METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

LEGAL OPINION NO. 2020-01

To: Honorable John Cooper
Metropolitan Mayor
Metropolitan Courthouse, Suite 100
Nashville, Tennessee 37201

Mr. Kevin Crumbo
Metropolitan Director of Finance
Metropolitan Courthouse, Suite 106
Nashville, TN 37201

Date: September 28, 2020

QUESTION

You have requested a legal opinion from the Department of Law on the following questions:

1. Are the provisions of the proposed "4GoodGovernment" charter amendment legal and enforceable?

2. Are the provisions of the proposed amendment severable, or does the illegality of one provision invalidate the entire amendment?

SHORT ANSWER

1. No, the proposed charter amendment is not legal and enforceable. It is defective in form and conflicts with the Tennessee Constitution and state and local law in the following ways:

    - The proposed amendment violates the Tennessee Constitution and state law, which require taxes to be set by the Metropolitan Council, not by voter referendums. It also illegally uses the referendum process to repeal an ordinance and adjust the tax rate mid-fiscal year.

    - The proposed amendment violates state law by requiring voter referendums for bond issues greater than $15,000,000.

    - The proposed amendment violates Article I, § 20 of the Tennessee Constitution, which prohibits retroactive laws and laws impairing the obligations of contracts.

- The proposed amendment violates the state's takings and condemnation laws.
- The proposed amendment conflicts with the Tennessee Public Records Act.

2. The amendment was proposed as a single unit and contains no severability clause. If any part of the proposed amendment is void, then the entire amendment is void.

BACKGROUND

An entity calling itself "4GoodGovernment" filed a charter-amendment petition labeled the "Nashville Taxpayer Protection Act"[1] with the Metropolitan Clerk on August 26, 2020. The petition seeks to submit the following proposed charter amendment to referendum election:

Nashville Taxpayer Protection Act

REPEAL the 34% Property Tax Increase and make Metro Government more fiscally responsible. Davidson County Voters by Petition want this Charter Amendment submitted to the citizens:

☑ **Property Tax Rates.** Property Tax Rates shall not increase more than 2% per year after January 1, 2020, without a voter referendum.

☑ **No Give-away of Our Parks, Greenways, or Public Lands.** No part of a **Park, Greenway, Public Land,** or other real property shall be given away or conveyed without 31 votes of the Metro Council in favor. Transfers of interest in real property shall only be at fair market value or greater based on an independent appraisal. A voter referendum shall be required for transfers of interest in real properties valued over $5,000,000.00, and for leases exceeding twenty (20) years, commencing after January 1, 2020.

☑ **Issuance of Bonds.** All bonds issued or guaranteed after January 1, 2020, exceeding $15,000,000.00 for a specific project (excluding construction of educational classrooms, public libraries, public healthcare buildings, and police and fire stations, and Charter protected facilities) must be approved by voter referendum.

☑ **Failed Promises:** If a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) months, all facilities and related commercial development shall revert to the people, and all related contracts shall be terminated, including land leased from the Nashville Fairgrounds.

☑ **Metro's Records Shall Be Open to the Public.** Citizens are entitled to keep a close eye on Metro's actions and entitled to inspect its books and records for free and consistent with the Tennessee Open Records Act's protections (§10-7-501, *et seq)*. Public instrumentalities under Title 7 receiving more than $250,000 yearly in Metro taxpayer funds or benefits agree to be bound by this Amendment, and such entities refusing to provide public records shall be barred from receiving public funds and liable for treble the Citizen's damages, including attorney fees.

The vote on this Amendment shall be on December 5, 2020

The Davidson County Election Commission (the "Commission") certified to the Metropolitan Clerk on September 17, 2020, that 10% of the registered voters of Nashville-Davidson County who voted in the preceding general election signed the petition as required in Section 19.01 of the Metropolitan Government of Nashville and Davidson County Charter ("Metropolitan Charter").[2] The Metropolitan Clerk certified the petition to the Commission that same day. To avoid the possibly needless expense of conducting a county-wide election,

[1] "Nashville Taxpayer Protection Act" is also the name of a Tennessee nonprofit corporation created on May 13, 2020. Its registered agent is Jim Roberts, one of the petition-drive organizers.

[2] Signatures were affixed to seven formats of the petition forms. Petition formats one through six contained identical proposed charter amendment language. Petition format seven contained different language in the fifth section of the proposed charter amendment. The Commission verified that a sufficient number of signatures of registered voters were affixed to petition formats one through six to satisfy the requirements of Metropolitan Charter § 19.01.

the Commission voted on September 25, 2020, to seek a declaratory judgment from Davidson County Chancery Court on the proposed amendment's legal validity and set a conditional referendum election date of December 15, 2020.

ANALYSIS

The Department of Law has identified numerous illegalities and defects in the proposed amendment in the limited time since the petition was filed. While this memorandum is not intended to be an exhaustive list of the amendment's deficiencies, those identified to date are outlined in further detail below.

In addition to the specific defects identified herein, the incomplete, ambiguous, and argumentative language of the proposed charter amendment renders it defective in form as a whole. While the proposed amendment appears to affect multiple parts of the Metropolitan Charter, the petition fails to identify what portion or portions of the Charter are intended to be amended or repealed. As a result, the proposed amendment would create conflicts with other provisions within the charter. In addition, the proposed amendment contains language more accurately described as advocacy than amendatory language.

I. The "Property Tax Increase" Provision Violates the Tennessee Constitution and Statutes, Illegally Uses the Referendum Process To Repeal an Existing Ordinance, and Impermissibly Changes the Property Tax Rate Mid-Fiscal Year.

The "Property Tax Increase" provision of the proposed charter amendment states:

> **Property Tax Rates.** Property Tax Rates shall not increase more than 2% per year after January 1, 2020, without a voter referendum.

In June 2020, the Metropolitan Council passed substitute ordinance BL2020-287, which established the property tax levy for the 2020-21 fiscal year that began July 1, 2020. The total levy for the general services district was set at $3.788 per $100 and $4.221[3] per $100 for the urban services district, an increase of more than 2% from the previous year. On June 17, 2020, the Mayor signed the ordinance into law, establishing the 2020-21 fiscal year tax levy. The tax rates resulting from that levy became effective July 1, 2020. The property taxes will be due and payable on October 5, 2020, when tax bills with those duly-enacted tax rates will be sent to taxpayers.

4GoodGovernment's referendum petition states that the "Property Tax Rates" provision would "**REPEAL the 34% Property Tax Increase**." Based on the language in the referendum petition and the retroactive effective date of the proposed amendment, the intent and effect of the Proposal is to repeal BL2020-287. This provision has several fatal deficiencies that are discussed below.

[3] This amount reflects the combined rate for the general services district and the additional levy for property in the urban services district.

A. Setting Property Tax Rates By Referendum Would Violate Tennessee's Constitution and Statutes.

Article II, Section 28 of the Tennessee Constitution permits the State to tax property. Article II, Section 29 provides that counties and incorporated towns can tax property only as authorized by the General Assembly. As a metropolitan government, Metro Nashville is vested with powers of both counties and cities. Tenn. Code Ann. § 7-2-108(a)(1); *see also* Metropolitan Charter § 1.05. The proposed property tax amendment does not comply with the taxing authority granted either to counties or cities.

The General Assembly extended property tax authority only to county legislative bodies, not to the public. Tenn. Code Ann. § 67-5-102(a)(2) (counties are authorized to levy an ad valorem tax on all property, and the "amount of such tax shall be fixed by the county legislative body of each county"); *id*. § 49-2-101(6) (the "county legislative body" shall "[l]evy such taxes for county . . . schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the county legislative body").

The Tennessee Attorney General has explained that the county legislative body, not the public, determines property tax rates. According to a 1994 opinion, "[a]ll counties . . . must follow the general law concerning the setting of the county property tax rate, which does not allow for submitting a rate increase to the voters." Tenn. Op. Atty. Gen. No. 94-008, 1994 WL 88766 (Jan. 14, 1994). The opinion states:

> Article II, Section 29 [of the Tennessee Constitution] authorizes the General Assembly to delegate the power of property taxation to counties and cities. The General Assembly has implemented this provision by a general statute applicable to all counties, T.C.A. § 67-5-102, and which states that the amount of the tax is to be fixed by the county legislative body. T.C.A. § 67-5-510 further specifies the times at which such property tax rates are to be set by the county commissions. Numerous other code provisions specify the precise manner in which county property taxes are to be levied and administered, all under the oversight of the State Board of Equalization. T.C.A. §§ 67-5-1501 et seq. *Imposition of a requirement of a public referendum to increase the property tax rate is not permitted under any of these statutes and would be fundamentally inconsistent with their provisions. Such a referendum requirement would thus violate the general law applicable to all 95 counties*.

Id. at *2 (emphasis added); *see also* Tenn. Op. Atty. Gen. No. 05-027, 2005 WL 740148, at *1 (Mar. 21, 2005) ("[I]n the absence of a general law authorizing such a procedure, a county legislative body may not hold a public referendum to establish the county property tax rate.").

With respect to cities, the General Assembly has empowered home rule municipalities to amend their charters by referendum to establish a property tax rate or to increase or reduce the rate, but Metro Nashville is explicitly exempted from that statute. Tenn. Code Ann. § 6-53-105(b). And the legislature has authorized municipal school boards, not the public, to submit a school property tax to voters, but only when the county fails or refuses to levy a county school property tax. Tenn. Code Ann. § 49-2-401; *see also* Metropolitan Charter

§ 9.04(3). Neither statute supports the sweeping referendum authority asserted in the proposed property tax amendment.[4]

Accordingly, the proposed "Property Tax Rates" charter amendment is defective in form, as it violates the property tax authority granted to Metro Nashville under the Tennessee Constitution and state statutes and exceeds the scope of property tax referendum authority allowed by state law.[5]

B. Metropolitan Charter Amendment Referendums Cannot Be Used to Adopt, Amend, or Repeal Legislation.

A local government cannot legislate by referendum petition absent express authority. *See McPherson v. Everett*, 594 S.W.2d 677, 680 (Tenn. 1980) ("The right to hold an election does not exist absent an express grant of power by the legislature."). The proposed "Property Tax Rate" amendment improperly uses the referendum process to legislate by repealing a duly-enacted ordinance. In so doing, the proposed amendment facially exceeds the authority conveyed under both the Metropolitan Charter and state laws for charter amendment referendum elections.

The Tennessee Supreme Court has defined "legislative authority" as "the authority to make, order, and repeal law." *McClay v. Airport Mgm't Servs., LLC*, 596 S.W.3d 686, 694 (Tenn. 2020). The power of direct legislation by initiative and referendum is only permissible when consistent with the Constitution and statutory authority. *See* Eugene McQuillin, The Law of Municipal Corporations § 16:48 (3d ed.), Westlaw (database updated Aug. 2020) (citing *Bean v. City of Knoxville*, 175 S.W.2d 954 (Tenn. 1943));.

In *Bean v. City of Knoxville*, the Tennessee Supreme Court examined whether the City of Knoxville's power to legislate included the power to repeal an ordinance by referendum election. *Id.* at 954-55. The *Bean* plaintiffs sought to enjoin the city from holding a referendum election to adopt an ordinance that would allow motion pictures to be exhibited on Sunday. *Id.* at 954. A state statute prohibited Sunday movies except when authorized "by a majority vote of the *legislative council* of any municipality." *Id.* (emphasis added). The *Bean* plaintiffs argued that voters in a referendum election could not be considered part of "the legislative council." *Id.* The court rejected this argument, relying on the fact that the legislature's private act establishing the Knoxville Charter[6] had extended legislative authority directly to the citizens. *Id.* at 955 ("Section 99 of the [Knoxville] Charter not only

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[4] *But see* Tenn. Op. Atty. Gen. No. 03-019, 2003 WL 912609, at *2 (Feb. 19, 2003) (suggesting that home rule municipalities have broader authority to set property tax rates by referendum than that expressly granted by Tenn. Code Ann. § 6-53-105(b)).

[5] The Department of Law reached a similar conclusion concerning the charter amendment adopted by referendum on November 7, 2006, which required referendum approval for an increase in the maximum property tax rate. *See* Metro Dep't of Law Legal Op. No. 2006-03 (Dec. 8, 2006).

[6] *Bean* pre-dates the 1953 amendment to Article XI, Section 9 of the Tennessee Constitution, limiting the legislature's authority to regulate municipal governments via private act without the local government's consent.

provides for the passage or adoption of ordinances by referendum, but also for the repeal of such in the same manner.").

Put another way, the City of Knoxville's delegation of legislative authority to voters via referendum was upheld because the state legislature and the municipal charter authorized that delegation. *Id.*; *see also* Francis C. Amendola, *et al.*, C.J.S. *Municipal Corporations* § 386 (database updated June 2020) ("A council of a municipal corporation, operating under a freeholders' charter, which charter has no provision for a referendum, has no power to confer such power on the electors of the corporation since such action is regarded as a delegation of the legislative power of the council.") (citing *Bean*).

In contrast, there is no similar delegation of legislative authority in the Metropolitan Charter or in state law that would allow Davidson County voters to use the referendum process to repeal an existing ordinance.

Under the Metropolitan Charter, "[t]he council shall exercise its legislative authority *only by ordinance*, except as otherwise specifically provided by th[e] Charter or by general law." Metropolitan Charter § 3.05 (emphasis added). Likewise, nothing in Metropolitan Charter § 19.01 permits a Metropolitan Charter amendment by referendum to repeal or suspend the implementation of a lawfully enacted ordinance.[7]

The Metropolitan Charter was adopted pursuant to enabling legislation enacted by the General Assembly—the Metropolitan Charter Act. *See* Tenn. Code Ann. § 7-1-101, *et seq*. Under this generally applicable statute, all metropolitan governments must have a metropolitan council, which "shall be the legislative body of the metropolitan government and shall be given all the authority and functions of the governing bodies of the county and cities being consolidated." *See* Tenn. Code Ann. § 7-2-108(11). The Metropolitan Charter was drafted consistently: "The legislative authority of the metropolitan government of Nashville and Davidson County, except as otherwise specifically provided in this Charter, shall be vested in the metropolitan county council." Metropolitan Charter § 3.01; *see also Binkley v. Metro. Gov't of Nashville*, No. M2010-02477-COA-R3CV, 2011 WL 2174913, at *5 (Tenn. Ct. App. June 1, 2011) ("The Metropolitan Council is the legislative body of the metropolitan government.").[8] As with the Metropolitan Charter, nothing in the Metropolitan Charter Act permits metropolitan governments to pass or repeal an ordinance by referendum. As a result, if the Metropolitan Council wanted to repeal ordinance BL2020-287, it could not do so by referendum. Metropolitan Charter §§ 3.05, 3.06.

Likewise, generally applicable state law provides no support for repealing legislation by referendum as the proposed amendment seeks to do. While the Tennessee Constitution makes clear that all governmental power is derived from the people, it "contains no

[7] It is unlikely that the Metropolitan Charter could be amended to permit repeal by referendum. But that is not what this proposed amendment does. It seeks to legislate a repeal of a previously enacted ordinance.

[8] In *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962), the Court upheld the constitutionality of the Metropolitan Charter, in part, due to its consistency with this statutory framework, which in turn was held to be legislation that Article XI, Section 9 of the Tennessee Constitution constitutionally authorized. *Id.* at 454.

reservation to the people of the powers of initiative or referendum." *Vincent v. State*, No. 01A-01-9510-CH-00482, 1996 WL 187573, at *3 (Tenn. Ct. App. Apr. 19, 1996); *see also State ex rel. Potter v. Harris*, No. E2007-00806-COA-R3-CV, 2008 WL 3067187, at *9-10 (Tenn. Ct. App. Aug. 4, 2008) ("While some states, *e.g.* Colorado and Arizona, have provided for referendum in their state constitutions, Tennessee has not done so."). Similarly, the General Assembly has not authorized broad powers of initiative or referendum at the state or local level, but instead authorized the use of a referendum in only a handful of discrete subject areas with particularized requirements. *See, e.g.*, Tenn. Code Ann. § 57-3-101 (liquor retail sales); *id.* § 6-51-104 (annexation); *id.* § 67-6-706 (local sales tax); *id.* § 9-21-208 (general obligation bonds); *id.* § 7-86-104 (E911 districts).

There is no authority under the Metropolitan Charter or state law to use a charter referendum amendment in this manner. Thus, the proposed amendment is defective in form.

C. Metropolitan Charter Amendment Referendums Cannot Be Used to Adjust Tax Rates Mid-Fiscal Year.

There is no legal authority for adjusting tax rates after the first Monday in October, as the proposed amendment attempts to do. The tax rates resulting from the ordinance establishing the 2020-21 fiscal year tax levy became effective July 1, 2020. On October 5, 2020, tax bills with those duly enacted tax rates will be sent to taxpayers. The proposed amendment, however, seeks to adjust the property tax rate mid-fiscal year.

County legislative bodies have the duty "to fix the tax rates on all properties within their respective jurisdictions for all county purposes" "on the first Monday in July, or as soon thereafter as practicable." Tenn. Code Ann. § 67-5-510. As a general rule, county, school, and all property taxes are "due and payable on the first Monday in October of each year." *Id.* § 67-1-702(a), -701(a). Unpaid property taxes become delinquent on March 1. *Id.* § 67-5-2010(a)(1). Construing these statutes collectively, the Tennessee Attorney General has opined that a "county legislative body lacked the authority to alter the county's property tax rates in mid-fiscal year." Tenn. Op. Atty. Gen. No. 04-149, 2004 WL 2326706 (Oct. 1, 2004); Tenn. Op. Atty. Gen. No. 92-3, 1992 WL 544978 (Jan. 14, 1992). A county may only alter its tax rate before the first Monday in October; allowing it to do otherwise could lead to the "untenable result" of taxes becoming delinquent as soon as they are levied. Tenn. Op. Atty. Gen. No. 92-3, 1992 WL 544978, at *3. The proposed amendment expressly intends to do what the attorney general has concluded the county cannot do.

"An electorate has no greater power to legislate than the municipality itself." *Town of Hilton Head Island v. Coal. of Expressway Opponents*, 415 S.E.2d 801, 805 (S.C. 1992) (citing *City & Cty. of San Francisco v. Patterson*, 202 Cal.App.3d 95 (Cal. Ct. App. 1988)); *City of Hitchcock v. Longmire*, 572 S.W.2d 122, 127 (Tex. Civ. App. 1978) ("There can be no right or power existing in the people of a city to adopt an ordinance through the initiative process if the power to adopt it is not lodged in the city council in the first instance.").

The Metropolitan Council has no authority to revise tax rates for the current fiscal year after the taxes for that fiscal year become due. The proposed amendment, however, seeks to use the referendum process as a legislative tool to accomplish what Metro Nashville could not do.

II. The "No Give-away of Our Parks, Greenways, or Public Lands" Provision Violates the Tennessee Constitution's Prohibition on Retrospective Laws and Impairment of Contracts.

The "No Give-away of Our Parks, Greenways, or Public Lands" provision of the proposed charter amendment states:

> **No Give-away of Our Parks, Greenways, or Public Lands.** No part of a **Park, Greenway, Public Land,** or other real property shall be given away or conveyed without 31 votes of the Metro Council in favor. Transfer of interest in real property shall only be at fair market value or greater based on an independent appraisal. A voter referendum shall be required for transfer of interest in real properties valued over $5,000,000.00 and for leases exceeding twenty (20) years, commencing after January 1, 2020.

The Tennessee Constitution states that "no retrospective law, or law impairing the obligations of contracts, shall be made." Tenn. Const., art. 1, § 20. The constitutional guarantee against retrospective laws prohibits retrospective substantive legal changes "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Doe v. Sundquist,* 2 S.W.3d 919, 923 (Tenn. 1999) (quoting *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978)); *Estate of Bell v. Shelby Cty. Health Care Corp.*, 318 S.W.3d 823, 829 (Tenn. 2010). "A 'vested right,' although difficult to define with precision, is one 'which it is proper for the state to recognize and protect and of which [an] individual could not be deprived arbitrarily without injustice.'" *Doe*, 2 S.W.3d at 923.

The proposed charter provision requiring a voter referendum for all transfers of interest in real properties valued over $5,000,000 and for leases exceeding 20 years, commencing after January 1, 2020, violates Article 1, Section 20 of the Tennessee Constitution. The proposed charter provision would eliminate vested rights by attaching a new requirement for transactions considered and passed before the charter referendum date. For property transactions undertaken after January 1, 2020, this provision would either invalidate them completely if a voter referendum were not held or create a new voter approval requirement with the potential to dissolve the transaction. Either way, the proposed charter provision is a retrospective law as indicated by its plain language and thus violates the Tennessee Constitution. This proposed charter amendment has the substantive effect of impairing or overturning executed contractual transactions and obligations that at the time of consummation were lawful by attaching the new burden of a voter referendum approval process.

III. The "Issuance of Bonds" Provision Violates the Bond Referendum Requirements of State Law and the Tennessee Constitution's Prohibition on Retrospective Laws and Impairment of Contracts.

The "Issuance of Bonds" provision of the proposed charter amendment states:

> **Issuance of Bonds.** All bonds issued or guaranteed after January 1, 2020, exceeding $15,000,000.00 for a specific project (excluding construction of educational classrooms, public libraries, public healthcare buildings, and

police and fire stations, and Charter protected facilities) must be approved by voter referendum.

The proposed amendment is unnecessarily vague. It does not define the scope of debt instruments used by the Metropolitan Government that would fall within the term "bonds." It does not define "Charter protected facilities," a term that otherwise does not appear in the Metropolitan Charter or Code. And it excludes from its requirements bonds related to "construction of educational classrooms" without clarifying whether construction of educational facilities other than classrooms is also excluded. But beyond its vagueness, the provision violates state law as described below.

A. The Provision Violates the Bond Referendum Requirements of the Local Government Public Obligations Act of 1986.

Metro Nashville issues general obligation and revenue bonds under the authority of the Local Government Public Obligations Act of 1986 (the "LGPOA"), Tenn. Code Ann. § 9-21-101, *et seq.*[9] The LGPOA's provisions "prevail" over any conflicting law with respect to all bonds issued under the LGPOA, and bonds may be issued under the LGPOA "without regard to the requirements, restrictions or procedural provisions contained in any other law or any home rule charter." *Id.* § 9-21-124(a). To the extent it conflicts with the LGPOA, the "Issuance of Bonds" provision would be preempted.

The LGPOA specifies the circumstances under which a public referendum can be held to approve general obligation and revenue bonds. *Id.* § 9-21-201(a)(1). Under the LGPOA, the public can demand a referendum on a particular general obligation bond issuance only after adoption by the local governing body of an initial resolution to issue the bonds, publication of notice of the resolution, and timely filing of a petition signed by at least 10% of registered voters to be taxed for the bonds, which in Metro Nashville is almost always every registered voter (the "LGPOA Referendum Petition Process"). *Id.* §§ 9-21-205, -206. The LGPOA does not allow referendums if the bonds are revenue bonds, such as bonds issued to fund water works or sewerage projects, or if the local governing body determines that an emergency requires the bond issuance. *Id.* §§ 9-21-207, -301, *et seq.*

Contrary to the LGPOA Referendum Petition Process, the proposed "Issuance of Bonds" charter amendment would automatically trigger a referendum for nearly all of Metro's bond issues for projects exceeding $15,000,000. In other words, the current petition seeks to satisfy future LGPOA petition requirements and is thus defective in form. In addition, the automatic-referendum provision would apply to revenue and emergency bonds, even though they are explicitly exempt from the LGPOA Referendum Petition Process. These defects in the proposed bond amendment's form are compounded by the petition that was submitted to place the proposed amendment on the ballot. The petition was signed by only 10% of the registered voters in the previous general election, not by 10% of the total number of registered voters in the county as required by the LGPOA to place a bond referendum on the ballot.

[9] Metro's Sports Authority, which is incorporated pursuant to Tenn. Code Ann. § 7-67-101, *et. seq.*, also issues bonds in accordance with the LGPOA. *Id.* § 7-67-109(15).

These defects in form are illustrated by a recent Metro bond issue: $213,105,000 Water and Sewer Revenue Bonds, Series 2020A and 2020B, issued April 8, 2020, pursuant to the LGPOA. The proposed amendment would automatically subject the Series 2020A and 2020B Bonds to a referendum if the proposed amendment passes because the bonds exceed $15,000,000 for a specific project and were issued after January 1, 2020. The referendum on Series 2020A and 2020B Bonds would occur even though these bonds have already been validly issued and are exempt from referendum requirements under the LGPOA.[10]

B. The Provision Violates the Constitutional Prohibitions on Retroactive Laws and Impairment of Contracts.

The proposed "Issuance of Bonds" charter amendment would unconstitutionally impair contractual rights relating to several of Metro's existing bond and other debt obligations, not only the Series 2020A and 2020B Water and Sewer Revenue Bonds and other debt obligations issued after January 1, 2020.

First, the limitation on the Metro Council's taxing authority would impair the vested rights of holders of Metro's outstanding general obligation bonds. Metro issued these bonds pursuant to bond resolutions adopted by the Metro Council. These resolutions constitute contractual relationships with the bondholders. Metro pledged to bondholders that it will adopt annual tax levies sufficient to pay the interest and principal on the bonds (as required by Tenn. Code Ann. § 9-21-215). A charter provision seeking to limit the Metro Council's duty to adopt a sufficient tax levy would directly impair the vested contractual rights of the bondholders on Metro's outstanding general obligation bond issues.

Second, Metro has issued and currently has outstanding general obligation and water and sewer bond anticipation notes. These are short-term notes that the noteholders expect to be retired by a date certain with the issuance of long-term general obligation or water and sewer revenue bonds. The short-term notes are issued after Metro adopts its initial resolution, publishes the statutorily required notice, and (in the case of general obligation bond anticipation notes) waits for the 20-day protest by referendum period to expire. Like bond resolutions, the bond anticipation note resolutions constitute contractual relationships with the noteholders. The noteholders have relied on the resolutions as a representation that Metro satisfied all voter protest requirements before issuing the notes. But the proposed amendment purports to mandate a referendum vote on the bonds needed to retire the outstanding bond anticipation notes. The contractual right, which vested with the note resolution approval, to receive payment at maturity from the proceeds of the bond issue is at risk of voter disapproval. Thus, the proposed amendment attaches "a new disability in respect of transactions . . . already passed," which violates the constitutional prohibition against impairment of contracts. *Doe*, 2 S.W.3d at 923.

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[10] The proposed "Issuance of Bonds" amendment effectively purports to invalidate the Water and Sewer Revenue Bonds, Series 2020A and 2020B, which Metro has already validly issued. The bonds' terms and conditions provide that invalidity is an event of default, entitling debt holders to accelerate payment of principal. Metro Nashville would suffer significant costs related to an alleged default on the bonds.

Third, as described above, Metro has issued its Series 2020A and 2020B Water and Sewer Revenue Bonds for more than $15,000,000 for a single project. When issued, these bonds were valid, did not require a voter referendum, and created a vested right of repayment for the bondholders. The proposed charter amendment would call into question the validity of these bonds as well as impair the vested rights of the bondholders.

IV. The "Failed Promises" Provision Violates the Tennessee Constitution's Prohibition on Taking Private Property Without Just Compensation.

The "Failed Promises" provision of the proposed charter amendment states:

> **Failed Promises.** If a professional sports team leaves Nashville, or ceases playing professional games for more than twenty-four (24) months, all facilities and related commercial development shall revert to the people, and all related contracts shall be terminated, including land leased from the Nashville Fairgrounds.

Each of Metro's professional sports teams—the NHL Hockey Club, the NFL Football Team, the Minor League Baseball Team, and the MLS Soccer Club—have lease interests in the sports facilities in which their teams play, as well as property interests in related commercial endeavors in the area. If the "Failed Promises" provision is triggered by a team's departure or the games-played provision, then two actions will happen: 1) "all facilities and related commercial development will revert to the people," and 2) "all related contracts shall be terminated, including land leased from the Nashville Fairgrounds."

The Tennessee Constitution provides that "no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor." Tenn. Const., art. I, § 21. Under Tennessee law, eminent domain is to be used sparingly, and the laws of eminent domain are to be "narrowly construed so as not to enlarge, by inference or inadvertently, the power of eminent domain." Tenn. Code Ann. § 29-17-101.

The meaning of the proposed amendment is, on its face and with its plain language, open to interpretation. Adopting the required narrow reading of the proposed amendment for purposes of this analysis, this memorandum assumes the following definitions:

- "*facilities*" refers to the professional sports facilities constructed and owned by the Metro Sports Authority where the professional sports teams play their home games;
- "*related commercial development*" refers to other developments in which the professional teams hold a property interest; and
- "*the people*" refers to the Metropolitan Government.

Under these definitions, if a team fails to meet its 24-month requirement, the team will lose not only its lease interests in the facilities but also its interests in its related private commercial developments, without compensation. One caveat to this analysis is that the proposed charter amendment uses the word "revert," which under a narrow reading of the provision suggests that only property that once belonged to Metro would be taken if one of the triggers is met. In any event, applying the reversion language in the petition clearly would result in private entities losing real property interests and the benefits accruing under

established contracts. And it could well fall to Metro to make good those losses under Tennessee's inverse condemnation principles. Finally, sales tax and other revenues generated by the sports facilities at issue are used to repay bond debt issued to finance construction of those facilities. Losing a sports team as a tenant would likely require that bond debt be repaid with general government revenues.

V. The "Metro's Records Shall Be Open to the Public" Provision Improperly Expands Penalties Under the Public Records Act Against Metro Public Authorities.

The "Metro's Records Shall Be Open to the Public" provision of the proposed charter amendment states:

> **Metro's Records Shall Be Open to the Public.** Citizens are entitled to keep a close eye on Metro's actions and entitled to inspect its books and records for free and consistent with the Tennessee Open Records Act's protections (§10-7-501, *et seq*.). Public instrumentalities under Title 7 receiving more than $250,000 yearly in Metro taxpayer funds or benefits agree to be bound by this Amendment, and such entities refusing to provide public records shall be barred from receiving public funds and liable for treble the Citizen's damages, including attorney fees.

The language in this proposed charter provision is unclear. It does not indicate what a "public instrumentality under Title 7" is or where "Title 7" is found. Since the Metropolitan Charter utilizes an "Article/Chapter" nomenclature, this memorandum assumes that the petition language references Title 7 of the Tennessee Code Annotated, entitled "Consolidated Governments and Local Governmental Functions and Entities."

The Tennessee Public Records Act (the "TPRA") applies to "governmental entities," defined as "the state of Tennessee and any county, municipality, city or other political subdivision of the state of Tennessee." Tenn. Code Ann. §§ 10-7-503, -504(a)(16)(A)(i). Accordingly, by stating that instrumentalities created pursuant to Title 7 of the Tennessee Code Annotated are subject to the TPRA, the proposed amendment simply restates certain provisions of the TPRA, but less clearly.

There are several types of public instrumentalities authorized to be organized under Title 7, four of which have been created in Metro:

- Industrial Development Corporations (Chapter 53)
- Hospital Authorities (Chapter 57)
- Sports Authorities (Chapter 67)
- Convention Center Authorities (Chapter 89)

Concerning Sports Authorities, the TPRA and applicable case law make clear that Metro's Sports Authority is a public instrumentality of the Metropolitan Government and, as such, an agency of that government:

> The Sports Authority, while a separate corporate entity, is merely an agency or instrumentality of the Metropolitan Government of Davidson County, Tennessee. *See Fort Sanders Presbyterian Hosp. v. Health and Educ'l Facilities Bd. of the County of Knox,* 224 Tenn. 240, 453 S.W.2d 771, 774 (1970) ("The Health and Educational Facilities Board, while it is a separate corporate entity, is merely an agency or instrumentality of Knox County, formed under a duly adopted Resolution of Knox County."); *Garner v. Blount County,* No. E1999–02525–COA–R3–CV, 2000 WL 116026, at *3–4 (Tenn. Ct. App. Jan.28, 2000) ("the Public Building Authority, inasmuch as it is an instrumentality of the County that it serves, is an 'agency' of Blount County"). Tennessee Code Annotated section 7–67–109 specifically provides that "Each sports authority created pursuant to this chapter shall be a public nonprofit corporation and a public instrumentality of the municipality with respect to which the authority is organized." Therefore it is inapposite that Powers' financial affairs are controlled by an agent of the Metropolitan Government as opposed to the government itself.

Allen v. Day, 213 S.W.3d 244, 257-58 (Tenn. Ct. App. 2006); *see also* Tenn. Op. Att'y Gen. No. 96-011, 1996 WL 56175 (Feb. 6, 1996) (noting that a Sports Authority is a governmental agency within the meaning of the Public Records Act). *Allen* also holds that the Sports Authority's contractor, Powers Management, is the functional equivalent of a governmental entity and thus subject to the TPRA as well.

Similarly, once created by resolution of the governing body of the creating municipalities, Hospital Authorities are "public and governmental bodies acting as agencies and instrumentalities of the creating and participating municipalities." Tenn. Code Ann. § 7-57-102(b). As such, the same logic would apply to them as would to Sports Authorities: as an agency of a governmental entity, they are part of a governmental entity to which the TPRA applies. Similar arguments can be made as to Convention Center Authorities and Industrial Development Corporations.

The consequences of disregarding or denying in bad faith a request for public records are already set forth in state law:

> If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity. In determining whether the action was willful, the court may consider any guidance provided to the records custodian by the office of open records counsel as created in title 8, chapter 4.

Tenn. Code Ann. § 10-7-505(g).

This section of the TPRA says nothing about treble damages or an agency being barred from having government funds allocated to it. In this respect, the proposed charter amendment conflicts with the TPRA—a state statute with general applicability. *See S. Ry. Co. v. City of Knoxville*, 442 S.W.2d 619, 622 (1968) ("[M]unicipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state.") (internal quotation marks omitted).

VI. If Any Provision of the Proposed Amendment Is Invalid, Then the Entire Amendment Fails.

The language of the Nashville Taxpayer Protection Act petition indicates that the signers intended for the entire proposed amendment be submitted to the voters. All seven versions of the petition contain the following endorsement of the entire amendment, with minor variations: "Davidson County Voters by Petition *want this Charter Amendment submitted* to the citizens." (emphasis added). The proposed amendment's purpose as described in the petitions covers all of the amendment's provisions: the "Charter Amendment" should be adopted to fix Metro's "budgetary mismanagement and financial incompetence," to force Metro to "be more financially responsible," and to "rein in its spending, cut waste, and stop giving away our city, parks, and public lands for free." Nothing in this language would allow a court to determine which provisions petition signers intended to support and which, if any, could be severed. Accordingly, under the rule of elision as applied in Tennessee, a court would not sever invalid parts of the proposed amendment but rather would strike down the entire amendment.

While there are no Tennessee cases applying the doctrine of elision to a public referendum measure, the doctrine is not favored under Tennessee law. *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985); *Smith v. City of Pigeon Forge*, 600 S.W.2d 231, 233 (Tenn. 1980). The Tennessee Supreme Court has applied the rule of elision to legislation only when:

> it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable, . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage.

Gibson Cty., 691 S.W.2d at 551. The Court cautioned that the legislative intent required for elision must be "fairly clear of doubt from the face of the statute" because eliding the act without such intent would be an act of "judicial legislation." *Id.*; *see also Willeford v. Klepper*, 597 S.W.3d 454, 470 (Tenn. 2020) (courts may elide unconstitutional portion of statute "in keeping with the expressed intent of a legislative body").

The Tennessee Supreme Court decision in *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531 (Tenn. 2004), cited two Missouri cases that discuss the doctrine of elision in a judicial referendum challenge. *Id.* at 540. Both cases emphasize the difficulty of determining the "legislative intent" of petition signers for purposes of elision.

In *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990) (en banc), the Missouri Supreme Court declined to sever provisions of a referendum initiative that had been removed from the ballot for violating the state constitution. *Id.* at 832. The court identified several factors that would make a provision severable: "whether the provision is essential to the efficacy of the amendment, whether it is a provision without which the amendment would be incomplete and unworkable, and whether the provision is one without which the voters would not have adopted the amendment." *Id.* Because the proposed amendment had more than one subject, the court concluded that it could neither

determine which provisions the petition signers intended to support nor identify the provisions essential to the amendment's efficacy.

In *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457 (Mo. Ct. App. 2000), the Missouri Court of Appeals declined to sever provisions of a proposed city charter amendment, despite the city charter providing that if any charter provision was held void, the validity of other provisions would not be affected. *Id.* at 470-71. The court explained that it would be "impossible" to determine what the amendment framers or petition signers intended "with respect to whether they considered the unconstitutional language to be essential to the efficacy of the amendment." *Id.* at 471.

Other courts have also declined to apply elision where a referendum measure was removed from the ballot because part of it was unconstitutional. *See In re Jackson Twp. Admin. Code*, 97 A.3d 719, 725-28 (N.J. App. Div. 2014) (court declined to sever voter initiative, holding that it "cannot discern with any certainty which provisions of an initiative ordinance induced each voter to sign it. It is not the role of the courts to interfere with the legislative powers granted to [these] citizens . . . ."); *Bennett v. Drullard*, 149 P. 368, 370 (Cal. Ct. App. 1915) (redacting petition to remove invalid provisions "would be directing something to be placed on the ballot which the hundreds of voters did not petition for at all"), *cited with approval in Alexander v. Mitchell*, 260 P.2d 261, 268-69 (Cal. App. 1953).

As set forth in Sections I through V above, every provision of the proposed amendment contains legal defects. Based on Tennessee's doctrine of elision, Tennessee courts would likely follow the practice in multiple states of striking down the entire petition amendment if any part is found invalid.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

Robert E. Cooper, Jr.
Director of Law

cc: Vice Mayor
Members of the Metropolitan Council