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July 6, 2009

Council Members  
Memphis City Council  
City Hall  
Memphis, TN 38103

Dear Ladies and Gentlemen:

Some of you have requested a number of opinions relative to consequences of the recent announcement of the Mayor's resignation effective July 11, 2009. The purpose of this opinion is to address some of the issues that you have raised in order to provide some clarity as to the procedure for the transition from Mayor Herenton to Mayor Pro-Tem Myron Lowery and the effect on Mr. Lowery's temporary departure as a Council member.

Pursuant to the 2008 referendum vote, the City's Home Rule charter was amended to change the procedure for filling a vacancy in the office of the Mayor. Referendum Ordinance No. 6 provides as follows:

In the event the office of the Mayor becomes vacant City Council chair who will at that time have the title of Mayor Pro-Tem shall serve as Mayor for up to 180 days following such vacancy, at which time the public shall elect a duly qualified person to serve the remaining unexpired term of the vacated office, provided that if no general or municipal election is scheduled to occur within 180 days of such vacancy, a special election shall be held within 90 days of such vacancy to elect a candidate to fill the Office of the Mayor through the end of remaining unexpired Mayoral term.

Since the next general or municipal election is scheduled to occur more than 180 days from July 11, 2009, 2008 Referendum Ordinance No. 6 requires a special election to be held to fill the office of Mayor on or before October 11, 2009. The Home Rule Charter, as amended by 2008 Referendum Ordinance No. 6, provides that the newly elected Mayor shall take office immediately upon election and will serve the unexpired term of the current Mayor. *Home Rule Ordinance 1852 §4*. Technically, such elections are not official until the Election Commission certifies the vote; in the last special election, Mayor Hackett was not sworn in until after the vote

was certified. Thus, the newly elected Mayor will take office upon certification of the vote in the special election.

Although the Council Chair has already forwarded Mayor Herenton's resignation letter to the Election Commission and requested that it begin the necessary processes for a special election, the Council should adopt a resolution on this coming Tuesday with an effective date of July 11, 2009, requesting the Election Commission to hold a special election and allocating funds for the special election.

#### THE NEWLY ELECTED MAYOR

The new Mayor ("Newly Elected Mayor") will serve the unexpired term of Mayor Herenton or until the office is vacated due to the death or resignation, the inability for any reason to serve or recall of the Newly Elected Mayor. *Home Rule Ordinance 1852 §4*. The Mayor Pro-Tem and the Newly Elected Mayor will receive the salary of the office of Mayor. The Mayor Pro-Tem and the Newly Elected Mayor are required to devote their "entire time and attention to the office. *Id*. Consequently, the Mayor Pro-Tem cannot serve simultaneously as City Councilman and Mayor Pro-Tem. As will be explained subsequently, such simultaneous service would also be antithetical to the Council-Mayor form of government adopted in the City's Home Rule Charter.

#### DIVISION DIRECTORS

Section 8 of the City's Home Rule charter specifically provides that in the event of the death, retirement or recall, or for other reasons causing a vacancy in the office of Mayor, the terms of office for Division Directors shall be concurrent with the appointing Mayor's tenure. That is, in the event a Mayor dies or is recalled or vacates office for other reasons, then and in that event the Division Directors shall serve at the will and pleasure of the Newly Elected Mayor for not to exceed 90 calendar days. *Home Rule Ordinance 1852 §8*. The Newly Elected Mayor could seek the removal of any Division Director prior to the expiration of said 90 day period, but any such removal would require Council approval. After the expiration of the 90 day period, the Newly Elected Mayor may reappoint or replace the existing Division Directors. Such appointments or reappointments would be subject to Council approval. In any event existing directors serve until their successors are nominated and approved.

As the Mayor Pro-Tem, Councilman Lowery would be authorized to fill any Division Director vacancies; those appointments would be subject to approval by the Council. Any appointments by the Mayor Pro-Tem would continue to serve until the newly elected Mayor replaced them. Any removal of an existing Director by the Mayor Pro-Tem would require Council approval.

#### CITY COUNCIL

##### A. Council Chairman

Under 2008 Referendum No. 6, the Council Chair shall serve as Mayor Pro-Tem until his successor is elected and qualified. Under the Council's Rules of Procedure, the Vice-Chair of the

Council becomes the Chairman for the remainder of the calendar year and a new Vice-Chairman is elected for the remainder of the calendar year. In November, 2009, the Council will elect from its membership a new chair for the 2010 calendar year. There is no automatic succession to the office of Chairman from year to year and there is no preference for seniority in the selection of Chairman and Vice-Chairman. Should Myron Lowery return to the Council after his temporary tenure as Mayor, he would return as a Council member rather than as Chairman, but would be eligible for election as Chairman for 2010 as are all other Council members.

#### B. Lowery's Status as a Council Member

Myron Lowery does not lose his seat on the Council because of the mandate of the Charter that he become Mayor Pro-Tem; however, his status, as a Council member, is frozen as of the date he takes the oath of office as Mayor Pro-Tem until he returns or becomes Mayor. The 2008 Referendum No. 6 is mandatory and is intended to protect the interests of the City during the transition to a new Mayor. It, therefore, does not cause a forfeiture of Mr. Lowery's elected position, because there is no voluntary and irrevocable election by Lowery to vacate his position. While some may assert that during Lowery's service as Mayor Pro-Tem the voters in Super District 8 will be deprived of a representative and that the Council will be comprised of twelve (12) rather than thirteen (13) council members, 2008 Referendum No. 6, also approved by the voters, specifically mandates this result and further makes it clear that Lowery's mandatory accession to the Mayoral position and his absence from the Council are temporary. The term "Pro-Tem" is the abbreviated version of "Pro Tempore" which means appointed to occupy a position temporarily. *See Black's Law Dictionary (7<sup>th</sup> ed. 1999)*. Lowery has not resigned his Council seat and has expressed his intention to resume his Council duties once his mandatory stint as Mayor Pro-Tem has expired and if his bid for Mayor in the special election is not successful.

Section 1 of the City's Home Rule Charter supports this view. For example, the pertinent portion of the charter provides:

Upon any *vacancy* occurring in the Council, including a vacancy in the office of Chairman, by reason of death, resignation, removal or otherwise, the remaining members of the Council shall have the power by a majority vote to elect a person to fill such vacancy and to serve until his successor is elected and qualified. Said vacancy shall be filled as soon as possible and within a period not to exceed thirty (30) days thereafter.

In order for the Council to be authorized to fill a vacancy, there must be a vacancy to fill. Vacancy as contemplated by the Charter means an irrevocable vacation of office by the current Council member. In every case in which the Council has acted to elect a person to replace a Council member, the action was precipitated by an irrevocable vacation of office by the current Council member. For example, Councilman Muhammed's position became vacant as a result of his death. Janet Hooks, TaJuan Stout-Mitchell, Rickey Peete and Scott McCormick all made irrevocable elections to resign their offices. The Council acted in each instance to fill the vacancy. The Charter then specified that the term of the person elected by the Council to fill the

irrevocably vacant position would be “until [the replacement Council member’s] successor is elected and qualified.” The Council does not have the authority to determine the tenure of the replacement Council member; the tenure of the replacement Council member is dictated by the Charter.

The same section addresses when a Council seat may be declared vacant by the Council, other than in the obvious situations of death, resignation or removal, namely:

In the event a person elected as Councilman shall be absent from duty without proper and reasonable explanation therefor being made for a period of ninety (90) days, his or her said office shall be declared vacated and said vacancy shall be filled as herein provided.

First, there can be no declaration of involuntary vacancy due to absence prior to the expiration of ninety (90) days. Second, even after the expiration of ninety (90) days, the Council cannot declare a vacancy on the Council due to absence from office if the absent Council member has a proper and reasonable explanation for his or her absence.<sup>1</sup> Thus, Mr. Lowery’s absence from his duties for 90 days or less would not create any basis for declaring his seat vacant as contemplated by the charter. Further, Mr. Lowery would undeniably have a proper and reasonable explanation for his absence as a Council member, which would be his mandatory service as Mayor Pro-Tem for the benefit of the City. The mandatory nature of his service could be viewed as an extension of his service on the Council, such that his service as Mayor Pro-Tem would not be considered an absence from office at all.

In any event, without a vacancy on the Council, as contemplated by the Charter, a condition necessary to trigger the Council’s power to replace a Council member would be missing. It is our opinion that absent a permanent and irrevocable vacancy in Mr. Lowery’s Council seat, the Charter does not authorize the Council to elect a person to act in Mr. Lowery’s absence. The certified elected Councilman is Myron Lowery; only he is authorized to exercise the privilege of voting as the elected representative of Super District 8, position 3. His right to vote cannot be delegated by him or the Council to some other person during his temporary absence from office. Any temporary replacement would be *ultra vires* and may invalidate the actions of the Council in which such temporary replacement voted.

### C. Lowery’s Ability to Act Simultaneously as Mayor Pro-Tem and Council Member

Prior to the adoption of home rule, the Mayor and other then Commissioners possessed legislative and administrative powers. After the adoption of home rule, the City now operates under a Council and a strong Mayor form of government, pursuant to which the Council and the Mayor have separate and independent responsibilities. Section 1 of the Home Rule Charter vests the legislative power of the City exclusively in the Memphis City Council. All administrative authority is vested in the Mayor and his subordinate officers and employees. The charter of the City expressly states:

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<sup>1</sup> This provision is further limited by 2008 Referendum No. 4, which provides for suspension (rather than expulsion) of a council member indefinitely, if charges or indicted with official malfeasance or misconduct.

The Council shall not, however, exercise executive or administrative powers nor interfere in the operation of the administrative divisions.

Consequently, simultaneous service as Mayor and Council member would be antithetical to the Council-Mayor form of government adopted in the City's Home Rule Charter. Mr. Lowery could not act as Council member without violating the separation of powers enumerated in the Charter. Further, the language in the Charter mandating that the Mayor devote his "entire time and attention to the office [of Mayor]" would appear to foreclose any simultaneous service as Mayor and Council member. During his tenure as Mayor Pro-Tem, Mr. Lowery would receive the salary designated for the Mayor and would not receive any compensation as a Council member.

#### D. Actions of Current Council Members on Mayor Pro-Tem's Transition Team

There is no prohibition for a current Council member to serve as a member of the Mayor Pro-Tem's transition team. There is no violation of the City's ethics ordinance. Any current Council member or any citizen may request an audience with Mayor Pro-Tem elect Lowery to offer advice and recommendations about appointments or about the conduct of City government during the term of the Mayor Pro-Tem. Mayors and Council members have routinely conferred about the business of the City and other pleasantries. Service on a transition team is advisory only; no member makes any decisions or has any authority to bind the City. Thus, such service is not in an official administrative capacity. Further, such service by a current Council member is no different than a current Council member seeking the Mayor's support for a legislative proposal. While the Council member will vote on such matters, Council members are allowed to advocate proposals that they will support and may indeed vote on such proposals. However, out of an abundance of caution and to avoid any perception of impropriety, Lowery's transition team will not have any role in any director's appointments or other hiring decisions; those will be made solely by the Mayor Pro-Tem.

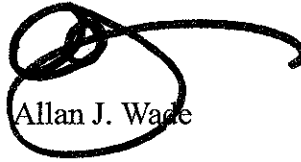
The transition team will make recommendations about the suggested focus, direction and priorities of City government during the Mayor Pro-Tem's limited term of office. Lowery has indicated he would welcome suggestions from other Council members and members of the public.

#### E. Meetings of the Transition Team

There is only one elected official on the transition team. It is our understanding that Mr. Lowery has not participated in any of the meetings, but that his representative has attended; if Councilman Lowery participates, then those transition team meetings in which "Council Member" Lowery participates must be open to the public. Once Mr. Lowery becomes Mayor Pro-Tem, he may meet with the transition team in public or in private as he chooses. The Mayor is not a member of the City's Governing Body; and, therefore, may meet with any individual Council member without violating the Open Meetings Law, as long as he meets with no more than one Council member at any given time.

July 6, 2009

Very truly yours,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Allan J. Wade

Cc: Elbert Jefferson, Jr., Esq.