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City of Chattanooga

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July 14, 2008

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Re: City of Chattanooga Charter

Dear Mr. Thompson:

This is in response to your letter of June 20, 2008, concerning the application of the City of Chattanooga's Charter to a residency requirement for a potential candidate for the Office of Mayor. Unfortunately, the circumstances concerning the re-codification of the City of Chattanooga's Charter preclude a simple answer to your inquiry. A brief factual history and legal analysis will follow.

Chattanooga changed from the Commission form of government to a Mayor-Council form of government by virtue of the ruling in *Brown, et al vs. Board of Commissioners of the City of Chattanooga, Tennessee, et al*, Civil Action No. 1-87-388, (E.D. TN). Paragraph 6 of the Plan adopted as the Judgment of the Court follows:

No person shall be elected to the office of Mayor unless he or she has been a resident of the City of Chattanooga for at least one year prior to his or her election and unless he or she shall be at least thirty (30) years of age.

A similar residency requirement and minimum age of twenty-five (25) years in paragraph 15 of the Judgment applied to City Council members.

Chattanooga is a home-rule city. Accordingly, its charter can be amended by an ordinance adopted by the City Council and approved by the voters in a referendum. Ordinance Number 9432 adopted by the City Council on August 21, 1990, was subsequently ratified by the

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voters in the November 6, 1990 election. The operative section of this ordinance amended the City's Charter with respect to age and residency qualifications for Mayor and Council as follows:

The residency and age requirements must be met at the time (s)he qualifies to run for office. Each candidate, at the time of qualification, shall sign an oath that (s)he meets the residence and age requirements.

Ordinance No. 9432 effectively changed paragraphs 6 and 15 of the Court order which are now codified as Section 8.2 for the qualifications of City Council members and Section 8.27 for the Mayor. Following enactment of Ordinance Number 9432, candidates for council and mayor must meet the residency and age requirements at the time they qualify to run for office rather than at election day.

In 2002, the City Council enacted Ordinance Number 11272 "so as to amend and restate the Charter of the City in its entirety so as to conform it to the decision of the United States District Court in *Brown vs. Board of Commissioners, et al*, and subsequent amendments thereto." The purpose of this re-codification was to remove references to the commission form of government and to replace with appropriate references to the City Council or the Mayor.

In what can probably be best described as a clerical oversight the changes adopted by Ordinance Number 9432 were not included within the re-codification of Section 8.2 relating to the qualification of Council members and 8.27 relating to the qualifications of the Mayor.

The initial discussion about the re-codification of the City's Charter to include changes brought about by the Court order occurred in the minutes of the Legal and Legislative Committee on January 8, 2002, and contain City Attorney Nelson comments about charter changes as follows:

He explained that when the government changed form in 1990 that the City Attorney's office put in changes that they felt were appropriate that have never been adopted officially - that it was their interpretation, and they thought it had gone pretty well. He stated that they needed to make an official decision, and the Charter needed to be gone through section by section in conjunction with the Mayor's office. He stated that this needed to be done by May and on the August ballot. He stated that he would rather than we not make any substantial changes, other than the required changes to incorporate the new government terminology, until November.

Subsequent minutes of the Legal and Legislative Committee reflect this advice about changing terminology but not substance was followed.

Common changes included changing "board" to "council" and deleting reference to former commissioners such as "commissioner of the department of public works, streets, and airports" and replacing with "mayor." These types of changes became so common in the process

that the minutes began to abbreviate the explanation of changes with such phrases as "routine change," or "named word changes," and "regular changes."

The re-codification also involved removal of inoperative provision such as those relating to the operation of schools. The minutes of the Legal and Legislative Committee reflect that changes to the charter were considered chapter by chapter utilizing draft changes presented by the City Attorney.

A section of Chapter 5 of the charter involving "Election of Mayor, Commissioner, and City Judge" was reviewed in the Legal and Legislative Committee on March 12, 2007. If there was to be a change in qualification of the Mayor or City Council member, this is one meeting where that would have logically occurred. There is no mention of the any proposed changes in the minutes.

According to the minutes of March 12, 2002, the re-codification of Chapter 8 of the Charter was scheduled for the Legal and Legislative Committee on March 19, 2002. Unfortunately, we have been unable to locate a copy of the minutes of March 19 if they were in fact prepared. We believe there was a failure in the process of taking or preparing the minutes resulting in none being prepared.

We have located a red-lined copy of the changes to Chapter 8 prepared by the City Attorney for consideration of the Legal and Legislative Committee (copy enclosed). Please that that Section 8.2 and 8.27 do not contain the language adopted in Ordinance 9432. The Editor's notes in the pre-existing 1995 version of the Charter used as the base for the red-lined changes do not reference Ordinance No. 9432 or the changes it enacted. The inadvertent failure to include the changes enacted by Ordinance Number 9432 in the 1995 codification of the City Charter was carried forward in the draft being used to make the changes in 2002. Unless someone noted this omission, it is unlikely that a change would have been discussed. Circumstances strongly suggest that the omissions arose from the Editor's error in the preparation of the 1995 Code.

A finished draft of the Charter change was submitted to the Legal and Legislative Committee on April 16, 2002, and the matter referred to the City Council for adoption on first reading on April 23, 2002, and for second and final reading on April 30, 2002. The whole process from January 8, 2002, through April 30, 2002 wherein the matter was considered reflect that adopting the Charter to the Court decision was the legislative intent and there was no intent expressed to change the provisions of Ordinance Number 9432.

This re-codification was described to the public as a housekeeping measure. There was no indication that the City Council was attempting to repeal the provisions approved by the public in the 1990 referendum. To the best of our knowledge, there was no public discourse about this omission or any intent to change the age and residency requirements prior to its ratification by the electorate in the 2002 referendum.

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Additionally, Ordinance Number 11272 contained the following provision in Section 2:

That all laws containing the present Charter of the City of Chattanooga, not in conflict with this amendatory home rule ordinance, be and the same are continued in full force and effect, and all laws or parts of laws in conflict therewith are hereby repealed.

Therefore, it appears to be a legislative intent that the language adopted via Ordinance Number 9432 covering age requirements being met at the time (s)he qualifies to run for office was intended to remain in full force and effect.

There are a number of Tennessee cases about errors caused by codification. An 1898 case, *Brien vs. Robinson*, 102 Tenn. 156, at 166-67 (1899) stated "it is a general rule of construction that in doubtful cases it would be presumed that the Code was not intended to change, but only to compile, the old statutes citing, *Bates vs. Sullivan*, 3 Head, 633; *Tennessee Hospital v. Fuqua*, 1 Lea, 611; *State vs. McConnell*, 3 Lea, 338 (Tn. 1899). Utilizing this rule of construction, Ordinance Number 11272 was not intended to change the provisions enacted by Ordinance No. 9432. This rule of construction was reaffirmed by the case of *Ackerman vs. Marable*, 95 S.W.2d 1286 at 1289 (Ct. App. 1934).

Errors in codifications were also discussed in the case of *Roberts vs. Cahill Forge & Foundry Co.*, 184 S.W.2d 29, at 31 (1944) wherein it is stated, "Counsel further insists that we are precluded from reference to the original acts because such acts were repealed by section 2 of the Code. This section has no application where the codifiers clearly express an intention to embody in the Code, and so re-enact Acts of the Legislature which were in force and effect at the time of the adoption of the Code in 1932." Section 2 of Ordinance Number 11272 expresses a similar intention to continue in full force and effect those laws that were not in conflict.

A more recent case *State vs. Hicks*, 835 S.W.2d 32 at 37 (Tenn. Cr. App. 1992) pertaining to an error in codification stated the public act is controlling, and "when there is a conflict during the process of codification, the Act as originally passed controls." We believe Ordinance Number 9437 continues to be controlling.

Accordingly, it is our considered opinion that the provisions of Ordinance Number 9432 remain in full force and that the candidates for Mayor and City Council members must meet the residency and are requirements at the time they qualify for office. However, it must be admitted that a contrary legal argument could be made. Counsel for the election commission will have to determine if it is appropriate for it to rely upon this opinion or whether a declaratory judgment action is warranted.

Section 8.2 of the City Charter should read:

Sec. 8.2. Qualification of council members.

The City shall be divided into nine (9) districts within the geographic boundaries of the city. The city council shall be composed of nine (9) members with each member elected from one of such single districts. The candidate for each council position who receives the majority of his or her district shall be elected. No person shall be elected or appointed as a member of the council who is not at least 21 years of age and who has not been a resident of the district for at least one year preceding his or her election. The residency and age requirements must be met at the time (s)he qualifies to run for office. Each candidate, at the time of qualification, shall sign an oath that (s)he meets the residence and age requirements.

Section 8.27 of the City Charter should read:

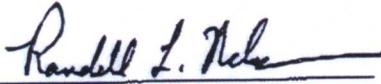
Sec. 8.27. Qualifications of mayor.

No person shall be elected to the office of mayor unless he or she has been a resident of the city of Chattanooga for at least one year prior to his or her election and unless he or she shall be at least thirty (30) years of age. The residency and age requirements must be met at the time (s)he qualifies to run for office. Each candidate, at the time of qualification, shall sign an oath that (s)he meets the residence and age requirements.

Mr. Summers has mentioned the possibility of a declaratory judgment to address this issue. In the case of *Comer vs. Ashe*, 514 S.W.2d 730 (1974), a candidate for state senate sought judgment declaring the opposing candidates named be stricken from the ballot for not meeting an age eligibility requirement. In the case of *Jordan vs. Knox County*, 15 S.W.3d 751 (2007) the County Election Commission sought declaratory judgment about the validity of term-limit amendments to the county charter. The circumstances surrounding the passage of Ordinance 11272 and its ratification by the voters and the public interests at stake might warrant a suit for declaratory judgment either by either a candidate who might be impacted or the election commission should a candidate attempt to qualify who does not meet the age and residency requirements at the time of qualification pursuant to the provisions of Ordinance No. 9432. Courts do not render advisory opinions. It appears to us at this stage of the election process that only a potential candidate otherwise qualified who would be disqualified by virtue of the changes to the Chattanooga Charter enacted by Ordinance No. 9432 has standing to seek declaratory judgment.

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Sincerely,



RANDALL L. NELSON
City Attorney



MICHAEL A. McMAHAN
Assistant City Attorney

RLN/mms
Enclosure

cc: Mayor Ron Littlefield
Chattanooga City Council Members
Jerry Summers
Rob Healy