MEMORANDUM TO: All Members of the Metropolitan Council

FROM: Jon Cooper, Director
Metropolitan Council Office

DATE: July 7, 2009

RE: Analysis for Ordinances Amending the Zoning Code Text

ORDINANCE NOS. BL2009-410 & BL2009-465 (MURRAY) **–** These two zoning text changes amend the code provisions pertaining to mobile vending activity. In January 2007, the council enacted Ordinance No. BL2006-1087, as amended, to designate mobile vending as a use permitted with conditions in the commercial zoning districts. The conditions require mobile vendors to be located within a permanent, enclosed structure. The ordinance exempted street vendors licensed by the county clerk, as well as mobile vendors selling only food items, living plants or agricultural products.

Ordinance No. BL2009-410 would allow mobile vendors who are unable to comply with the indoor-only requirement to apply for a special exception from the board of zoning appeals (BZA) to engage in the outdoor vending activity. The code provides that a special exception permit is not to be considered an entitlement, and is only to be granted by the BZA if the applicant demonstrates that all of the required standards are met. In addition to the specific conditions applicable to the use, the BZA is to determine whether the proposed use will not "adversely affect other property in the area to the extent that it will impair the reasonable long-term use of those properties."

The specific conditions that would apply to mobile vendors are as follows:

1. The hours of operation would be restricted to 7:00 a.m. to 6:00 p.m.
2. The mobile vending activity must be setback at lest fifty feet from the public right-of-way and from any residential zoning district.
3. The mobile vending activity shall take place only along a collector street, not a residential or arterial street.
4. No loud speakers or public address systems would be permitted.

The BZA may also impose other reasonable restrictions necessary to protect the public health, safety and welfare.

This ordinance was deferred indefinitely by the planning commission.

Ordinance No. BL2009-465 would establish a new zoning overlay district called the "mobile vendor overlay" to allow mobile vendors not meeting the qualifications for a conditional use permit to engage in mobile vending in areas specifically approved by the council for that activity. Once the council designated a certain area as a mobile vendor overlay district, individual vendor permits within the district would be administratively approved by the codes department. The conditions that would be applicable to the mobile vendor overlay are the conditions provided in Ordinance No. BL2009-410. The major difference between the two pending ordinances is the approval process and enforcement mechanism.

This ordinance has been referred to the planning commission.

Since the planning commission has not made a recommendation regarding these two ordinances, the Council Rules will need to be suspended in order to hold the public hearing.

ORDINANCE NO. BL2009-432 (JAMESON & DOMINY) - This zoning text change would eliminate the historic bed and breakfast overlay district and would make such use a special exception (SE) and permitted (P) use in certain zoning districts. Prior to August 2005, historic bed and breakfast establishments were permitted by special exception. In response to a particular establishment, the council enacted Ordinance No. BL2005-701 to remove historic bed and breakfasts from the jurisdiction of the board of zoning appeals and place it solely with the council through the creation of a new historic bed and breakfast homestay zoning overlay district.

This ordinance essentially reinstates bed and breakfast homestays as a special exception use in the residential and office districts, and as a use permitted by right in the mixed-use and commercial districts. The conditions for those districts in which the use would be a special exception are essentially the same as the conditions for the current overlay. The historic zoning commission must approve the existing structure, as well as any future exterior improvements. The property must be owner-occupied, contain no advertising, and restrict meal service to overnight guests only. The fire marshal must also certify that the structure is safe for operation as a bed and breakfast.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-462 (COLEMAN) **–** This zoning text amendment rewrites the conditions applicable to cellular telephone towers. The Code allows cell towers as a use permitted with conditions in all zoning districts. In order to obtain a permit to build a cell tower, the applicant must demonstrate that existing towers in the area cannot accommodate the new equipment, must meet setback and height restrictions, and must install a landscaping buffer yard. Further, the district councilmember must be given the opportunity to hold a community meeting on the tower when the tower is proposed to be in or near a residential zoning district.

This ordinance, which is modeled after Chattanooga's cellular tower ordinance, would broaden the information that must be submitted at the time of an application for a cellular tower and would further specify certain conditions regarding setbacks, landscaping, and site plans. First,

the ordinance would require the applicant to provide the following information at the time of application for the final site plan or building permit:

1. A schematic site plan and landscaping plan.
2. Identification of the intended users of the tower.
3. A statement justifying the location that considers alternatives to the proposed site and describes why no existing facilities in the coverage area are available. A map of the coverage area identifying all service providers must be submitted. The applicant must show that the tower will have minimum visual impact upon adjacent residential properties.
4. Documentation of the number of users that can be accommodated by the new tower.
5. Proof of an enforceable bond or letter of credit to ensure the removal of the tower when it ceases to be used for a year.

Second, the ordinance sets forth some specific landscaping requirements. The code currently requires cell towers to have an "A" buffer yard. This ordinance would require all tower pads that are not screened with existing structures or natural vegetation to have a 10-foot buffer yard. The ordinance includes specific recommended species of vegetation for the buffer yard, and the property owner will be responsible for maintaining the landscaping. No screening will be required if the base of the tower is not visible from an adjoining property or right-of-way.

Third, the ordinance includes some specific requirements for new towers to facilitate future co-location. A new tower between 100 and 200 feet tall would be required to accommodate three additional personal communication system applications and three additional single antenna applications (i.e., 911, two-way radio, and emergency communication applications). Towers would be required to accommodate an additional personal communication system application and single antenna application for each additional 50 feet above 200 feet tall.

Fourth, the towers would be required to be setback the distance equal to the height of the "lowest engineered failure point", but not less than 50 feet from adjacent property lines. The height requirements would be set by the district bulk tables in the zoning code.

Finally, any tower that ceases to be used for twelve months would be considered abandoned, and the owner would be responsible for taking the tower down.

The notification provisions contained in the existing code would continue to apply under this ordinance.

This ordinance has been approved by the planning commission.

In order the ensure consistency with state law, the council office recommends that this ordinance be amended to delete one ambiguous sentence pertaining to the siting of towers, as well as to clarify that the application of these regulations to existing towers will only apply when the height is being extended beyond the height limitations set forth in the zoning code.

ORDINANCE NO. BL2009-463 (TYGARD) **–** This zoning text change amends the sign provisions in the zoning code to implement the recommendations of the Sign Ordinance Task Force pertaining to electronic display signs. In March 2008, the Council considered Ordinance No. BL2008-152 to allow LED message boards in residential zoning districts for schools, churches, recreation centers and cultural centers on collector and arterial streets. This ordinance was deferred indefinitely. Subsequently, the Council approved Resolution No. RS2008-319 requesting the Vice Mayor to appoint a task force to study Metro's existing sign ordinance and to make recommendations to the Council regarding whether modifications to the sign ordinance were necessary given the recent technological advancements in the sign industry.

The Task Force met for several months to discuss revisions to the sign ordinance, and ultimately recommended this ordinance pertaining to electronic display signs to allow such signs with limitations by special exception in certain areas where they are now prohibited. As the Council is aware, special exception uses require approval of the board of zoning appeals after a public hearing.

Existing Zoning Code Provisions

The zoning code provisions pertaining to electronic display signs are currently located in the "prohibited signs" section. However, this section actually only prohibits the signs in certain districts. Further, the zoning code does not include a definition for LED or other electronic signs. These signs are allowed by right in the more intense commercial and industrial districts, but are prohibited in the agricultural, residential, mixed-use, office, and less intensive commercial areas except for time, temperature, and date signs. The sign image for LED signs must remain static and nonflashing for a period of 8 seconds, with all copy changes occurring instantaneously and without any special effects.

LED signs cannot be located within 100 feet of any agriculturally or residentially zoned property. Further, signs cannot have display areas "with varying light illumination and/or intensity, blinking, bursting, dissolving, distorting, fading, flashing, oscillating, rotating, scrolling, sequencing, shimmering, sparkling, streaming, traveling, tracing, twinkling, simulated movement, or convey the illusion of movement." Video, continuous scrolling messages, and animation signs are prohibited except in the commercial attraction (CA) district.

Proposed New Provisions

First, the ordinance adds a definition of "electronic display sign" in the zoning code to clarify the type of technology the ordinance is designed to cover. The definition includes on-premises signs that display electronic static images, static graphics or static pictures, with or without textual information. The definition retains the existing requirement that the sign image remain static for a minimum of eight seconds, and the change sequence be accomplished instantaneously. Video signs would continue to be allowed only in the CA district (Opryland area).

Second, the ordinance designates "electronic display sign" as a special exception use in the AG, AR2a, R, RS, RM, MUN, MUL, MUG, ON, OL, OG, OR20, OR40, CN, CL, SCC and SCN districts, and as a permitted use in the CA, CS, CF, CC, SCR, IWD, IR and IG districts (the districts where

such signs are currently allowed). For those districts where electronic display signs would be permitted as a special exception use, all non-residential uses in the mixed-use, office, and lower intense commercial districts would be eligible for consideration. However, only churches, schools, community centers, and cultural centers would be eligible for an electronic display sign in the residential zoning districts.

Third, the sign must meet various specific conditions in order for the board of zoning appeals to approve an electronic display sign as a special exception use. The conditions are as follows:

- The electronic display sign must be replacing an existing back-lit or flood-lit sign on the property. No more than one electronic sign would be permitted on a given lot for each street frontage. This will ensure that allowing electronic display signs in these districts will not result in more total signs.
- Electronic display signs must be spaced at least 500 feet from another electronic display sign, and must be set back at least 250 feet from an existing residence.
- The intensity and contrast of light levels must remain constant, and the sign must use amber color lights as opposed to red.
- All parts of the electronic display sign must be oriented so that no portion of the sign face is visible from an existing single or two-family residence at the time the sign is installed.
- Each electronic display must shut off between the hours of 10:00 p.m. and 6:00 a.m., and must use automatic day/night dimming software to reduce the illumination intensity of the sign from dusk until 10:00 p.m.
- The size of electronic display signs will be limited to a maximum surface area of 32 square feet and must be integrated into a brick, stone or wood monument-style sign.
- The minimum street setback would be 15 feet and the sign could not encroach upon the required side setbacks of the base zoning district.
- The maximum height of the sign structure would be 8 feet.

This ordinance is an attempt by the task force to balance the need for electronic display signs in certain areas where they are now prohibited against the concerns of residents that such signs will negatively impact their neighborhoods. The spacing requirements will make it very difficult for property in the urban areas of Nashville (such as Hillsboro Village, East Nashville, and West End) to be eligible for an electronic display sign.

There are three proposed amendments for this ordinance. One of the amendments would require such signs to be at least 250 feet from any residential property, as opposed to a residential structure. Another amendment would allow electronic display signs by right in the CL district. Finally, the third amendment would prohibit the board of zoning appeals from allowing an electronic display sign in the single-family residential zoning districts.

This ordinance was deferred by the planning commission at the request of the sponsor.

ORDINANCE NO. BL2009-464 (HOLLEMAN) **–** This zoning text change amends the sign provisions in the zoning code to add some specific height requirements for LED signs in the districts where they are currently permitted by right. This ordinance would impose a sliding scale for the height of LED signs based upon the distance from any agriculturally or residentially-zoned property. Signs four feet or less in height could not be less than 100 feet

from such property. Each additional foot in height would require an additional 25-foot setback. As an example, a sign between five and six feet in height could not be less than 150 feet from any agriculturally or residentially-zoned property.

It is important to point out that this ordinance has no impact on Ordinance No. BL2009-463, which would allow electronic display signs as a special exception use in certain areas where they are currently prohibited.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-477 (TYGARD) – This zoning text change creates a new land use for small wind energy facilities (windmills). This ordinance is similar to an ordinance modeled after the small wind energy system ordinance adopted in Carroll County, Maryland that was deferred indefinitely by the council in September of 2008.

According to the definitions in the ordinance, small wind energy systems are equipment used to convert or transfer wind energy into electricity. The zoning code currently does not allow small wind energy systems as a permitted use. This ordinance would allow small wind energy facilities as a use permitted with conditions in all zoning districts. Small wind energy facilities are defined as those consisting of one tower and turbine, and having a rated capacity of not more than 100 kilowatts. Facilities with two or more towers and turbines that produce more than 100 kilowatts would be considered large wind energy facilities. The large facilities would only be permitted as part of a specific plan (SP) district adopted by the council.

The ordinance includes three pages of conditions that would be applicable to small wind energy facilities. These conditions include the following:

- The maximum height of the facility would be 15 feet above the maximum building height allowed under the base zoning district.
- The facility must be setback the greater of one and one-half times the height of the tower from the nearest property line or a distance equal to the height of the facility from any occupied buildings.
- No guy wires or anchors could be closer than five feet from the property line.
- An information sign identifying the owner of the facility and a contact phone number must be placed on the facility.
- No lighting of the facility will be permitted.
- The facility cannot generate noise in excess of 60 decibels measured from the closest occupied building.
- Nashville Electric Service must approve the site plan before the facility can operate.
- The applicant must provide a removal bond or other form of financial security to ensure that the facility will be removed when it ceases to be used for a year.

In addition to the above conditions, the ordinance requires someone desiring to install a windmill to submit a very detailed site plan prepared by a licensed engineer. The site plan must include 12 specific requirements contained in the ordinance. These include identification of all existing buildings on site and within 600 feet of the site's boundary; the location of the proposed tower and associated infrastructure; existing tree cover; the location of other windmills within 2,000 feet of the proposed location; proposed landscaping changes; tower

foundation blueprints signed by a licensed engineer; a statement from a licensed engineer that the wind turbine will meet the noise standards in this ordinance; an electrical diagram; documentation regarding the manufacturer of the facility; color photos showing how the facility will look when completed; and an operation and maintenance plan.

If the purpose of this ordinance is to encourage the placement of wind energy facilities in the county to further Metro's goal of becoming the "greenest city in the southeast", it is questionable whether this ordinance lives up to its purpose. The complex conditions included in the bill would likely act as a deterrent to the average person seeking to install a windmill on his/her property. However, if the purpose is to protect the neighbors from any possible negative impact associated with the windmill, then this ordinance certainly offers plenty of protection.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-478 (PAGE) – This zoning text change amends the definitions of "automobile repair" and "automobile service" as it relates to used tire shops. In March 2006, the council enacted Ordinance No. BL2006-972 making most automotive uses no longer permitted in the commercial zoning districts. Rather, such uses have to be approved individually by the council as part of an SP district. Although Ordinance No. BL2006-972 addressed most automotive uses, it did not apply to automobile service establishments. The zoning code currently defines "automobile service" as property used for "the replacement of any part, or repair of any part, to an automobile that does not require removal of the engine head or pan, engine transmission or differential, including, but not limited to oil change and lubrication, cooling, electrical, fuel and exhaust systems, wheel alignment and balancing, brake adjustment, relining and repairs, mufflers, batteries, tire services and sales, shock absorbers, installation of stereo equipment, car alarms or cellular phones." The dismantling, rebuilding, reconditioning, or salvage of automobiles is considered "automobile repair", which is required to be within an adopted SP district. Used tire shops are considered "automobile service" establishments under the current definitions, and thus are not required to be within a SP district.

This ordinance would add "the reconditioning, repairing, sale, mounting, or installing of used tires" to the definition of "automobile repair" to require used tire shops to be located within a SP district. New tire sales would be considered "automobile service" and would continue to be allowed in most of the commercial districts.

This ordinance would make every existing used tire shop in Nashville a nonconforming use, which could impact the owner's ability to remodel his/her business or obtain financing for improvements.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-479 (HOLLEMAN, BARRY & OTHERS) – This zoning text change creates a new land use for community gardening. Community gardens are typically found in urban areas and are a place for an individual or group of individuals to grow and harvest crops. The code currently considers such activity to be "agricultural activity", which is only allowed by

right in the agricultural zoning districts and as an accessory use in the larger-lot residential zoning districts, with a condition that the lot be at least five acres and be outside of the urban services district. This essentially prohibits the use of community gardens in most areas of Nashville.

This ordinance would separate community gardening into two categories: commercial and non-commercial. Commercial community gardens would include the growing and harvesting of crops for commercial sale. Non-commercial community gardening applies to crops grown for the use and consumption of the growers. The ordinance would allow non-commercial community gardens to be permitted by right in the agricultural districts, the single and two-family districts, the commercial districts, and the industrial districts. Commercial community gardens would be a permitted use in the AR2a, R80, RS80, R40, and R40 districts; a use permitted with conditions in the R20, RS20, R15, and RS15 districts; and as a special exception use in the RS7.5, RS5, RS3.75, R10, R8 and R6 zoning districts.

The ordinance includes a number of conditions for commercial community gardens, such as lighting limitations, regulations regarding the on-site storage of compost, landscaping requirements, and drainage requirements, as well as parking standards to reduce traffic congestion.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-480 (HOLLEMAN) – This zoning text change would require applicants seeking an amendment to the official zoning map to disclose the use of lobbyists, public relations firms, pollsters, and other similar firms to communicate with the public regarding the zoning application. The Metro Code requires that lobbyists (those communicating directly or indirectly with an official in the legislative or executive branch for pay for the purpose of influencing official action) to register with the Metropolitan clerk. However, this does not apply to persons "lobbying" the public for the purpose of influencing the public's support of a zoning measure, who in turn would presumably express their support of the rezoning to the council.

This ordinance would require zoning applicants to file, prior to the council public hearing on the rezoning, a report with the Metropolitan clerk and the planning department regarding the applicant's use of lobbyists to communicate with the public about the rezoning. Failure to file the lobbying report would result in the automatic deferral of the zoning public hearing.

The ordinance defines "lobbyist" as any person or firm, including pollsters and public relations firms, hired for pay in excess of $1,000 to communicate, directly or indirectly, with any resident of Metropolitan Nashville and Davidson County regarding any proposed or pending application to rezone property. The ordinance would require that the following information be included as part of the report:

1. A statement of all compensation received by the lobbyist, or agent of the lobbyist, from the zoning applicant, or the agent of the zoning applicant.
2. A statement of all activities in which the lobbyist, or agent of the lobbyist, engaged on behalf of the applicant for the relevant zoning request, including but not limited to:
   - A list of phone calls made to residents

- a copy of the script or "talking points" for such phone calls
- a copy of any mail, whether electronic or hard copy, sent to any resident
- electronic copies of all video or audio recordings produced by the lobbyist or its agent
- any other materials of any sort which were provided to a resident of Metropolitan Nashville and Davidson County in the course of representing the lobbyist's client
- a statement of all aliases, false names, and/or e-mail addresses utilized by the lobbyist, employee, or agent of the lobbyist in the course of representing the lobbyist's client or the agent of the client.

The planning commission deferred taking action on this ordinance at the request of the sponsor.

The council office would point out that the act of lobbying is a form of political speech that is protected by the First Amendment to the United States Constitution. Therefore, the government must demonstrate a compelling governmental reason for regulating lobbyists and must show that the regulations are related to accomplishing that interest. The council office recommends that this ordinance be amended to address some of the First Amendment concerns, specifically those provisions that could be considered viewpoint discrimination.