MEMORANDUM

FROM: Sid Hemsley, Senior Law Consultant

DATE: May 11, 2010

RE: Mayor's "COLA"

The City, through its city attorney, has the following questions:

1. Does the language in the City Charter that the "compensation of the Mayor shall not be changed during his term of office" either entitle or authorize the cost of living increases for the mayor?

The answer is no.

2. If so, does the language of the resolution tying such raises to the cost of living raises received by other city employees instead of the consumer price index render the resolution invalid?

The answer is that the pay raise, whether or not tied to the pay raises given to city employees, is simply illegal under Section 7(b) of the City Charter, which entirely prohibits pay raises during the mayor's term of office; a COLA is not authorized in that charter of in the general state law. It is not even clear that if the charter authorized a COLA geared to the consumer price index or some other formula designed to preserve the buying power of the mayor's salary would be legal. If such a COLA were authorized by a private act, it might still be a private act that "having the effect of" raising the salary of the mayor during his term of office, which is prohibited by Article XI, Section 9, of the Tennessee Constitution.

3. If prohibited by the city charter, is it a criminal offense for the board of aldermen to vote to give the mayor a raise and/or for the mayor to accept and retain the raise?

As I understand it, the district attorney general has already determined that no criminal offense arose from the illegal payments of the salary to the mayor. For that reason, I am reluctant to deal with this question; any views I have on it would be superfluous. If that is not so, I will be glad to speak on that question later.

4. If the raises are invalid, can the board of aldermen recover the "excess" compensation previously paid, or is the mayor entitled to rely upon the presumed validity of the resolution?

The board of aldermen is entitled to attempt to recover the excess compensation. I doubt that the mayor is entitled to rely on the validity of the resolution that authorized the illegal pay raises. But as I will point out in the Analysis of Question 4, there are many cases in which "good faith" has been a successful defense to the repayment of salaries subsequently found to be paid illegally, based on the existence of a statute that authorized the illegal payment. In the mayor's case, his "good faith" defense would be based on a city resolution, which violated Section 7(b)'s requirement that the mayor's salary be set by ordinance and that it not be altered during his term of office. I am skeptical that the courts would accept that defense on the part of a mayor relying on a salary raise based on a municipal resolution.

5. Does the applicable statute of limitation apply to bar collection of the raises, or is the City exempt from such application as an instrumentality of the state?

6. If the City were to obtain a judgment against the mayor, could the mayor's salary be garnished or would such action be barred because the mayor is a public officer?

Ordinarily, I would recite the facts from which the above questions arise. However, those facts are set out so well in the comptroller's audit and documents associated with that audit, that I see no need to repeat them here. Suffice it to say that the mayor was given pay raises beginning in 1991, the schedule of which is reflected in the table labeled "Review of Mayor's Salary Increases" contained in Mr. X's fax to Mr. Y on January 11, 2010. Those pay raises were made in the face of Section 7(b) in the City Charter, which provides that "The compensation of the Mayor and Aldermen shall be set by ordinance, but the salary of the Mayor or any Alderman shall not be changed during their term of office...."

Generally, questions involving changes in the compensation of elected officials during their terms in private act cities implicates Article XI, Section 9, of the Tennessee Constitution, which, among other things, prohibits the passage of private acts that have the effect of altering the salary of incumbents during the term for which they were selected. However, Section 7(b) itself prohibits the salary of the mayor and aldermen from being altered during their terms of office. For that reason, the mayor's pay raises do not implicate Article XI, Section 9; they reflect the straightforward question of whether such payments violate Section 7(b) of the City Charter.

Analysis of Questions 1 and 2

The City Charter provision in question, Section 7(b) actually provides that, "The compensation of the Mayor and Aldermen shall be set by ordinance, but the salary of the Mayor or any Aldermen shall not be changed during their term." On its face, the charter provision does not authorize a cost of living increases for the mayor; it provides that the salary of the mayor "shall not be changed during [his] term." In addition, it required the salary of the mayor to be

set by ordinance, and the pay increase of the mayor was approved by resolution.

It is the law in Tennessee that the provisions of the city charter are mandatory, and that in a conflict between the city charter and that a municipal ordinance or resolution, the former prevails. [See Wilgus v. City of Murfreesboro, 532 S.W.2d 50 (Tenn.Ct. App. 1975); Sitton v. Fulton, 566 S.W.2d 887 (Tenn. Ct. App. 1978); State ex rel. Lewis v. Bowman, 814 S.W.2d 369 (Tenn. Ct. App. 1991).]

It is true that Overton County v. State ex rel. Hale, 588 S.W.2d 282 (Tenn. 1979) upheld a COLA for judges in the face of Article VI, Section 7, of the Tennessee Constitution, which contains a salary change limitation similar to that found in Article XI, § 9, as follows:

> The Judges of the Supreme or Inferior Courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, *which shall not be increased or diminished during the time for which they are elected* .... [Emphasis is mine.]

The primary question there was whether Public Acts 1974, Chapter 808, which was a general state law covering all sessions court judges in the state, and which entitled them to annual salary adjustments tied to the consumer price index, was constitutional. The statute was effective September 1, 1974, and the General Sessions Judges of Overton County took office on the same date. The county argued that the annual cost of living increase for sessions judges violated Article VI, Section 7, of the Tennessee Constitution. The court ruled in favor of the judges, declaring that:

> It is universally recognized that the rationale undergirding such constitutional provisions is the maintenance of judicial independence from legislative action to punish or reward judges for decisions that produce a favorable or unfavorable reaction. The key words of the Tennessee constitutional provision are "during the time" which obviously means legislative action taken within the time period of a judicial term of eight years, to increase or diminish compensation. [At 288.]

In this case, said the court, the legislation containing the COLA was adopted by the legislature *before* the judges took office, rather than "during the time for which they are elected."

The Court also said this about the judges' COLA:

> The theory behind hinging an annual change in salary to the consumer price index is that the index accurately measures the change in the purchasing price of the dollar, with the result that by "indexing" judicial salaries, the "compensation" remains constant. That theory has a solid foundation in fact. *The Tennessee Legislature has no power over the amount of index change and*

> *thus no power over the will of judges....* [At 289.] [Emphasis is mine.]

The statute in question had been passed *before* the judges took office, and did not affect the salary of any judges then in office.

The distinctions between the judge's COLA and the pay raise for the mayor are clear:

- A general state statute authorized the COLA in State ex rel. Hale. There is nothing in the state law, including in the City Charter, that authorizes a COLA for the mayor; it was the product of a city resolution that clearly violated Section 7(b) of the City Charter.

- Contrary to the characterization of the mayor's pay raise as a COLA, it substantially differed from the COLA's at issue in State ex rel. Hale. The COLA in that case reflected an intent on the part of the legislature to fix the judges' salaries before they began their terms of office, according to a formula that preserved the purchasing power of their salaries *without any further action of the legislature during their terms of office. The so-called "COLA" in the case of the mayor was given to the mayor several times during his term of office, and was tied to city employee pay raises.*

- The judges pay raise in Hale was enacted by a general state law that applied to all sessions court judges. The mayor's pay raise was enacted by a resolution of the City.

A number of cases speak of the significance of state legislation with respect to salaries of public officials.

Public legislative bodies in Tennessee, including municipal governing bodies, have broad authority to modify the salaries and other forms of compensation of elected officers to the extent not limited by the Tennessee Constitution and statute. In Peay v. Nolan, 157 Tenn. 222, 7 S.W.2d 815 (1928), the Tennessee Supreme Court held that the General Assembly could authorize the payment of expenses of its members without violating Article II, Section 23, of the Tennessee Constitution, which prescribes the compensation of members of the General Assembly. The court reasoned that the constitutional limitation in Article II, Section 23, was a "salary" and not a "compensation" limitation.

Blackwell v. Quarterly County Court, 622 S.W.2d 535 (1981), contains even more sweeping language along that line. In upholding the right of a county to modify a pension plan, the Tennessee Supreme Court in effect declared that within constitutional limitations, governments at both the state and local levels have broad authority relative to salary and compensation adjustments of their elected as well as appointed officials.

But while Peay and Blackwell distinguish between "salary" and "compensation," *they also stand for the propositions that any claim to salary or compensation on the part of a public official must be based on legislative authority*, and that "A municipal officer rightfully holding an office is entitled to such compensation, and only such compensation, as is provided by law as an incident to the office." In Peay, it is said that:

> Compensation attached to the office, wherever 'salary' or 'per diem' [citation omitted] is not given to the incumbent because of any supposed legal duty resting upon the public to pay for the service, [citation omitted] and a law creating an office without any provision for compensation carries with it the implication that the services are to be rendered gratuitously.

Even more emphatic on that point is Bayless v. Knox County, 286 S.W.2d 579 (1955). There it was argued that even in the absence of statutory authority for the county to pay certain expenses of the county judge and county commissioners related to official county business the county had authority to pay those expenses. The Court rejected that argument, declaring:

> Considered on principle, the decisions of this State are directly contrary, as this Court views it, to that assertion. In State ex. Rel Vance v. Dixie Portland Cement Company, 151 Tenn. 53, 60, 267, SW. 595, 597, it is said:
>
> 'It is a well settled policy of the state, determined by statute and judicial decree, that public officers can receive no fees or costs except as expressly authorized by law.'
>
> To the same effect is State v. True, 116 Tenn. 294, 311, 95 SW. 1028; Shelby County v. Memphis Abstract Co., 140 Tenn. 74, 84, 203 SW. 339, L.R.A. 1918E, 939; Henry v. Grainger County, 154 Tenn. 576, 578, 200 SW. 2; Stone v. Town of Crossville, 187 Tenn. 19, 24, 213 S.W.2d 678; and many others which might be cited. There are no decisions to the contrary. [At 587]

Both Peay and Blackwell explain that absent constitutional limitations, the legislative body is entitled to *legislate* with respect to salaries and compensation. But in both those cases, there was *legislative authority* supporting the contested payments to the public officials. In your city, there is legislative authority in Section 7(b) of the City Charter for the payment of a salary to the mayor, but that salary is not to be changed during the mayor's term of office, and that any change was required to be done by ordinance. The City Charter reflects state legislation that applies to the City.

Analysis of Question 3

See my answer to question 3 above.

Analysis of Question 4

A number of cases involving the unconstitutional payments of salaries to general sessions court judges under Article VI, § 7, of the Tennessee Constitution, and to other county officials under other statutes, have arisen, and in which the unconstitutional payments were "forgiven." .

In Franks v. State, 772 S.W.2d 428 (Tenn. 1989), the Williamson County Commission in 1982 approved a supplemental income for the general sessions judge who exercised juvenile court jurisdiction, under a state statute that authorized counties to provide that supplement in such situations, which was also alleged to violate . But as pointed out above, Article VI, § 7 of the Tennessee Constitution.

The Court pointed out that even though general sessions courts are inferior courts within the meaning of Article VI, Section 7 of the Tennessee Constitution, general sessions judges are county, not state, officers, and that:

> Under Article 6, Section 7 of the Constitution of Tennessee the power to ascertain and fix the compensation of County judges is vested in the Legislature and cannot be delegated to County Court or any other body. *Shelby County v. Six Judges*, 3 Shan.Cas. 508, 511, 516, 520; *Judges' Salary Cases,* 110 Tenn. 370, 381, 382, 75 S.W. 1061. [At 430]

The Court declared that the same law applied to juvenile court judges in response to the plaintiff's argument that as a county officer a juvenile court judge fell outside Article VI, § 7.

For those reasons, concluded the Court, "The last sentence of T.C.A. § 37-1-201 which permits counties to provide additional compensation to general sessions judges who also exercise juvenile court jurisdiction is unconstitutional." [At 430]

The court spoke to the application of the doctrine of elision in this and other cases involving the "good faith" defense to being required to pay back illegally paid salary, but because it does not appear to me that the doctrine of elision applies to the resolution through which the Mayor received his salary increases, I will not discuss. There would be nothing left of the resolution if the illegal parts were elided.

The general sessions judge argued that even if the salary supplements were found by the Court to be unconstitutional, the ruling should not apply to the judge's current term, that applying the ruling to the judge's current term would constitute a reduction in salary in violation of Article VI, § 7 of the Tennessee Constitution. The Court rejected that argument, but spoke to the question of whether the judge was obligated to repay the unconstitutionally paid salary supplements:

> Under the "void ab initio" approach, an unconstitutional act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 U.S. 425, 6 S. Ct. 1121, 30 L.Ed. 178 (1886). [At 431]

That sounded like bad news for the general sessions judge, but that was not the case. The Court went on to say:

> However, in *Roberts v. Roane County*, 160 Tenn. 108, 23 S.W.2d 239 (1929) this Court recognized "that parties may so deal with each other upon the faith of such a statute that neither may invoke the courts to undo what they themselves have done." Id. At 124, 23 S.W.2d at 243. Because of the presumption in favor of the constitutionality of statutes, the public and individuals are bound to observe a statute though unconstitutional, until it is declared void by an authoritative tribunal. *O'Brien v. Rutherford County*, 199 Tenn. 642, 28 S.W.2d 708 (1956). Defendants concede that plaintiffs were acting in good faith in paying and receiving the salary supplement fixed by the Williamson County legislative body and that plaintiff Franks should not be required to pay back the supplemental salary. In these circumstances it is appropriate to apply the principle that the unconstitutional act was voidable until condemned by judicial pronouncement. See *Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516 (Tenn. 1977). Based on the foregoing, the excess monies paid and received to the date of the release of this opinion cannot be recovered. [At 431]

Under Franks, statutes are presumed constitutional until a court declares them unconstitutional, assuming there has been good faith in the paying and receiving of the unconstitutional payment.

In State v. Hobbs, 250 S.W.2d 549 (1952), the state sued Hobbs, the Lawrence County Clerk and Master, and others, to recover salaries unconstitutionally paid to them. The Tennessee Supreme Court did not allow the county to recover those unconstitutionally paid salaries, reasoning that:

> The private acts complained of as authorizing the payment to the defendant of certain compensation have not as yet been held unconstitutional by a court of competent jurisdiction, although some similar Private Acts have been held invalid. While the bill alleges that defendant Hobbs knew that said acts were unconstitutional, there is no averment that he was advised of that fact by any competent authority; nor is there any averment as to who, if any competent legal authority, advised the County Judges that the Acts were unconstitutional. Conceding for the purposes of this decision that the Acts herein assailed were unconstitutional, they are presumed to be valid and must be so regarded until the contrary is made to appear by some competent judicial tribunal. In Wade v. Board of Com'rs, 161 Okla. 245, 17 P.2d 690, 692, it was held: 'The general rule is that laws are presumed to be constitutional, and ministerial officers may safely rely thereon and follow them until they are held unconstitutional or until such

> officers are advised by the proper officers that they are unconstitutional.' [At 552] [Citations omitted by me.]

An often heard legal mantra is the persons are presumed to know the law. The Court had this to say about the application of that theory to judges:

> We cannot consider that an issue is presented under the presumption that the defendant and the several County Judges of Lawrence County were presumed to know that law, and that they were violating it to the prejudice of Lawrence County. While a citizen is presumed to know the law he is not presumed to know that a statute, which the Supreme Court presumes to be constitutional, is unconstitutional. So said the Supreme Court of the United States in *United States v. Realty Company*, 163 U.S. 427, 438, 16 S.Ct. 1120, 1125, 41 L.Ed. 215.... [At 553]

Further, continued the Court:

> Finally, we think the case at bar is controlled by *Roberts v. Roane County*, 160 Tenn. 19, 123, 23 S.W.2d 239, 243, wherein it was held: 'But it appearing that the validity of the salary was recognized by the financial agent of the county, the county judge, and by complainant, during the time the complainant served as sheriff, and that the payment of salary now sought to be recovered were paid and received in good faith, without collusion, and upon the faith of the statutory direction, we think that the authorities support the equitable estoppel asserted in the complainants answer to the county's cross-bill. [Citations omitted by me.] 'The authorities cited do not question the general rule, that an unconstitutional statute is not a law, does not of itself confer any rights, duties, or obligations, and is in 'legal contemplation, as inoperative as though it had never been passed.' [Citation omitted by me.] But it is recognized that parties may so deal with each other upon the faith of such a statute that neither may invoke the aid of the courts to undo what they themselves have done.' [At 553]

Several general sessions judges and other county officials were also relieved by the Tennessee Supreme Court from paying back unconstitutional salary payments in Bayless v. Knox County, 286 S.W.2d 579 (1965), which relied on State v. Hobbs. With respect to the judges, the Court declared:

> Appellants assert that these General Sessions Judges, and because they were judges, must be presumed to have known that the Act which purported to authorize a salary of $6,000 per annum is

> unconstitutional. Hence, that they did not receive this salary in good faith. Aside from the violence of such a presumption, this insistence is rejected in the *Hobbs* case. There one of the officials involved in the payment of the salary under that unconstitutional Act was the County Judge. [At 584]

The same result was reached in State v. Harmon, 882 S.W.2d 352 (1992) (Tenn. 1994) There a general sessions court judge for Sequatchie County was paid an expense allowance of $400 per month from July 1, 1983 until November, 1990, under the authority of Private Acts 1983, Chapter 79. The trial court, held that Private Act unconstitutional, but citing Roberts v. Roane County, 23 S.W.2d 239 (Tenn. 1929), declared that the Act was presumed constitutional and binding on the parties, and held that the general sessions judge was not required to pay-back the expense allowance he received under that unconstitutional private act. The Tennessee Court of Appeals did not agree, declaring that:

> *Roberts*, and *Franks* indicate that good faith is necessary to preclude one party from recovering payment submitted pursuant to an unconstitutional statute. See also *State v. Hobbs*, 25 S.W.2d 549, 553 (Tenn. 1952). In *Bayless*, the court ruled that taxpayer could not recover the salary increases paid to the general sessions judges, saying that judges, simply because they are judges, cannot be presumed to have known that the statute authorizing the increases in their salaries was unconstitutional. [At 6]

But then the Court turned to the facts in State v. Harmon:

> ....plaintiff testified that at some time in 1983 the county commission requested that plaintiff assume additional judicial responsibilities after which time he quit his part time job with the Board of Education as a bus driver. Plaintiff had no formal legal education. Plaintiff testified that when he and the county attorney drafted Chapter 79 in 1973, he was aware or was advised by the county attorney that his compensation could not be increased during his term. Plaintiff also testified that he did not incur $400 per month in expenses related to his judicial office. We conclude that this testimony distinguishes the facts of the present case from *Bayless*, *Franks* and *Roberts* and establishes a lack of good faith by plaintiff. [At 6]

But the Tennessee Supreme Court overturned the court of appeals and relieved the judge from the payment of the illegal salary, declaring that:

> .... in deciding whether the defendants are entitled to the claimed reimbursement, the determinative issue is whether Judge Barker reasonably relied upon the validity of the private act authorizing

> the monthly expense allowance when he accepted the monthly checks from July of 1983 through August 1990. The defendants say that Judge Barker's reliance on the constitutional validity of the private act was not reasonable, because he was told by the county attorney that it would be unlawful to have his salary increased during his term of office. In our view, that statement, without context and standing alone, does not demonstrate that Judge Barker acted unreasonably by accepting the expense allowance in reliance on the private act. There is nothing in the record to indicate that the county attorney informed Judge Barker, a non-lawyer, or any County official, that the expense allowance would be, or might be, interpreted as a salary increase or an increase in compensation. Indeed, this judicial proceeding arose because that issue was open for question. Moreover, the county attorney drafted the private act with the County Commission's authority and approval. Thereafter, the legislature passed the act; the County Commission ratified the act and authorized payment of the expense allowance under the act for a period of seven years. In accordance with the provisions of the act and in reliance thereon, Judge Barker became a full-time judge and gave up other employment. We are convinced that his case fits squarely with the rule discussed and applied in Franks, and therefore conclude that Judge Barker reasonablely relied on the validity of the private act. [At 356-57]

I have been unable to find any Tennessee cases on the application of the "good faith" defense to illegal payments of salary to municipal officials under a resolution or even an ordinance. All of the above cases in which that defense was successful, involve *state statutes, including private acts,* that authorized the payments subsequently found to be illegal. The mayor's case apparently involved only a city resolution approving the mayor's increase in salary. That is reflected in the letter the comptroller's staff attorney, Mr. Chadwick H. Jackson sent to the City on March 10, 2010.

> The Mayor's attorney submits that in February of 2001, the mayor proposed that his salary be increased in conjunction with the city employees' annual salary increases While the *mayor's motion* was taken and carried prior to the May 2001 election, no ordinance was passed, according to my records, that changed the mayor's salary or the mayor's salaries prior to May of 2001, therefor, when the Board approved the 4% salary increase for city employees and the mayor in June 2001, the mayor's salary was then officially "changed during [his] term of office, which directly violates the city's charter. [Emphasis is mine.]

If those facts are correct, it was the mayor himself who proposed his pay raises, which

were approved by resolutions, although a pay increase given the mayor by ordinance during his term would have been no more effective than a pay increase given by resolution.

But in Hobbs, above, the state alleged that Hobbs "persuaded and coerced" the county judges to make the illegal payments in question, that he knew the payments were illegal, and that the county judges had been advised they were illegal, but that Hobbs had "fraudulently and illegally procured the enactment of these private acts" that authorized the raises. Those

> "averments" were not enough, held the court. The charge of coercion reflected no "method of coercion which was resorted to in order to secure such payments." More significantly, said the court:
> The presumption must be indulged that statutes enacted by the Legislature are constitutional. The general charge that the Legislature acting upon the advice and urgent solicitation of the defendant practiced a fraud upon Lawrence County is not confessed to be true by the demurrer. Moreover, it is not conceivable that such an allegation could be established by proof. [At 552]

I have no idea what the mayor did to procure the passage of the resolution that granted him an illegal pay raise. Likewise, I do not know if he was told by "competent authority " or by "proper officers that he was not was not entitled to pay raises during his term of office, or if the board of aldermen was told by such authority or officers that they were not entitled to give him a pay raise during his term of office. *Blacks Law Dictionary*, 6th Ed., 1990, defines "Competent authority" this way: "As applied to the courts and public officers, this term imports jurisdiction and due legal authority to deal with the particular matter in question." I am sure that an investigation would disclose whether "competent authority" or a "proper officer" told the mayor and board of aldermen that the increase in the mayor's salary was illegal. Frankly, it does seem incredible to me that neither the mayor nor board of aldermen knew what the charter said about the salary of the mayor.

As all of the above cases make clear, payments of money under unconstitutional statutes are clearly illegal. It goes without saying that money paid under ordinances or resolutions that violate a city charter are likewise illegal. The legal doctrine that saves the person paid the illegal salary from repaying the salary is equitable estoppel. Fair play is generally critical in making a claim for equitable relief of any kind. A person asking to be relieved of re-paying money paid to him under an unconstitutional statute cannot have taken part in securing to himself the unconstitutional payment under conditions that appear to reflect bad faith.

But if the courts have been so generous in allowing the "good faith" defense judges, why would they not be as generous to a mayor. For the answer to that question, besides the obvious one that judges might have been kind to judges, I keep returning to the distinction between the state statutes upon which the judges relied in the above cases in claiming a "good faith" defense to salaries illegally paid them, and the city resolution upon which the mayor must rely for a good

"faith defense." A state statute authorizing the payment of an illegal salary has at least had the benefit of being enacted by a legislature that, according to Hobbs, is legally impossible to allege has been induced to practice a fraud, in that case upon the county.

It has been held that municipal ordinances (and presumably municipal resolutions) are, like state statutes, presumed to be valid. [Penn-dixie Cement Corp. v. Kingsport, 225 S.W..2d 270 (Tenn. 1949)]. But that argument is hollow when Section 7(b) of the Charter requires the mayor and board of aldermens' salaries to be raised by ordinance and the charter itself prohibits such raises during their terms of office. In City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988), the Tennessee Supreme Court discussed at length the effect of *ultra vires* contracts. It pointed to two kinds of such contracts: (1) Contracts wholly outside the scope of the city's authority under its charter or a statute; and (2) Contracts not undertaken consistent with the mandatory provisions of its charter or a statute. It declares that the first kind of contracts are simply illegal, but that with respect to the *latter* kind of ultra vires actions, the court will weigh the equities to determine if the action should be voided. That case obviously involved a contract into which the city had entered but had not approved by ordinance as required by the city charter, but its language suggests it applies to all city actions, including pay raises for municipal officials. In the case of the mayor the contract was simply outside the authority of the Board of Aldermen to enact, and in all events, would have required such pay raises to be adopted by ordinance. In fact, in the unreported case of City of Johnson City v. Campbell, 2001 WL 112311 (Tenn. Ct. App.), it was held that City of Lebanon v. Baird did not help save an exercise of eminent domain by the city where the city exercised that power under its charter, the charter required the exercise by ordinance, but the city did it by resolution. It is difficult to believe that the courts would treat pay raises for public officers required by the charter to be done by ordinance but done by resolution any different, particularly when the pay raises were illegal. manner it treats contacts required by the charter to be done by ordinance.

Ironically, it is the case of a sessions judge seeking to force the payment to him the salary paid to his predecessor in office that also works against the mayor with respect to a "good faith" defense against being required to pay back his illegally paid salary. In Sexton v. Sevier County, 948 S.W.2d 747 (Tenn. Ct. App. 1997), a sessions judge sued to be paid the same salary his predecessor was paid, on the theory of equitable estoppel. A distinguishing feature of this case was that in rejecting his claim, the court declared that even the judge knew that *he had no statutory claim to that salary,* and estoppel protected rights already acquired; it did not create new ones.

The judge in Sexton got far less consideration for his claim than did the other judges in the above cases whose claims for "good faith" relief from the illegally paid salaries rested on statutes that authorized the illegal salaries in question. The court spoke at some length about the application of equitable estoppel to governments:

> Generally speaking, the doctrine of estoppel is not favored under our law. [citations omitted by me.] Although the doctrine may be invoked against a county [citation omitted by me], "very exceptional circumstances are required to invoke the doctrine against the State

> and its governmental subdivisions." [Citations omitted by me.]
>
> In order to invoke the doctrine of equitable estoppel, a party must show the following:
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> (1) his or her lack of knowledge and of the means of knowledge of the truth as to the facts in question;
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> (2) his or her reliance upon the conduct of the party who is estopped; and
>
> (3) action by the invoking party based thereon of such a character as to change that party's position.
>
> [Citations omitted by me.] It is the burden of the party claiming estoppel to prove each of the above elements. [Citations omitted by me.] [At 750-51]

The court reasoned that:

> As a threshold matter, we have concluded that Judge Sexton's case does not satisfy the first requirement-lack of knowledge and of the means of obtaining knowledge of the truth-for the application of estoppel against Sevier County. As stated by our Supreme Court,
>
> It is essential to estoppel that the person claiming it was himself not only destitute of knowledge of the facts, but without available means of obtaining such knowledge; for there can be no estoppel where both parties have the same means of ascertaining the truth.
>
> [Citations omitted by me.] Like everyone else, Judge Sexton is charged with knowledge of the law. [Citation omitted by me.] This is especially true in his case, given the fact that he is a judge. Under the circumstances of this case, it is clear that even if Judge Sexton did not have actual knowledge of the correct salary for his position, he certainly possessed the means of ascertaining that information. The private act creating the Trial Justice Court, and its amendments, as well as Chapter 5 of Title 16 of the Code, with its exclusion as to Sevier County, were readily available to him. [Citation omitted by me.] ("The contents of a city charter are public and readily available to all who deal with a city.") [Citation omitted by me.] Therefore, Judge Sexton cannot rely upon the county' s payment to Judge Sexton in excess of the salary provided for in the Private Act to claim that the county is estopped to deny his entitlement to the salary supplements. Since he is presumed to know the salary provided by the Private Act and is presumed to know that Sevier County is

> excluded from the operation of the general law pertaining to general sessions court, he "knew" that he was not entitled to the supplements under the general law. He cannot relay on the doctrine of estoppel. [At 751]

Why is this case significant for the mayor of your city? Neither the sessions judge in Sexton nor the mayor could point to a statute that gave them a claim to their salary increases, although the mayor can point to a resolution that authorized his pay increases. In addition, although he is not a lawyer, the mayor was in the same position as was Judge Sexton to have ascertained the law governing his salary, simply by reading the City Charter.

Analysis of Question 5

Hobbs observed that certain of the alleged illegal payment of salaries to the defendant and his office were made more than 30 years prior to the bringing "of the present suit; others 24, 25, and 18 years prior thereto, of which are barred by the statute of limitations of 10 years as provided in code Section 8601." [At 553]

The statute of limitations of 10 years found in Section 8601 referred to in Hobbs, is presently found in Tennessee Code Annotated, § 28-3-110, which is entitled "Actions on public officers' and fiduciary bonds–Actions not otherwise covered," and applies to:

> (1) Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds;
>
> (2) Actions on judgments and decrees of courts of record of this or any other state or government;
>
> (3) All other cases not expressly provided for.

Analysis of Question 6

Standing to sue. A critical issue in suits based on an allegation that a government illegally spent money is the standing of individuals to sue. Without such standing, the persons filing the suit are not even entitled to a hearing on the merits of the suit. Apparently, two classes of persons have standing to sue to recoup the money illegally paid to the mayor. The first class is probably the board of aldermen and perhaps any officer who has responsibility to insure that municipal expenditures are legal. Until recently, I was uncertain whether any member of the Board of Aldermen had individual standing to sue the mayor. However, Fannon v. City of LaFollette, 2010 WL 92540 (Tenn. Ct. App), held that individual members of the board of mayor and aldermen did not have standing to sue the city in their individual capacities because the board could act only as a body.

The second class is a taxpayer or taxpayers. There are a number of cases involving the question of what it takes for these two classes of persons to achieve standing to sue for the

recoupment of illegally paid government funds. [Cobb v. Shelby County Board of Commissioners, 771 S.W.2d 124 (1989); Badgett v. Rogers, 436 S.W.2d 292 (1969); Metropolitan Government of Nashville v. Fulton, 701 S.W.2d 597 (Tenn. 1985).]

As I read those cases, the aldermen achieve standing by virtue of their positions, because through those positions the illegal expenditures cause them damage or injury that is not common to the body of citizens as a whole. The second class–taxpayer or taxpayers-- have standing to sue, provided they do three things:

1. Show they are taxpayers;

2. Allege a specific legal prohibition on the use of funds;

3. Show that they have notified "appropriate" public officials of the illegal expenditure and have given them an opportunity to take corrective action short of litigation.

However, the necessity for taxpayers to do No. 3 is excused where the notice and demand would be a formality. In Badgett v. Rogers, above, the taxpayers suing for the recovery of money alleged to have been illegally paid from city funds were excused from the requirement of notice and demand for corrective action because the suit involved the claim that the mayor was illegally being paid an expense account in addition to his salary by the city's finance director. In that instance, said the Court, "The Mayor and Finance Director patently have interests contrary to this action. Demand upon them would have been a vain formality." [At 295]

However, it seems to me that whether a suit for the recovery of the money paid to the mayor brought by a member of the board of mayor and aldermen, or by a taxpayer or taxpayers, it is relatively easy for both classes of potential plaintiffs to avoid any standing issue by doing No. 3.

Officials subject to suit. The suit itself is brought against "delinquent public officials." [Cobb v. Shelby County Board of Commissioners, at 126] It appears that the "delinquent public official/s" in the case of the City would include the mayor, the board of aldermen, and perhaps the city official who made the payment to the mayor. The board of aldermen approved the expenditure, presumably a city officer signed the check, and check was paid to the mayor. However, the case law supports the logical proposition that where there is an illegal expenditure made to a public official, recovery of the money is actually sought from that public official. In addition, the case law also supports the proposition that in a suit brought by either potential class of plaintiff, the Board of Mayor and Aldermen would apparently be joined as a defendant.

In Badgett v. Rogers, above, suit was brought against Knoxville Mayor Leonard Rogers and Finance Director Snoddy, alleging that the $3,000 expense account paid annually to Mayor Rogers in addition to his salary was an illegal expenditure of city money. It claimed that Finance Director Snoddy's payment of that expense account to Mayor Rogers was a "misappropriation of the funds of the City, *for which defendant Rogers is personally liable*." [At 293] Although the Court dismissed this case because the plaintiff failed to allege any specific facts supporting his argument that the $3,000 expense account was illegal, there appears to have been no dispute that

the suit was properly brought against the mayor and the city finance director individually, and that it properly claimed restitution of the alleged illegal expenditures from the *mayor*. Likewise it appears that in Cobb v. Shelby County Board of Commissioners, the suit was brought against the county commissioners, the mayor and two finance commissioners for the recoupment of parts of salaries claimed to have been illegally paid to the commissioners. The plaintiff lost the case on its merits, but the case implies that the persons from whom recovery of the alleged illegally paid salaries were sought were the county commissioners. The mayor and the finance commissioners appear to be "delinquent public officials" to the extent that it was they who either refused to stop the payment of the salaries when requested to do so, or who actually paid them.

If a suit against the "delinquent public officials" in the City seeks recovery of the illegally paid funds from the mayor, what is the purpose of the requirement that a taxpayer or taxpayers who file/s the suit give the city prior notice of the illegal payment and an opportunity to take corrective action? Apparently that purpose is to permit the board of mayor and aldermen itself to attempt to recoup the money illegally paid, apparently including by filing of a suit against the person to whom the payment was made.

Bayless v. Knox County, 286 S.W.2d 579 (1955) points to the reason that the taxpayers in that case were entitled to file a suit against individual county commissioners for the recovery of salaries and other benefits illegally paid to them, and the reason Knox County was a defendant in the case:

> *The bill [complaint] alleges that these taxpayers unsuccessfully requested the Quarterly Court to institute this suit to enjoin allegedly unlawful appropriations and to collect county funds alleged to have been illegally paid to certain of the defendants. Knox County was made a party defendant to the end that judgment might be rendered in its favor for such amounts as it may be due from the respective defendants. In view of the refusal of the county, though requested to institute this suit, the proceedings by the taxpayers seems to be authorized by Peeler v. Luther, 175 Tenn. 454, 135 S.W.2d 926. [At 582]*

I mentioned above the good prospect that no potential class of plaintiffs need give the notice and make the demand required by No. 3 under **Standing to Sue**, above, prior to the filing of a suit to recover the funds illegally paid by the Board of Aldermen to the mayor. But again I also suggest that such notice and demand is relatively easy to make by either class of potential plaintiffs, and that it may help eliminate any possibility that a suit might be dismissed for their failure to make it.

Analysis of Question 6

Tennessee Code Annotated, § 26-2-221, provides that:

> Garnishment of salaries, wages or other compensation due from the state, or from any county or municipality, to any officer or employee thereof is permissible . No such officer or employee, ... may

validly claim any privilege or immunity in that regard....

Under the same statute, such officers and employees are treated the same as officers or employees of private corporations.