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**VIA US MAIL AND EMAIL**

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RE: Residency requirement for candidates running for the position of Mayor of the City of Memphis on October 5, 2023

Dear Mr. Swatley:

Because of my experience as a Commissioner on the Shelby County Election Commission ("SCEC") City Attorney Jennifer Sink asked me to respond to the SCEC's question regarding the residency requirement for the Mayor of Memphis, Tennessee directed to the City of Memphis, which I have set forth below.

**QUESTION PRESENTED**

When must a candidate for Memphis Mayor establish residency in the City of Memphis to be eligible to run for (or hold) that office?

**SHORT ANSWER**

A candidate for the position of Mayor of the City of Memphis must have lived within the City limits for the five (5) years preceding the election for Mayor.

**LEGAL ANALYSIS**

The legal analysis of your question requires a two-fold analysis. First, we must determine if the Mayor's five (5) year residency requirement survived the enactment of Ref. Ord. No. 4346. Next, we must analyze whether the five year residency requirement will stand up to constitutional scrutiny.

*The five (5) year residency requirement for the Mayor of Memphis survived the enactment of Ref. Ord. No. 4346*

Beginning with the Tennessee Legislative Act of 1905, the City of Memphis' Charter was amended by adding a residency requirement for candidates running for Mayor. The residency requirement for the position of Mayor of the City of Memphis was set at five years. This was continued by the Acts of 1909. This requirement was maintained when the Citizens of Memphis passed the Home Rule Amendment, Reference Ordinance No. 1852 (November 8, 1966). Ref. Ord. No. 1852 established that the Mayor's qualifications "shall be the same as those required herein for members of the Council," which required five years of residency.

In 1995, in a lawsuit challenging the selection of City Councilman, United States District Court Judge Jerome Turner for the Western District of Tennessee, ruled that the electoral system for selecting members of the City Council established in 1968 in accordance with Ref. Ord. No. 1852<sup>1</sup> violated the Constitution of the United States. In response to Judge Turner's ruling, on December 19, 1995, Reference Ordinance No. 4346<sup>2</sup> was passed by the citizens of Memphis. This ordinance addressed the makeup of the City Council and changed the way citizens of Memphis elected members of the Council. This referendum expressly states that "[e]ach [council] Member shall be a resident, as defined by state election laws, of the City and of the district from which he or she is elected." See Ref. Ord. No. 4346, §1. One can see that the caption of the referendum, reproduced in footnote 2 below, addresses only the "election of 13 City Council members" and does not mention the position of Mayor at all, let alone put voters on notice that they were changing the residency requirement for Mayor. Neither did the publication of the Official Ballot by the Election Commission in the Commercial Appeal on October 11, 1996 (Exhibit "A").

Under Tennessee law, interpreting referendums requires an understanding of the "collective intent" of the electorate that voted for the measure. *Jordan v. Knox County*, 213 S.W.3d 751, 783 (Tenn. 2007). Absent ambiguity, the meaning is interpreted to be that meaning which is "apparent upon the face of the initiative measure." *Id.* at 781. Applying this instruction to Ref. Ord. No. 4346 you can see that it expressly addresses changing the residency requirement

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<sup>1</sup> "No person shall be elected or appointed as a Councilman unless he or she shall have been a resident voter and taxpayer of the City of Memphis for not less than five (5) years preceding his or her election or appointment, or unless he or she shall have resided during the five (5) years preceding his or her election or appointment in territory that has been annexed to and at the time of such election or appointment forms a part of the City of Memphis, but it shall not be necessary for the territory in which such person resides to be annexed for five (5) years; nor shall any person be elected or appointed as a member of the Council from a particular council district unless he or she has been a resident of such district for not less than six (6) months preceding his or her election." See Ref. Ord. No. 1852, §2.

<sup>2</sup> "An Ordinance to propose an amendment to the charter of the City of Memphis same being Chapter 11 of the Acts of 1879, as amended, pursuant to the provisions of Article XI, Section 9 of the constitution of the state of Tennessee (home rule amendment) so as to adopt a plan with will result in the election of 13 city council members and to give each voter the opportunity to vote for and be represented by four council members and to submit the proposed ordinance to the qualified voters of the city of Memphis at the first general state election to be held November 5, 1996."

for the Council, but it is silent as to the residency requirements of the Mayor. Thus, it is apparent on the face of the referendum (Ref. Ord. No. 4346) that it only addresses the residency requirement for the Council and not for Mayor. Therefore, one could not say that the “collective intent” of the electorate was to change the residency requirement for Mayor.

Moreover, Section 2 of Ref. Ord. No. 4346 provides “that all laws constituting the present Charter of the City of Memphis not in conflict with this amendatory Home Rule Ordinance, be and the same are continued in full force and effect, and all laws in conflict therewith are hereby repealed.” See Ref. Ord. No. 4346, §2. Therefore, Ref. Ord. No. 4346 continued “in full force and effect” all laws that are not in conflict with this amendment including the residency requirement for the City Mayor. Thus, the five-year residency requirement for Mayor under Ref. Ord. No. 1852 remained in place.<sup>3</sup> In addition, repeals by implication are not favored and will only be found when an irreconcilable conflict or repugnance clearly exists between the early ordinance and the later ordinance. See *Oliver v. King*, 612 A.W.2d 152, 154 (Tenn. 1981). To conclude otherwise, would mean the voters who approved Ref. Ord. No. 4346 were unaware that they were repealing by implication the Mayor’s residency requirement.

Based on the foregoing analysis, it is my opinion that the five-year residency requirement to run for Mayor of the City of Memphis survived the enactment of Ref. Ord. No. 4346. Accordingly, candidates for Mayor of the City Memphis in the 2023 election must meet the five year residency requirement.

*The five (5) year residency requirement for the Mayor of Memphis is constitutional*

An analysis of the residency requirement for the Mayor of the City of Memphis would not be complete without considering the constitutionality of the requirement. In examining the constitutionality of the five (5) year residency requirement for the position of Mayor of the City of Memphis, I start with the fact that there has not been a constitutional challenge to the Mayor’s residency requirement.

Late last year, the Sixth Circuit Court of Appeals addressed the issue of candidate residency requirement in *Burrell v. Tipton Cnty. Election Comm'n*, No. 22-5867, 2022 WL 10225146 (6th Cir. Oct. 18, 2022). In *Burrell*, the Plaintiff challenged the denial of a Temporary Restraining Order he sought against the Tipton County Election Commission by the United States District Court. One of Burrell’s claims was that the mayoral residency requirement of six months violated his First and Fourteenth Amendment rights. The *Burrell* Court found that when assessing barriers to run for public office the applicable standard of review required by the Supreme Court was that such laws be “closely scrutinized” and found “reasonably necessary to the accomplishment of legitimate state objectives.” *Burrell*, 2022 WL 10225146 (citing, *Bullock*

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<sup>3</sup> Tenn. Code Ann. §6-3-103 provides that “[n]o person shall be eligible for the office of Mayor unless such person has resided within the municipality for at least one (1) year next preceding the election.” However, this requirement only applies to cities incorporated under the mayor-aldermanic form of government. Tenn. Op. Atty. Gen. No. 06-055, 206 WL 1197448. It does not apply to municipalities formed pursuant to private act, such as the City of Memphis.

*v. Carter*, 405 U.S. 134, 144 (1972)). This standard is lower than the standard used to review residency requirement to be an eligible voter. *See Dunn v. Blumstein*, 405 U.S. 330,336 (1972) (holding “State must show a substantial and compelling reason for imposing durational residence requirements [on the opportunity to vote].”)

The Supreme Court in *Bullock* focused on a Texas filing-fee requirement for candidates. The Sixth Circuit Court of Appeals has applied *Bullock*’s standard to durational residency requirements for state or municipal office. *Beil v. City of Akron*, 660 F.2d 166 (6th Cir. 1981). *Beil* upheld the City of Akron’s requirement that candidates for the position of ward councilman have resided for at least one year in the ward they seek to represent. *Id.* at 167, 169. *Beil* adopted and applied the same standard of scrutiny from *Bullock*, determining that “the one year durational residency requirement of the City of Akron is reasonably necessary to effectuate an important municipal interest.” *Id.* at 169. In no case has the Sixth Circuit or the Supreme Court demanded that municipalities must affirmatively show that durational residency requirements are “substantially related to an important government interest,” as the Plaintiff in *Burrell* suggests. *Burrell*, 2022 WL 10225146, at \*4. Rather, the correct standard is whether the requirement is reasonably necessary to effectuate an important government interest. *Id.*

Thus, the Sixth Circuit held that the District Court in *Burrell* correctly concluded that Mason’s six-month durational residency requirement is reasonably necessary to effectuate an important municipal interest. *Id.* Municipal interests for durational residency requirements include exposing candidates to the scrutiny of the electorate, protecting the community from outsiders not seriously committed to the community, and having officeholders who are familiar with the problems of the community.<sup>4</sup> *Joseph v. City of Birmingham*, 510 F. Supp. 1319, 1336 (E.D. Mich. 1981). In both *Joseph* and *Beil*, one-year durational residency requirements were upheld as serving these legitimate interests.

Note, that the Supreme Court has upheld even longer residency requirements for state office *Sununu v. Stark*, 420 U.S. 958 (1975) (affirming a seven-year residency requirement for state senators); *Chimento v. Stark*, 414 U.S. 802 (1973) (affirming a seven-year residency requirement for governor). While these offices may be more powerful than the position of town or city mayor, “[t]he smaller governmental unit is equally entitled to protect its smaller self.” *Beil*, 660 F.2d at 168. The *Burrell* Court also held that because the length of the residency requirement for the mayor of Mason is proportional to the power of the position, it satisfies the standard of being reasonably necessary to effectuate the town’s interests.

Now turning to the five (5) year residency requirement for the position of Mayor of the City of Memphis, should there be a constitutional challenge in the future, I believe that Memphis’s Mayoral residency requirement will be found constitutional (although I cannot

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<sup>4</sup> As noted by the District Court, the municipality’s important interests do not have to be affirmatively displayed in a town or city charter alongside the durational residency requirements. In both *Beil* and *Joseph*, these municipal interests were not explicitly advanced in the charter and in both the one-year durational residency requirements were upheld. *See Beil*, 660 F.2d at 167-68; *Joseph*, 510 F. Supp. at 1337-38.

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guarantee that it will). The bases for my prognostication are: (1) the fact that the five year residency requirement was voted on by the voting citizens of the City of Memphis by referendum; (2) the five (5) year residency is reasonably necessary to effectuate an important government interest (candidates exposed to the scrutiny of the electorate; protecting the community from outsiders not seriously committed to the community, and having officeholders who are familiar with the problems of the community); (3) the residency requirement is proportional to the power of the position (Memphis is the first or second largest city in Tennessee); and (4) the position of Mayor of the City of Memphis is an especially powerful role. But one example of the power of the Mayor is the fact that he has the sole contracting power for the City of Memphis.

I hope this answers the SCEC's question.

Very truly yours,

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