making appropriations of money embracing distinct items, and the part or parts approved shall become a law and the items or items disapproved shall be void unless enacted in the manner following...."

Pointing out that the provision was similar to the one in the Montana Constitution, and citing Mills v. Porter, and other cases, the Idaho Supreme Court rejected the governors attempt to reduce a certain line item appropriation from $101,250 to $80,700.

The Idaho Supreme Court spoke at greater length on a similar question under the same constitutional provision, in Cenarrusa v. Andrus, 582 P.2d 182 (1974). There the Governor of Idaho sought to veto parts of line items that specified how money was to be spent. That was not within the power of the Governor, concluded the Court, reasoning that:

> The power of a partial veto is the power to disapprove. This is a

> negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions. Bengazon v. Secretary of Justice, 299 U.S. 410, 57 S. Ct. 252, 81 L.Ed. 312 (1937); Fitzsimmons v. Leon, 141 F.2d 886b (1st Cir. 1944); State v. Holder, 76 Miss. 158, 23 So.7643 (1898); state ex rel. Cason v. Bond, [495 S.W.2d Mo. 1973] supra; Veto Case, 69 Mont. 325, 222 P.2d 428 (1924); Fulmore v. Lane, supra [104 Tex. 499, 140 S.W. 405, 412 , 182 (1911).] Thus a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences. [At 1092]

The New Mexico Constitution provided the governor veto power over legislation generally, and the line item veto in the following language:

> "The governor may in like manner approve or disapprove any part or parts, line or items, of any bill appropriating money, and such parts or items approved shall become a law, and such as are disapproved shall be void unless passed over his veto, as herein provided."

In rejecting the governor's change in several line item appropriations, both as to amounts and conditions on the use of the appropriations, the New Mexico Supreme Court declared in State v. Kirkpatrick, 524 P.2d 975 (1974), that:

> The power of the partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions. [Citations omitted.] [At 981]

A few cases permit the chief executive officer to adjust the amount of appropriations in connection with the line item veto power. In reviewing the veto powers of the Governor of the United States Territory of Guam, the U.S. District Court of Guam in Thirteenth Guam Legislature v. Bordallo, 430 F.Supp. 405 (1987), the right of the Governor of Guam to reduce or "zero down" appropriations in some instances was upheld. But in that case, the line item provision in the Organic Act of Guam specifically authorized the governor to veto "one or more of such items, or any part or parts, portion or portions *thereof*." The Court reasoned that the "thereof" referred to the part, parts, portion or portions, of appropriations. That case cited Commonwealth v. Barrett for support, and the more recent case of Blanch v. Cordero, 180 F.2d 856 (1st Cir. 1950). In the latter case, the Court upheld the right of the Governor of Puerto Rico

to reduce certain salaries in the exercise of his line item veto powers, under a statute identical to the one in Guam.

Some state cases have gone the same way, most notably Commonwealth v. Barnett, discussed at some length above. State ex rel. Jamison v. Forsyth, 133 P. 521 (1913), appears to be another, although whether that is so is far from clear. There the Wyoming Constitution provided that:

> The Governor shall have power to disapprove of any item or items or part or parts of any bill making appropriations of money or property embracing distinct items, and the part or parts of the bill approved shall be law, and the item or items disapproved shall be void....

The Legislature in a salary bill that appropriated money for a number of state employees and officials appropriated $15,000 for the salary of a geologist. The Governor approved the bill, but with respect to the appropriation for state geologist, AI approve of so much of this item as appropriates $10,000 and withhold my approval from $5,000, leaving the appropriation $10,000". The case discussed at length Commonwealth v. Barnett, and concluded that, "It will observed that there is not a concurrence of judicial opinion respecting the power of the Governor to disapprove part of an item under a constitutional provision authorizing him to disapprove of an item, or items, or part or parts, of an act appropriating money," but conceded that the proposition that he has that authority is a "doubtful one." [At 528]. The Court then simply did an end run around answering the question by concluding that the Governor's scaling down of the salary was not his "disapproval," of the bill, that if the Governor's veto were illegal, the bill as written would be approved in whole. For that reason, the $10,000 appropriation would stand, and "Whether or not the entire amount as passed by the Legislature is appropriated, we find it unnecessary to decide, and theretofore refrain from doing so." [at 532]

But in Management Council of Legislature v. Geringer, 953 P.2d 839 (Wyo. 1989), a case considering the question of whether the line item veto prevision in the Wyoming Constitution permitted the Governor to veto substantive provisions in appropriations bills, the Supreme Court of Wyoming, appears to have made it clear that the prevision applied to both substantive and dollar provisions. It did so without mentioning State ex rel. Jamison, except almost in passing.

As pointed out above, all of the cases upholding adjustment in either the dollar or substantive provisions of as a part of the governor's line item veto power involve constitutional line item provisions much more loose than the one in ' 15 of the City Charter.

Many of the cases in which the use of the line item veto to adjust dollar figures, delete language, or otherwise change the condition of the expenditure of the dollar figures, have been held to be illegal, also resolve the question of the status of an illegal line item veto. They appear to be almost unanimous for the proposition that where the veto was illegal the bill in question is

restored to the dollar figures and language it reflected when it was sent to the chief executive officer.

State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (1974) (New Mexico) declares that, "An unconstitutional veto must be disregarded and the bill given the effect intended by the Legislature." [At 987] Similar language involving line item vetoes declare such illegal vetoes "nullities" and "void." It is said, for example, in Caldwell v. Meskill, 320 A.2d 788 (1973)(Connecticut), that, "Under the provisions of the Connecticut constitution *effective gubernatorial disapproval* is required if a legislative enactment is not to become a law. [Citations omitted.] It follows that the governor's action in purporting to veto portions of House Bill No. 8022 is void." Similar language is found in other cases: State ex rel. Turner v. Iowa State Highway Commission, 186 N.W.2d 141 (1971); Porter v. Hughes, 82 P. 165 (1893) (Arizona); Fergus v. Russel, 110 N.E.130 (1915) (Illinois); Fulmore v. Lane, 140 S.W. 405 (1911) (Texas);State v. Forsyth, 133 P. 531 (1913); State v. Bond, 495 S.W.2d 385 (1973)(Missouri); Cenarrusa v. Andrus, 582 P.2d 1082 (1978) (Idaho); State ex rel. Link v. Olson, 266 N.W.2d 262 (1979) (North Dakota).]

Mills v. Porter, 222 P. 428 (1926) ("The Veto Case"), takes the position that an illegal line item veto invalidates the entire appropriation bill in question. It distinguishes the earlier cases that hold otherwise by reasoning that each of them is based on a constitutional provision which permits a bill to become a law without the governor's approval. Regents of State University v. Trapp, 113 P. 910 (1911)(Oklahoma), reached a similar conclusion.

That exception would not apply to the City, because under ' 15 of its charter, an ordinance can become a "law" without the approval of the mayor; the mayor can simply hold the ordinance for 10 days. In State ex rel. Link v. Olson, immediately above, the North Dakota Supreme Court explained away those two cases by pointing to a similar provision in the North Dakota Constitution.

Analysis of Question 2

The mayor's executive powers do not include the withdrawal of a veto

The law in every jurisdiction, including Tennessee, is that the veto power is legislative rather than executive, notwithstanding the fact that it is exercised by the chief executive officer. It is said in Cooper v. Nolan, 195 S.W.2d 274 (Tenn. 1929), that, In granting his approval to a bill passed by the General Assembly, or in withholding it, the Governor acts as a 'component part of the Legislature,' and the power exercised is legislative rather than executive. [At 275.] Similarly in our sister state of Kentucky, Chemic v. Harris, 19S.W.2d 567 (1930), says:

> Under our scheme of government the executive is apportioned a very important part in the performance of the legislative function and the presentation of bills to him is a vital factor in their enactment. The veto power, though exercised by an officer whose

> functions are principally executive, is essentially legislative in its nature, though of a negative or destructive character. It is by all authorities declared that in performing that duty the Governor is considered to be a part of the lawmaking body.... Cooley's Constitutional Limitations, p. 321; 25 R.C.L. 888. [At 569]

In Missouri, the Supreme Court declared in State v. Bond, 495 S.W.2d 385 (1973), that, ".... [W]e take cognizance of the fact that when the Governor takes part in appropriating procedures, he is participating in the legislative process and the language conferring such authority is to be strictly construed." [At 392]

In Tennessee, a mayor is a part of the legislative or administrative bodies of the city only to the extent expressly provided in the charter or statute. [Weil v. Roth & Co. v. Town of Newbern, 148 S.W.2d 680 (1912); City of Nashville v. Fisher, 1 Tenn. Cas. 345 (1874); Boyer Fire Apparatus Co. v. Town of Bruceton, 66 S.W.2d 210, 214 (1932); Lionel Hudson, Mayor, Hollow Rock v. Town of Hollow Rock, 15 TAM 25-18.]

In regard to the legislative powers of the Mayor of the City, it has been held in Reeder v. Trotter, 142 Tenn. 37 (1919) and Sam Anderson, Mayor and Ray Tardy, Alderman of the Town of Gainesboro v. Town of Gainesboro, (unreported), Tenn. Ct. App., MS, Sept. 26, 1988, that a mayor in Tennessee is not a member of the legislative body of the city, except to the extent provided in the city charter or other statute. In Reeder, the Court, citing Dillard on Municipal Corporations, Vol. 2, section 513, said:

> The question of whether the mayor of a city shall be regarded as a member of the council is one of legislative intent. It is within the power of the legislature to confer upon him the functions of a member of the council in every respect, and if the legislation on that subject calls for that construction he will be so regarded. But in American Jurisprudence the mayor is not necessarily a constituent part of the legislative power of the municipality. His functions are intended to be, and usually are, of an executive or administrative character, and *whatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute*. [Emphasis is mine.] In this view, in the absence of a statute necessarily implying that he has the same standing in the council, as another other member, *and particularly when his powers are expressly stated to be to preside at meetings and to give a casting vote in case of a tie, he is only a member of the council sub moto, and to the extent of the powers specially committed to him*. [Emphasis is mine.] [At 42]

Citing a New Hampshire Supreme Court case that spoke of the role of the mayor as follows, the Court continued:

> The mayor of a city is not an alderman or councilman of the city in a general or proper sense of those terms...He is not a member of either branch [legislative or administrative] of the city council unless expressly made by such law;...and when this is the case, it is to the extent of such powers as are specially committed to him, and no further that he is a part of the city council. He is not one of its own members in the sense of which an alderman is; ...*nor has it been understood that he is to be counted in determining the presence of a quorum*... [Emphasis is mine.] Applying the principles of these authorities (and none have been found to the contrary) to the statutory provisions relating to the mayor and aldermen cited in behalf of the defendants, the result is indubitably to establish the proposition that while the mayor is a constituent

> part of the...board for some special purposes, he sits and acts in the board not in the capacity of an alderman, but in the capacity of an ex officio presiding officer, and exercises those powers only which have been specially committed to him as the chief executive officer of the city. [At 43]

Under the City's Charter, the mayor has extensive executive power, but his legislative power is limited. Under ' 10 he "....shall preside at all meetings of the council or of the council sitting as any other board; provided, however the mayor shall have no vote at such meetings," and under ' 15, the veto power. Section 15 contains both the extent and limit on that power. It is to *veto* legislation, including line items in the budget, within ten days. Nothing in that provision gives him the authority to withdraw a veto.

Statutes (and ordinances) become law when constitutional And statutory requirements are met

That conclusion also finds support in the Tennessee cases involving the Governor's general veto power under Article III, ' 18, of the Tennessee Constitution, and under the provisions for the passage of laws by the General Assembly under Article II, ' 18, of the Tennessee Constitution. Article III, ' 18, provides with respect to bills passed by the General Assembly, that:

> ....If he approve, he shall sign it, and the same shall become a law; but if he refuse to sign it, he shall return it with his objections thereto, in writing, but if it passes both houses by the appropriate majorities] it shall become a law...If the Governor shall fail to return any bill with his objections in writing within ten calendar days (Sundays excepted) after it shall have been presented to him, the same shall become law, unless disapproved by the Governor and filed by him with his objections in writing in the office of the Secretary of State within said ten-day period.

Several cases have held that a bill becomes a law when it has received all the constitutional sanctions required to give it effect. [Logan v. State, 50 Tenn. 442 (1871); Hill v. State, 73 Tenn. 725 (1879); Memphis v. United States, 97 U.S. 293 (1878); 591 S.W.2d 793 (Tenn. Crim. App. 1979). Also see Daugherty v. State, 573 S.W.2d 739 (1939); Forrester v. City of Memphis, 15 S.W.2d 739 (1929).] Specifically, it is said in Hill v. State, that under Article III, ' 18, of the Tennessee Constitution:

> These constitutional provisions establish as the present rule, that an act takes effect when the formalities of the enactment are actually complete under the Constitution, and not sooner, even where the Legislature says that it shall take effect from its passage. *It is passed when the constitutional formalities are complete*. [At 729]

The cases in other states reach the same result. [See Board of Education v. Morgan, 147

N.E. 34 (1934) (Illinois); Amos v. Gunn, 94 So. 615 (1922) (Florida); State ex rel. Schwartz v. Bledsoe, 31 So.2d 457 (1947) (Florida).]

The same rule undoubtedly applies with respect to municipal charter provisions governing the question of when ordinances become "laws," and when they take effect with further respect to a mayor's right to veto ordinances. [See State ex rel. Lewis v. Bowman, 814 S.W.2d 369 (Tenn.Ct.App. 1991); East Tennessee University v. Mayor of Knoxville, 65 Tenn. 166 (1873); Sweetwater Valley Memorial Park, Inc. v. Sweetwater, 372 S.W.2d 168 (1963); Bradford v. Jellico, 1 Tenn. Ch. App. 700 (1901); Rutherford v. Nashville, 79 S.W.2d 581 (1935); Wilgus v. City of Murfreesboro, 532 S.W.2d 50 (Tenn. Ct. App. 1975)].

That conclusion is also supported by City of Atlanta v. East Point Amusement Company, 152 S.W.2d 374 (1966). There East Point Amusement Company applied for a change in the zoning of certain property. The zoning change was passed by the board of mayor and aldermen, and approved by the mayor, who then forwarded the ordinance to the clerk of the board of mayor and aldermen for recording in the city's ordinance book. The day after he approved and forwarded the ordinance, the mayor, upon the request of East Point Amusement Company, had the clerk return the ordinance to him, and on the same day he vetoed it. The question was whether the mayor's veto was valid. No, held the Supreme Court of Georgia, declaring that:

> Respecting the approval of state statutes, it is stated in 50 Am.Jur. 108, ' 108: "After an act has passed both houses, and has been properly signed by the proper officers, has been regularly presented to the governor for his approval, and he has approved and signed the same without mistake, inadvertence, or fraud, and thereafter has voluntarily deposited it with the secretary of state as a law of the state, it has passed beyond his control and he has no power thereafter to withdraw his approval." In 82 C.J.S. Statutes ' 51b, p. 84, it is said: "The governor's approval of a bill is not complete until it has left his possession, and prior thereto he may reconsider any action previously taken....However, after a bill has been signed by the governor and passed beyond his control, by placing it with the proper depository of state laws, it status has become fixed and unalterable, as far as he is concerned unless the bill was illegally passed and was wrongfully transmitted to him." And in Floyd County v. Salmon, 151 Ga. 313, 315, 106 S.E. 280, 281, this Court said: "The general rule is that, in the absence of constitutional or general statutory provision governing the matter, the statute becomes effective on the day of its passage; that is to say, on the day of its approval by the chief executive, or its passage over his veto." The defendants' answer affirmatively shows that Mayor

> Hartsfield's veto of the ordinance here involved occurred after the ordinance had been approved by him and filed for record with the proper depository for the city. *We think the rule governing the approval of state statutes is applicable and should be followed relative to the approval of city ordinances*. [At 376]

Section 15 of the City Charter gives the mayor 10 business days in which to approve ordinances, including the budget ordinance, and to veto line items in the budget. That section makes it clear what happens to such vetoed ordinances and line item provisions:

> If disapproved by a veto, an ordinance shall be returned before the next regular meeting of the council, to the council....An ordinancevetoed shall *become effective* only after readapted by roll call vote of a two-thirds (2/3) majority of the council membership, not a two-third (2/3) majority of the council present and voting.

If a law or ordinance becomes effective after it jumps all the constitutional or statutory hurtles, there is no conceivable way the chief executive officer could somehow invalidate or change that law or ordinance by withdrawing his veto.

The effect of the mayor's veto on the legal rights of members of the city council

A subsidiary question in connection with the city council's unsuccessful attempt to override the mayor's veto is whether that attempt would have foreclosed any action on the part of council members to have legally challenged the mayor's veto. The answer is apparently no. In State ex rel. Brotherhood v. Blankenship, 214 S.E.2d (1975), the Governor of West Virginia vetoed certain legislation and the West Virginia Legislature unsuccessfully attempted to override his veto. The West Virginia Supreme Court of Appeals held that the President of the Senate and the Speaker of the House had standing as citizens and taxpayers to maintain a suit to challenge the legality of the Governor's veto. In Lipscomb v. State Board of Higher Education, 753 P.2d 939 (Or. 1998), the Oregon Supreme Court rejected an argument that the Court need not decide whether a governor's veto was within his power because the Constitution committed the Legislative Assembly the power to override the veto, reasoning that:

> But legislators do not vote on overriding a veto purely on constitutional grounds. A vote to override a veto of a specific measure involves the legislator's view of its merits, not to mention partisan considerations; it is not a clean vote on the constitutional issue. Moreover, passage of a bill over a veto requires a two-third majority. Or. Const. Art. V, ' 15b. The legal effect of an arguably unconstitutional veto should not depend on whether a Governor can muster the support of one member more than one-third of those voting in one chamber to sustain the veto. [At 942]

On the other hand, in Clinton v. City of New York, 118 S.Ct. 2091 (1998), in which the

U.S. Supreme Court held that the line item veto power granted to the President of the United States by statute was unconstitutional, the Court pointed out that it had earlier in Raines v. Byrd, 521 U.S. 811, rejected a challenge to that statute by six congressmen who had voted against that statute, on the ground that they had not "alleged a sufficient injury." However, Raines v Byrd is clearly distinguishable because there the six congressmen had brought the suit the day after the effective date of the statute, and before the President had ever exercised his line item veto power.

The reasoning of Blankenship and Lipscomb appear no less sound with respect to a statute governing a chief executive's veto power, and the attempt of a legislative body to override the veto under the same statute. Under ' 15 of the City Charter, a veto override requires a 2/3 vote of the entire membership of the city council.

Analysis of Question 3

Tennessee Code Annotated, ' 6-54-201 is the Municipal Budget Law of 1982. It applies to all municipalities that do not have provisions in their charters that are at least as restrictive as to those in the Municipal Budget Law. Virtually all cities in Tennessee, including the City, fall into the Municipal Budget Law. A provision of the Municipal Budget Law, Tennessee Code Annotated, ' 6-56-208, provides that:

> If for any reason a budget ordinance is not adopted prior to the beginning of the next fiscal year, the appropriations for the last fiscal year shall become appropriations for the next fiscal year, until the adoption of the new budget ordinance.

A plain reading of that statute leads to the conclusion that it does not apply to line items. The phrase "budget ordinance" in both places it appears points to a whole budget ordinance rather than line items in the budget.

Surprisingly, a similar question arose under the statutes governing the United States Territory of Guam, in Thirteenth Guam Legislature v. Bordallo, 430 F. Supp.(1977). In the words of the U.S. District Court for the Territory of Guam, the statute governing the territory's budget provided that:

> ...if at the end of any fiscal year the legislature has "failed to pass" appropriation bills covering current expenses and legal obligations for the ensuing year, the sums appropriated "in the lastappropriation bills for the objects and purposes therein specified, as far as the same may be deemed reappropriated item by item." [At 410-11]

The Governor of Guam, Bordallo, argued that provision applied to line items he had vetoed to zero. The Court struck down that argument on two grounds. First, by its language, the provision applied only when a budget had not been passed. Second, "Were this interpretation correct, the Governor's line item veto power could afford him impermissibly creative powers." [at 411] What were such creative powers?

> Were the Governor able to reactivate the prior appropriations by vetoing a current year's measure, he could simply create a larger budget than the legislature intended. In the case at bar, if last year's fiscal appropriations are deemed to be reappropriated, government spending would be increased by $1,581,656.

The Court distinguished the earlier case of In Re Hawaiian Star Newspaper Association, 15 Hawaii 532 (1904), in which it was held that under a similar reappropriation statute, last year's appropriations were reappropriated. In that case, said the Court, the legislature had adjourned without submitting an appropriation bill to the governor.

As I understand the facts, in the City's budget for last year there was an appropriation for 20 police cars. If that is true, there was no danger that had the appropriations default provisions contained in Tennessee Code Annotated, 6-58-208 been triggered for the current fiscal year (whether for the entire budget or only for the line item for police cars) there would have been an appropriation for more police cars than the city council would have otherwise approved. But the policy reason cited in Bordallo against permitting an automatic appropriations default statue to applies to a line item veto, especially when the legislature is in session, is still *generally* sound, and falls upon benign as well as impermissibly "creative" line item vetoes. The City Council never "adjourns" in the sense that the U.S. Congress, and state and territorial legislatures adjourn.

Sincerely,

Sidney D. Hemsley
Senior Law Consultant

SDH/