

MEMORANDUM TO: All Members of the Metropolitan Council

FROM: Jon Cooper, Director
Metropolitan Council Office

DATE: **April 5, 2011**

RE: **Analysis Report**

Balances As Of:	<u>3/30/11</u>	<u>3/31/10</u>
<u>GSD 4% RESERVE FUND</u>	* \$23,996,590	\$13,232,956
<u>GENERAL FUND UNDESIGNATED FUND BALANCE</u>		
GSD	\$34,451,559	\$25,160,041
USD	\$24,263,010	\$22,180,965
<u>GENERAL PURPOSE SCHOOL FUND UNRESERVED FUND BALANCE</u>		
	\$27,099,790	\$27,354,208

* Assumes estimated revenues in fiscal year 2011 in the amount of \$23,440,100

– BILLS ON PUBLIC HEARING AND THIRD READING –

ORDINANCE NOS. BL2011-860 and BL2011-861 (MITCHELL) – These two ordinances adopt a plan of services and approve the extension of the boundaries of the urban services district (USD) to include five parcels of property along Highway 70 South in the Bellevue area (the Bellevue Kroger complex). The Metropolitan Charter provides that general services district property may be annexed into the urban services district, in accordance with state law annexation procedures, whenever such areas come to need urban services. State law requires that a plan of services be considered by the planning commission and then be adopted by the council before an ordinance to extend the boundaries of the urban services district can be approved on final reading. The planning commission approved the plan of services at its January 27, 2011, meeting.

These parcels of property already receive additional police protection, fire protection, water and sewer service, street lights street cleaning services. The properties also receive the same level of water and sewer service from the Harpeth Valley Utility District that properties served by Metro water services within the USD receive. Thus, the department of public works has determined that there will be no additional cost to the Metropolitan Government for implementation of the plan of services.

State law requires that the council hold a public hearing on both the plan of service and the annexation ordinance prior to their adoption on third and final reading.

Similar ordinances were approved in October 2010 to annex approximately 960 individual parcels in the Bellevue area located along Old Hickory Boulevard between Interstate 40 and Highway 70 South.

Ordinance No. BL2011-860 adopts the proposed plan of services for the annexation of these five parcels.

Ordinance No. BL2011-861 extends the boundaries of the urban services district to include these properties.

– RESOLUTIONS –

RESOLUTION NO. RS2011-1534 (CRAFTON) – This resolution removes the members of the board of fair commissioners. The Metropolitan Charter provides that members of boards and commissions may be removed by a three-fourths vote of the entire membership of the council. The current five members of the fair board are Ned Horton, Alex Joyce, Charles Sueing, Katy Varney, and James Weaver. Rule 44 of the council rules of procedure requires that a resolution removing a member of a board or commission state the reasons or grounds for such removal. The reason cited in this resolution for the removal of the fair board members is the board's decision concerning the discontinuation of the state fair and the other activities at the fairgrounds property.

Each of the five fair board members has the opportunity to appear before the rules committee on March 15, 2011, and to address the full council before a vote is taken on the resolution.

An identical resolution was filed and withdrawn in December 2010.

RESOLUTION NO. RS2011-1586 (BARRY) – This annual resolution calls the Metropolitan board of equalization (MBE) into regular session convening June 1, 2011, and adjourning June 18, 2011, and calls the MBE into special session convening June 20, 2011, to complete any unfinished business regarding appeals on pro-rated assessments. The special session is not to extend beyond May 31, 2012. The MBE always meets during the month of June to hear appeals of assessments on real property. Historically, the MBE has been required to have special sessions to conclude its work due to the large number of appeals.

State law authorizes county legislative bodies to fix the number of days the board of equalization is to sit in regular session and to call the board into special session to complete unfinished business.

RESOLUTION NO. RS2011-1587 (BARRY & GOTTO) – This resolution approves an extension of a grant in the amount of \$20,000 from the Metropolitan development and housing agency (MDHA) to the Metropolitan historical commission to perform environmental review required by federal law for development proposals using federal funds to determine potential adverse effects to historic properties. MDHA is responsible for administering certain federal grant programs that require compliance with the National Environmental Policy Act, part of which requires a review under the National Historic Preservation Act to identify historic properties potentially affected by developments using the federal funds.

MDHA has contracted with the Metropolitan historical commission to review MDHA proposals and identify historic properties potentially affected by each proposal. This resolution approves an extension of the grant through March 31, 2012.

RESOLUTION NO. RS2011-1588 (LANGSTER & BARRY) – This resolution approves an amendment to a grant from the state board of probation and parole to the state trial courts to fund the Davidson County community corrections program. This program provides alternative punishments for non-violent offenders consisting of offender supervision, residential programs, and day reporting center programs. The goal of the grant is to limit the recidivism rate to 10% for those offenders completing the community corrections program. This amendment increases the amount of the grant by \$147,876 for a new multi-year grant total of \$4,245,336.

This amendment is essentially the same as an amendment approved by the council in December 2010. However, the state never signed the original amendment, and has since increased the amount of the required local match from \$198,450 to \$212,625.

RESOLUTION NO. RS2011-1589 (LANGDTER & BARRY) – This resolution approves a grant in the amount of \$3,516,513 from the U.S. department of homeland security to the Metropolitan Nashville fire department to hire 32 new firefighters. This grant will pay the salaries and benefits of the firefighters for two years. After the second year, there will be no requirement that Metro continue to fund these positions. The council approved the application for this grant in October of last year.

RESOLUTION NOS. RS2011-1590 & RS2011-1591 (LANGSTER & BARRY) – These two resolutions approve grants from the Tennessee emergency management agency to the Nashville police department to support the ongoing efforts to prevent, respond to, and recover from incidents of terrorism. These federal pass-through funds are to be used to purchase equipment to increase the sharing of information and intelligence. The terms of the grants are from June 1, 2010 through March 31, 2013.

Resolution No. RS2011-1590 approves a grant in the amount of \$194,000 for the buffer zone protection program in zone A.

Resolution No. RS2011-1591 approves a grant in the amount of \$194,000 for the buffer zone protection program in zone B.

RESOLUTION NO. RS2011-1592 (FORKUM & BARRY) – This resolution approves a grant in the amount of \$1,678,804 from the U.S. department of health and human services to the Metro board of health to enhance access to community-based care for low income individuals and families with HIV. These grant funds are used to provide a number of medical and support services for HIV patients under the Ryan White HIV/AIDS Treatment Extension Act of 2009. The grant is for a term of March 1, 2011, through February 29, 2012.

RESOLUTION NO. RS2011-1593 (FORKUM & BARRY) – This resolution approves two amendments to an annual grant from the state department of health to the Metropolitan board of health to provide family planning services in accordance with state law. Local health departments are required by state law to provide contraceptive procedures, supplies, and information to all persons eligible for free medical services. The first amendment to the grant increases the amount of federal funding by \$160,000, and the second amendment reduces the amount of state funding by \$25,000, for a new grant total of \$875,100.

RESOLUTION NO. RS2011-1594 (MATTHEWS & HODGE) – This resolution approves a contract between the Tennessee department of transportation (TDOT) and the Metropolitan Government for the installation and maintenance of traffic safety improvements, including flashing beacons, on Clarksville Pike from Stevens Lane to Briley Parkway. This is a typical contract between TDOT and the Metropolitan Government for signalization projects involving state roads. Pursuant to this contract, TDOT will install the improvements, and Metro will be responsible for paying all costs associated with the maintenance and operation of the devices.

RESOLUTION NO. RS2011-1595 (FORKUM & BARRY) – This resolution authorizes the department of law to compromise and settle the claim brought by Kathleen Flake against the Metropolitan Government for the amount of \$85,000 to be paid from the self-insured liability fund. On October 14, 2009, a Metro police officer was traveling west on Charlotte Pike in (continued on next page)

RESOLUTION NO. RS2011-1595 (continued)

response to a burglary call with his emergency equipment activated. As the officer approached the red light at White Bridge Road, he slowed before attempting to turn left. Kathleen Flake did not see nor hear the police car and proceeded through the green light colliding with the police car. Ms. Flake was seriously injured in the accident incurring \$16,592 in medical expenses and requiring a long recovery period.

Ms. Flake is a professor at Vanderbilt and was on a five month sabbatical at the time of the accident during which she planned to write a book. Ms. Flake was unable to work on the book while recovering and has alleged lost income in the amount of \$46,915.55, plus a loss of \$25,334.40 resulting from a delayed promotion for the inability to complete the book.

The police department determined that the officer was negligent in failing to adequately reduce his speed to ensure the intersection was clear before proceeding. The officer received disciplinary action consisting of a three day suspension.

The department of law recommends this lawsuit be settled for \$85,000, as the plaintiff would likely receive a higher award if the case went to trial.

RESOLUTION NO. RS2011-1596 (BARRY) – This resolution authorizes the department of law to settle the Metropolitan Government's claim against Willie Jeffreys for the amount of \$8,545.26. On October 8, 2010, a Metro police officer was traveling through the intersection of Clarksville Highway and Ed Temple Boulevard when his patrol car was struck by a vehicle driven by Willie Jeffreys. Mr. Jeffreys failed to yield to the red flashing traffic light at the intersection. The Metro patrol car was deemed to be a total loss. This resolution accepts the fair market value of the patrol car at the time of the accident.

RESOLUTION NO. RS2011-1597 (BARRY) – This resolution authorizes the department of law to settle the Metropolitan Government's claim against Vilasini Ali for the amount of \$11,054.64. On December 31, 2008, a Metro police officer was attempting to make a U-turn on Old Hickory Boulevard with his emergency equipment activated when the motorcycle was struck in the rear by a vehicle driven by Vilasini Ali. The Metropolitan Government paid \$6,275.28 in medical bills and \$7,205.98 in lost wages for the police officer.

The case was mediated in January 2011, and the mediator is of the opinion the officer would be assessed a portion of the fault since he made an abrupt U-turn. This settlement reduces Metro's subrogation claim by 18 percent, which is the same percentage the officer agreed to reduce his claimed damages in his personal lawsuit.

RESOLUTION NO. RS2011-1598 (BARRY) – This resolution authorizes the department of law to settle the Metropolitan Government's claim against Tiffany Rugless for the amount of \$5,035.46. On October 2, 2010, a Metro police officer was traveling on 19th Avenue North with his emergency equipment activated in response to an emergency call when he was struck by

Ms. Rugless's vehicle at the Church Street intersection. This resolution accepts the full amount of the damage to the Metro vehicle.

RESOLUTION NOS. RS2011-1599, RS2011-1600, & RS2011-1601 (BARRY) – These three resolutions authorize the department of law to settle the personal injury claims brought by Raymond L. Jackson and two members of his family injured in a motor vehicle accident involving an employee of the Metro fire department. On August 6, 2010, a fire department employee driving a fire truck was attempting to turn onto Anderson Road from Kenwood Drive when he struck the side and front of a vehicle driven by Mr. Jackson while stopped at the red light. The driver of the fire truck turned too sharply, which caused the accident. Mr. Jackson, his stepson, and daughter all sustained neck, thoracic, and lumbar strains, incurring medical bills totaling \$7,404, \$4,696, and \$5,144, respectively. The property damage portion of the claim has already been settled.

The department of law recommends that these claims be settled as follows:

1. \$10,000 for Mr. Jackson
2. \$5,802 for his stepson
3. \$7,448 for his daughter

These amounts are to be paid from the self-insured liability fund. The Metro employee involved in this accident received disciplinary action consisting of an oral reprimand.

RESOLUTION NO. RS2011-1602 (BARRY) – This resolution authorizes the department of law to settle the Metropolitan Government's lawsuit against Richard T. Bell for the amount of \$50,000. Mr. Bell was a Metro police officer from 1974 to 1993. In November 1994, Mr. Bell was granted an in-line-of-duty medical pension because it was determined that he was medically unable to fulfill the duties of a police officer. Under Metro's disability pension system, pensioners are limited in the amount of outside income they can earn without having their Metro pension reduced accordingly. Metro determined that Mr. Bell failed to accurately report all of his earnings while disabled from 1995 to 2002, and again in 2007, resulting in the payment of \$89,119.26 in pension payments to which he was not entitled.

Metro filed suit against Mr. Bell to recover the amount of the overpayment. If the court were to determine that Mr. Bell intentionally defrauded the pension system, he could be required to repay the overpaid amounts and lose all future benefits under the pension system, including health insurance. Mr. Bell will likely allege his disability prevented him from forming the necessary intent to defraud the system. The court may also determine that the collection of the overpayments from 1995 to 2002 is barred by the statute of limitations.

The department of law recommends settling this case for a \$50,000 repayment to be made through a voluntary assignment of a portion of Mr. Bell's pension income each month. This amount would be paid into the benefit board pension plan fund.

RESOLUTION NO. RS2011-1603 (BARRY) – This resolution authorizes the department of law to compromise and settle the claim brought by O.C. Hunter against the Metropolitan Government in the amount of \$23,416.55 to be paid from the self-insured liability fund. On December 14, 2010, a Metro public works employee struck the rear of a vehicle attempting to
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RESOLUTION NO. RS2011-1603 (continued)

turn into a driveway off of Litton Avenue. The accident caused the vehicle to run into the sunroom of Mr. Hunter's home causing \$23,416.55 in damage. The department of law is recommending this settlement for the full amount of the damage since the public works employee was clearly at fault. No disciplinary action was taken against the Metro employee.

RESOLUTION NO. RS2011-1604 (BARRY) – This resolution authorizes the department of law to settle the Metropolitan Government's claim against Thelma Petty for the amount of \$11,035.37. On February 5, 2009, Ms. Petty struck the rear of a Metro employee's personal vehicle while the Metro employee was traveling on Charlotte Pike en route to a work-related seminar. The Metropolitan Government paid the employee \$3,684.83 in lost wages and incurred \$9,511.86 in medical expenses. Of this amount, \$2,162 was arguably the result of a pre-existing condition. This settlement accepts the full amount of lost wages and medical expenses paid by Metro minus the portion resulting from the pre-existing condition.

RESOLUTION NO. RS2011-1605 (BARRY) – This resolution authorizes the department of law to compromise and settle the lawsuit brought by Gavin P. Flatt against the Metropolitan Government for the amount of \$35,000 to be paid from the self-insured liability fund. On May 9, 2009, at approximately 10:00 p.m., a Metro fire department employee driving a Chevy Tahoe on Nolensville Road struck Tamyra Jones, a pedestrian, as she attempted to cross the street. Ms. Jones was intoxicated at the time of the accident and was not walking in a crosswalk. The Metro employee stated that he did not see Ms. Jones until she was in front of the vehicle. Ms. Jones died as a result of being struck by the Metro vehicle, and her son brought a wrongful death suit against the Metropolitan Government.

The police department investigator's supplement to the traffic collision report indicates that a reasonable driver under the circumstances should have been able to avoid hitting the pedestrian. The department of law is of the opinion that a percentage of the fault would be assigned to Metro for this accident, and recommends paying \$35,000 as a fair and reasonable settlement given the circumstances.

The Metro employee involved was required to attend a defensive driving course.

- BILLS ON SECOND READING -

ORDINANCE NO. BL2010-808 (WILHOITE) – This ordinance amends the metropolitan ethics code to allow members of council to act as non-compensated representatives for constituents before Metropolitan Government departments, agencies, boards, and commissions. The current ethics code approved by the council in 2007 prohibits “employees”, which includes members of council, from personally representing or appearing on behalf of the private interest of another before the council, or any board or department of the Metropolitan Government. There are exceptions to this general prohibition for lobbyists and attorneys serving on boards and commissions, but no such exception exists for members of council. While council members frequently appear before the planning commission, traffic and parking commission, and the board of zoning appeals on behalf of their constituents, they are typically not considered to be acting as a personal representative. However, a literal reading of the ethics code could cause such an appearance to be an issue.

This ordinance would allow a member of council to represent a constituent or constituents before any department, agency, board, or commission, including civil service matters, as long as the member of council does not receive any compensation for acting in such representative capacity.

ORDINANCE NO. BL2011-859 (CRAFTON) – This ordinance amends the metropolitan solid waste code to allow Davidson County property owners residing outside the county to pay the same fee at the Metro solid waste convenience centers as Davidson County residents. The solid waste code provides that all tip fees and charges are to be doubled when waste or refuse is transported to a disposal or collection site in a vehicle bearing a license tag issued by a county other than Davidson County. This ordinance would allow the lower in-county rate to be charged to persons with a Davidson County licensing plate or presenting proof of ownership of property in Davidson County.

There is an amendment to this ordinance to restrict its application to owners of single and two-family residential property, as well to require the higher fee when disposing used tires.

ORDINANCE NO. BL2010-862 (GILMORE) – This ordinance amends the recently-adopted Metropolitan Code provisions pertaining to economic and community development incentive grants to require that certain demographic information be submitted by the qualifying company before receiving any grant funds. The council enacted a modification to the economic and community development incentive grant program in February 2011 to allow a corporate headquarters or technology firm relocation/expansion that will create at least 500 jobs over a five year period to qualify for an incentive grant. This ordinance would add a new requirement that such companies submit certain demographic information regarding the company's employees working in Davidson County. This information is to include the ethnicity, race, sex, county of residence, and salaries of the existing employees, as well as a description of the existing jobs. In addition, such qualified company must provide a description of the future jobs to be created during the term of the agreement, including the estimated salaries. No resolution approving the grant could be considered by the council unless and until this demographic information is provided.

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ORDINANCE NO. BL2010-862 (continued)

Private companies are typically reluctant to disclose the information required by this ordinance. However, since the ordinance is only applicable to companies seeking an incentive grant from Metro, the council office sees no legal problem with this requirement.

ORDINANCE NO. BL2011-865 (TOLER & BARRY) – This ordinance approves a second extension to the term of the cable television franchise held by Comcast. The original franchise was granted to Viacom in 1995, which was subsequently transferred to Intermedia and then Comcast. The term of the 1995 franchise agreement, which was set to expire on May 5, 2010, was extended for one year in order to allow the CATV special committee to negotiate a new franchise agreement with Comcast. The parties continue to negotiate regarding this matter and the CATV special committee has recommended an additional one year extension.

This ordinance approves an extension of the cable franchise through May 5, 2012. Comcast has agreed to make a \$100,000 contribution for public, educational and governmental (PEG) access support, which is the annual contribution amount Comcast has been making under the existing franchise agreement. The recitals to the ordinance state that the CATV committee is in the process of reviewing Comcast's performance under the initial agreement and wishes to explore the possibility of informal franchise renewal that would require approval of the council by ordinance.

ORDINANCE NO. BL2011-866 (BARRY, FORKUM & LANGSTER) – This ordinance approves an agreement between the Metropolitan Government and Hospital Corporation of America (HCA) for the exchange of property and construction of a new public health center. It has been previously determined that the Lentz public health center located on 3.7 acres of property at 311 23rd Avenue North is inadequate to meet the needs of the health department and the community. In fact, construction of a new public health center has been contemplated in at least two capital spending plans.

HCA owns a 3.5 acre parcel of property (HCA tract) as part of a larger 14.7 acre tract located at 2512 Charlotte Avenue. In order to construct a new public health center quicker, and likely cheaper, HCA and Metro have agreed to swap the HCA tract for the current Lentz property, and for HCA to construct a new health center on the HCA tract for the benefit of Metro. The construction cost for the new health center is not to exceed \$28.5 million, and is to be completed within 30 months after work commences.

HCA will be responsible for obtaining bids for the architectural, engineering, and construction services associated with the construction of the new health center. If no bids are received that are less than the \$28.5 million maximum construction price, Metro will have the opportunity to (1) seek approval from the council for an increase in price; (2) terminate the agreement and reimburse HCA for the expenses it incurred; or (3) revise the scope of work to lower the cost. Metro representatives will be allowed to observe the procurement process and to reject any bid "considered not responsible under Metro's procurement rules and regulations." This means that although HCA will not be required to follow all of Metro's procurement laws and requirements, Metro will have veto power over a bid if Metro determines that the contractor is not qualified under Metro rules and regulations.

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ORDINANCE NO. BL2011-866 (continued)

Metro will have unrestricted access to the HCA property during construction of the health center. Metro will also have the right to make changes to the project plans. The agreement includes a "covenant not to sue" whereby Metro agrees that it will not pursue any claims against HCA for faulty construction after the closing. All such claims could only be brought against the contractor.

This agreement also includes provisions governing parking at the new health facility. Five parking spaces are to be available for each 1,000 square feet of the facility, which is consistent with the zoning code requirements. HCA will be allowed to use the health center parking for its own benefit if it decides to construct additional facilities around the new health center, provided HCA makes additional parking areas available to Metro within ¼ mile of the facility. If HCA constructs a parking garage near the facility, Metro will be allowed use of the garage parking to the extent that all available parking is equal to five spaces per 1,000 square feet, not to exceed 491 spaces.

In order to compensate HCA for financing the construction costs of the new health center, Metro will pay interest at the rate of three percent of the total construction costs plus a one-time \$50,000 fee. Once construction is completed, the parties will swap ownership of the two properties. At the time of closing, Metro will pay HCA an amount based upon the following formula:

	Total Construction Cost
+	HCA Architectural Costs
+	Appraised Value of the HCA Tract
--	<u>Appraised Value of the Lentz Property</u>
	Total Amount Paid by Metro at Closing

The agreement will not become effective until HCA and Metro have agreed on the appraised value of both properties. Preliminary appraised values have not been provided to the council. The value of the entire 14.7 acre HCA tract according to the assessor of property is \$6.4 million, but this transaction only includes 3.5 acres of the tract. The assessor's office has appraised the Lentz property at \$2.25 million. The council office would recommend that the council at least obtain preliminary outside appraisal amounts for the two properties before approving this ordinance on third reading.

It is not anticipated that HCA will use the Lentz property immediately after becoming owner of the property. As an additional incentive to HCA, the contract provides that HCA may obtain a tax abatement in the form of a payment in lieu of tax (PILOT) agreement through the industrial development board (IDB). Such PILOT agreement is to provide a 100% tax abatement for the first five years, and a 50% abatement for the next five years. The IDB authority to negotiate a PILOT agreement with HCA would be subject to approval of the council by ordinance. If HCA chooses not to enter into a PILOT agreement, HCA would have the legal right to sell the property to a third party at any time.

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ORDINANCE NO. BL2011-866 (continued)

An additional benefit to Metro by having HCA construct the new health center is the ability to delay the issuance of debt until the building is complete, given Metro's current bonding capacity. As the council is aware, Metro has taken on a considerable amount of debt in recent years. In fiscal year 2008, the ratio of Metro's outstanding indebtedness compared to the operating budget was approximately 1.4:1, or 140%. That ratio increased in fiscal year 2010 to 1.63:1, or 163%. The debt restructuring plan approved by the council in May 2010 reduced the debt service budget for fiscal year 2011 from \$162 million to \$77.2 million in order to free up more operating funds. However, the debt restructuring will result in higher debt payments in fiscal years 2014 through 2020.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2011-867 (BARRY, HODGE & LANGSTER) – This ordinance approves a construction agreement between the Metropolitan Government and CSX Transportation, Inc., pertaining to the construction of a new overhead highway bridge for the 28th Avenue connector. This contract is basically to reimburse CSX for its expenses associated with the interference of the railroad tracks during construction of the bridge. All plans must be approved by CSX before work can begin. Metro agrees to reimburse CSX for its flagging and engineering costs, estimated to be approximately \$235,574. All work affecting the railroad is to be completed by December 31, 2012.

ORDINANCE NO. BL2012-868 (HODGE) – This ordinance abandons 190 feet of an existing 8 inch sanitary sewer line and a twenty-foot easement for the Centennial medical offices located at 2222 Murphy Road and 334 23rd Avenue North. This sewer line is no longer being used by the department of water and sewerage services. This ordinance has been approved by the planning commission.

– BILLS ON THIRD READING –

ORDINANCE NO. BL2007-71 (JAMESON & COLE) – This ordinance declares Metropolitan Government-owned property located at 217 South 10th Street to be surplus, and authorizes the director of public property administration to sell the property in accordance with the standard procedures for the disposition of surplus property. The Metropolitan action commission has determined that it no longer needs this property for its program services. The proceeds of the sale will be credited to the GSD general fund unappropriated fund balance.

On March 1, 2011, the department of general services claimed this property, which under the Metro code prohibits it from being disposed of as surplus property at this time.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2010-754 (STANLEY & DUVALL) – This ordinance, as amended, amends the zoning code to allow cosmetology and barber shops as a permitted accessory use in residential districts. The current home occupation provisions in the zoning code currently prohibit customers from coming onto the property. This ordinance would allow cosmetology and barber shops to operate in residential districts as long as they only have one chair available to service customers and no more than two customers are allowed on the premises at any one time. Further, only a resident titleholder of the property upon which such home occupation cosmetology or barbershop is located would be permitted to work upon the premises.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2011-838 (JAMESON, GILMORE, HOLLIN & OTHERS) – This ordinance, as amended, amends the Metropolitan procurement code to prohibit Metropolitan Government contractors from discriminating on the basis of sexual orientation or gender identity in their employment practices. In September 2009, the council enacted Ordinance No. BL2009-502 to prohibit the government itself from discriminating on the basis of sexual orientation or gender identity in employment practices. However, Ordinance No. BL2009-502 did not apply to any employer in the private sector.

The Metro procurement code currently prohibits contractors that provide services or supplies to the Metropolitan Government from discriminating on the basis of race, creed, color, national origin, age, sex, or disability. Contractors are also prohibited from subscribing to any personnel policy that allows such discrimination. The code further requires the purchasing agent to include a provision in the bid specification or request for proposals that no contract will be entered into unless the successful bidder submits an affidavit stating that the company does not subscribe to an employment policy that permits such discrimination.

This ordinance would add sexual orientation and gender identity to the list of protected classes as it pertains to the employment practices of Metro contractors that have fifteen or more employees. This discrimination prohibition would also apply to private entities that enter into lease agreements with the Metropolitan Government having a term of greater than six months. In order to ensure compliance with the First Amendment to the U.S. Constitution, the ordinance includes a provision exempting religious entities, organizations, and institutions from the
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ORDINANCE NO. BL2011-838 (continued)

prohibition on sexual orientation and gender identity discrimination if such actions are in furtherance of the organization's religious beliefs. Further, the ordinance provides that the provisions prohibiting discrimination on the basis of sexual orientation or gender identity would not apply to any group or organization if such prohibition would significantly burden the freedom of expression of the group or organization.

As the council is aware, questions have recently been raised regarding the constitutionality of this ordinance. Specifically, an argument has been made that the ordinance violates the commerce clause of the U.S. Constitution because it would require a company doing business with Metro to agree not to subscribe to a discriminatory employment policy anywhere the company is doing business. It is alleged that this is an unlawful attempt to regulate interstate commerce, which would make it per se unconstitutional, or that it at least poses a burden on interstate commerce. While this argument poses an interesting legal question, the council office is of the opinion that the existing ordinance language would be upheld.

The commerce clause provides that the U.S. Congress has the power to regulate commerce among the states. The basic principle behind the commerce clause is to avoid economic protectionism. States and local governments are not allowed to enforce regulations to benefit their own economic interests at the exclusion or expense of other states. By inference, the courts have held that since the power to regulate interstate commerce is delegated to Congress, then the states do not have the power to impose regulations that burden interstate commerce. This is known as the "negative" or "dormant" commerce clause.

A key argument supporting the constitutionality of this ordinance is what is known as the "market participant" exception. This doctrine basically means that Metro can choose who it wants to do business with, and under what conditions, without violating the commerce clause because it is directly participating in the market. Thus, as a player in the game, Metro can choose who it wants to play ball with and what game to play. An argument against the applicability of the market participant exception is the fact that this ordinance implicitly requires Metro contractors to abide by the nondiscrimination provisions everywhere they conduct business, not just in Tennessee, which would ostensibly turn Metro into a market regulator as opposed to a market participant.

However, even if the market participant exception was deemed not to be applicable to this ordinance as it is currently worded, the council office does not believe this would impact its constitutionality. This ordinance is not an economic protectionist measure, meaning it does not favor in-state firms over out-of-state firms. The ordinance requires compliance with the nondiscrimination policy while treating all private companies the same.

Since the ordinance likely would not be deemed to discriminate against interstate commerce, the analysis shifts to whether any effect on interstate commerce is outweighed by a legitimate local interest. As long as Metro has a legitimate governmental interest, in this case prohibiting discrimination, any incidental burden on interstate commerce would likely be outweighed by this interest. The courts have held that prohibiting discrimination is a legitimate governmental
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ORDINANCE NO. BL2011-838 (continued)

interest. The ordinance may “effect” the operation of contractors outside Tennessee, but this does not automatically make it an undue burden on interstate commerce, especially since laws favoring governmental interests are given more deference by the courts than laws favoring private businesses over their competitors.

The council office cannot find where any similar ordinances pertaining to government contractor nondiscrimination have been struck down on commerce clause grounds. A number of local governments across the country have adopted essentially the same provisions contained in this ordinance, including King County (Seattle), WA; Kansas City, MO; and San Diego, CA. Given the lack of cases on point and the very limited impact this ordinance would have on interstate commerce, Metro would likely prevail in court if challenged. If the council so chooses, the rules could be suspended to offer a minor amendment on third reading clarifying that the requirements of the ordinance are only applicable to the performance of services for the Metropolitan Government. However, the council office is of the opinion that the ordinance is constitutional whether an amendment is offered or not.

ORDINANCE NO. BL2011-863 (GILMORE) – This ordinance amends the Metropolitan Code to exempt artisan distilleries from certain location restrictions for the sale of liquor. Artisan distilleries were added to the zoning code in 2009 to allow smaller-scale distilleries in the downtown area to serve as tourist attractions. The code requires all establishments engaged in the retail sale of liquor to meet certain location restrictions, which technically includes artisan distilleries selling commemorative bottles of alcoholic beverages produced on site. These location restrictions include required access to a major street, location on the ground floor with at least one main entrance opening to a public street, and an unobstructed view from the street of the interior of the space where liquor is sold. In addition, liquor stores cannot be located within 50 yards of a private residence or library, 100 yards of a church, or 200 yards of a school or another liquor store.