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Opinion No. 09-94

Charter of the City of Clarksville

QUESTIONS

1. In the current Clarksville City Charter, the mayor is the executive head of the city government, presides over the City Council meetings, and has a seat, a voice, and the right to vote on any matter presented to the City Council. The current charter also provides that the mayor has a right to veto any ordinance passed by the City Council. The veto of the mayor renders an ordinance null and void unless the City Council, by majority vote, reenacts or re-passes the ordinance at its next regular meeting. Does this arrangement violate the separation of powers doctrine contained in Article II, Sections 1 and 2, of the Tennessee Constitution?

2. Article III, Section 18, of the Tennessee Constitution requires only a majority vote of the Legislature to overturn a gubernatorial veto. Does this constitutional provision prevent the General Assembly from enacting a private act that allows the Clarksville City Council to override a mayoral veto by a two-thirds vote?

3. Chapter 47 of Title 8 of the Tennessee Code provides for the ouster of public officials by judicial process. May the General Assembly enact a private act that provides for the removal of a City of Clarksville official for certain offenses by a two-thirds vote of the City Council?

OPINIONS

1. Based on *County of Shelby v. Blanton*, 595 S.W.2d 72 (Tenn. Ct. App. 1980), *aff'd* (Tenn. 1980), it appears that the above-described arrangement does not violate the separation of powers doctrine.

2. No.

3. The ouster law, Tenn. Code Ann. §§ 8-47-101, *et seq*., does not take away the power of a municipality to remove its officers. The ouster law is remedial only and provides an additional and cumulative remedy.

ANALYSIS

In the current Clarksville City Charter, the mayor is the executive head of the city government. Clarksville City Charter, Art. IV, § 2. The mayor is also a member of the City Council. Clarksville City Charter, Art. I, § 2(b); Art, II, §§ 3, 11. The mayor presides over the City Council meetings and has a seat, a voice, and the right to vote on any matter presented to the City Council. Clarksville City Charter, Art. II, § 10; Art. IV, § 2. The current charter also provides that the mayor has a right to veto any ordinance passed by the City Council. The veto of the mayor renders null and void such ordinance unless the City Council, by majority vote, reenacts or re-passes such ordinance at its next regular meeting. Clarksville City Charter, Art. IV, § 2.

Your first query is whether this arrangement violates the separation of powers doctrine contained in Article II, Sections 1 and 2, of the Tennessee Constitution. Article II, Section 1, of the Tennessee Constitution establishes the legislative, executive, and judicial departments of government. Article II, Section 2, prohibits the members of one department from exercising the powers belonging to either of the others. The Constitution does not define in express terms what are legislative, executive, or judicial powers, but the Tennessee Supreme Court has said that the legislative power is to make, order, and repeal laws; the executive power is to administer and enforce laws; and the judicial power is to interpret and apply laws. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975); *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664 (1909).

Tennessee courts have recognized that the separation of powers doctrine applies with less force to local governments. In *Summers v. Thompson*, 764 S.W.2d 182 (Tenn. 1988), *reh'g denied* (1988), *appeal dismissed*, 488 U.S. 977, 109 S.Ct. 524, 102 L.Ed.2d 556 (1988), the Tennessee Supreme Court addressed whether a city legislature could constitutionally be authorized to terminate a city judge. The majority opinion concluded that this arrangement was constitutional, but only because the particular city judge did not exercise the power of an inferior court within the meaning of Article VI of the Tennessee Constitution. In a concurring opinion, Justice Drowota, who also wrote the majority opinion, discussed the broader constitutional issues the case presented. Justice Drowota discussed the various forms of municipal government authorized by statute and noted that the "basic tripartite distribution of powers is reflected to some extent" in each statutory charter system. *Summers*, 764 S.W.2d at 191. He observed, however, that the distinctions among the powers are not as well-defined at the level of municipal government. *Id*. And he noted that no statute or municipal charter could vest all powers completely in one body. *Id*. at 192. Accordingly, he stated:

> "[t]he great diversity of municipal corporations required to meet the wants of local communities seems to demand a larger liberty of legislation than private corporations." Thus, at least at the local level, strict adherence to the departmental division of powers is not always required, as "it has long been recognized that it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government."

Id. (citations omitted).

Consistent with the foregoing, the Tennessee Supreme Court has recognized that a mayor's functions are usually executive or administrative in nature but that a mayor may also exercise legislative functions and be a member of the city's council if expressly provided by law. *Reeder v. Trotter*, 142 Tenn. 37, 215 S.W. 400, 401 (1919). In recognizing the dual capacity in which a mayor may serve, the *Reeder* Court said: "It is within the power of the Legislature to confer upon [the mayor] the functions of a member of the council in every respect, and if the legislation on the subject calls for that construction he will be so regarded." *Id*. (quoting *Dillard on Municipal Corporations*, vol. 2, § 513). Accordingly, the authority of the mayor as a member of the council and his authority with respect to voting as such is derived from the charter or law under which the municipality functions. *Anderson v. Town of Gainesboro*, 1992 WL 33893*2 (Tenn. Ct. App.) (citing 4 McQuillin, *Municipal Corporations* § 13.25). Under *Reeder* and *Anderson*, the mayor of Clarksville may vote as a member of the City Council because the Clarksville City Charter expressly designates the mayor as a member of the council and states that the mayor has a seat, a voice, and the right to vote on any matter presented to the council.

With respect to granting a mayor veto power, Tennessee courts have similarly found that such a right exists where a charter or statute expressly authorizes such power. *City of Knoxville v. Heiskell*, 2 Higgins 459, 2 Tenn. Civ. App. 459, 467-68 (1911); *see Boyer Fire Apparatus Co. v. Town of Bruceton*, 66 S.W.2d 210, 214 (Tenn. Ct. App. 1932). The right to veto, though, is limited to legislative acts; the right to veto does not extend to administrative acts. *Boyer Fire Apparatus Co.*, 66 S.W.2d at 214; *see Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664 (1909).

In *County of Shelby v. Blanton*, 595 S.W.2d 72, 76 (Tenn. Ct. App. 1980), *aff'd* (Tenn. 1980), the Court directly addressed the question as to whether the veto power granted to the mayor of Shelby County by Chapter 260 of the 1974 Private Acts violated the separation of powers doctrine contained in Article II, Sections 1 and 2, of the Tennessee Constitution. The Court held that it did not. *Id*. at 79. The Court went on to state, however, that such a provision must not run afoul of other constitutional prohibitions. The County Recovery and Post War Aid Act was at issue in *Blanton*, and the Act provided that a bond resolution passed by the governing body of a county under the provisions of that statute would not "be subject to veto by the chief executive officer of the county or presiding officer of the governing body." *Id*. (citation omitted). Thus, the Court found that Article XI, Section 8, of the Tennessee Constitution was implicated,[1] because it held that the statute was mandatorily applicable to all counties and that there was no reasonable basis for excluding Shelby County from its express provision that denied the executive the power to veto a bond resolution passed pursuant to its terms. *Id*.

[1] Where the provisions of an act that is either local or local in effect contravene a general law of mandatory applicability, the provisions of Article XI, Section 8, of the Tennessee Constitution come into play, and there must be some reasonable basis for the special provision. *Shelby County Civil Serv. Merit Bd. v. Lively*, 692 S.W.2d 15, 18 (Tenn. 1985); *Knoxville's Community Dev. Corp. v. Knox County*, 665 S.W.2d 704, 705 (Tenn. 1984).

While *Blanton* involved a private act that granted veto power to a county mayor, we think that *Blanton* would be applied to a private act that grants veto power to a city mayor.[2] Thus, under the Clarksville City Charter, the mayor may veto ordinances passed by the City Council because the Clarksville City Charter expressly grants the mayor the right to veto any ordinance passed by the City Council. *See Heiskell*, 2 Higgins 459, 2 Tenn. Civ. App. at 467-68; *see Boyer Fire Apparatus Co.*, 66 S.W.2d at 214. The mayor's right to veto, though, is limited to ordinances that are legislative in nature. *See Boyer Fire Apparatus Co.*, 66 S.W.2d at 214. The mayor's right to veto may also be limited by other constitutional prohibitions depending on the nature of the ordinance. *See Blanton*, 595 S.W.2d at 79.

You next ask whether Article III, Section 18, of the Tennessee Constitution prevents the General Assembly from enacting a private act that allows the Clarksville City Council to override a mayoral veto by a two-thirds vote since this constitutional provision requires only a majority vote of the Legislature to overturn a gubernatorial veto. Specifically, Article III, Section 18, provides, in pertinent part:

> Every Bill which may pass both Houses of the General Assembly shall, before it becomes a law, be presented to the Governor for his signature. 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, to the house in which it originated; and said House shall cause said objections to be entered at large upon its journal, and proceed to reconsider the Bill. If after such reconsideration, a majority of all the members elected to that House shall agree to pass the Bill, notwithstanding the objections of the Executive, it shall be sent, with said objections, to the other House, by which it shall be likewise reconsidered. If approved by a majority of the whole number elected to that House, it shall become a law. The votes of both Houses shall be determined by yeas and nays, and the names of all the members voting for or against the Bill shall be entered upon the journals of their respective Houses.

The first rule of interpreting a constitutional provision is to give effect to the intent of the people who adopted it. *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983). This intent is derived from the language of the provision. *Id.* The words in the provision are given their ordinary and inherent meaning. *State ex rel. Cohen v. Darnell*, 885 S.W.2d 61, 63 (Tenn. 1994). Article III, Section 18, clearly refers to the Governor and both Houses of the General Assembly. By giving the words contained in Article III, Section 18, their ordinary meaning, we are of the opinion that this constitutional provision is confined to the manner in which a gubernatorial veto

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[2] We do note that there are differences between the powers bestowed upon the Shelby County mayor and the City of Clarksville mayor, namely that the City of Clarksville mayor has a right vote on matters presented to the City Council. However, it does not appear that the *Blanton* Court held that the doctrine of separation of powers was not violated based on the fact that the Shelby County mayor lacked voting rights. It simply held that the Legislature may constitutionality vest veto power in a county mayor of a particular county without alluding to the other powers of the Shelby County mayor.

may be overridden by the state legislature. Accordingly, we do not believe this provision, expressly or impliedly, restricts the General Assembly's ability to enact legislation to provide that the Clarksville City Council may override a mayoral veto by a two-thirds vote, rather than a majority vote. *See Prescott v. Duncan*, 126 Tenn. 106, 148 S.W. 229 (Tenn. 1912) (General Assembly has unlimited power to enact laws except as expressly or impliedly restricted by the United States or Tennessee Constitution); *Summers*, 764 S.W.2d at 192 (quoting *Malone v. Williams*, 118 Tenn. 390, 425, 103 S.W. 798, 807 (1907)) ("[T]he legislature ha[s] power to grant special charters to municipal corporations, and may, in general, include within those charters such peculiar provisions, not in conflict with the constitution, as may be needed for the convenience and well being of the particular community.").

Moreover, we note that there is no general law of mandatory applicability that addresses the percentage of votes that a municipal governmental body must have in order to override a mayoral veto. Thus, Article XI, Section 8, of the Tennessee Constitution is not implicated.[3] For these reasons, we think that the General Assembly may enact a private act that allows the Clarksville City Council to override a mayoral veto by a two-thirds vote.

Your last question concerns the removal of officials of the City of Clarksville. You observe that Chapter 47 of Title 8 of the Tennessee Code provides for the ouster of public officials by judicial process and ask whether the General Assembly may enact a private act that provides for the removal of a City of Clarksville official for certain offenses by a two-thirds vote of the City Council. We begin by revisiting Op. Tenn. Att'y Gen. 90-027 (February 27, 1990), which addresses the removal of public officers. In that opinion, we stated:

> As a general proposition an individual accepts a public office subject to any conditions placed on that office, including conditions related to removal. 67 C.J.S. *Officers* §117 (1978). The legislature has all power not denied by the Tennessee or United States Constitutions. *Perry v. Lawrence County Election Commiss*ion, 219 Tenn. 548, 411 S.W.2d 538 (1967). It may therefore establish conditions for office holding, suspension and removal that do not conflict with the Tennessee and United States Constitutions.
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> The Tennessee Constitution establishes the exclusive methods of removal of certain officials. Article V creates the impeachment process which is the sole method of removing the Governor, the Treasurer, the Comptroller and the Secretary of State. Judges and attorneys for the state are subject to impeachment under Article V as well as removal by concurrent vote of both Houses of the General Assembly under Article VI, Section 6. Members of the General Assembly may only be removed by expulsion under Article II, Section 12. Article V, Section 5 of the Tennessee Constitution provides that other civil officers are subject to indictment for crimes or misdemeanors in office and upon conviction shall be removed from office by the court. The provision, however, relates to criminal proceedings alone. It does not undertake to prohibit or regulate removal

[3] *See* note 1, *supra*.

> proceedings that are civil in character. *State ex rel v. Crump*, 134 Tenn. 121, 141, 183 S.W. 505 (1915). The Legislature is therefore free to establish suspension or removal grounds and methods for such officers. *Id*. *See* T.C.A. §8-47-101 *et seq*. It does not matter whether the official is an elected or appointed one.[4] 67 C.J.S. *Officers* §108 (1978).

Op. Tenn. Att'y Gen. 90-027 (February 27, 1990).

You inquire as to the removal of a City of Clarksville official "for certain offenses." For purposes of this opinion, we assume that you mean an offense that rises to the level of a removal for cause. Based on the foregoing law, a private act authorizing the Clarksville City Council to remove its officials, other than any constitutional officers,[5] for such offenses is permissible.[6] However, such removal must be done in compliance with the constitutional mandates of due process. The accused is entitled to notice and a fair hearing. The charges must be specific and stated with substantial certainty. The proof and judgment must conform to the charges made. *Summers*, 764 S.W.2d at 195; *Rhea County v. White*, 43 S.W.2d 375, 377 (Tenn. 1931); *Hayden v. City Council of Memphis*, 100 Tenn. 582, 47 S.W. 182, 183 (1898).

We now turn to Chapter 47 of Title 8 of the Tennessee Code, which sets forth the remedy of ouster, a proceeding to be brought against persons holding offices "of trust or profit" in state or local government who knowingly or willfully commit misconduct in office, or knowingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state. The Attorney General, the District Attorneys General, and county attorneys within their respective jurisdictions may institute such actions without complaint being made to them or request made of them. Tenn. Code Ann. §§ 8-47-101, *et seq.*; *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981); *State ex rel. Thompson v. Walker*, 845 S.W.2d 752 (Tenn. Ct. App. 1992).

In sum, the ouster law provides a judicial process for the removal of certain officers. The ouster law, though, does not take away the power of a municipality to remove such officers. The ouster law is remedial only and provides an additional and cumulative remedy. *Broyles v. State*, 341 S.W.2d 724, 726 (Tenn. 1960); *State ex rel. Phillips v. Greer*, 98 S.W.2d 79, 79 (Tenn. 1936); *State v. Ward*, 43 S.W.2d 217, 219 (Tenn. 1931); *State ex rel. Timothy v. Howse*, 134 Tenn. 75, 183 S.W. 510, 512 (Tenn. 1916); *Roberts v. Brown*, 310 S.W.2d 197, 208-09 (Tenn.

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[4] The opinion contains a footnote that states: "Under current law, officials who serve at the pleasure of the appointing authority may be removed for any reason that does not violate the Tennessee Constitution or the United States Constitution." That law has not changed. *See Summers v. Thompson*, 764 S.W.2d 182 (Tenn. 1988); *Williams v. Bougher*, 46 Tenn. 486, 6 Cold. 486 (1869).

[5] As previously noted, the removal of certain constitutional officers is governed exclusively by the Tennessee Constitution.

[6] In fact, a municipal corporation in Tennessee has no power to remove a city official elected or appointed to a term of office in the absence of an express grant of power. *Brock v. Foree*, 76 S.W.2d 314, 315 (Tenn. 1934); *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978).

Ct. App. 1957); *accord Sitton*, 566 S.W.2d at 889-890 (Court held that absent authorization by charter or ordinance, the mayor had no authority to remove the director of law, who was appointed to a term under the charter; consequently, charter provision that said that ouster law applied to metropolitan officers was the procedure for discharge).

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