MEMORANDUM

FROM: Sid Hemsley, Senior Law Consultant

DATE: January 4, 2001

RE: Constitutionality of Changes to a Home Rule City Charter

You have the following questions:

1. Are the changes to a City's home rule city charter, which are the product of a referendum by initiative of the voters under Tennessee Code Annotated, ' 6-53-105, legal? I understand that the city had the approval of the Tennessee State Election Commission to hold the referendum, but I cannot say that is true because I have seen neither the request for an opinion form, nor a response from, the Election Commission on that question.

In my opinion, the answer is clearly no. Tennessee Code Annotated, ' 6-53-105, plainly contravenes Article IX, '11, of the Tennessee Constitution.

2. Does the City have standing to challenge the constitutionality of Tennessee Code Annotated, ' 6-53-105(a), under the facts outlined in Question 1 above?

In my opinion, the answer is clearly yes.

Analysis of Question 1

Tennessee Code Annotated, ' 6-53-105(a) provides that:

> In any municipality that has adopted home rule, where any question subject to local approval, under the provisions of the Constitution of Tennessee, article XI, ' 9 has not been approved by a two-thirds (2/3) vote of the local governing body, a petition signed by the qualified voters of the municipality in a number amounting to at least ten percent (10%) of the votes cast in the last election for mayor may be filed with the appropriate election commission officials not later than sixty (60) days prior to the day of the next regular election or primary and the question shall be placed on the ballot of the next regular election. Where the total cost of conducting a special election pursuant to the Constitution of Tennessee, article XI, ' 9 is defrayed completely by private financial contributions, a special election may be held for the purpose of approving or disapproving the question.

Here it is important to point out that the provisions in Article XI, ' 9, that apply to the question are the product of the 1953 Limited Constitutional Convention, and were submitted to, and approved by the people, as Amendment No. 6, and Amendment No. 7.

The second paragraph of Article XI, ' 9, is the product of Amendment No. 6, as follows:

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected. [Para. 2]

The third through eighth paragraphs of Article XI, ' 9, are the product of Amendment No. 7, as follows:

> Any municipality may by ordinance submit to its qualified voters in a general or special election the question: “Shall this municipality adopt home rule?” [Para. 3]
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> In the event of an affirmative vote by a majority of the qualified voters voting thereon, and until the repeal thereof by the same procedure, such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect. [Para. 4]
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> Any municipality after adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by general act of the General Assembly. The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered. [Para. 5]
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> A charter or amendment may be proposed by ordinance of any

> home rule municipality, by a charter commission provided for by act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in every two (2) years, in a municipal election, pursuant to petition for such election signed by the qualified voters of a home rule municipality not less in number than ten (10%) percent of those voting in the then most recent general election. [Para. 6]
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> It shall be the duty of the legislative body of such municipality to publish any proposal so made and to submit the same to its qualified voters at the first general state election which shall be held at least sixty (60) days after such publication and such proposal shall become effective sixty (60) days after such approval by a majority of the qualified voters voting thereon. [Para. 7]
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> The General Assembly shall not authorize any municipality to tax incomes, estates or inheritance, or to impose any other tax not authorized by Sections 28 or 29 of Article II of this Constitution. Nothing herein shall be construed as invalidating the provisions of any municipal charter in existence at the time of the adoption of this amendment. [Para. 8]

The genesis of Amendment No. 7 was Resolution No. 118, introduced on Wednesday, June 3, 1953, in the 1953 Limited Constitutional Convention by Rep. Sims et al. [See Journal and Proceedings of the Limited Constitutional Convention, p. 261; hereinafter referred to as "Journal."]

Fourteen Tennessee cities have adopted home rule under Article XI, ' 9, Para. 3, of the Tennessee Constitution.. Approximately two-thirds of the cities in Tennessee remain private act cities, as they are entitled to do under Article XI, ' 9 [Para. 8]. The remaining Tennessee cities are general law cities chartered under the general laws of the state.

Article XI, ' 9, of the Tennessee Constitution provides for the means by which a municipality can adopt home rule and the consequences of home rule with respect to action by the General Assembly. There are at least two reasons that Tennessee Code Annotated, ' 6-53-105, is fatally flawed with respect to home rule municipalities under Article XI, ' 9. The first reason is that Article IX, ' 9, expressly and unequivocally proves the exclusive ways by which a home rule charter can be amended:

- Passage of an ordinance by the governing body of the municipality;
- By a charter commission established by an act of the General Assembly and elected by the qualified voters of the home rule municipality; or
- By a charter commission of seven members chosen at large (not more than once every two years) in a municipal election held pursuant to a petition of not less than 10% of the voters of the home rule municipality

voting in the latest general municipal election.

None of the three methods for amending a home rule charter expressly prescribed by Article IX, ' 9, of the Tennessee Constitution remotely includes the method contained in Tennessee Code Annotated, ' 6-53-105(a). In fact it is clear from Rep. Sims explanation of Resolution 118 to the 1953 Limited Constitutional Convention that those methods were the exclusive methods by which amendments to home rule charters could be accomplished, and that even the General Assembly could not add to, nor change, those methods.

The Journal reflects that in his introduction to Resolution 118, on Wednesday, June 3, 1953, Mr. Sims says with respect to home charter amendments:

> The next paragraph is the simple procedure that was in Resolution 105; it provides that a home rule municipality may propose by an ordinance or through a charter commission which has been authorized by an act of the General Assembly, and elected by the qualified voters of the home rule municipality, changes in the charter and require a vote thereon; the changes in the city charter may be initiated in that manner.
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> Now, the next provision is that if the General Assembly fails to authorize a charter commission to be elected by the people, then in that event only, ten per cent of those voting in the most recent municipal election may file a petition and propose an amendment or a change in the charter; but that ten per cent would not have the right to do so if there has been a charter commission authorized by the General Assembly, and it is to be elected by the people. [Journal, at 1011-12]

Following Mr. Sims' introduction of Resolution 118, there followed a question and answer period relative to home rule that included the following exchange between Mr. Sims and one of the delegates:

MR. FRIERSON: Mr. Sims, under your proposal if a municipality adopts the home rule under this charter, and then they sought to change the charter by an amendment to the charter, by a petition of the peopleB, that is on your second page there-,.you say "not less than ten per cent of those voting in the most recent general election." Now, if a municipality wants to adopt this plan, can they increase that percentage to say twenty-five per cent or fifty per cent?

MR. CECIL SIMS OF DAVIDSON: No.

MR. FRIERSON: In these smaller cities?

MR. CECIL SIMS: It has to be changed here and now.

MR. FRIERSON: You say it isn't in this, but I wonder if we vote to come under this home rule, if there could be a provision put in there whereby we could in smaller cities have twenty-five per cent of the people petitioning it. In some of our smaller cities we don't have many that go to the polls, a very few, and ten per cent would be extremely few.

MR. CECIL SIMS OF DAVIDSON: As it stands there, if the legislature by a general act provided for a different charter commission, in the absence of this charter commission, you would have to do it by not less than ten per cent of those voting; some delegates want to make it fifteen or twenty per cent.

MR. FRIERSON: Could a city adopting this make a prevision of say twenty-five per cent of those?

MR. CECIL SIMS OF DAVIDSON: It would be all right with me if the delegates want to make that twenty-five percent, but you would have to do it now.

MR. FRIERSON: By amendment to this?

MR. CECIL SIMS OF DAVIDSON: Yes.

MR. FRIERSON: We could do that to the charter, couldn't we?

MR. CECIL SIMS OF DAVIDSON: Not if you want the people in Columbia to have the right in that contingency to propose an amendment; if you want to have at least twenty-five percent, then you must change that figure now from ten to twenty-five per cent. [At 1015-16]

Mr. Sims never suggested or even intimated in his introduction of Resolution 118, or in his exchange with Mr. Frierson, that the General Assembly could after the adoption of Amendment 7 go back and legislate a change in the methods for amending home rule charters. Although the exchange between Mr. Sims and Mr. Frierson applied to the third method, the obvious corollary is that the exchange applied to all three methods.

In Washington County Election Commissioners v. City of Johnson City, 350 S.W.2d 601 (1961), the Tennessee Supreme Court analyzed Article XI, ' 9, with respect to the above three methods outlined therein for amending a home rule charter, and declared that:

> Thus, a charter or amendment may be proposed by such a municipality itself, by "ordinance," or by a "charter commission," provided for by Act of the Legislature and elected by the voters of the municipality; or if there is no such Act, chosen in the municipal election by the voters in the manner set out in section (3) above... [At 603]

That case dealt with the question of whether the methods prescribed by Article XI, ' 9 for amending a home rule charter were self-executing. In holding that the answer was yes, the Court declared that:

> So, when it says a charter change may be proposed by "ordinance" of such municipality, it refers to action by the legislative body of the municipality; when it says such a change may be proposed by charter commission as set out in (2) above, it refers to action by the Legislature and by the voters of the municipality; likewise when it says such change may be proposed by such commission chosen as set out in (3) above, it contemplates action by the voters in a municipal election to be called and held according to existing laws.

> Thus, this provision gives the right and supplies the rule for its enforcement, in each of the three ways set out; and it assumes the existence of the functionaries that are to act in each case and the laws and ordinances under which they are to act. Though these may differ in different municipalities, this provision is nonetheless self-executing in all of them without the aid of supplemental legislation.
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> It is true that though the language in (3) above states in some detail the rule governing the choice of the charter commission in the municipal election, it does not specify the qualifications of the candidates for, or members of, such commission. It assumes, as the Chancellor held, that this may be done by the legislative body of the municipality involved.
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> As we have seen, the self-executing nature of this constitutional provision is not impaired by reason of its omission to set forth such minor details as to when and where the charter commissioners shall meet and how and to whom they shall report their proposals, if any.
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> This provision is immediately followed by the provision that it "shall be the duty of the legislative body of such municipality to publish any proposal so made and to submit the same to its qualified voters," etc. So, the plain implication is that the commissioners shall report their proposals to the City's legislative body. [At 604-605]

It was held in State v. Dunn, 406 S.W.2d 480 (1973), that:

> ...a self-executing constitutional provision does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of constitutional right and make it more available. [At 488]

There is not the slightest hint in the records of the Limited Constitutional Convention of 1953, or in Washington County Election Commissioners that any method for amending a home rule charter can be gleaned from Article XI, ' 9, except the three methods contained therein. Indeed, they point to the proposition that of the three methods contained in Article XI, ' 9, for amending a home rule charter, only the second method contemplates any action by the General Assembly. Dunn stands for the proposition that even if the General Assembly were free to legislate with respect to the three methods contained in Article XI, ' 9, Tennessee Code Annotated, '6-53-105(a) plainly fails because it is not in harmony with any of those methods.

Article XI, ' 9, of the Tennessee Constitution pertinent to the amendment of home rule charters provides that such charters "*may*" be amended by one of the three methods listed. It can be argued that the "may" reflects discretionary language that gives the General Assembly the authority to add to the methods by general legislation That is an extremely weak argument. Article XI, ' 3, of the Tennessee Constitution, on its face provides two ways the Tennessee

Constitution can be amended:

First, “Any amendment or amendments to this Constitution *may* [emphasis is mine] be proposed in the Senate or House of Representatives...” Where this method and the procedures prescribed for this method are followed, the amendment or amendments is/are finally submitted to the people for a vote.

Second, “The Legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution [or any part or parts of it]” Where this method, and the procedures prescribed for this method, are followed, the amendment or amendments is/are also finally submitted to the people.

Notwithstanding the “may” language contained in the first method, it was declared in Metropolitan Government of Nashville & Davidson County v. Poe, 383 S.W.2d 265 (1964), that “The only method by which the Constitution may be amended is set out in Article 11, Section 3 of the Constitution itself.” [At 268] The “may” creates discretion only as to which of the two enumerated methods can be used to amend the Tennessee Constitution. The same thing is unquestionably true with respect to the “may” language contained in Article XI, ' 9, relative to amendments to home rule charters; there the “may” creates discretion only as to which of the three methods can be used to amend such charters.

That brings us to the second reason Tennessee Code Annotated, ' 6-53-105(a) is fatally defective: under Article XI, ' 9 of the Tennessee Constitution: It is not possible for a home rule charter amendment to receive the approval at the local level by a 2/3 vote of the local governing body. Whoever proposed that statute apparently did not understand the distinction between how private act charters and home rule charters are amended.

As pointed out above, Article XI, ' 9, permits the continued existence of municipalities chartered under private acts [Para. 8], but not the future creation of new private act municipalities. [Para. 5] Approximately two-thirds of Tennessee cities continue to be chartered under private acts. Under Article XI, ' 9, the General Assembly has no power to pass private acts that alter the salary of incumbent local public officers or that shorten the term of such officers. In addition Article XI, ' 9 requires that private or local acts applicable to counties and municipalities receive local approval, either by a two-thirds vote of the local government’s governing body, or by a majority vote in the affected municipality or county, as provided by the private act itself. [Para. 2]

But Article XI, ' 9, provides that in the event home rule is adopted by a municipality, “such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.” [Para. 4] While Tennessee Code Annotated, ' 6-53-105(a) is ostensibly a general law that applies to all home rule municipalities, we have seen above that Article XI, ' 9, itself provides the exclusive three methods by which home rule charters are amended, and that Tennessee Code Annotated, ' 6-53-105 (a) is inconsistent with each and every method. None of them remotely provide for a 2/3 vote of the governing body, the failure of which triggers a voters initiative upon petition of 10% of the voters. The third method provides for a charter commission of seven members to be elected by the people, upon a petition of 10% of the voters. That method cannot possibly be stretched so far as to include Tennessee Code Annotated, ' 6-53-105(a).

It is elementary law that where a statute clearly contravenes a provision of the Tennessee Constitution, the statute must yield to the Constitution. In fact, it has been held that legislation that is unconstitutional is no law at all. [See State ex rel. Knight v. McCann, 72 Tenn. 1 (1879).

Also see Smith v. Isenhour, 43 Tenn. 214 (1866); Bank of Tennessee v. Woodson, 45 Tenn. 176 (1867); Shaw v. Woodruff, 156 Tenn. 529, 3 S.W.2d 167 (1928); Matill v. City of Chattanooga, 132 S.W.2d 201 (1939) Hart v. City of Johnson City, 801 S.W.2d 512 (Tenn. 1990); Vollmer v. City of Memphis, 730 S.W.2d 619 (Tenn. 1987); Bufford v. State, 845 S.W.2d 204 (Tenn. 1992).]

Analysis of Question 2

The city has standing to challenge the constitutionality of Tennessee Code Annotated, ' 6-53-105(a). In Matill v. City of Chattanooga, 132 S.W.2d 201 (1939), the city was held to have standing to challenge a statute that exempted certain businesses from the application of the city's ordinance regulating electrical work in the city. The ordinance was a police power ordinance which the city sought to enforce, and the plaintiff sought to escape through the statute. It seems almost absurd to argue that Matill would not apply to a case where the city sought to vindicate its own home rule charter against a state statute.

The Tennessee Supreme Court pointed to a similar absurdity, in Corporation of Collierville v. Fayette County Election Commission, 539 S.W.2d 334 (Tenn. 1976). There the general law manager commission charter provided that where an attempted incorporation was within two miles of an existng city, the attempted incorporation would be held in abeyance for 15 months to give the existing city the opportunity to annex all or a part of the territory. The City of Piperton, which was within two miles of the City of Colliverville, held an incorporation election on May 2, 1974, and the Fayttte County Election Commission certified the election the following day. The City of Collierville did not challenge the election until July 30, 1974. Did the City of Collierville have standing to sue to invalidate the charter of the City of Piperton? Yes, held the Court, reasoning that:

> To hold otherwise would be to say that the Legislature intended to give the established city a right which it could enforce unilaterally and out of court against a proposed city proceeding in obedience to the law but that it could not seek redress in the courts when the proposed city proceeds in defiance of the law. Such a result would be absurd. [At 336]

Then the Court turned to the difference between the city's and citizens' standing to challenge the illegal incorporation attempt:

> Our cases on standing to sue are founded on the principle that private citizens may not sue to challenge the corporate existence of a municipality, but that this is a public matter which may only be redressed in a proceedings prosecuted by a representative of the state. With the general rule we are in full accord.
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> We are urged to affirm on the authority of City of Fairview v. Spears, 210 Tenn. 404, 359 S.W.2d 824 (1962). We do not question the soundness of the rule in Fairview, but it has no application to this case. There private citizens sought to invalidate a municipal charter. The only question before the Court was the mechanics of the charter election.
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> *Here, we do not deal with private citizens. We deal with a complaining municipality for whose benefit a statutory proviso was*

> *obviously enacted. It is beyond question that a municipality is an agency of the state exercising a portion of the sovereign power of the state for the public good...* [Emphasis is mine.]
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> This case is further distinguishable from Fairview in that there the Court was dealing with mere technical irregularities; whereas, *here we deal with controlling criteria in the form of conditions precedent to corporate existence.* [At 336] [Emphasis is mine.]

Your question deals not with the question of the statutory right of one city over another, but with the question of the supremacy of a state constitutional provision applicable to a home rule municipality over a state statute applicable to a home rule municipality. The home rule provisions of Article XI, ' 9, of the Tennessee Constitution were adopted for the benefit of the City, and that the home rule provisions "deal with controlling criteria in the form of conditions precedent to" the amendment of home rule charters, and for those reasons, the City of has standing under Corporation of Collierville with respect to that question.