



County Technical Assistance Service

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Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

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County Operations

Reference Number: CTAS-155

ADA Title II

Reference Number: CTAS-2033

Title II of the ADA applies to all activities, services and programs of public entities. A public entity is any state or local government and any of its departments, agencies or other instrumentalities. 42 U.S.C. § 12131(1).

Included under Title II are activities of State legislatures and courts, town meetings, police and fire departments, motor vehicle licensing, and employment. Under section 504 of the Rehabilitation Act, only programs that receive federal funds are covered. Under Title II of the ADA, all activities of State and local governments are covered whether or not they receive Federal funds.

Private entities that operate public accommodations are covered under Title III of the ADA and public transportation services operated by state and local governments are covered by Department of Transportation (DOT) regulations.

Title II Requirements

Reference Number: CTAS-2034

To be in compliance with Title II, state and local governments—

- May not refuse to allow an individual with a disability to participate in a service, program, or activity because of the disability.
- Must provide programs and services in an integrated setting, unless separate or different accommodations are needed for equal opportunity.
- Must eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy programs and services.
- Are required to make needed modifications to policies, practices, and procedures that deny equal access to individuals with disabilities unless doing so would result in a major change to the program.
- Must ensure effective communication by furnishing auxiliary aids and services unless doing so would result in an undue burden or change.
- May provide additional special benefits to individuals with disabilities.
- May not charge individuals with disabilities to cover the costs of changes needed to ensure nondiscriminatory treatment.
- Shall operate all programs so that they are readily accessible and usable by individuals with disabilities.

42 U.S.C. § 12132.

Qualified Individuals under Title II

Reference Number: CTAS-2035

Under Title II, the definition of an individual with a disability is the same as already described under Title I. However, the definition of a qualified individual with a disability differs slightly.

Under Title II a qualified individual with a disability meets the essential eligibility requirements for the program or activity offered by a public entity.

Essential eligibility requirements vary depending on the program or activity. For some activities, like state licensing programs, there may be skills or performance requirements that are considered essential. Other activities may have minimal eligibility requirements.

42 U.S.C. § 12131(2).

Program Access under Title II

Reference Number: CTAS-2036

State and local governments—

- Must make sure buildings that house services, programs, and activities are accessible to individuals with disabilities.
- Need not remove physical barriers in existing buildings so individuals with disabilities can access programs as long as they provide an alternative method to provide the program such as—
 - Relocate the program/service to an accessible facility (example: moving a public information office from the third floor to the first floor).
 - Provide an aid or personal assistant to help the individual with disability obtain the service.
 - Provide the program/service at the individual's home or an alternate accessible site.
- May not carry an individual with a disability as a method of providing program access except in exceptional circumstances.
- Do not have to make any changes that will result in a fundamental alteration of the program or service or be an undue financial burden.

One of the purposes of the ADA is to integrate individuals with disabilities into the mainstream of society. For this reason, public entities should not offer separate programs for individuals with disabilities unless a separate program is necessary to ensure benefits and services are equally effective.

State and local governments can not require an individual with a disability to accept a special accommodation or benefit if the individual chooses not to accept. Even if separate programs are offered, individuals with disabilities have the right to choose to participate in the regular program. 42 U.S.C. § 12182.

Communication under Title II

Reference Number: CTAS-2037

To ensure effective communications with individuals with disabilities, state and local governments must offer auxiliary aids when necessary. Auxiliary aids include—

- Qualified interpreters,
- Assistive listening headsets,
- Television captioning and decoders,
- Telecommunications devices for deaf persons (TDD's),
- Videotext displays,
- Readers,
- Taped texts,
- Brailled materials and
- Large print materials.

A public entity may not charge an individual with a disability for use of an auxiliary aid. Telephone emergency services, including 911, must provide direct access to individuals with speech or hearing impairments. Public entities do not have to make any changes that will result in a fundamental alteration of the program or service or be an undue financial burden.

Accessibility, Enforcement and Compliance

Reference Number: CTAS-2038

Accessibility

Public entities must ensure that newly constructed buildings are readily accessible to individuals with disabilities. When a building is altered, it must still be accessible to individuals with disabilities. While ADA does not require retrofitting of existing buildings to eliminate barriers, it does establish a high standard of accessibility for new buildings.

Public entities can choose between—

- The Uniform Federal Accessibility Standard (UFAS), established under the Architectural Barriers Act; or
- The Americans with Disability Act Accessibility Guidelines (ADAAG), adopted by the Department of Justice for places of public accommodation and commercial facilities covered under Title III of the ADA.

The elevator exemption for small buildings under the ADA Accessibility Guidelines do not apply to public entities under Title II.

Under Title II, if the start date for new construction is March 15, 2012 or after, the construction must comply with the 2010 Americans with Disabilities Act Standards for Accessible Design. The state of Tennessee adopted the 2010 Standards for Accessible Design for all public buildings constructed, enlarged, or substantially altered or repaired after July 1, 2012. T.C.A. 68-120-204.

Enforcement and Compliance

Private parties may file lawsuits to enforce their rights under Title II of the ADA. The remedies available are the same as under Section 504 of the Rehabilitation Act. Reasonable attorneys fees may be awarded to the prevailing party.

There are eight administrative agencies designated to handle complaints filed under Title II. They are—

Department of Agriculture
 Department of Education
 Department of Health and Human Services
 Department of Housing and Urban Development
 Department of Interior
 Department of Justice
 Department of Labor
 Department of Transportation

Individuals may file a complaint with the appropriate administrative agency or with any federal agency that provides financial assistance to the program in question. Complaints may also be filed with the Department of Justice who will refer the complaint to the appropriate agency.

The address for the Department of Justice is—

Disability Rights Section
 Civil Rights Division
 U.S. Department of Justice
 950 Pennsylvania Avenue, NW
 Washington, D.C. 20530-0001

Complaints on behalf of a class of people are permitted. Complaints should be in writing, signed by the complainant or an authorized representative, and should contain the complainant's name, address, and describe the public entities discriminatory action.

County Buildings, Property and Space Allocations

Reference Number: CTAS-160

County Buildings, Hours, and Office Space

Reference Number: CTAS-576

The county legislative body is required to provide funds to erect a courthouse, jail and other necessary county buildings, but the jail may be a joint facility operated with one or more other counties. T.C.A. §§ 5-7-104, 5-7-105. The courthouse and all county buildings for county officers except the jail and the county highway garage must be erected within the limits of the county town. T.C.A. § 5-7-105. Although not required to do so, the county legislative body may provide offices for the county clerk and other officials outside of the county town so long as an office is maintained in the county town for offices where a county town office is mandated. T.C.A. § 5-7-103.

County buildings are to be kept in order and repair at the expense of the county, under the direction of the county legislative body, and a special tax may be levied for this purpose. T.C.A. § 5-7-106. Under T.C.A. § 5-7-108, the sheriff is charged with the custody and security of the courthouse unless the county legislative body assigns this duty to someone else. It is the duty of the sheriff to prevent trespasses, exclude intruders, and keep the courthouse and the courthouse grounds in order, reporting from time to time the repairs required, and the expense, to the county legislative body. Under T.C.A. § 5-6-108, the county mayor is designated the custodian of county property that is not by law placed in the custody of other officers. As custodian of these properties, the county mayor acts as an agent or administrator of the county legislative body and must report from time to time when repairs are needed and must obtain authorization from the county legislative body for major repairs that are required. See *Driver v. Thompson*, 358 S.W.2d 477 (Tenn. 1962).

Non-Smoker Protection Act. Under the Non-Smoker Protection Act, T.C.A. § 39-17-1801 *et seq.*, smoking is prohibited in any enclosed area of any place to which the public is invited or in which the public is permitted and in any enclosed area under the control of a public or private employer that employees normally frequent during the course of employment including private offices and vehicles. The act requires "No Smoking" signs or the international "No Smoking" symbol be clearly and conspicuously posted at every entrance to every public place and place of employment where smoking is prohibited by the act by the owner, operator, manager, or other person in control of that place. A person who smokes in an area where smoking is prohibited shall be subject to a fifty-dollar (\$50) fine.

Courthouse Hours and Allocation of Courthouse Space. The county legislative body has no statutory authority to establish uniform office hours for the courthouse and require other officials to remain open or closed during these scheduled hours. Op. Tenn. Att'y Gen. U97-005, cited in 98-058. However, elected officials cannot neglect the business of the office without being subject to removal from office in an ouster suit. T.C.A. § 8-47-101. Therefore, each official is under a duty to maintain office hours that will allow the public reasonable access to the offices and allow the work of the office to be performed in a timely and efficient manner. Each official can decide whether to remain open on holidays. T.C.A. § 15-1-101.

The county legislative body has the authority to assign office space within the courthouse. See *Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875 (Tenn. Ct. App. 1978).

ADA Compliance. T.C.A. § 68-120-204(a)(1) requires public buildings constructed, enlarged or substantially altered or repaired after July 1, 2012 be designed and constructed pursuant to standards approved by the responsible authority. The minimum standards shall be the 2010 ADA Standards for Accessible Design and any amendments thereto. If a local building inspector is the responsible authority, the local government may use the 2010 ADA Standards for Accessible Design or choose other standards from the codes or publications of other nationally recognized agencies or organizations.

Eminent Domain

Reference Number: CTAS-2180

Counties, through the county legislative body, may condemn and take property, including land, buildings, privileges, rights and easements of individuals and private corporations and other private entities for county purposes. T.C.A. § 29-17-201. Property owners must be compensated for damages involved in condemnation. The amount of payment may be agreed upon by the parties or determined by a court of law. T.C.A. § 29-17-701.

There are limitations on the use of the power of eminent domain. Private use or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity, are generally excluded from the definition of public

use for which this power may be used. However, the following designated purposes are excepted and allowed even if there are private benefits:

- The acquisition of any interest in land for a road, bridge, or other public transportation project.
- The acquisition of any interest in land necessary to the function of a utility, common carrier or any entity authorized to exercise the power of eminent domain under Title 65.
- The acquisition of property by a housing authority or community development agency for urban renewal or redevelopment in a blighted area under Title 13, Chapters 20 and 21.
- Private use that is incidental to a public use if no land is condemned primarily to convey or permit the incidental private use.

As of 2017, cities and counties may no longer exercise the power of eminent domain to acquire property to be used for an industrial park. See Public Chapter 422 (2017).

An appraisal of property sought to be condemned is required. The appraisal must be based upon the highest and best use, its use at the time of the taking, and any other use to which the property is legally adaptable at the time of the taking. The appraiser must be a Member of the Appraisal Institute or be otherwise licensed and qualified under Title 62, Chapter 39, Tennessee Code Annotated. The condemning authority must deposit with the court the amount determined as the value by the required appraisal. The deposited amount does not fix the amount to be awarded, and any amount awarded in excess of the deposited amount bears interest from the date of the taking or possession.

The statute provides that under no circumstance may land used predominately in the production of agriculture be considered blighted. T.C.A. § 13-20-201.

Land acquired by eminent domain may be sold, leased, or otherwise transferred to another public entity or to a private person or entity if fair market value is received for the land. T.C.A. § 29-17-1003. T.C.A. § 29-17-1005 provides that if a condemning entity determines that property taken by eminent domain is not used for the purpose for which it was condemned, or for some other authorized public use, or if the condemning entity decides to sell the property within 10 years of taking the property, then the condemning entity must first offer the property for sale to the persons from which the property was taken. Such persons may purchase the property for the lessor of the price paid to the former owner by the local government acquiring the property plus fair market value of any improvements made after condemnation plus the average interest that would have been accrued on the amount paid to the former owner had the money been held in treasury bonds or the fair market value of the property. If the former owner does not purchase the property within the 30 days, then the property may be sold in any commercially reasonable manner for not less than fair market value plus costs.

Former owners have the right to request a statement of intent for public use from the local government every 24 months following condemnation. T.C.A. § 29-17-1005. The right of the former owner to request such a statement does not transfer to the former owner's heirs or other parties.

Purchase, Sale and Lease of County Property

Reference Number: CTAS-577

Counties are statutorily authorized to acquire and hold property for county purposes. They may also make contracts governing its management, control, and improvement and may also dispose of their properties. T.C.A. § 5-7-101; Op. Tenn. Att'y Gen. 87- 133 (Aug. 5, 1987). Counties have the authority to levy taxes to build, extend, or repair county buildings. T.C.A. § 5-5-122. Counties are authorized under T.C.A. § 5-7-116 to lease land and buildings owned by them.

Counties are also authorized by T.C.A. § 7-51-901 *et seq.* to enter into long and short-term contracts, leases, and lease-purchase agreements. Long-term contracts are specifically authorized by statute, although lease terms for capital improvement property may not exceed forty (40) years or the useful life of the property, whichever is less. T.C.A. § 7-51-902. When the term of the contract, lease, or lease-purchase agreement is less than five (5) years, the agreement must be approved by a resolution of the county legislative body. If the agreement is for a term greater than five (5) years, county legislative body approval is also required, and public notice of the proposed contract must be given at least seven (7) days prior to the meeting at which it is to be considered. T.C.A. § 7-51-904.

Before the county may sell, lease, exchange, option or make any material disposition of the assets of a hospital owned or operated by the county, the county must comply with the Public Benefit Hospital Sales and Conveyance Act of 2006. This act requires the county to give written notice to the state attorney

general containing such information regarding the proposed action as the attorney general may require and then to publish this notice in a newspaper of general circulation in the county. The attorney general will examine the proposed transaction and report on it. T.C.A. § 48-68-204.

Libraries

Reference Number: CTAS-578

The legislative body of any county and/or the governing body of any incorporated city or town has the power to establish and maintain a free public library, give support to any free public library already in existence, contract with another library for library service for its citizens, or enter into contractual agreements with one or more counties or cities for joint operation of a free public library. T.C.A. § 10-3-101 *et seq.* To fund these services a county may levy a property tax or may use funds raised for general county or municipal purposes. Libraries established under these statutes must be free to all inhabitants of the county and/or city; the city or county may allow use of the library by those residing outside its territorial boundaries upon such terms as it may deem proper. T.C.A. § 10-3-107.

If two (2) or more counties have qualified for participation in the state's multicounty regional library program, have been recognized as a region by the State Library and Archives Management Board, and have made the minimum local appropriation of funds required by the management board, then they may execute contracts with each other to create a regional library board to administer the library services within the region. The State Library and Archives Management Board manages regional libraries, whose employees are employees of the state. After the governing body of a county authorizes participation, municipalities within the county may also participate in the regional library service as long as the county participates. Larger single counties may also constitute a region upon recognition by the State Library and Archives Management Board by executing a contract between the county and one (1) or more cities within the county. T.C.A. § 10-5-101. The formation and creation of these boards is not mandatory for any county. T.C.A. § 10-5-101.

Abandoned Personal Property

Reference Number: CTAS-579

A county may have unclaimed or apparently abandoned funds left in accounts in county offices from several sources. All property held for the owner by any court (including a federal court), public corporation, public authority or agency, public officer, or a political subdivision that has remained unclaimed by the owner for more than one (1) year after the property becomes distributable is presumed abandoned. Exceptions to this rule include property in the custody or control of any state or federal court in any pending action, as well as property that is otherwise disposed of by law. Property described above, without regard to any activity or inactivity within the past one (1) year, is also presumed abandoned if the owner is known to the holder (county) to have died leaving no one to take his or her property by will or by intestate succession. T.C.A. § 66-29-105.

County offices holding funds or other tangible or intangible property that is presumed abandoned must file a report containing the required statutory information with the state treasurer before May 1 of each year. T.C.A. § 66-29-125. With some exceptions, unclaimed funds and intangible property presumed abandoned must be delivered with the report to the treasurer. Tangible property must be held for 120 days awaiting further instructions from the treasurer or, absent those, delivered to the treasurer at the end of that time. T.C.A. § 66-29-134. Any person delivering property to the treasurer is relieved of liability in respect to that property. T.C.A. § 66-29-135. If someone submits a claim to the county for property already delivered to the treasurer, then the county may pay the claim, and the treasurer will reimburse the county. T.C.A. § 66-29-136.

Not more than one hundred eighty (180) days, nor less than sixty (60) days, before filing the report, holders of abandoned property are required to give notice to apparent owners as provided in T.C.A. § 66-29-128. This notice must be given by mail and also by email if the apparent owner has consented to receiving electronic communications from the holder. The holder must also maintain a record of the last known address for 10 years. T.C.A. § 66-29-126. After the reports are submitted to the treasurer, the treasurer is required to provide notice to apparent owners of abandoned property as prescribed in T.C.A. § 66-29-130.

At the request of any local government whose yearly total for abandoned property exceeds \$100, all unclaimed funds that have been held by the treasurer for at least eighteen (18) months, less administrative costs, are returned. The funds go into the county general fund, except those necessary to maintain a sufficient amount in the unclaimed property accounts to ensure prompt payment of any claims. T.C.A. § 66-29-146.

County officials who fail to carry out their responsibilities regarding unclaimed property may be subject to sanctions. The treasurer may assess against a holder who fails to report, pay, or deliver property within the time prescribed by this part a civil penalty of two hundred dollars (\$200) for each day the duty is not performed, up to a cumulative maximum amount of five thousand dollars (\$5,000). T.C.A. § 66-29-173. There are additional penalties for evading or willfully failing to perform the obligations set forth in the act. T.C.A. § 66-29-174. The treasurer is authorized to waive penalties under the act. T.C.A. § 66-29-175.

Education

Reference Number: CTAS-84

Article XI, Section 12 of the Tennessee Constitution declares that the state of Tennessee recognizes the inherent value of education and encourages its support. The constitution mandates that the General Assembly provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly has addressed this constitutional mandate through a complex set of statutes wherein the cost and administration of the public school system for grades kindergarten through 12 is shared among the state and counties and also municipalities that operate school systems as well as some special school districts.

The K-12 Education System in Tennessee

Reference Number: CTAS-85

The present system of providing and funding K-12 education in Tennessee has been in place since the enactment of the Education Improvement Act in 1992. Formerly, public education in this state was funded according to the Tennessee Foundation Program (TFP), a system that was found unconstitutional because it denied children in small school systems the same opportunities provided to those in the larger and more affluent ones. *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993). The TFP was replaced with the Basic Education Program (BEP), a funding formula providing increased and more equalized funding among the state's local school systems. T.C.A. § 49-3-351.

The BEP provides for minimum levels of funding at both the state and local level. The BEP has three major categories: instruction, classroom, and non-classroom. The funds generated by the BEP are divided into state and local shares for each of the three major categories. Student enrollment as measured by average daily membership is the primary driver of funds generated by the BEP. The state and local share for each school system is based on an equalization formula. This equalization formula is the primary factor in determining the state's share of funding versus the local share of funding for each local education agency (LEA). The equalization formula determines the fiscal capacity at the county level and is driven primarily by local property values and sales tax. Local school systems are free to raise additional education dollars in addition to the funds generated by the BEP. The statutes pertaining to education funding are found in Tennessee Code Annotated, Title 49, Chapter 3, Part 3.

The state board of education, in consultation with the commissioner of education, establishes performance goals and measures and sets objectives for achievement for the state and for all local education agencies (LEAs). Schools and LEAs are evaluated annually. T.C.A. § 49-1-602.

On the local level, the management and control of the county schools is the responsibility of the county board of education and the director of schools. Counties are required to have a board of education whose members are popularly elected to staggered four-year terms. T.C.A. § 49-2-201. Each board of education is required to employ a director of schools by contract of up to four years' duration. T.C.A. §§ 49-2-203, 49-2-301. The authority of the board of education and the director of schools is subject to state law, rules and regulations adopted by the state board of education, and the express powers given the state commissioner of education. The county board of education establishes local policies and regulations within the authority given to the board. The director of schools serves as the chief administrative

officer to implement board policies and manage the county department of education within the guidelines provided by the state and the county board of education.

Title 49 of Tennessee Code Annotated (Volume 9) defines the funding mechanism for education and sets out the duties and authority of the above-mentioned boards and officials as well as those of the county legislative body and county trustee as they relate to education.

County Board of Education

Reference Number: CTAS-86

School board members in each county are required to be elected by the people from districts of substantially equal population. Board members must be elected to staggered four-year terms, and may succeed themselves. Board members in special school districts may serve different terms of office established by private act but must be popularly elected on a staggered term basis. T.C.A. § 49-2-201.

Boards of education may have "no more members than the number of members authorized by general law or private act for boards of education in existence on January 1, 1992, or the number of members actually serving on a board on January 1, 1993," or the General Assembly, by private act, may establish the membership of particular school boards at any number not less than three nor more than eleven. T.C.A. § 49-2-201.

Members of the board of education must be residents and voters of the county in which they are elected, and, except in a few counties, must possess a high school degree or G.E.D. Members of the county legislative body and other county officials are not eligible for election to the board of education. T.C.A. § 49-2-202(a). Members of the board of education are not eligible for election as teacher or any other paid position under the board. T.C.A. § 49-2-203(a)(1)(D).

The compensation of the board of education is fixed by the county legislative body. T.C.A. § 49-2-202. Vacancies are filled by the county legislative body until the next election. T.C.A. § 49-2-202(e) and Tenn. Const., art. VII, § 2, as interpreted in *Marion County Board of Commissioners v. Marion County Election Commission*, 594 S.W.2d 681 (Tenn. 1980). Members must attend annual training sessions as prescribed by the state board of education which must include an annual session. T.C.A. § 49-2-202.

The board is to elect a chair from among its members annually. T.C.A. § 49-2-202. The chair countersigns all warrants approved by the board and issued by the director of schools. T.C.A. § 49-2-205. The chair of the school board also serves as chair of the executive committee, composed of the chair and the director of schools, which functions as purchasing agent for the school board unless there is a separate purchasing board or purchasing agent otherwise established by law, and also monitors accounts to see that the budget is not exceeded. T.C.A. § 49-2-206.

Meetings of County Board of Education

Reference Number: CTAS-87

The county board of education must hold regular meetings at least quarterly, although the chair may call special meetings. T.C.A. § 49-2-202. All business coming before the county school board must be passed by a majority of the membership of the school board and not just a majority of the quorum. T.C.A. § 49-2-202(g).

County boards of education may allow a member to attend a scheduled board meeting by by electronic means if the member is absent due to work, family emergency, or military service, as long as the following requirements are met:

- a quorum is physically present at the meeting
- the absent board member can be visually identified by the chair
- the absent member gives at least 5 days' notice prior to the meeting
- no board member can participate electronically more than twice in a year (except military service)
- the board has a policy in place for conducting electronic meetings

T.C.A. § 49-2-203.

A board member having a relative employed by the board is required to declare the relationship before voting on any matter that affects the employment of the relative, certifying that the vote about to be cast is in the best interest of the school system.. T.C.A. § 49-2-202(a)(3).

School Board Mandatory Duties and Discretionary Powers

Reference Number: CTAS-88

There are certain duties listed in T.C.A. § 49-2-203 that the board of education is required by law to perform. Some of the more significant duties are summarized as follows:

1. To employ a director of schools under written contract of up to four years duration, which may be renewed. This director may be referred to as "superintendent" and replaces the former superintendent of schools. The school board is the sole authority in appointing a director of schools.
2. Upon the recommendation of the director of schools, to elect teachers who have attained or who are eligible for tenure, to fix their salaries, and to make contracts with them.
3. To manage and control all public schools under its jurisdiction.
4. To purchase all supplies, furniture, fixtures, and materials of every kind through the executive committee. Expenditures over \$10,000 must be publicly advertised and competitively bid.
5. To dismiss teachers, principals, supervisors and other employees upon sufficient proof of improper conduct, inefficient service or neglect of duty. Such employees must be given written notice and an opportunity to make their defense.
6. To suspend or dismiss pupils when the progress or efficiency of the school makes it necessary.
7. To require the director of schools and the chair of the local board to prepare a budget on forms furnished by the commissioner of education and, when the budget has been approved by the local board, to submit it to the county legislative body. No school budget may be submitted to the legislative body that directly or indirectly supplants or proposes to use state funds to supplant any local current operation funds, excluding capital outlay and debt service.
8. To develop and implement an evaluation plan for all certified employees in accordance with the guidelines and criteria of the state board of education, and submit such plan to the commissioner of education for approval.
9. Such other duties as are required by law. In addition to the duties specifically required in T.C.A. § 49-2-203, the local board is given certain discretionary powers.

These are things the board is empowered, but not required, to do. Briefly summarized, these discretionary powers include the following:

1. To consolidate schools under its jurisdiction;
2. To require school children and employees to submit to a physical examination by a competent physician under certain circumstances;
3. To establish night or part-time schools;
4. To permit school buildings and property to be used for public, community or recreational purposes, subject to rules and regulations adopted by the board;
5. To employ legal counsel;
6. To make rules providing for school safety patrols;
7. To establish minimum attendance requirements or standards as a condition for passing a course or grade;
8. To provide written notice to probationary teachers of specific reasons for failure of reelection and provide a hearing to determine the validity of the reasons, upon request;
9. To offer and pay monetary incentives to encourage the retirement of any teacher or other employee who is eligible to retire;
10. To lease or sell buildings and property, or portions thereof, in such a manner as is deemed by the board to be in the best interest of the school system and the community it serves, including sales or leases to public or private entities;
11. To establish and operate before- and after-school care programs in connection with any schools, before and after the regular school day and while school is not in session;
12. To establish and operate evening alternative schools for students in grades 6 through 12; and
13. To provide pre-kindergarten programs for at-risk children who reach the age of four-years by September 30, and for other children when an insufficient number of at-risk children are enrolled to fill a classroom, in accordance with the "Voluntary Pre- K for Tennessee Act of 2005." T.C.A. § 49-6-101 through 49-6-110.
14. To apply for and receive federal or private grants, and unless the grant requires matching funds, in-kind contributions of real property, or expenditures beyond the life of the grant, appropriations of the federal or private grant funds shall be made upon resolution passed by the board of education; the board is required to provide a copy of the resolution as notice to the local legislative body within 7 days of passage.

School Property

Reference Number: CTAS-89

The board of education is empowered to exercise the right of eminent domain for public school purposes. T.C.A. § 49-6-2001. The board has the power to purchase land and to erect and equip buildings for public schools, and the board holds Title to property so acquired. The board has the power to dispose of real property to which it has Title in accordance with T.C.A. § 49-6-2006. Personal property that has become surplus is required to be sold by the board in accordance with T.C.A. § 49-6-2007. The board is permitted to transfer surplus real or personal property to the county or to any municipality within the county for public use, without the requirement of competitive bidding or sale. T.C.A. §§ 49-6-2006 and -2007. The board of education is not authorized to donate surplus real or personal property to charitable or non-profit organizations; the board may, however, sell or lease surplus property to such organizations. T.C.A. §§ 49-2-203(b)(10), 49-6-2006, 49-6-2007; Op. Tenn. Att'y Gen. 96-046 (March 14, 1996).

Any local education agency (LEA) having underutilized and vacant properties must make those properties available for use by charter schools operating in the LEA. In any LEA in which a charter school operates, the school board must catalog all underutilized and vacant properties owned or operated by the LEA and submit a listing of all such properties to the department of education and the comptroller annually, and this list will be made available to any charter school operating in the LEA or to any sponsor seeking to establish a charter school in the LEA. T.C.A. § 49-13-136.

Donations

Reference Number: CTAS-90

The board of education is authorized to receive donations of money, property or securities from any source for the benefit of the public schools, which the board is to disburse in good faith in accordance with the conditions of those gifts. T.C.A. § 49-6-2006.

Student Transfers

Reference Number: CTAS-91

Local school boards may admit pupils from outside their school systems. They may also arrange for the transfer of pupils residing within their systems to schools located outside their districts, and enter into arrangements with other school boards for admission or transfer of pupils from one school system to another. State school funds follow the transfer student into the receiving school system. T.C.A. § 49-6-3104. The receiving system may charge tuition in an amount determined under T.C.A. § 49-6-3003. Where an LEA has created a regional school with a specific focus on science, technology, engineering, and math (STEM), local BEP school funds also follow the student into the LEA to which the student is transferring and no tuition may be charged by the receiving LEA. T.C.A. § 49-6-3104.

School Resource Officers and Security Officers

Reference Number: CTAS-92

The board of education is authorized to enter into an agreement of understanding with a local law enforcement agency to have a school resource officer (SRO) assigned to a school. The SRO must be a law enforcement officer as defined under T.C.A. § 39-11-106, and must be in compliance with all rules and regulations of the POST commission. The SRO is required to complete 40 hours of basic training in school policing within twelve months of assignment and at least 16 hours annually thereafter. T.C.A. § 49-6-4217. LEAs and law enforcement agencies are not required to assign or provide funding for SROs to city school systems within the county; the provision of security or SROs is considered a law enforcement function and not a school operation or maintenance purpose. T.C.A. § 49-6-815.

An LEA is also authorized to create the position of "school security officer," defined as a person employed exclusively by a local school board to (1) maintain order and discipline, (2) prevent crime, (3) investigate violations of school board policies, (4) return students who may be in violation of the law or policies to school property or to a school-sponsored event until the officer can place the student into the custody

of the school administrator, the school resource officer, or a law enforcement officer, and (5) ensure the safety, security, and welfare of all students, faculty, staff and visitors in the officer's assigned school. The LEA is authorized to adopt, in consultation with the appropriate local law enforcement agency, a policy authorizing a school security officer to patrol within a one-mile radius of the assigned school but not outside the boundaries of the LEA. A copy of any policy adopted must be filed with the appropriate local chief law enforcement officer. In patrolling the one-mile radius, the school security officer can only patrol for violations of laws involving minors, including truancy, and must immediately notify the appropriate local law enforcement agency of any violation of the law if the officer reasonably believes the perpetrator is a minor. T.C.A. § 49-6-4206.

Under T.C.A. § 49-6-809, local boards of education are authorized to adopt a policy authorizing off-duty law enforcement officers to serve as armed school security officers during regular school hours when children are present on school premises and during school-sponsored events. An LEA adopting such a policy is required to enter into a memorandum of understanding (MOU) with each law enforcement agency that employs the law enforcement officers selected by the chief law enforcement officer of the law enforcement agency to serve as armed school security officers. The requirements for the MOU are set out in the statute. The chief law enforcement officer is required to consider the Fair Labor Standards Act (minimum wage and overtime) in considering officers to serve. Funding for armed security officers may come from a law enforcement agency or from the LEA, including but not limited to local, state, or federal funds received by the LEA. Nothing in this statute requires an LEA or a law enforcement agency to assign or provide funding for an armed security officer.

State Rules and Regulations

Reference Number: CTAS-93

The authority of the county board of education is limited by the rules and regulations of the state board of education as enforced by the commissioner of education. It is the duty of the state board to prescribe rules and regulations for all public schools, kindergarten through the 12th grade, to prescribe curricula, and to approve courses of study adopted by local boards of education. T.C.A. § 49-1-302. The state regulations extend to such matters as personnel evaluation, classroom size, pupil-teacher ratios, building suitability and other matters that directly impact the budget process.

Ethics Policies for School Districts

Reference Number: CTAS-1649

County, municipal and special school districts are considered separate governmental entities and are governed by ethical standards established by the board of education of the school district. T.C.A. § 8-17-102(d). The Tennessee School Boards Association (TSBA) must prepare a model of ethical standards for school officials and employees of school districts and file the model policy with the state ethics commission. If a school board develops and adopts a standard of its own, it must forward a copy of that standard to the state ethics commission and maintain a copy for public inspection. School boards that adopt the standards promulgated by the TSBA are not required to file the policy with the commission, but rather, must notify the commission in writing that the policy has been adopted and the date such action was taken. T.C.A. § 8-17-105.

Director of Schools

Reference Number: CTAS-94

The elected office of county superintendent of public instruction was abolished in 1992, and in its place is a director of schools (who may also be referred to as "superintendent"), who is appointed by the local board of education and is considered an employee of the board. T.C.A. § 49-2-301. A director of schools appointed by the local board of education is only required to have a baccalaureate degree. T.C.A. § 49-2-301(d).

The numerous duties of this position are described in T.C.A. § 49-2-301 and are summarized in part below:

1. Insure that laws relating to education are faithfully executed;
2. Attend all meetings of the school board and serve on its executive committee;

3. Keep records of meetings, actions, and financial transactions of the school board;
4. Issue, within 10 days, all warrants authorized by the board;
5. Make recommendations to the board, although the director of schools may not vote;
6. Supervise and visit the schools;
7. Enforce the regulations of the commissioner of education regarding courses of study and systems of pupil promotion;
8. Sign certificates and diplomas;
9. Recommend teachers eligible for tenure to the school board;
10. Recommend salaries for teachers;
11. Employ school principals under written contract (T.C.A. § 49-2-303);
12. Assign teachers and educational assistants to specific schools;
13. Keep on file all teachers' licenses and contracts of teachers and other employees;
14. Prepare and submit attendance reports;
15. Prepare full quarterly financial reports and monitor school spending;
16. Prepare and submit a school budget;
17. File a copy of the approved school budget with the commissioner of education within ten days after its adoption by the county legislative body;
18. Furnish a list of teachers and salaries to commissioner of education;
19. Approve access to personnel files when necessary;
20. Employ, transfer, suspend, non-renew and dismiss all personnel within the approved budget and applicable statutes and board policies, rules and regulations, contracts and negotiated agreements; and
21. Submit a report to the General Assembly by January 1 each year relative to the number of students in alternative schools.

The director of schools is a full-time position. It is a misdemeanor for the director to enter into any other contract with the board of education, to take any additional compensation from it, or to act as principal or teacher in any school; a director who violates this provision must be dismissed from the position. T.C.A. § 49-2-301(c). A director of schools is ineligible to serve as a member of the county legislative body; however, this prohibition does not apply to a director of schools who was serving as a member of the county legislative body on June 18, 2005. T.C.A. § 5-5-102(c)(2).

County School Budget

Reference Number: CTAS-95

The budget for the county school system is developed by the director of schools and board chair and presented to the full board for its consideration. The budget developed by the director and board chair must be prepared according to the revenue estimates and revenue determinations made by the county legislative body as required in T.C.A. § 49-2-101. When the school budget has been approved by the board, it must be submitted to the county legislative body not later than 45 days prior to the July meeting of the county legislative body or 45 days prior to the actual date the budget is to be adopted, if such adoption is scheduled prior to July 1. T.C.A. § 49-2-203(a)(10). Local option budgeting laws and private acts that may be in effect in a particular county will affect the budgeting process and must be consulted.

Under most circumstances, the legislative body either accepts the school budget as submitted by the school board or rejects it, in which case the budget is sent back to the school board with a specified amount of total funding. The school board then revises the specific items to conform with the total appropriated amount. In counties operating under the County Financial Management System of 1981, T.C.A. § 5-21-101 *et seq.*, the county legislative body may alter or revise the total amount of expenditures proposed by the school board in its budget as long as it is in compliance with state law and regulations, and then the director of schools is required to submit a revised budget with the total expenditures approved by the county legislative body within 10 days. The Local Option Budgeting Law of 1993, T.C.A. § 5-12-201 *et seq.*, contains provisions that allow the county legislative body to revise the school budget under specified circumstances, but this law applies only in counties that have adopted its provisions. Regardless of the procedure used to adopt the budget, once a school budget has passed, amendments must be approved by the school board and by the county legislative body. T.C.A. §§ 5-9-407, 49-2-301(b)(1)(W).

School Budget-Maintenance of Effort

Reference Number: CTAS-96

Of particular interest to local governments is the statutory limitation that prohibits local school boards from submitting a budget that reduces local educational funds, excluding capital outlay and debt service, and then replaces them with money from the state. See T.C.A. §§ 49-2-203(a)(10) and 49-3-314(c). This is commonly known as the "maintenance of effort" requirement or the "supplanting test." These statutes have been consistently interpreted to mean that an LEA cannot use local funds as part of its operating budget and then discontinue this funding and use state funding to fill the gap. See Op. Tenn. Att'y Gen. 09-70 (5/4/09).

There are four exceptions to this rule. First, if the school system has a reduction in student population total funding may be calculated on a per pupil level. Second, if there is a reduction in state funding, then local funds used to offset these funding reductions are not subject to the maintenance of local funding requirement. Third, this restriction does not apply for three years after a city and county system have consolidated into one. Fourth, if in any fiscal year the governing body and the school board enter into a written agreement establishing the non-recurring nature of an appropriation, the appropriation may be excluded from maintenance of effort (and from any applicable apportionment requirements). T.C.A. §§ 49-2-203(a)(10), 49-3-314(c). See also, Op. Tenn. Att'y Gen. 13-107 (12/20/13).

If a school budget violates the maintenance of effort requirement, then the Commissioner of Education may, at his or her discretion, withhold state education funds from the LEA under T.C.A. § 49-3-314(c). See Op. Tenn. Att'y Gen. 09-70 (5/4/09).

More information on [Maintenance of Effort](#) can be found under [Operating Budgets](#) under [Accounting/Budget/Finance](#).

School Budget Fund Balance

Reference Number: CTAS-97

Unexpended education funds remaining at the end of a fiscal year are carried forward in the education fund balance. The fund balance may be used to offset shortfalls of budgeted revenue or, with the approval of the school board and the county legislative body, to meet unforeseen increases in operating expenses. Any accumulated fund balance in excess of three percent of the budgeted annual operating expenses for the current fiscal year may be budgeted and expended for any education purposes, but must be recommended by the board of education prior to appropriation by the county legislative body. In any fiscal year in which state-shared revenues distributed to counties are reduced below the levels distributed to counties in the 2002-2003 fiscal year, any or all of the accumulated fund balance may be used for education purposes without restrictions. T.C.A. § 49-3-352.

School Continuing Budget

Reference Number: CTAS-98

If the county legislative body has not adopted a budget for the operation of the public schools by July 1 of any year, the school budget for the year just ended continues in effect until a new school budget has been approved. Any continuing budget (the previous year's budget as temporary authority to expend funds until new annual budget is adopted) is not valid beyond October 1 of the current fiscal year for purposes of the local education agency's ability to receive state funds. T.C.A. § 49-3-316(d). Therefore, if a budget has not been adopted by October 1, the state may discontinue the county's funding.

State Funds for Education (BEP)

Reference Number: CTAS-99

The method for allocating state funding for local education is the Basic Education Program (BEP), which has been in place since 1992. The purpose of the BEP is to allocate state funding fairly and equitably, taking into account the ability of local jurisdictions to raise revenues. T.C.A. § 49-3-356.

BEP Formula. Effective beginning in fiscal year 2016-2017, the BEP formula shall be calculated using the criteria set out in T.C.A. § 49-3-307, which includes the following four categories of components: (1) instructional salaries and wages, (2) instructional benefits, (3) classroom, and (4) nonclassroom. The state shall provide 70% of the funds generated in instructional salaries and wages components and in instructional benefits components, 75% of the funds generated in classroom components, and 50% of the funds generated in nonclassroom components. The dollar value of the BEP instructional salaries and wages position component shall be \$44,430 for fiscal year 2016-2017 and may be adjusted in subsequent fiscal years in accordance with the general appropriations act. The details of the funding formula are found in T.C.A. § 49-3-307. Additional information is available in the "[BEP Blue Book](#)" published by the State Board of Education.

Equalization Formula. Revenues generated under the BEP formula are distributed to LEAs based upon an equalization formula adopted by the state board of education "to provide funding on a fair and equitable basis by recognizing the differences in the ability of local jurisdictions to raise local revenues." T.C.A. § 49-3-356. Because of this equalization of funding, the actual percentage paid by the state for classroom and nonclassroom components in each school system will vary from the percentages applied to the BEP formula noted above.

Required Local Matching Funds. Application of the BEP formula as equalized through the equalization formula results in the actual amount of state funding provided, and the corresponding amount of local funding required, for each LEA. The local government is statutorily required to fund its share of the BEP program, and the school term may not begin until the local portion has been included in the budget approved by the local legislative body. T.C.A. § 49-3-356.

Charter Schools

Reference Number: CTAS-103

Tennessee's charter schools are public schools that are part of the state's program of public education. A charter school may be formed by creating a new school or by converting an eligible existing public school. Charter schools are operated by independent, non-profit governing bodies. Chartering authorities authorize, monitor, and, when necessary, revoke or non-renew charter schools that fail to meet high academic and fiscal standards. In exchange for the opportunity to meet these standards, charter school operators are given greater autonomy to make decisions at the school level. Charter schools are governed by the Tennessee Public Charter Schools Act of 2002, T.C.A. § 49-13-101 *et seq.* The state department of education provides information on its website on how a public charter school is organized and operated.

Charter schools are entitled to receive 100 percent of the per-pupil expenditure allocated in the LEA and may also be funded by grants, gifts and donations. Pupil transportation may be provided at the election of the charter school, and if transportation is provided the LEA must provide the charter school with all funds the LEA would have spent to provide transportation to those students. Each LEA must include as part of its budget the per pupil amount of local money it will pass through to charter schools within the LEA during the school year.

Reference Materials on County Departments of Education

Reference Number: CTAS-104

The educational system at the county level is a complex and extensive area of the law. The reader is referred to the following publications for additional information:

1. Tennessee Code Annotated, Volume 9, Title 49.
2. [Rules, Policies and Guidance](#) of the State Board of Education.
3. [Annual Statistical Report](#) and other reports published by the state department of education are available at the [web site of the Department of Education](#).
4. Numerous publications by the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) relative to education funding in Tennessee are available on the [TACIR Web site](#).

You can also check with your local board of education.

Environment

Reference Number: CTAS-161

Solid Waste Management, Collection and Disposal

Reference Number: CTAS-524

One of the more important functions of county government is solid waste disposal. There are three (3) sources of legislative authority that may provide the framework for these services: T.C.A. Title 5, Chapter 19, T.C.A. Title 68, Chapter 211, and, in some cases, private acts, county charter or consolidated government charter.

Title 5, Chapter 19

Reference Number: CTAS-525

Counties are authorized to provide garbage and rubbish collection and disposal services to the entire county or to special districts within the county and are also granted the power to do all things necessary to carry out these functions. T.C.A. §§ 5-19-101, 5-19-107. This authority is exercised through resolution by the county legislative body and carried out by an existing agency, a county sanitation department, or a county board of sanitation appointed by the county mayor and confirmed by the county legislative body.

Also, a county may contract with a private company or another governmental entity to provide these services for county residents. T.C.A. § 5-19-104. If a municipality within the county furnishes garbage (solid waste) collection and disposal services, the county must establish service districts outside the municipality to fund this county service if the property tax is a source of funding for the county solid waste services.

T.C.A. § 5-19-108. If the county services are provided within special service districts, they are funded by user fees, or a property tax levied only within the district served, or a combination of the two. T.C.A. §5-19-109. Plans for collection and disposal services must be submitted to the regional planning commission for study before they are carried out. T.C.A. § 5-19-112. The county must inspect these facilities at least once every quarter, and the commissioner of health may also investigate and make recommendations for improvement. T.C.A. §§ 5-19-113, 5-19-114.

County Board of Sanitation

Reference Number: CTAS-526

One of the options given to counties for management of solid waste operations is through a county board of sanitation. T.C.A. § 5-19-103. Such a board may be established by resolution of the county legislative body and consists of three members appointed by the county mayor subject to confirmation of the county legislative body. The members of this board serve for terms of three years except for the initial appointments for one, two and three years to create a staggered system. Members of this board may be compensated according to a resolution of the county legislative body. T.C.A. § 5-19-104. This board has general supervision and control of the acquisition, improvement, operation and maintenance of all solid waste collection and disposal systems operated by the county. If this board is established, then it appoints a superintendent to be in charge of daily solid waste management operations. T.C.A. § 5-19-105.

Local Solid Waste Management Planning

Reference Number: CTAS-527

In an effort to coordinate and plan for safe, efficient solid waste disposal in the state, the Tennessee General Assembly has enacted several pieces of legislation, which are compiled in Title 68, Chapter 211 of the *Tennessee Code Annotated*. To comply with the requirements of this chapter, all local governments must engage in specified planning and organizational activities. See the Solid Waste Management Act of 1991, T.C.A. §§ 68-211-801 through 68-211-874.

Municipal Solid Waste Regional Board

Reference Number: CTAS-528

To begin implementation of the Solid Waste Management Act, counties were instructed to form solid waste regions (single or multicounty) and establish a solid waste board and advisory committee for each region. The primary function of this board is to make and annually update a plan for a 10-year disposal capacity and to achieve compliance with the waste reduction and recycling goal required by T.C.A. §§ 68-211-861, T.C.A. § 68-211-813.

The regional boards are established by resolution of the county legislative body or by agreement of each participating county adopted by resolution of each county legislative body in the region and may be modified by agreement of the county legislative bodies. The board consists of an odd number of not fewer than five nor more than 15. Each member county must be represented by at least one board member. Municipalities that provide solid waste collection or disposal services, either directly or by contract, must be represented on the board. However, municipalities entitled to representation may agree to joint or multiple representation by a board member or for a county member to represent one or more municipalities upon agreement of the local governing bodies that share representation. Any such agreement must specify the method of making the shared appointment. Otherwise, members are appointed by the county and municipal mayors of the participating counties and municipalities, subject to confirmation by their respective legislative or governing bodies. Members of county and municipal governing bodies, county and municipal mayors, county and municipal officers and department heads as well as other citizens may be appointed to the board. The county and municipal mayors, and any other authorities, who appoint members must strive to ensure that at least two (2) elected officials serve on each regional board. Members serve terms of six years, except for initial appointments for two, four and six years to create staggered terms. T.C.A. §§ 68-211-861, T.C.A. § 68-211-813.

Regional areas (and their boards) may be changed only by approval of the county legislative bodies of the counties involved in the change and with the approval of the Tennessee Department of Environment and Conservation, which will review the new or revised plans and receive information regarding the new board members. T.C.A. §§ 68-211-811, 68-211-813. These regional boards are constituted according to the provisions of T.C.A. § 68-211-813. Additionally, each region was required to formulate a plan for collection and disposal of solid waste in the area and submit this plan to the State Planning Office by July 1, 1994. A regional plan may be revised at any time to reflect subsequent developments in the region subject to approval by the Department of Environment and Conservation. Each municipal solid waste region must submit an annual progress report to the department regarding how this annual activity affects the regional plan over the next 10 years. T.C.A. § 68-211-814.

Plan Requirements

Reference Number: CTAS-529

The plan, and any revised plan, submitted by each region must be consistent with the state solid waste plan and with all relevant state laws and regulations. At a minimum, each plan must contain the following items:

1. Demographic information;
2. A current system analysis of waste streams, collection capability, disposal capability, costs, and revenues;
3. Adoption of the statutorily required uniform financial accounting system;
4. Anticipated growth trends and waste capacity needs for the next 10 years;
5. Anticipated waste capacity needs;
6. Planned capacity assurance, including a descriptions of planned or needed facilities;
7. A recycling plan;
8. A plan for the disposal of household hazardous wastes;
9. Adoption of the statutorily required reporting requirements;
10. A description of waste reduction and recycling activities designed to attain the goal required by T.C.A. § 68-211-861;
11. A description of education initiatives designed to achieve the goals stated in the statute;
12. An evaluation of multicounty solid waste disposal region options with an explanation of the reasons for adopting or failing to adopt a multicounty regional approach;
13. A timetable for implementation of the plan;

14. A description of the responsibilities of each participating jurisdiction;
15. A certification of review and approval of the plan (or revised plan) from the Solid Waste Authority (organized under Chapter 211, Part 9), if such an authority has been formed, or if no such authority has been formed, from the county legislative body of each county in the region;
16. A plan for managing solid waste generated as a result of disasters or emergencies; and
17. Any other information the commissioner of the Department of Environment and Conservation deems relevant.

T.C.A. § 68-211-815.

Solid Waste Authority

Reference Number: CTAS-519

A county (or counties in multicounty solid waste regions) may decide to form a solid waste authority to operate all solid waste systems within the region. (See the Solid Waste Authority Act in T.C.A. §§ 68-211-901 through 68-211-925.) Cities may participate or remain outside the authority, although all counties in the region must agree to the creation of the authority before it may be formed; a municipality with most of its territory in the county creating the authority may participate. T.C.A. § 68-211-903. Similarly, the authority can be dissolved by agreement of its participating counties and cities. The board of directors may be composed of the same members as the region's solid waste board, but this is not required. The method of selection, officers required, terms of office, and vacancy procedures are described in T.C.A. §§ 68-211-904, 68-211-905.

The advantage of using a solid waste authority to oversee the region's waste management lies in the authority's broad statutory powers. The solid waste authority is a separate legal entity that may issue bonds, incur debts, enter into contracts, and exercise the power of eminent domain. With the concurrence of the counties and municipalities participating in the solid waste authority, it may exercise exclusive control over the publicly owned solid waste systems within its boundaries. T.C.A. § 68-211-906.

Public Ownership of Solid Waste Facilities

Reference Number: CTAS-530

Counties have several options through which they may fulfill their responsibilities for solid waste management. They may contract with private entities for those services, they may provide services or contract for services through solid waste authorities, or they may provide the services themselves. A county or municipality may apply for a solid waste facility permit. A county may execute a contract of obligation instead of a performance bond to insure proper operation and closure of its publicly owned facilities.

T.C.A. § 68-211-116. In addition to equipment for collection and disposal of solid waste, a county may also construct and operate energy recovery and resource recovery facilities which process waste into energy fuels. T.C.A. § 68-211-502.

Flow Control and Regional Approval Options

Reference Number: CTAS-531

State law appears to grant regions and solid waste authorities powers under certain conditions to direct the flow of solid waste generated within the region and to restrict the flow of solid waste into the region for disposal. However, federal court decisions, including U.S. Supreme Court rulings, make the validity of Tennessee statutes on flow control very questionable since the case law strongly indicates they may violate the commerce clause of the U.S. Constitution where regulatory power is exercised to control the flow of waste between private parties. *Fort Gratiot Sanitary Landfill Inc. v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019 (1992); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S.Ct. 1677 (1994).

State law also provides that any construction or expansion of solid waste facilities or incinerators within the region must be approved by the board of the region or the (Part 9) solid waste authority if one has been formed before a permit is issued. The region or solid waste authority is to hold a public hearing after proper notice and may reject the proposal if it is inconsistent with the regional plan. T.C.A. § 68-211-814.

Sanctions

Reference Number: CTAS-532

If any region fails to submit a plan in a timely fashion, submits an inadequate plan, or fails to comply with other provisions of this act, then the commissioner of the Department of Environment and Conservation will impose the following sanctions:

1. On the first instance of noncompliance, the commissioner shall issue a letter of warning indicating the reasons for noncompliance, setting forth the sequence of graduated sanctions for noncompliance and offering technical assistance to remedy the causes of noncompliance.
2. Any noncompliance should be resolved as soon as possible. If noncompliance continues for thirty (30) days after receipt of the warning letter, the noncomplying county or region will lose eligibility for funds from the solid waste management fund, unless the commissioner states in writing that, due to particular circumstances, a longer time is appropriate.
3. If noncompliance continues for sixty (60) days after receipt of the warning letter, then, in addition to any other penalty imposed by law, the commissioner may impose a civil penalty of not more than five thousand dollars (\$5,000) for each day of noncompliance beyond the sixty-day period.

Any civil penalty will be assessed in the same manner as provided in § 68-211-117(b). Any penalty collected pursuant to this section shall be deposited in the solid waste management fund. T.C.A. § 68-211-816.

Operational Requirements

Reference Number: CTAS-533

There are several different sources of authority governing the operation of solid waste disposal facilities, including federal legislation and regulations as well as state law and its implementing rules. In addition to the Solid Waste Management Act, it is important to note the Solid Waste Disposal Act (T.C.A. §§ 68-211-101 through 68-211-124) as well as other relevant sections in Title 68. Furthermore, other governmental entities such as counties, municipalities, and boards of health may also adopt regulations governing solid waste disposal if their standards are at least as stringent as those set out by the state Department of Environment and Conservation and consistent with state and federal law. T.C.A. § 68-211-107.

Minimum Service Levels

Reference Number: CTAS-534

Each county must see that there is at least one solid waste collection and disposal system for the needs of county residents; at a minimum there must be one or more convenience centers, unless a higher level of service, such as household garbage pickup, is provided. The service is to be coordinated with those available from municipalities within the county and may be supplied directly by the county, by contract, or through a solid waste authority. The convenience centers must also comply with regulations developed by the Department of Environment and Conservation. T.C.A. § 68-211-851.

Problem Wastes

Reference Number: CTAS-535

Certain substances are no longer to be placed in a landfill but are to be disposed of through alternative methods. Among these is household hazardous waste. To provide for the safe collection of these household hazardous wastes, the Department of Environment and Conservation must provide, directly or by contract, for the collection of such wastes on designated days in each county. The county or authority is responsible for advertising the location of these units, the days and hours on which they will be available, and examples of hazardous household wastes. Furthermore, the county or solid waste authority must appoint at least one person to represent the county or authority to be present at the site on collection

days in order to assist those operating the mobile collection unit. T.C.A. § 68-211-829. Depending on a county's population, competitive grants may be available for a permanent household hazardous waste collection site. T.C.A. § 68-211-828.

Other examples of wastes prohibited at landfills include whole waste tires, lead-acid batteries, and used oil, all of which will no longer be accepted at any solid waste disposal facility or incinerator. Each county must provide at least one site to receive and store these materials. T.C.A. § 68-211-866. Whole waste tires may not be placed in a landfill. T.C.A. § 68-211-867.

Baled Waste and Inspections

Reference Number: CTAS-536

There are special detailed instructions governing the disposal of baled waste. It may not be placed in a landfill unless (1) that facility is licensed to receive hazardous waste, (2) the waste was baled and certified according to the procedure specified by statute, or (3) the waste was properly verified by the supervisor of the receiving landfill. T.C.A. § 68-211-119. A manifest that gives the nature of the waste, its origin and destination, and the names and addresses of all those in possession of it must accompany the baled waste and be maintained for 30 years. T.C.A. § 68-211-120.

In an effort to prevent processing and disposal of unlawful materials, the operator of each facility must inspect the waste. The inspection should be conducted according to a plan that is approved by the commissioner of environment and conservation and is similar to that for baled waste. T.C.A. § 68-211-119.

Education - Solid Waste Plan

Reference Number: CTAS-537

A component of each region's solid waste plan must be an education program "to assist adults and children to understand solid waste issues, management options and costs, and the value of waste reduction and recycling." T.C.A. § 68-211-842. After a region's plan is approved, the Department of Environment and Conservation may award matching grants for implementing the education program. T.C.A. § 68-211-847.

Recycling

Reference Number: CTAS-538

Each county must provide at least one site for the collection of recyclable materials within the county. T.C.A. § 68-211-863. From funds available from the solid waste management fund, the Department of Environment and Conservation is required to provide a matching funds grant program for the purchase of equipment needed to establish or upgrade recycling at a public or not-for-profit recycling collection site.

However, these grants will generally not be granted if there is adequate equipment at privately-owned facilities which serve the same area. The eleven counties which generate the greatest amount of solid waste receive a rebate from the state surcharge on waste disposed in the county in accordance with a formula described in T.C.A. § 68-211-825. A county may only expend the rebate for recycling purposes and must expend from local funds an amount equal to the amount of the rebate towards this purpose. Counties which receive recycling rebates are not eligible for the recycling equipment grants.

Reporting Requirements

Reference Number: CTAS-539

Each solid waste region must submit an annual report to the Department of Environment and Conservation. This report is to follow the format prescribed by the department, and must contain solid waste information in the following areas: collection, recycling, transportation, disposal, public costs, and any other information which the department deems relevant. In conjunction with the annual report each region must also submit an annual progress report on the implementation of the region's solid waste disposal plan. T.C.A. § 68-211-871. There are additional reporting requirements for operators of recycling collection centers and for owners and operators of solid waste disposal facilities and incinerators. The owner or operator of a Class 1 disposal facility, incinerator, or transfer station must keep records of all amounts and

county of origin of solid waste, measured in tons, received at the facility. T.C.A. §§ 68-211-862, 68-211-863.

State Revenue, Funding and Grants

Reference Number: CTAS-540

A state fund through which most of the statewide programs are financed is the solid waste management fund. It is funded in part through a state surcharge of 90 cents on each ton of municipal solid waste received at all facilities or incinerators. T.C.A. § 68-211-835. Additionally, the state solid waste management fund receives revenue from a pre-disposal fee of \$1.35 per tire collected by dealers upon the sale of a each new tire in this state (beginning July 1, 2014 counties can choose to receive \$1.00 of this fee directly from the department of revenue if they choose not to enter into tire grant contracts with TDEC). Counties, municipalities, and solid waste authorities may be able to receive grants from the fund for such activities as planning assistance (T.C.A. § 68-211-823), programs to establish or upgrade statutorily-required convenience centers (T.C.A. § 68-211-824), recycling (T.C.A. § 68-211-825), education (T.C.A. § 68-211-847), and waste tire collection and disposal (T.C.A. § 68-211-867). Additionally, the Department of Environment and Conservation, from available funds in the solid waste management fund, may directly or through contract, investigate and clean-up unpermitted waste tire disposal sites. T.C.A. § 68-211-831.

In 2015 the General Assembly enacted the Tire Environmental Act to establish a fee on each purchase of a new motor vehicle. The fee is administered by TDEC and is intended to be used for tire environmental programs, including local grants, subsidies or loans. This fee does not impact the existing pre-disposal fee on the sale of tires for which counties receive \$1 per tire for the processing of waste tires.

Local Revenue Sources

Reference Number: CTAS-541

In addition to state aid, there are several other sources through which counties and other governmental entities may fund their solid waste management operations. In general, these options are cumulative; they may be used singly or in mix-and-match combinations to suit each area's needs. These revenue sources include the following choices:

1. *Tipping Fee.* Any county, municipality, or solid waste authority that owns a disposal facility or incinerator may impose a tipping fee on each ton of waste or its volume equivalent. The amount of the fee is determined according to the cost of providing services, and the uniform solid waste accounting system is to be used to arrive at this cost. Revenue raised by the tipping fee is to be used only for solid waste management purposes. T.C.A. § 68-211-835(a).
2. *Host Fee.* In order to encourage regional use of solid waste disposal facilities or incinerators, a county that is host to a solid waste disposal facility or incinerator used by other counties in the same region may impose a surcharge on municipal solid waste received at any such solid waste disposal facility or incinerator by resolution of its county legislative bodies in the region. These revenues may be used only for solid waste management purposes or to offset costs resulting from hosting the facility. T.C.A. § 68-211-835(e).
3. *General Surcharge.* After approving the regional solid waste plan, a municipality, county, or solid waste authority may impose a surcharge on each ton of waste received at a disposal facility within that area. Funds collected through this surcharge may be expended for collection or disposal purposes. T.C.A. § 68-211-835(f).
4. *Disposal Fee.* A county, city, or solid waste authority may collect a mandatory user fee that bears a reasonable relationship to the cost of providing disposal services. This fee may be imposed on residences and businesses. A disposal fee may not be imposed on a waste generator who owns the facility for processing its own waste. A county disposal fee may be imposed on municipal residents if the municipal residents have access to the services funded by the disposal fee, such as a convenience center. Op. Tenn. Att'y Gen. 93-49 (July 23, 1993). Disposal fee revenues may be used only to establish and maintain collection and disposal services to which all county residents have access. Upon agreement with the area's electric utility, these fees may be collected as part of the utility's billing process. T.C.A. § 68-211-835(g).
5. *Property Tax.* A county may levy a general county-wide property tax to pay for waste collection and disposal services if all persons in the county are to be equally served, but such a county-wide levy shall be

unlawful if any city, town or special district in any city or town, that, through its own forces or by contract, provides such services within its boundaries, or if any other part of the county is to be excluded from the service area. T.C.A. § 5-19-108.

6. *Service Charge*. A county may charge users a reasonable fee for providing waste collection services. T.C.A. § 5-19-107.

Landfill Approval by County - "Jackson Law"

Reference Number: CTAS-542

The so-called "Jackson Law" is an optional general law that may be adopted by a county or municipal legislative body by a two-thirds (2/3) majority vote. If adopted, it provides that no new construction will be initiated for a landfill without the approval of the county legislative body unless the landfill only accepts waste generated by its owner and all such waste is generated in the same county as the landfill. Additionally, if such proposed construction is in an incorporated area or within one mile of an incorporated area, the governing body of the municipality must also approve before construction can be initiated. T.C.A. § 68-211-701. Public notice and public hearings are required before the vote of the legislative body. T.C.A. § 68-211-703. This law states criteria that must be considered by the legislative body in determining whether or not to approve the construction. Judicial review of the legislative body's determination may be had before the chancery court for the county in which the landfill is to be located. T.C.A. § 68-211-704. The Tennessee Court of Appeals upheld a decision by the Davidson County Chancery Court that exclusion of county and municipal landfills from application of the Jackson Law as provided in T.C.A. § 68-211-706(b) is unconstitutional as a violation of the equal protection clause since there is no rational basis for this discrimination against private landfills. However, the Court applied the doctrine of elision (removal of offending provision, exemption of public landfills) and upheld the remainder of the act. *Profill Development, Inc. v. Dills*, 960 S.W.2d 17 (Tenn. App. 1977).

In 2013, the Jackson Law was amended to increase the scope of the law to include a change in classification of a landfill to a classification with higher standards. However, this amendment provides that it only applies if independently approved by a two-thirds vote of the county legislative body if the county adopted the Jackson Law prior to May 13, 2013.

In a statute separate from the "Jackson Law," municipalities must obtain the approval of the county legislative body at two consecutive regularly scheduled meetings before the municipality may exercise the power of eminent domain to obtain property to be used as a landfill for solid waste disposal outside of the corporate limits of the municipality. T.C.A. § 68-211-122.

Hazardous Waste and Hazardous Substances

Reference Number: CTAS-544

Hazardous waste storage facilities, treatment facilities and disposal facilities throughout the state are under the supervision of Tennessee's Department of Environment and Conservation. T.C.A. § 68-212-107. Before the state issues a permit for a facility for the storage, treatment, or disposal of hazardous waste, it must give public notice of the application and, within 45 days of that notice, hold a public community meeting concerning the permit application. The county legislative body, the municipal governing body, if any, where the facility is proposed, and the governing body of any municipality located within one mile of the proposed facility must be represented at the meeting; failure to participate is deemed a waiver. The county legislative body or other governing bodies may make reports summarizing issues they feel are appropriate. If the governing body chooses to make a report, it must include a decision to accept, reject, or modify the application. The report must be submitted within 90 days of the community meeting. The decision announced in this report is to be based on the factors listed in T.C.A. § 68-212-108. The commissioner of environment and conservation may then affirm the decision or may modify or reverse it if the decision is based upon improper factors. T.C.A. § 68-212-108. The local governing body may seek judicial review of an adverse determination. T.C.A. § 68-212-111.

There are statutory incentives available to counties in which commercial facilities for the disposal of hazardous waste are located. There is a "responsible waste disposal incentive fund" which, if funded by the legislature, is available to counties meeting the eligibility requirements. T.C.A. § 68-212-210. Furthermore, any local government receiving these funds may levy an additional fee, not to exceed statutory

maximums, on the disposal of hazardous wastes at facilities within its jurisdiction. T.C.A. § 68-212-211. The county also has limited monitoring and inspection authority at these sites. T.C.A. § 68-212-208.

In addition to state legislation on hazardous substance management, there are federal provisions with which county governments must comply if they deal with hazardous materials. Local governments should also be aware that landfills containing hazardous waste may be subject to Superfund cleanup requirements.

Finally, every employer (including counties) must comply with all of the requirements of the federal hazard communication standard codified in 29 CFR 1910.1200. Along with these standards, state law under T.C.A. § 50-3-2001 requires employers where certain hazardous chemical are used to: (1) provide employee training programs; (2) report the chemicals to the fire chief; (3) place appropriate signage on buildings containing the chemical; (4) maintain list of the chemicals present; and (5) notify new or newly assigned employees about the workplace chemical list before working in an area containing the hazardous chemicals.

Underground Storage Tanks

Reference Number: CTAS-545

A statewide program, in conjunction with a national effort, is in effect to protect the public and the environment from leaking underground petroleum storage tanks. All owners, including counties, of underground tanks for the storage of petroleum products are subject to the program specifications. Among other requirements, owners must prevent leaks and protect their tanks from corrosion and they must notify the commissioner of environment and conservation and the United States Environmental Protection Agency of the existence of the tank. A fund has been created to help pay for leak cleanups. Owners must contribute fees to this fund, and the proceeds of an environmental assurance fee (four tenths cent per gallon of petroleum products imported into this state or manufactured in this state) are deposited into this fund.

T.C.A. § 68-215-101 *et seq.* An owner/operator of a tank must pay all outstanding fees, interest and penalties in order to receive a certificate for the tank. A certificate is necessary to lawfully receive petroleum products into the tank. All applications for the payment of costs of cleanup must be received by the Division of Underground Storage Tanks within one (1) year of the performance of the tasks covered by that application in order to be eligible for reimbursement. Any person who knowingly causes or allows a release of petroleum into the environment commits a Class E felony, punishable by fine only. T.C.A. § 68-215-120.

Public Water Supplies and Wastewater Treatment

Reference Number: CTAS-553

The Department of Environment and Conservation is responsible for supervising the construction, maintenance, and operation of public water supply and sewerage systems throughout the state. T.C.A. § 68-221-101 *et seq.* The Tennessee Safe Drinking Water Act of 1983, T.C.A. § 68-221-701 *et seq.*, provides the state water quality control board with extensive powers to adopt rules and regulations regarding public water systems and public water supplies. T.C.A. § 68-221-704. This Chapter also deals with wastewater treatment, construction and financing of facilities, and the creation of authorities and boards governing the operation and regulation of these facilities. One of these acts is The Wastewater Treatment Works Construction Grant Act of 1984, codified in T.C.A. § 68-221-801 *et seq.* This act provides financial assistance to encourage local governments to construct wastewater treatment facilities. T.C.A. § 68-221-802.

Other sections deal with subsurface sewage disposal systems and set minimum standards with which these systems must comply. T.C.A. § 68-221-401 *et seq.* Subsurface sewage disposal systems are also under the general supervision of the state Department of Environment and Conservation, and therefore are subject to rules, regulations, and standards established by the commissioner of that department.

However, county health departments are authorized to enter into agreements with the commissioner to implement the requirements of this part, provided that the county's staff and resources are adequate to comply with the standards of the act. T.C.A. § 68-221-403.

Electricity may not be furnished to newly constructed houses or establishments unless the official electrical inspector verifies that the new construction is served by a public sewerage system or that the builder has applied for a permit for a subsurface sewage disposal system. T.C.A. § 68-221-414. Any

county with a countywide building permit program is exempt from the requirements of this Section if it certifies to the commissioner of environment and conservation that its program requires a subsurface sewage disposal system permit before a building permit can be obtained. Any county that subsequently adopts a countywide building permit program will become exempt if it meets the requirements of this section. T.C.A. § 68-221-414. Also, a representative of the commissioner of environment and conservation (county health officer) must approve subdivision plats with parcel of less than five acres when subsurface sewage disposal is to be used. T.C.A. § 68-221-407.

Urban-Type Public Facilities

Reference Number: CTAS-554

Counties are authorized to establish, construct, install, acquire, operate, and maintain urban-type public facilities. These include pipelines, docks, and water treatment systems, as well as operations to dispose of wastewater, sewage, garbage, and other waste matter. T.C.A. § 5-16-101. In order to exercise this authority, the county legislative body, by resolution, may designate an existing agency, create a public works department, or establish a board of public utilities to oversee the project. The composition of this board varies depending on the county's population (T.C.A. § 5-16-103), although a superintendent with specific statutory powers and duties is its head. T.C.A. §§ 5-16-104, 5-16-105. The statute also provides for bond issues (T.C.A. § 5-16-106), and addresses the relationship between cities and counties in the operation of these facilities. T.C.A. §§ 5-16-107, 5-16-110, 5-16-111. Before the county legislative body can authorize any of these services, it must submit plans to the regional planning commission for study. T.C.A. § 5-16-112.

Storm Water Management

Reference Number: CTAS-555

Many counties, particularly those in urbanized areas, are required to establish a program for storm water management in order to comply with the mandates of the Environmental Protection Agency's (EPA) Storm Water Management program. The Storm Water Program is a series of regulations promulgated by the EPA. The purpose of these regulations is to implement amendments to the Clean Water Act, National Pollutant Discharge Elimination System (NPDES) Storm Water Program. The Storm Water Program is designed to regulate and clean up runoff that is entering water bodies from storm sewer systems, construction sites, and industrial sources.

According to the EPA Office of Water Quality, the quality of waters in the United States has improved dramatically since the passage of the Clean Water Act; however, degraded waterbodies still exist. According to the 1996 National Water Quality Inventory, approximately 40 percent of surveyed U.S. waterbodies are still impaired by pollution and do not meet EPA standards. A major source of the pollution found in our rivers, lakes and streams is runoff. The purpose of the storm water program is to regulate and clean up that runoff.

Phase I

Reference Number: CTAS-556

Storm Water Phase I regulations were promulgated by the EPA in 1990. Phase I uses a permit system set up under the NPDES to regulate storm water discharges from three sources:

1. Medium and large municipal separate storm sewer systems (MS4s) serving populations of 100,000 or greater;
2. Construction activity disturbing five acres of land or more; and
3. Ten categories of industrial activity.

Phase II Coverage

Reference Number: CTAS-557

Phase II of the program expands Phase I by requiring additional parties to implement programs and practices to control polluted runoff again by using NPDES permits. The Phase II Final Rule automatically covers two groups on a nationwide basis:

1. Operators of small municipal separate storm sewer systems (MS4s) located in "urbanized areas." (As a practical matter, a small MS4 is any MS4 not covered in Phase I.); and
2. Operators of small construction activities that disturb from one to five acres of land.

Further, small MS4s outside of urban areas, construction activity affecting less than one acre and any other storm water discharges may be covered if the NPDES permitting authority or the EPA decides they need to be regulated.

For the most part, the authority to issue permits for storm water discharges has been delegated to the states. (In a few cases, the EPA retains the authority.) In Tennessee, anyone needing an NPDES permit applies to the Tennessee Department of Environment and Conservation (TDEC) for the permit.

How to Comply with Phase II

Reference Number: CTAS-558

An operator of a small municipal separate storm sewer system has to apply to TDEC for a permit to discharge storm water and has to implement a series of storm water discharge "best management practices." These practices include the following:

1. An operator must develop, implement and enforce a storm water management program designed to reduce the discharge of pollutants from its MS4 to the "maximum extent practicable," to protect water quality and to satisfy the appropriate water quality requirements of the Clean Water Act.
2. An operator's program must include six minimum control measures: (1) public education and outreach; (2) public participation/involvement; (3) illicit discharge detection and elimination; (4) construction site runoff control; (5) post-construction runoff control; and, (6) pollution prevention/good housekeeping.
3. An operator must also identify its best management practices and measurable goals in its permit application. An evaluation and assessment of those goals and practices must be included in periodic reports to the NPDES permitting authority.

Deadlines and Important Dates

Reference Number: CTAS-559

The Tennessee Department of Environment and Conservation began issuing general permits for small MS4s and small construction activity on December 9, 2002. Counties automatically covered in the program obtain permit coverage within 90 days of permit issuance. After obtaining permit coverage, operators of small MS4s must fully implement storm water management programs by the end of the first permit term, typically a five-year period

Authority to Comply and Regulatory Powers

Reference Number: CTAS-560

In 1993, the Tennessee General Assembly passed a series of statutes to help larger municipalities comply with Phase I of the storm water regulations. These statutes are found in Title 68, Chapter 221, Part 11, of the *Tennessee Code Annotated*. They were intended to facilitate compliance with the environmental regulations by authorizing municipalities to regulate storm water discharges, establish a system of drainage facilities, and fix and require payment of fees for the privilege of discharging storm water. The statutes also authorized municipalities to construct and operate a system of drainage facilities for storm water management and flood control. "Municipality," as defined under that law, included only incorporated cities or towns, metropolitan governments, or special districts of the state that had a population of at least 75,000.

In 2001, the General Assembly passed Public Chapter 119 to expand the definition of municipality under these Tennessee storm water management statutes to include more local governments. T.C.A. § 68-221-1102. Since Phase II of the EPA storm water regulations will affect a significant number of cities and counties that were not under Phase I, the intent of the act was to give those cities and counties the ability to exercise the authority that larger municipalities had under T.C.A. § 68-221-1101 *et seq.* The bill accomplishes this by removing the population limitations from the law and by including "county" within the definition of "municipality."

Under the storm water management statutes, counties are authorized to:

1. Exercise general regulation over the planning, location, construction, and operation and maintenance of storm water facilities in the municipality, whether owned and operated by the county or not;
2. Adopt any rules and regulations deemed necessary to accomplish the purposes of this part, including adopting a system of fees for services and permits;
3. Establish standards to regulate the quantity of storm water discharged and to regulate storm water contaminants as may be necessary to protect water quality;
4. Review and approve plans and plats for storm water management in proposed subdivisions and commercial developments;
5. Issue permits for storm water discharges, or for the construction, alteration, extension, or repair of storm water facilities;
6. Suspend or revoke permits when it is determined that the permit holder has violated any applicable ordinance, resolution, or condition of the permit;
7. Regulate and prohibit discharges into storm water facilities of sanitary, industrial, or commercial sewage or waters that have otherwise been contaminated; and
8. Expend funds to remediate or mitigate the detrimental effects of contaminated land or other sources or storm water contamination, whether public or private.

T.C.A. § 68-221-1105 (as amended by Acts of 2001 Public Chapter 119).

It is important to note that as the law currently reads, county authority over storm water discharge may be exercised only outside of municipal boundaries.

In counties that are not in the state's computer assisted appraisal system, the county trustee is authorized to bill and collect storm water fees for the county as a designated item on the ad valorem tax notice issued by the trustee. Municipalities in these counties are authorized to contract with the county to have their storm water fees collected in the same manner. T.C.A. § 68-221-1107.

Air Pollution Control

Reference Number: CTAS-561

Under the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the Tennessee Air Pollution Control Act, T.C.A. § 68-201-101, *et seq.*, certain counties may be required by the Tennessee Air Pollution Control Board to implement a motor vehicle inspection and maintenance program in order to attain or maintain compliance with national ambient air standards if

- (a) the county has been designated by the United States Environmental Protection Agency as a nonattainment county and has more than 50,000 registered vehicles, or
- (b) is a former nonattainment county with more than 50,000 registered vehicles that is under a maintenance plan designed to continue to meet the national ambient air standards, or
- (c) the county contributes significantly to nonattainment in another county and has more than 60,000 registered motor vehicles.

The Air Pollution Control Board may issue waivers consistent with federal and state law. Also, such a program may exist in counties for which the county legislative body has adopted a resolution that establishes an inspection and maintenance program consistent with the programs required by the state. All counties implementing a vehicle inspection and maintenance program may only charge fees that are directly related to the county's cost of establishing and maintaining the program. Such programs must follow rules established by the Tennessee Air Pollution Control Board. Inspections will occur annually in conjunction with vehicle registration renewal. 2004 Public Chapter 926; T.C.A. §§ 55-4-128, 55-4-130.

Ethics

Reference Number: CTAS-162

The issue of ethics in state and local government has dominated the news media in Tennessee over the past several years. A number of scandals involving elected officials inspired a new prohibition on “consulting fees” for government officials in 2005 and eventually led to an extraordinary session of the General Assembly at the beginning of 2006 to deal with the topic of ethics. During that session, the General Assembly passed the “Comprehensive Governmental Ethics Reform Act of 2006” (the Ethics Reform Act). This wide-ranging act created a new State Ethics Commission, established substantial new registration and reporting requirements for lobbyists and their employers, and enacted new provisions to set limits on gifts and require disclosure of conflicts of interest for certain state officials. The law also included a requirement for local governments to adopt ethics policies covering the disclosure of gifts accepted by officials and employees and the disclosure of conflicts of interest. In addition to the Ethics Reform Act, there are other state laws which address ethics and conflicts of interests in county government

County Ethics Policies

Reference Number: CTAS-621

The “Comprehensive Governmental Ethics Reform Act of 2006” is codified in T.C.A. § 8-17-101 *et seq.* Pursuant to the Ethics Reform Act all counties were required to adopt local ethics policies by June 30, 2007. The law directed CTAS to develop a [model policy](#).

These ethics policies are required to include rules and regulations regarding limits on, and/or reasonable and systematic disclosure of, gifts or other things of value received by officials and employees that impact or appear to impact their discretion, and rules and regulations regarding reasonable and systematic disclosure by officials and employees of their personal interests that impact or appear to impact their discretion. T.C.A. § 8-17-102(a)(3). It is important to note that the provisions of state law, to the extent that they are more restrictive, control. Additionally, the Ethics Reform Act expressly states that these policies cannot include personnel or employment policies, or policies or procedures related to operational aspects of governmental entities. T.C.A. § 8-17-102(a)(3).

The ethics policies adopted by a county commission apply broadly to all officials and employees in all offices, agencies, and departments of the county and to the members, officers, and employees of all boards, commissions, authorities, corporations, or other instrumentalities of a county. However, ethics policies adopted by the county commission do not apply to utility districts or schools which must adopt their own ethics policies. T.C.A. §§ 8-17-102(c) and 8-17-102(d).

If a board, commission, authority, corporation or other instrumentality is created by two or more local government entities, such creating entities are required, by amendment to the interlocal agreement or other agreement creating such joint instrumentality, to designate the ethical standards that govern the jointly created instrumentality. T.C.A. § 8-17-102(b).

Violations of ethics policies by officials or employees covered by the local ethics policy are enforced in accordance with the provisions of existing state law. T.C.A. § 8-17-106(b).

County Ethics Committees

Reference Number: CTAS-622

The ethics legislation that was passed in 2005 and 2006 does not require a county to have an ethics committee. Nevertheless, many counties have established county ethics committees to deal with potential ethics complaints. Bear in mind that a county ethics committee has very little, if any, authority to do anything other than to screen ethics complaints and direct the complaint to the proper county official or county or state agency that can take appropriate action on the complaint.

As previously stated, the county ethics policy is required to cover the acceptance of and disclosure of gifts accepted by officials and employees and the disclosure of conflicts of interest. Accordingly, an ethics complaint received by a county ethics committee that does not address either the acceptance and/or disclosure of a gift or a conflict of interest need not be pursued by the ethics committee.

Note that the County Purchasing Law of 1957, T.C.A. § 5-14-101 *et seq.*, and the 1981 Financial Management Act, T.C.A. § 5-21-101 *et seq.*, both contain stringent conflict of interest provisions and prohibi-

tions on the acceptance of gifts. It is important to note that in counties that have adopted either of these two Acts, the provisions of these state laws control to the extent that they are more restrictive than the county's ethics policy.

County officials who serve on a county ethics committee should review ethics complaints to make sure that the complaint first addresses either the acceptance/disclosure of a gift or a conflict of interest. If the ethics complaint does not address one of these two issues, the ethics committee should direct the complainant to the appropriate person or agency that may properly address the complaint and proceed no further.

If the complaint does address an issue covered by the county ethics policy, the committee should proceed to determine if the complaint bears further inquiry. If the complaint states a possible violation of the county ethics policy, the committee should turn the complaint over to the proper county official who actually has the authority to deal with the violation. Depending upon the stated complaint, that could be a county office holder, if the complaint is against an employee, or the county attorney if the complaint is against an elected county official. If the complaint states a possible criminal violation, the committee should turn the matter over to the district attorney's office. In addition, if the information contained in the complaint reasonably causes the committee members to believe that a theft, forgery, credit card fraud, or any other act of unlawful taking of public money, property, or services has occurred, the committee must report the information in a reasonable amount of time to the office of the Comptroller of the Treasury. T.C.A. § 8-4-503(a).

In order to do the job effectively, members of the ethics committee must be well versed in the state conflict of interest laws that apply to their particular county. A general understanding of criminal law would also be helpful.

Conflicts of Interest

Reference Number: CTAS-623

Most county governments in Tennessee do not experience lobbying at the local level in the same way it happens at the General Assembly. Generally speaking, where there is a danger of a conflict of interest or undue influence of a county official, it relates not to the exercise of legislative authority but to the exercise of purchasing power, such as when the county commission votes on a county contract.

General Conflict of Interest Law

Reference Number: CTAS-2463

In this area county officials and employees in all counties are subject to T.C.A. § 12-4-101. Under T.C.A. § 12-4-101(a)(1), it is unlawful for a public official, or other person, whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract with the county, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest.

In *Madison County v. Alexander*, 94 S.W. 604 (Tenn. 1906), the Tennessee Supreme Court noted that "[i]t is the policy of the law to prohibit members of the county court from making contracts with their own members (meaning the county court), for any purpose which calls for compensation out of the county treasury." The Court stated:

The underlying principle is that no man shall be allowed to make a contract with the county, whose duty it is to pay for such contract. In other words, he cannot make a contract to pay himself out of the public treasury for any purpose. That such a rule may operate harshly is no argument against it. It is based on a wise purpose and principle, that is, to prevent public officials from using their public functions and duties to subserve their private interests. It does not matter that the service is rendered faithfully and inures to the benefit of the county, or that the material may be necessary and cheaply furnished.

Id. See also *Cagle, for Use of Cagle v. Benton County*, 181 S.W.2d 1 (Tenn. 1944).

Because the making of a general appropriation out of which contractual funds are eventually expended makes the appropriating body a superintending agency, a county commissioner may be said to be superintending county contracts. See Op. Tenn. Atty. Gen. 03-034 (April 1, 2003); Op. Tenn. Atty. Gen. 08-15

(January 30, 2008) (the Attorney General's office has taken the view that those who vote on budgets and appropriations superintend the contracts paid for by those budgets and appropriations). Accordingly, it would be unlawful for a county commissioner who owns a wrecker service to do business with the county even if he abstains from voting on the wrecker contract.

The Attorney General has opined that the term "directly interested" refers to a personal pecuniary interest (Op. Tenn. Atty. Gen. U96-043 (June 4, 1996)) and has concluded that T.C.A. § 12-4-101(a)(1) prohibits an officer from being directly interested in a contract, whether or not he or she abstains from voting on it. Op. Tenn. Atty. Gen. 04-016 (February 5, 2004).

The Attorney General has opined that a county commissioner has a direct interest in a contract for the sale of his land to the county and that such a contract is prohibited under T.C.A. § 12-4-101(a). Op. Tenn. Atty. Gen. 04-016 (February 5, 2004). A county commissioner whose duty it is to provide funds for construction contracts entered into by the county school board cannot enter into a construction contract with the county board of education without violating T.C.A. § 12-4-101(a). Op. Tenn. Atty. Gen. 91-31 (April 9, 1991). See also Op. Tenn. Atty. Gen. 83-336 (October 5, 1983) (a county commissioner cannot contract with the board of education of his county to provide school bus service); Op. Tenn. Atty. Gen. 83-229 (May 3, 1983) (a county commissioner cannot contract with his county hospital to provide computer services to the county hospital).

An official who violates the provisions of T.C.A. § 12-4-101 shall forfeit all pay and compensation under the contract and shall be dismissed from office and shall be ineligible for the same or a similar position for ten years. T.C.A. § 12-4-102. See *State v. Perkinson*, 19 S.W.2d 254 (Tenn. 1929) (contracts by officers with county subject officials to removal); *Madison County v. Alexander*, 94 S.W. 604 (Tenn. 1906) (member of county court was refused recovery for supplies sold to county workhouse in violation of the statute); *Hope v. Hamilton County*, 47 S.W. 487 (Tenn. 1898) (member of the county court was held not to be able to recover from the county for services performed for the county); *M. F. Parsley & Co., Inc., v. Cole & Miller*, 1926 WL 1963 (Tenn.Ct.App. 1926) (member of the county court who was the stockholder of a corporation owning a lumber yard could not lawfully contract with the county for building a school). See also Op. Tenn. Atty. Gen. 04-016 (February 5, 2004) (an officer who enters into a contract in violation of T.C.A. § 12-4-101 must forfeit compensation received under the contract, and a suit to enforce this provision is a quo warranto action ordinarily brought by the District Attorney General).

Besides prohibiting direct conflicts of interest, the statute also requires disclosure of any indirect financial interests. The statute states in pertinent part:

It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be indirectly interested in any such contract unless the officer publicly acknowledges such officer's interest. "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county.

T.C.A. § 12-4-101(b). See Op. Tenn. Atty. Gen. 09-48 (April 2, 2009) (the chairman of the county school board who is employed by an architectural firm that contracts with the school board has an indirect interest which must be disclosed); Op. Tenn. Atty. Gen. 09-109 (June 8, 2009) (purchase of building materials - sole supplier); Op. Tenn. Atty. Gen. 99-185 (September 17, 1999) (contract for services - sole supplier).

The question often arises whether it is proper for a county official to have authority over a matter that will have a direct financial benefit to a relative. This question arises most often when the person who will receive the direct financial benefit is the spouse of a county official. In opinions dealing with T.C.A. § 12-4-101, the Attorney General has opined that when spouses commingle assets, a person has an indirect interest in any contract directly affecting his or her spouse's employment. Op. Tenn. Atty. Gen. 05-017 (February 3, 2005); Op. Tenn. Atty. Gen. 00-181 (November 22, 2000); Op. Tenn. Atty. Gen. 88-122 (July 13, 1988); Op. Tenn. Atty. Gen. 84-030 (January 27, 1984). Accordingly, if a county commissioner and his wife commingle assets he is "indirectly interested" in any contract his wife's company may enter into with the county. Under T.C.A. § 12-4-101, the commissioner must disclose any indirect pecuniary interest in a contract with the county if he has the duty to vote for, let out, or superintend that contract. See also Op. Tenn. Atty. Gen. 05-017 (February 3, 2005) (official should abstain from voting or participating in official acts or proceedings that directly affect contracts with a relative).

The disclosure of indirect interests required by the statute calls for the “public acknowledgment” of such interests. What is necessary for public acknowledgment is unclear, especially in the context of an official such as the register of deeds acting independently, as opposed to a member of the county legislative body announcing at a regular meeting that the member has an indirect interest prior to a vote. A county official should therefore be careful in indirect conflict of interest situations to provide public notice of these interests prior to taking any action. For example, if a county clerk purchases supplies from a corporation in which the clerk owns a small minority (not plurality) interest, this interest must be disclosed publicly. Because the county clerk has no natural public forum, some form of written public notice via bulletin boards in the courthouse or notice in a newspaper of general circulation in the county may be appropriate.

Special Rules for County Commissioners who are County Employees

Reference Number: CTAS-625

Countywide officeholders, such as the county mayor, sheriff, trustee, register, county clerk, or assessor of property, are statutorily prohibited from being nominated for or elected to membership in the county legislative body. T.C.A. § 5-5-102. However, county employees may hold the office of county legislative body member. Any county employee who is otherwise qualified may serve as a member of the county legislative body, notwithstanding the fact that such person is a county employee. T.C.A. § 5-5-102.

In 2016, the Legislature enacted Public Chapter 1072, effective May 20, 2016. This new law changes the conflict of interest provisions for county commissioners who are county employees or whose spouses are county employees. Pursuant to the new law, no member of the county legislative body who is also an employee of the same county or whose spouse is an employee of the same county may vote on matters in which the member has a conflict of interest. The new law provides that a conflict of interest is created when a member is voting on a matter which, if approved by the legislative body, would increase the pay or benefits of that member or that member's spouse. However, the new law does not prohibit a member from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which the member has a conflict of interest. A member who abstains from voting for cause on any issue coming to a vote before the body is not counted for the purpose of determining a majority vote. These new provisions have been codified as T.C.A. § 5-5-112.

2016 PUBLIC CHAPTER 1072

Tennessee Code Annotated, Title 5, Chapter 5, Part 1, is amended by adding the following as a new section:

(a) No member of the legislative body of a county who is also an employee of the same county or whose spouse is an employee of the same county may vote on matters in which such member has a conflict of interest. A conflict of interest is created under this section when a member is voting on a matter which, if approved by the legislative body, would increase the pay or benefits of that member or that member's spouse. The vote of any member having a conflict of interest shall be void if challenged in a timely manner. As used in this subsection (a), "timely manner" means during the same meeting at which the vote was cast and prior to the transaction of any further business by the body.

(b) Subsection (a) shall not prohibit a member of a local governing body of a county from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which the member has a conflict of interest.

(c) Any member of a local governing body of a county who abstains from voting for cause on any issue coming to a vote before the body shall not be counted for the purpose of determining a majority vote. This subsection (c) shall not apply to any county having a metropolitan form of government and having a population in excess of five hundred thousand (500,000), according to the 1990 federal census or any subsequent federal census.

(d) *Nothing in this section alters, amends, or otherwise affects § 12-4-101(a). In the event of any conflict between this section and § 12-4-101(a), § 12-4-101(a) shall prevail.*

(e) *The legislative body of any metropolitan form of government or charter form of government may opt out of this section by resolution.*

Other Statutory Conflict of Interest Provisions

Reference Number: CTAS-626

The County Purchasing Law of 1957, T.C.A. § 5-14-101 *et seq.*, and the 1981 Financial Management Act, T.C.A. § 5-21-101 *et seq.*, both contain conflict of interest provisions more stringent than the general conflict of interest statute. The 1957 Act and the 1981 Act are optional general laws which may or may not be in effect in a particular county.

The County Purchasing Law of 1957-Conflict of Interest

Reference Number: CTAS-627

As previously noted, the County Purchasing Law of 1957 contains a separate, and more stringent, conflict of interest provision. *Tenn. Code Ann.* § 5-14-114(a) prohibits the county purchasing agent, members of the county purchasing commission, members of the county legislative body, and other officials of the county, from being financially interested or having any personal beneficial interest, either directly or indirectly, in any contract or purchase order for any supplies, materials, equipment or contractual services used by or furnished to any department or agency of the county government. An official who violates this statute commits a Class D Felony. While the Tennessee Court of Criminal Appeals found this penalty to be unenforceable, *State v. Whitehead*, 43 S.W.3d 921 (Tenn.Crim.App. 2000), a violation could constitute official misconduct. See Op. Tenn. Atty. Gen. 94-073 (June 16, 1994).

In *Garner v. Blount County*, 2000 WL 116026 (Tenn Ct. App., 2000), the court found that a contract between a county building authority and a corporation in which a county commissioner owned an interest was unlawful under T.C.A. § 5-14-114. See also Op. Tenn. Atty. Gen. 98-218 (November 25, 1998); Op. Tenn. Atty. Gen. 00-152 (October 6, 2000) (county commissioner prohibited under T.C.A. § 5-14-114(a) from working part-time as independent contractor for department of county government); Op. Tenn. Atty. Gen. 07-141 (October 10, 2007) T.C.A. § 5-14-114 prohibits a shareholder of a bank that conducts business with the county from serving as county commissioner, member of the county budget committee, or county purchasing commission).

The statute does not define the term, “personal beneficial interest.” However, in *State v. Whitehead*, 43 S.W.3d 921 (Tenn.Crim.App., 2000) the Court of Criminal Appeals found that the County Purchasing Law of 1957:

prohibits a county official from having any *personally favorable interest* in a county contract, regardless of whether that interest is direct or circuitous. While the statute prohibits a broad range of conduct by county officials, it is not so vague that the prohibited conduct cannot be ascertained.

Id. at 929 (emphasis added).

Further, T.C.A. § 5-14-114(b) prohibits the same group of individuals from accepting or receiving, directly or indirectly, from any person, firm or corporation to which any contract or purchase order may be awarded, by rebate, gift or otherwise, any money or anything of value whatsoever, or any promise, obligation or contract for future reward or compensation. See Op. Tenn. Atty. Gen. 94-073 (June 16, 1994) (in counties that have adopted the County Purchasing Law of 1957, there is a blanket prohibition against the acceptance of gifts of any value by county officials from any company to which a contract may be awarded; depending upon the circumstances, the acceptance of such gifts may constitute the criminal offense of official misconduct).

County Financial Management System of 1981-Conflict of Interest

Reference Number: CTAS-628

The County Financial Management System of 1981 contains the most stringent conflict of interest provisions. *Tenn. Code Ann.* § 5-21-121 provides:

(a) The director, purchasing agent, members of the committee, members of the county legislative body, or other officials, employees, or members of the board of education or highway commission shall not be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of any supplies, materials, equipment or contractual services for the county.

(b) No firm, corporation, partnership, association or individual furnishing any such supplies, materials, equipment or contractual services, shall give or offer, nor shall the director or purchasing agent or any assistant or employee accept or receive directly or indirectly from any person, firm, corporation, partnership or association to whom any contract may be awarded, by rebate, gift or otherwise, any money or other things of value whatsoever, or any promise, obligation or contract for future reward or compensation.

In addition to county officials and officers, this statute includes county employees within its prohibition. Further, the statute makes no distinction as to whether the interested person has any authority over the purchasing decision. The broad language of this statute prohibits county officials, officers and employees from having any interest in a contract for the purchase of supplies, materials, equipment or contractual services.

The statute does not define the term "interest." However, the Attorney General, when discussing this statute, has adopted the definition of "interest" contained in T.C.A. § 12-4-101. See *Op. Tenn. Atty. Gen.* 00-181 (November 22, 2000) (opining that the sale of items by the spouse of an employee of the school board to that same school system would give rise to a prohibited conflict of interest under T.C.A. § 5-21-121). Nor does the statute define the term, "personal beneficial interest." In *State v. Whitehead*, 43 S.W.3d 921, 929 (Tenn.Crim. App. 2000) the Court of Criminal Appeals found that a similar statute prohibited a county official "from having any *personally favorable interest* in a county contract, regardless of whether that interest is direct or circuitous."

Schools-Conflict of Interest

Reference Number: CTAS-629

Like other county officials, school board members are subject to the general conflict of interest statute, T.C.A. § 12-4-101.

Conflict of interest problems generally arise when a school board member has pecuniary interests that would interfere with that member's ability to vote objectively on matters before the board. *Tenn. Code Ann.* §§ 12-4-101(a)(1) and (b) provide that it is unlawful for any official whose duty it is to vote for any contract in which the county is concerned to be directly or indirectly financially interested in any such contract.

Op. Tenn. Atty. Gen. 01-144 (September 4, 2001).

Employment

Tenn. Code Ann. § 49-2-203(a)(1)(D) provides as follows:

(D) No member of any local board of education shall be eligible for election as a teacher, or any other position under the board carrying with it any salary or compensation;

The Attorney General has opined that this provision prohibits a school board member from serving as a substitute school teacher in the same school system, notwithstanding the fact that the school board contracts with a third party employment agency to obtain substitute teacher services, rather than employing substitute teachers directly. *Op. Tenn. Atty. Gen.* 08-180 (December 1, 2008).

"Nothing in the statute, however, prohibits the spouse of a school board member from working for the school board." *Op. Tenn. Atty. Gen.* 08-102 (May 6, 2008). In this situation the school board member would have an indirect conflict of interest under T.C.A. § 12-4-101(b) if the school board member and his spouse commingle their assets. *Op. Tenn. Atty. Gen.* 05-017 (February 3, 2005) (an official is indi-

rectly interested in a contract between a governmental agency and the official's spouse if the official and spouse commingle assets); Op. Tenn. Atty Gen. 00-181 (November 22, 2000).

The Attorney General has opined that “a non-instructional employee of a school system may run for election to the school board without leaving his job, but if elected to the board this individual must quit his job for the school system in order to serve as a school board member.” Op. Tenn. Atty. Gen. 02-070 (May 23, 2002). See also Op. Tenn. Atty. Gen. U90-124 (August 29, 1990) (school bus driver prohibited from continuing employment by the school system after he was elected to school board).

No member of the county legislative body nor any other county official shall be eligible for election as a member of the county board of education. T.C.A. § 49-2-202(a)(2). This statute prevents one person from holding an elected county office and being a member of the school board. Op. Tenn. Atty. Gen. 01-144 (September 4, 2001). Note also that pursuant to T.C.A. § 5-5-102(c)(2) a director of schools is not qualified to serve as a member of the county legislative body.

Purchasing

School officials are prohibited from having a direct or indirect pecuniary interest in providing tangible personal property to public schools. The statute applicable to school systems provides:

It is unlawful for any teacher, supervisor, commissioner, director of schools, member of a board of education or other school officer in the public schools to have any pecuniary interest, directly or indirectly, in supplying books, maps, school furniture or apparatus to the public schools of the state, or to act as agent for any author, publisher, bookseller or dealer in such school furniture or apparatus on promise of reward for the person's influence in recommending or procuring the use of any book, map, school apparatus or furniture of any kind, in any public school; provided, that nothing in this section shall be construed to include authors of books.

T.C.A. § 49-6-2003(a).

The statute does not define the term “apparatus.” Addressing the statute, the Attorney General opined that “a court would conclude that the term ‘apparatus,’ as used in Tenn. Code Ann. § 49-6-2003(a), includes school equipment and other tangible personal property, but does not apply to a contract for services.” Op. Tenn. Atty. Gen. 09-48 (April 2, 2009).

The statute further provides that a spouse or family member of a principal, teacher or other school administrative employee is not precluded from participating in business transactions with the school system where a sealed competitive bid system is used, as long as the principal, teacher or other school administrative employee does not have discretion in the selection of bids or specifications. T.C.A. § 49-6-2003(b).

Highway Departments-Conflict of Interest

Reference Number: CTAS-630

In those counties under the County Uniform Highway Law, a very strict conflict of interest statute applies. The statute, T.C.A. § 54-7-203(a), provides:

Neither the chief administrative officer, county highway commissioner, member of the county governing body nor any employee of the county road department shall be financially interested in or have any personal interest, either directly or indirectly, in the purchase of any supplies, machinery, materials, equipment or contractual services for the department or system of roads for the county, nor in any firm, corporation, partnership, association or individual selling or furnishing such machinery, equipment, supplies and materials.

Note that this prohibition is so broad as to preclude all employees of the highway department, whether or not they have any discretion or control over the purchase, from having a direct or indirect interest in these purchases. A violation of this statute constitutes official misconduct and is a Class C misdemeanor and is grounds for removal from office. T.C.A. § 54-7-203(b).

Additional Purchasing Conflicts of Interest

Reference Number: CTAS-2471

Pursuant to T.C.A. § 12-4-114, no public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract except as provided in this section, or as otherwise allowed by law.

Furthermore, no public employee having official responsibility for a procurement transaction is allowed to participate in that transaction on behalf of the public body when the employee knows that:

- A. The employee is contemporaneously employed by a respondent to a solicitation or contractor involved in the procurement transaction;
- B. The employee, the employee's spouse, or any member of the employee's immediate family holds a position with a respondent to a solicitation, a contractor involved in the procurement transaction, such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent (5%);
- C. The employee, the employee's spouse, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
- D. The employee, the employee's spouse, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a respondent to a solicitation or contractor involved in the procurement transaction.

A public officer or employee who will derive a direct benefit from a contract with the public agency the officer or employee serves, but who is not involved in making or administering the contract, cannot attempt to influence any other person who is involved in making or administering the contract.

No public officer or employee may solicit or receive any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency the officer or employee serves.

As used in this section, "immediate family" means spouse, dependent children or stepchildren, or relatives related by blood or marriage.

Prohibition on Consulting Fees

Reference Number: CTAS-631

In 2005, the General Assembly passed a law to prohibit state and local government elected officials from receiving a fee, commission or any other form of compensation for consulting services from any person or entity, other than compensation paid by the state, a county or municipality. T.C.A. §§ 2-10-123(a) and 2-10-124(a). A violation of this statutory prohibition is a Class A misdemeanor unless the conduct giving rise to the violation would also constitute the offense of bribery in which case the offense is a Class C felony. A person convicted of any violation under this statute is forever afterwards disqualified from holding any office under state law or the Tennessee Constitution. T.C.A. §§ 2-10-123(c) and 2-10-124(c). See *also* T.C.A. §§ 39-16-103 and 40-20-114.

As defined with respect to local officials, including a member-elect of a municipal or county legislative body, the term "consulting services" means services to advise or assist a person or entity in influencing municipal or county legislative or administrative action, including, but not limited to, services to advise or assist in maintaining, applying for, soliciting or entering into a contract with the local government represented by such official. T.C.A. § 2-10-122(2).

There are certain types of gifts and benefits listed in T.C.A. § 3-6-305(b) which are not prohibited. The list follows:

- Benefits resulting from business, employment, or other outside activities of a candidate or official or the immediate family of a candidate or official, if such benefits are customarily provided to others in similar circumstances and are not enhanced due to the status of the candidate or official. T.C.A. § 3-6-305(b)(1).
- Informational materials in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication. T.C.A. § 3-6-305(b)(2).
- Gifts that are given for a non-business purpose and motivated by close personal friendship, but only to the extent such gifts are specifically defined and authorized by the rules of the ethics commission. T.C.A. § 3-6-305(b)(3).
- Sample merchandise, promotional items, and appreciation tokens, if such merchandise, items and tokens are routinely given to customers, suppliers or potential customers or suppliers in the ordinary course of business. T.C.A. § 3-6-305(b)(4).
- Unsolicited tokens or awards of appreciation, honorary degrees, or bona fide awards in recognition of public service in the form of a plaque, trophy, desk item, wall memento and similar items; provided, that any such item shall not be in a form which can be readily converted to cash. T.C.A. § 3-6-305(b)(5).

- Opportunities and benefits made available to all members of an appropriate class of the general public, including but not limited to:
 - Discounts afforded to the general public or specified groups or occupations under normal business conditions, except that such discounts may not be based on the status of the candidate or official; and
 - Prizes and awards given in public contests.
T.C.A. § 3-6-305(b)(6).

Still, most anything of value provided by a vendor to a county official for advice or assistance in influencing county legislative or administrative action, such as getting a contract with the county, is prohibited under the law. Note also that in counties that have adopted the County Purchasing Law of 1957, there is a blanket prohibition against the acceptance of gifts of any value by county officials from any company to which a contract may be awarded. T.C.A. § 5-14-114(b). See Op. Tenn. Atty. Gen. 94-073 (June 16, 1994) (acceptance of such gifts by a county official or employee could constitute official misconduct, a criminal offense). Additionally, in counties under the County Financial Management Act of 1981, county officials and employees are prohibited from accepting any money or other things of value whatsoever from any company to whom any contract for supplies, materials, equipment or contractual services, may be awarded. T.C.A. § 5-21-121(b).

Prohibition on Honorariums

Reference Number: CTAS-632

The acceptance of an honorarium by a public official in such person's capacity as a public official is prohibited. "Honorarium" means a payment of money or any thing of value for an appearance, speech or article, but does not include actual and necessary travel expenses, meals and lodging associated with such appearance, speech or article. T.C.A. § 2-10-116(a). The acceptance of an honorarium for an appearance, speech or article by a public official in such person's capacity as a private business person, professional or tradesperson is not prohibited. T.C.A. § 2-10-116(b). See Op. Tenn. Atty. Gen. 08-11 (January 25, 2008).

Incompatible Offices

Reference Number: CTAS-633

Several state statutes prohibit a person from holding more than one county office. Pursuant to T.C.A. § 5-5-102(c)(2), no person elected or appointed to fill the office of county mayor, sheriff, trustee, register, county clerk, assessor of property, or any other county-wide office filled by vote of the people or the county legislative body, shall also be nominated for or elected to membership in the county legislative body.

No member of the county legislative body nor any other county official shall be eligible for election as a member of the county board of education. T.C.A. § 49-2-202(a)(2). This statute prevents one person from holding an elected county office and being a member of the school board. Op. Tenn. Atty. Gen. 01-144 (September 4, 2001). Note also that pursuant to T.C.A. § 5-5-102(c)(2) a director of schools cannot serve as a member of the county legislative body.

In addition to statutory provisions regarding dual office-holding, there is a well recognized common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 89 S.W. 316, 327 (Tenn. 1905).

The question of incompatibility depends on the circumstances of each individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. *Officers* § 38 (2008). Tennessee courts have recognized that an inherent inconsistency exists where one office is subject to the supervision or control of the other. *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). In *Thompson*, the Tennessee Supreme Court concluded that the offices of city manager and member of the city council were incompatible because the council had the authority to appoint, remove, and supervise the city manager, and no statute then in effect permitted the same individual to hold these offices. The Court found, therefore, that the common law principle of incompatible offices prohibited the same individual from acting as city manager and city council member.

Op. Tenn. Atty. Gen. 08-129 (August 8, 2008) (county commissioner and city mayor). See also Op. Tenn. Atty. Gen. 08-177 (November 20, 2008) (constable and county commissioner); Op. Tenn. Atty. Gen. 08-107 (May 9, 2008) (county board of education member also serving as city council member and city board of education member); Op. Tenn. Atty. Gen. 07-159 (December 6, 2007) (deputy sheriff and county bus driver); Op. Tenn. Atty. Gen. 02-109 (October 2, 2002) (constable and judicial commissioner); Op. Tenn. Atty. Gen. 02-012 (January 18, 2002) (offices of sheriff and constable incompatible under the common law); Op. Tenn. Atty. Gen. 00-050 (March 20, 2000) (constable serving as a full-time or part-time deputy sheriff); Op. Tenn. Atty. Gen. 99-160 (August 19, 1999) (constable serving as deputy sheriff); Op. Tenn. Atty. Gen. U86-77 (April 30, 1986) (city commissioner and county commissioner); Op. Tenn. Atty. Gen. 84-209 (June 27, 1984) (county commissioner and city alderman).

Crimes Involving Public Officials

Reference Number: CTAS-634

Felonies in Office-Forfeiture of Retirement Benefits

Reference Number: CTAS-635

Under the 2006 Ethics Act, each time a person is elected to a public office, that person, as a condition of their election, is deemed to consent and agree to the forfeiture of that person's retirement benefits from the Tennessee Consolidated Retirement System, any superseded retirement system or any other public pension system if that person is convicted in any state or federal court of a felony arising out of that person's official capacity, constituting malfeasance in office. This new law applies regardless of the date the person became a member of the public pension system. T.C.A. § 8-35-124(a)(3).

Bribery of Public Servant

Reference Number: CTAS-636

It is a criminal offense for an elected official to accept a bribe. T.C.A. § 39-16-102. See *State v. Frost*, 2003 WL 21339225 (Tenn.Crim.App. 2003) (constable convicted of soliciting a bribe).

The statute provides:

A person commits an offense who:

- (1) Offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion or other action in the public servant's official capacity; or
- (2) While a public servant, solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that the public servant's vote, opinion, judgment, exercise of discretion or other action as a public servant will thereby be influenced.

T.C.A. § 39-16-102(a)(1) & (2).

It is no defense to a prosecution for bribery that the person sought to be influenced was not qualified to act in the desired way because the person had not yet assumed office, lacked jurisdiction, or for any other reason. T.C.A. § 39-16-102(b).

Bribery is a Class B felony. T.C.A. § 39-16-102(c). A county official convicted under this statute may be punished by imprisonment of not less than eight (8) years nor more than thirty (30) years. In addition, the jury may assess a fine not to exceed twenty-five thousand dollars (\$25,000). T.C.A. § 40-35-111. Persons convicted of bribing a public official are subject to the same punishment. An elected official who is convicted of bribery under state or federal law is forever afterwards disqualified from holding any office under the laws or constitution of this state. T.C.A. § 39-16-103. The same is true even if citizenship status is later restored. T.C.A. § 40-20-114(b).

Soliciting Unlawful Compensation

Reference Number: CTAS-637

A public servant who requests a pecuniary benefit for the performance of an official action knowing that he or she was required to perform that action without compensation or at a level of compensation lower than that requested has committed the offense of solicitation of unlawful compensation, a Class E felony. T.C.A. § 39-16-104.

In addition, pursuant to T.C.A. § 8-21-101, a county official is not allowed to demand or receive fees or other compensation for any service further than is expressly provided by law. If any officer demands or receives any other or higher fees than are prescribed by law, such officer is liable to the party aggrieved in the penalty of \$50.00, to be recovered before any judge of the court of general sessions, and the officer also commits a Class C misdemeanor. T.C.A. § 8-21-103. See *State v. Dixie Portland Cement Co.*, 267 S.W. 595 (Tenn. 1925) (public officers can receive no fees or costs, except as expressly authorized by law). See also Op. Tenn. Atty. Gen. 95-118 (November 28, 1995) (As previously opined by this office, under *Bayless v. Knox County*, 199 Tenn. 268, 286 S.W.2d 579 (1955), and Tenn. Code Ann. § 8-21-101, a county or a county's chief law enforcement officer may only require or accept payment or other compensation if expressly authorized by statute. Op. Tenn. Atty. Gen. 91-76 (August 20, 1991). Op. Tenn. Atty. Gen. U91-76 (May 22, 1991). Op. Tenn. Atty. Gen. 88-199 (November 10, 1988). Op. Tenn. Atty. Gen. 88-93 (April 20, 1988)).

Buying and Selling in Regard to Offices

Reference Number: CTAS-638

This offense is committed when any person holding any office, or having been elected to any office, enters into any bargain and sale for any valuable consideration whatever in regard to the office, or sells, resigns, or vacates the office or refuses to qualify and enter upon the discharge of the duties of the office for pecuniary consideration. This offense is also committed when any person offers to buy any office by inducing the incumbent thereof to resign, to vacate, or not to qualify, or when a person directly or indirectly engages in corruptly procuring the resignation of any officer for any pecuniary or other valuable consideration. This offense is a Class C felony. T.C.A. § 39-16-105.

Exceptions and Defenses

Reference Number: CTAS-639

It is an exception to the offenses of bribery, solicitation, and buying and selling public office that the benefit involved is a fee prescribed by law to be received by a public servant or any other benefit to which the public servant was lawfully entitled. Additionally, it is a defense that the benefit was a trivial benefit incidental to personal, professional, or business contacts, which involves no substantial risk of undermining official impartiality, or a lawful contribution made for the political campaign of an elective public servant when the public servant is a candidate for nomination or election to public office. T.C.A. § 39-16-106.

Misconduct Involving Public Officials and Employees

Reference Number: CTAS-640

The criminal statutes relating to misconduct of public officials and employees are found in T.C.A. §§ 39-16-401 *et seq.* "Public servant" is broadly defined for these purposes as a person elected, selected, appointed, employed or otherwise designated as one of the following:

1. An officer, employee or agent of government;
2. A juror or grand juror;
3. An arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
4. An attorney at law or notary public when participating or performing a governmental function;
5. A candidate for nomination or election to public office; or
6. A person who is performing a governmental function under claim of right although not legally qualified to do so.

T.C.A. § 39-16-401.

Official Misconduct

Reference Number: CTAS-641

“Tennessee’s official misconduct statute only applies to public officials who have an affirmative duty to act and refuse to do so or who misuse their official authority for private gain.” Op. Tenn. Atty. Gen. 09-72 (May 6, 2009). Pursuant to T.C.A. § 39-16-402(a), a public servant commits an offense who, with intent to obtain a benefit, or to harm another, intentionally or knowingly:

1. Commits an act relating to the servant’s office or employment that constitutes an unauthorized exercise of official power;
2. Commits an act under color of office or employment (acting or purporting to act in an official capacity or take advantage of such actual or purported capacity) that exceeds the servant’s power;
3. Refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the office or employment;
4. Violates a law relating to the servant’s office or employment, or
5. Receives any benefit not otherwise provided by law.

In 2012, the legislature amended this statute to make it an offense to purchase real property or otherwise obtain an option to purchase real property with intent to make a profit if the public servant knows that such real property may be purchased by a governmental entity and such information is not public knowledge. It is also an offense to acquire nonpublic information derived from such person’s position as a public servant or gained from the performance of such person’s official duties as a public servant and knowingly act on such nonpublic information to acquire, or obtain an option to acquire, or liquidate, tangible or intangible personal property with intent to make a profit. T.C.A. § 39-16-402(c).

It is a defense to prosecution for this offense that the benefit involved was a trivial benefit incidental to personal, professional or business contact, and involved no substantial risk of undermining official impartiality. T.C.A. § 39-16-402(d). The offense of official misconduct is a Class E felony. T.C.A. § 39-16-402(e). See *State v. Szczepanowski*, 2002 WL 1358681 (Tenn.Crim.App. 2002) (upholding the constitutionality of the statute); *State v. Chumbley*, 2007 WL 1774250 (Tenn.Crim.App. 2007) (jail administrator convicted of official misconduct and theft). See also Op. Tenn. Atty. Gen. 94-073 (June 16, 1994) (the acceptance of a gift by a county official or employee from a company that does business with the county may, depending upon the circumstances, constitute the criminal offense of official misconduct); Op. Tenn. Atty. Gen. U93-48 (April 6, 1993) (a school superintendent requiring vocational students to provide repair work to his personal residence may constitute official misconduct); Op. Tenn. Atty. Gen. 91-76 (August 20, 1991) (a deputy sheriff is not entitled to a reward given for a service performed within the duties of his office; the acceptance of such a reward might be considered official misconduct).

Under T.C.A. § 8-47-103, county attorneys are directed to investigate any complaint alleging that a county officer within their jurisdiction is guilty of any of the acts constituting official misconduct as set forth in T.C.A. § 8-47-101, and upon determination of reasonable cause, to institute a proceeding in the appropriate court to oust such official. Op. Tenn. Atty. Gen. 07-169 (December 21, 2007); Op. Tenn. Atty. Gen. 00-126 (August 7, 2000).

Official Oppression

Reference Number: CTAS-642

A public servant acting under color of office or employment (acting or purporting to act in an official capacity or taking advantage of actual or purported capacity) commits an offense who:

1. Intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt, search, seizure, dispossession, assessment or lien when the public servant knows the conduct is unlawful; or
2. Intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity, when the public servant knows the conduct is unlawful.

T.C.A. § 39-16-403(a).

An offense under this section is a Class E felony. T.C.A. § 39-16-403(c).

See *Coffey v. State*, 339 S.W.2d 1 (Tenn. 1960) (upholding constable’s conviction for official oppression and removal from office).

Misuse of Official Information

Reference Number: CTAS-643

A public servant commits an offense who, by reason of information to which the public servant has access in the public servant's official capacity and that has not been made public, attains or aids another to attain a benefit. An offense under this section is a Class B misdemeanor. T.C.A. § 39-16-404.

Suspension, Removal and Discharge from Office

Reference Number: CTAS-644

A public servant convicted of official misconduct, official oppression or misuse of official information shall be removed from office or discharged from the position. A public servant elected or appointed for a specified term shall be suspended without pay immediately upon conviction in the trial court and continuing through the final disposition of the case, removed from office for the remainder of the term during which the conviction occurred if the conviction becomes final, and barred from holding any appointed or elected office for ten years from the date the conviction becomes final. A public servant who serves at will shall be discharged upon conviction in the trial court. Subsequent public service shall rest upon the hiring or appointing authority provided that such authority has been fully informed of the conviction. T.C.A. § 39-16-406. See *State v. Keck*, 1997 WL 254228 (Tenn.Crim.App. 1997).

Purchasing Property Sold Through Court or Sheriff's Sale

Reference Number: CTAS-645

A judge, sheriff, court clerk, court officer, or employee of any court commits an offense who bids on or purchases, directly or indirectly, for personal reasons or for any other person, any kind of property sold through the court for which the judge, sheriff, court clerk, court officer, or employee discharges official duties. A bid or purchase in violation of this provision is voidable at the option of the person aggrieved. This offense is a Class C misdemeanor, with no incarceration. T.C.A. § 39-16-405. See Op. Tenn. Atty. Gen. 99-105 (May 10, 1999) (purchase of confiscated items by law enforcement officers, city or county employees at public auction).

In addition, no sheriff, deputy sheriff, or constable may purchase, either directly or indirectly, any property sold through their own judicial sale no matter which court is involved. T.C.A. §§ 8-8-206 and 8-10-116. See *also* Op. Tenn. Atty. Gen. 99-105 (May 10, 1999) (purchase of confiscated items by law enforcement officers, city or county employees at public auction).

Purchasing Surplus County Property

Reference Number: CTAS-646

It is also unlawful for any county official or employee to purchase from the county any property declared to be surplus by the county except by bid at public auction or competitive sealed bid during the tenure of such person's office or employment, or for six months thereafter. T.C.A. § 5-1-125. A violation of this statute is a Class A misdemeanor. See Op. Tenn. Atty. Gen. 03-131 (October 3, 2003).

Misrepresentation of Information to Auditor

Reference Number: CTAS-647

A public servant commits an offense who, with intent to deceive, knowingly misrepresents material information related to an audit conducted by a state auditor in the department of audit. This offense is a Class C misdemeanor. T.C.A. § 39-16-407.

Sexual Contact with Inmates

Reference Number: CTAS-648

It is an offense for a law enforcement officer, correctional employee, vendor or volunteer to engage in sexual contact with a prisoner or inmate who is in custody at a penal institution whether the conduct occurs on or off the grounds of the institution. This offense is a Class E felony. T.C.A. § 39-16-408.

Destruction of and Tampering with Governmental Records

Reference Number: CTAS-649

Pursuant to T.C.A. § 39-16-504, it is unlawful for any person to:

1. Knowingly make a false entry in, or false alteration of, a governmental record;
2. Make, present, or use any record, document or thing with knowledge of its falsity and with intent that it will be taken as a genuine governmental record; or
3. Intentionally and unlawfully destroy, conceal, remove or otherwise impair the verity, legibility or availability of a governmental record.

A violation of this section is a Class E felony. T.C.A. § 39-16-504(b). See *State v. Chumbley*, 2007 WL 1774250 (Tenn.Crim.App. 2007) (jail administrator convicted of official misconduct and destruction of and tampering with governmental records). See also Op. Tenn. Atty. Gen. 03-057 (May 1, 2003) (if a register of deeds determines that a recorded deed was not entitled to registration, the register is not authorized to remove the recorded deed but may record an instrument stating that the deed in question was not entitled to registration).

Private Use of County Road Equipment and Materials Prohibited

Reference Number: CTAS-650

The chief administrative officer shall not authorize or knowingly permit the trucks or road equipment, the rock, crushed stone or any other road materials to be used for any private use or for the use of any individual for private purposes. Any employee of the county road department who uses any truck or any other road equipment or any rock, crushed stone or other road material for that employee's personal use, or sells or gives those things away, shall be immediately discharged. No truck or other road equipment or any rock, crushed stone or any road material shall be used to work private roads or for private purposes of owners of the roads. T.C.A. § 54-7-202(a) - (c). A violation of this statute is a Class C misdemeanor. Each separate use of the same for other than authorized purposes constitutes a separate offense and is subject to a separate punishment. T.C.A. § 54-7-202(e). See *State ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn. 1981) ("The statute prohibits private use unequivocally, without mention of compensation and it follows that such use violates the statute, with or without compensation."); *State v. Keck*, 1997 WL 254228, *21 (Tenn.Crim.App. 1997) ("We note that regardless of the Defendant's good intentions, the statute clearly states that county equipment and materials shall not be authorized for private use. Whether the Defendant received any personal compensation or benefit is irrelevant."). See also Op. Tenn. Atty. Gen. 03-088 (July 15, 2003) (under the County Uniform Highway Act, the chief administrative officer of the county is specifically prohibited from authorizing or knowingly permitting the use of trucks, road equipment, rock, crushed stone or any other road material for private uses).

Misuse of County Time and Property

Reference Number: CTAS-651

A county official has a duty not to neglect the duties of the office. *State ex rel. Thompson v. Reichman*, 188 S.W. 225 (Tenn. 1916) (sheriff removed from office for neglect of office). Therefore, while outside activities may be permissible, they can cause problems if taken to extremes. For example, a county official could sell computers during non-working hours, but if a contract called for the county official to personally train the purchaser's employees to use the new equipment during regular working hours over the first month of operation, a serious question of neglect of duty could arise.

As the Attorney General has noted,

conflicts of interest exist whenever a legislator or other public official has placed himself in a position where, for some advantage gained or to be gained for himself, he finds it difficult if not impossible to devote himself with complete energy, loyalty and singleness of purpose to the general public interest. The advantage that he seeks is something over and above the salary, the experience, the chance to serve the people, and the public esteem that he gains from public office.

Op. Tenn. Atty. Gen. 85-036 (February 14, 1985), quoting 1959 Minnesota Governor's Committee on Ethics and Government Report 17, quoted in Note; Conflict of Interests: State Government Employees, 47 Va. L. Rev. 1034 (1961) (footnote 1).

The occasional use of the office telephone for personal business should not cause a problem. But if a county official was also, for example, a real estate broker, the official could not use their county office in a dual capacity, official and private, without violating various duties and violating the prohibition against the use of public property for private purposes, which would be a form of official misconduct. T.C.A. § 39-16-402. See Op. Tenn. Atty. Gen. 81-587 (November 3, 1981) (the offices in a county courthouse may be used only for a public purpose); Op. Tenn. Atty. Gen. 82-391 (a county official can not use county property to conduct an insurance business or any other business in his private capacity).

In *Azbill v. Lexington Mfg. Co.*, 188 Tenn. 477, 483, 221 S.W.2d 522 (1949), the Tennessee Supreme Court noted that public funds provided by taxation may be used only for public, not private, purposes. The Attorney General has opined that, consistent with the foregoing principle, public equipment and other property paid for, and public officers and employees compensated, by public funds appropriated for public purposes from revenues derived by counties from taxes authorized by law cannot properly be donated or applied by a county officer to a private use. Op. Tenn. Atty. Gen. 84-166 (May 17, 1984); Op. Tenn. Atty. Gen. 03-088 (July 15, 2003). See Op. Tenn. Atty. Gen. No. U93-48 (April 6, 1993) (it is improper for a county official to use publicly owned equipment for private gain); Op. Tenn. Atty. Gen. 97-043 (April 7, 1997) (a law enforcement officer should not perform services that are not part of his or her official responsibilities while wearing his/her uniform or driving a patrol car in a way that might convey that any services performed for a private individual are, in fact, being carried out as part of the officer's official duties). See also *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981) ("It is patently intolerable and clearly unlawful and an inexcusable dereliction of duty for a public official to allow public employees to work for private employers while being paid from the public treasury.").

Theft of Services

Reference Number: CTAS-652

Another offense closely related to the misuse of county time and property is "theft of services." In addition to other conduct, a person commits "theft of services" who:

Having control over the disposition of services to others, knowingly diverts those services to the person's own benefit or to the benefit of another not entitled thereto.

T.C.A. § 39-14-104(2).

As used in the statute, the term "services" is defined to include labor, skill, professional service, transportation, telephone, mail, gas, electricity, steam, water, cable television or other public services, accommodations in hotels, restaurants or elsewhere, admissions to exhibitions, use of vehicles or other movable property. T.C.A. § 39-11-106(a)(35). See *State v. Gardner*, 1990 WL 169233 (Tenn.Crim.App. 1990) (county sheriff who used deputy sheriffs to build his personal residence was convicted of misuse of public funds in violation of T.C.A. § 39-5-408, the statute replaced by T.C.A. § 39-14-104(2)).

Inmate Labor for Private Purposes Prohibited

Reference Number: CTAS-653

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may employ, require or otherwise use any such inmate housed therein to perform labor that will or may result directly or indirectly in such sheriff's, jailer's or other person's personal gain, profit or benefit or in gain, profit or benefit to a business partially or wholly owned by such sheriff, jailer or other person. This prohibition shall apply regardless of whether the inmate is or is not compensated for any such labor. T.C.A. § 41-2-148(a). See also Op. Tenn. Atty. Gen. 03-075 (June 18, 2003).

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may permit any such inmate housed therein to perform any labor for the gain, profit or benefit of a private citizen, or for-profit corporation, partnership or other business unless such labor is part of a court-approved work release program or unless the work release program operates under a commission established pursuant to T.C.A. § 41-2-134. T.C.A. § 41-2-148(b)(1). See *also* Op. Tenn. Atty. Gen. 03-125 (September 29, 2003).

Penalties

Reference Number: CTAS-654

Any sheriff, jailer or other person responsible for the custody of an inmate housed in a local facility who violates the provisions of T.C.A. § 41-2-148 regarding inmate labor for private purposes commits a misdemeanor and shall be punished upon a first conviction by a fine equal to the value of the services received from the inmate or inmates and imprisonment for not less than 30 days nor more than 11 months and 29 days. Upon a second or subsequent conviction for a violation of T.C.A. § 41-2-148, the sheriff, jailer or other person is guilty of a felony and is subject to a fine of not less than the value of the services received from the inmate or inmates nor more than \$5,000 and imprisonment for not less than one nor more than five years. If the person violating T.C.A. § 41-2-148 for the second or subsequent time is a public official, in addition to the punishment set out above such person shall immediately forfeit his office and shall be forever barred from holding public office in this state. T.C.A. § 41-2-148(d)(1).

Any private citizen, corporation, partnership or other business knowingly and willfully using inmate labor in violation of T.C.A. § 41-2-148(b) commits a Class A misdemeanor and, upon conviction, shall be punished by a fine of \$1,000 and by imprisonment for not more than 11 months and 29 days. Each day inmate labor is used in violation of T.C.A. § 41-2-148(b) constitutes a separate offense. T.C.A. § 41-2-148(d)(2).

In the case of *In re Williams*, 987 S.W.2d 837 (Tenn. 1998), the Tennessee Supreme Court heard the appeal of Judge Billy Wayne Williams from the Court of the Judiciary's judgment recommending that he be removed from the office of general sessions court judge of Lauderdale County. Judge Williams had, among other things, used an inmate from the county jail to help build a house for his son. "Judge Williams asserted that he was unaware that the practice of using prison labor for personal work was illegal. He believed that he had committed no impropriety because other county officials had also used prison labor as an 'informal work release program.' Although several other witnesses testified that private individuals in Lauderdale County had a long standing practice of using inmate labor for personal work, it was undisputed that Lauderdale County did not have a formal, approved work release program." *Id.* at 838-839.

Noting that the use of an inmate for a private purpose is a criminal offense, the court found that neither assertion constituted a defense to the disciplinary charges and held that the judge's use of an inmate from the county jail to help build a house for his son violated several canons of the Code of Judicial Conduct. *Id.* at 841-842. The Supreme Court affirmed the Court of the Judiciary's recommendation that Judge Williams be removed from office. *Id.* at 844. See *also Jordan v. State ex rel. Williams*, 397 S.W.2d 383 (Tenn. 1965) (approving the ouster from office of a county commissioner for utilizing for his own benefit equipment and supplies of the county penal farm and labor of its inmates).

Reporting Fraud

Reference Number: CTAS-655

In 2007, the General Assembly passed the "Local Government Instances of Fraud Reporting Act," codified at T.C.A. § 8-4-501 *et seq.* The act requires public officials to report the unlawful taking of public money, property, or services to the comptroller of the treasury. The act states:

A public official with knowledge based upon available information that reasonably causes the public official to believe that a theft, forgery, credit card fraud, or any other act of unlawful taking of public money, property, or services has occurred shall report the information in a reasonable amount of time to the office of the comptroller of the treasury.

T.C.A. § 8-4-503(a).

"Unlawful conduct" means theft, forgery, credit or debit card fraud, or any other act of unlawful taking, waste, or abuse of, or official misconduct, as defined in T.C.A. § 39-16-402, involving public money, property, or services. T.C.A. § 8-4-502(4). "Reasonable amount of time" means any amount of time that is reasonable under the particular circumstances, but shall not under any circumstances exceed five working days. T.C.A. § 8-4-502(3).

An official who, acting in good faith, makes a report shall not be held liable in any civil or criminal action that is based solely upon (1) the person's decision to report what the person believed to be unlawful conduct; (2) the person's belief that reporting the unlawful conduct was required by law; or (3) the fact that a report of unlawful conduct was made. T.C.A. § 8-4-504(a). However, no immunity is conferred if the person reporting the unlawful conduct participated in or benefitted from the conduct. T.C.A. § 8-4-504(b).

Additionally, the comptroller is required to maintain a hotline whereby government employees and citizens can report alleged fraud, abuse, or wrongdoing by local governments and private corporations that contract with a local government to receive one or more community grants. The comptroller is required to investigate the information received through the calls to the hotline or refer such information to the appropriate program or investigative agency. Upon receiving the information relating to a call, a local government or community grant agency must undertake investigatory and remedial measures. T.C.A. §§ 8-4-402, -404 and -406.

Bribery for Votes

Reference Number: CTAS-656

The Tennessee Constitution and statutes also prohibit offering bribes for votes. *Clariday v. State of Tennessee*, 552 S.W.2d 759 (Tenn. 1976); *State v. Prybil*, 211 N.W.2d 308 (Iowa 1973). It is unlawful for any candidate for a county office to expend, pay, promise, loan or become pecuniarily liable in any way for money or any other thing of value, either directly or indirectly, or to agree to enter into any contract with any person to vote for or support any particular policy or measure, in consideration of the vote or support, moral or financial, of that person. T.C.A. § 2-19-121. See Op. Tenn. Atty. Gen. 07-113 (July 30, 2007) (paying a fee to a group or individual in exchange for their endorsement would violate T.C.A. § 2-19-121, which bars a candidate from bargaining for support).

A violation of this statute, known as bargaining for votes, is a Class C misdemeanor. T.C.A. § 2-19-123. It is not illegal under this statute to make expenditures to employ clerks or stenographers in a campaign, for printing and advertising, actual travel expenses, or certain other allowed expenditures. T.C.A. § 2-19-124.

A stronger prohibition against bribing voters is found in the statute which makes it illegal for a person, whether directly or indirectly, either personally or through another person, to pay or give anything of value to a voter to influence the person's vote (or failure to vote) in any election, primary or convention. T.C.A. § 2-19-126. See Op. Tenn. Atty. Gen. 02-073 (June 10, 2002) (awarding a prize to individuals who voted in an election violates the prohibitions of T.C.A. § 2-19-126 against offers of something of value in return for voting and direct payments given on account of voting). A violation of this statute is a Class C felony. T.C.A. § 2-19-128. Voters are also prohibited from accepting bribes, and the same penalty applies. Betting on elections is also prohibited. T.C.A. §§ 2-19-129 through 2-19-131.

In *State ex rel. Anderson v. Fulton*, 712 S.W.2d 90 (Tenn. 1986), a case involving the matter of whether the district attorney abused his or her discretion in refusing to bring a quo warranto proceeding against the Mayor of Nashville-Davidson County as requested by an unsuccessful candidate for that office, the Tennessee Supreme Court considered the question of bribery in violation of the bribery statutes and Article 10, Section 3 of the Tennessee Constitution, which states:

Any elector who shall receive any gift or reward for his vote, in meat, drink, money or otherwise, shall suffer such punishment as the law shall direct. And any person who shall directly or indirectly give, promise or bestow any such reward to be elected, shall thereby be rendered incapable, for six years, to serve in the office for which he was elected, and be subject to such further punishment as the Legislature shall direct.

The allegations of wrongdoing on the part of the Mayor involved distribution of free cheese and butter to low income groups through the Metropolitan Development and Housing Agency, and a barbecue and watermelon feast sponsored by the Mayor's re-election committee.

In finding no bribery under these circumstances, the Supreme Court explained the bribery prohibition as follows:

The prohibition of the Constitution and the statute involved here is directed to the giving or promising of rewards such as meat, drink, money or things of value for a vote to be elected to public office. Ms. Anderson and her attorney did not provide the District Attorney with a single instance wherein it was factually asserted that Mayor Fulton had given anything of value in exchange for a promise to vote for him in the Mayoral election. Implicit in the District Attorney General's letter of May 17 was the observation that the serving of food at a traditional political rally promoting a candidate for election to public office, to which the general public is invited, lacks the essential element of bribery, to-wit: that a voter is given food in exchange for his vote, which element was also not present in the distribution of butter and cheese.

Fulton, at 93 - 94.

Removal From Office-Ouster

Reference Number: CTAS-657

Article 7, Section 1 of the Tennessee Constitution provides that county officers shall be removed from office for malfeasance or neglect of duty. "The terms 'malfeasance' and 'neglect of duty' are comprehensive terms and include any wrongful conduct that affects, interrupts, or interferes with the performance of official duty." *State ex rel. Complainant v. Ward*, 43 S.W.2d 217, 219 (Tenn. 1931).

Pursuant to T.C.A. § 8-47-101, county officials may be ousted from office for:

1. Knowing or willful misconduct in office;
2. Knowing or willful neglect of duties required by law;
3. Voluntary intoxication in a public place;
4. Engaging in illegal gambling; or
5. Committing any act violating any penal statute involving moral turpitude.

Participating in the Tennessee lottery is not considered gambling. T.C.A. § 8-47-127.

"Proceedings under the Ouster Act should never be brought unless there is a clear case of official dereliction. This is a very drastic statute and should not be invoked except in plain cases that can be certainly proved." *State ex rel. Wilson v. Bush*, 208 S.W. 607, 609 (Tenn. 1919). See, e.g., *McDonald v. Brooks*, 387 S.W.2d 803, 806 (Tenn. 1965) (ouster suits should be brought only where the evidence of official dereliction is clear and convincing). As has been noted by the Tennessee Supreme Court:

The Ouster statute is a salutary one, but those administering it should guard against its overencroachment. Shreds of human imperfections gathered together to mold charges of official dereliction should be carefully scanned before a reputable officer is removed from office. These derelictions should amount to knowing misconduct or failure on the part of the officer if his office is to be forfeited; mere mistakes in judgment will not suffice.

Vandergriff v. State ex rel. Davis, 206 S.W.2d 395, 397 (Tenn. 1937) (emphasis added).

"Misconduct that would sustain an indictment under the common law would support a proceeding under the Ouster Law." *State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 597 (Tenn.Ct.App. 2008). Nevertheless, a plaintiff in an ouster suit shoulders a heightened burden of proof. *Id.* The Tennessee Court of Appeals has noted:

As used in reference to the ouster statute, the terms "knowingly" and "willfully" have been defined as encompassing "a mental attitude of indifference to consequences or failure to take advantage of means of knowledge of the rights, duties or powers of a public office holder." *Tennessee ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn.1981) (citing *Jordan v. State*, 217 Tenn. 307, 397 S.W.2d 383, 398 (1965)). The *Jordan* court also noted that the terms "knowingly" and "willfully" as used in ouster proceedings are "not confined to a studied or deliberate intent to go beyond the bounds of the law." *Jordan*, 397 S.W.2d at 399. However, it requires more than "simple negligence" to constitute willful or knowing misconduct. *Id.* (holding "simple negligence in discharging the duties of an officer does not constitute or amount to an officer acting knowingly or willfully").

Id. at 598.

Ouster is purely a civil proceeding and the rights granted to defendants in criminal cases are not applicable under the ouster statutes. *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981). Ouster proceedings may be instituted by the attorney general, district attorney general, or county attorney, either on their own initiative or after a complaint has been made. T.C.A. § 8-47-102. County attorneys, within their respective jurisdictions, are required to investigate any complaint made in writing alleging that a

county officer is guilty of any of the acts, omissions, or offenses set out in T.C.A. § 8-47-101, and upon determination of reasonable cause, to institute a proceeding in the appropriate court to oust such official. T.C.A. § 8-47-103. See Op. Tenn. Atty. Gen. 07-169 (December 21, 2007); Op. Tenn. Atty. Gen. 00-126 (August 7, 2000). Note that the county commission is not authorized by statute to bring ouster proceedings against county officials. "Nor, is the county executive authorized under the ouster statutes to bring such a suit." *Duncan v. Cherokee Ins. Co.*, 1987 WL 11329 (Tenn.Ct.App. 1987).

County attorneys have the power and are directed, whenever a complaint has been made, and the names of the witnesses have been furnished to them, or whenever they deem necessary, to issue subpoenas for witnesses and other persons they believe have knowledge of the complaint, to appear before them at a time and place designated in the subpoena and testify concerning the subject matter set out in the complaint. T.C.A. § 8-47-104. Each witness must be sworn and the testimony of each witness must be reduced to writing and signed by the witness. County attorneys may administer the necessary oaths and affirmations to the witnesses. T.C.A. § 8-47-105. Disobedience of a subpoena, or refusal to answer proper questions propounded by the county attorney at the inquiry, is a Class C misdemeanor. T.C.A. § 8-47-106.

The privilege against self incrimination does not apply in ouster proceedings. No person will be excused from testifying under the ouster statutes on the ground that the person's testimony may incriminate him or her. However, no person may be prosecuted or punished on account of any transaction, matter, or thing concerning which the person was compelled to testify, and the testimony cannot be used against the person in prosecutions for any crime or misdemeanor under the laws of this state. T.C.A. § 8-47-107. Citizens may also file ouster proceedings. Ten citizens and freeholders are required to institute the proceedings and they must post security for the costs of the lawsuit. T.C.A. § 8-47-110. *State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010). It is the duty of the county attorney, upon request of relator citizens and freeholders, to aid and assist in the prosecution of the proceedings against county officers. T.C.A. § 8-47-111.

When an ouster petition or complaint is filed the court may suspend the accused officer from performing any of the duties of their office, pending a final hearing and determination of the matter. The vacancy should be filled as the law provides for the filling of vacancies in that office. The person filling the vacancy carries on the duties of the office until the hearing is concluded or until a successor is elected. T.C.A. § 8-47-116. The officer temporarily filling the office receives the same salary and fees as paid to the suspended officer. T.C.A. § 8-47-121.

At least five days before an official is suspended, the official must receive a notice setting forth the time and place of the hearing on the suspension application. The officer has the right to appear and make any defense that the officer may have, and shall be entitled to a full hearing upon the application for the order of suspension. No order of suspension shall be made, except upon finding of good cause. T.C.A. § 8-47-117.

Ouster proceedings have precedence over civil and criminal actions, and must be tried at the first term after the filing of the complaint or petition, provided that the answer of the accused officer has been on file at least ten days before the day of trial. The accused officer is entitled to demand and have a trial by jury as to any issue of fact. T.C.A. § 8-47-119. Likewise, plaintiffs in an ouster suit are entitled to a trial by jury as to any issue of material fact. *State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010). If the officer is found guilty, the officer shall be ousted from office and must pay the full costs adjudged in the case. T.C.A. §§ 8-47-120 and 8-47-122.

If, after the final hearing the officer is not removed from office, the officer shall, if the officer has been suspended, be immediately restored to office and be allowed the officer's full costs and the salary and fees of the officer's office during the time of the officer's suspension. After the final hearing, any officer not removed from office may be reimbursed reasonable attorney fees. However, if either party appeals no such reimbursement shall be made until a final judgment is rendered. T.C.A. § 8-47-121. See *State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 602 (Tenn.Ct.App. 2008) (denying attorney fees). See also *Marshall v. Sevier County*, 639 S.W.2d 440 (Tenn.Ct.App. 1982).

Either party to an ouster proceeding may appeal, but the appeal does not operate to suspend or to vacate the trial court's judgment or decree, which remains in full force until vacated, revised or modified. T.C.A. § 8-47-123. An ouster suit has priority on appeal and will be heard at the first term after such appeal is perfected and filed. T.C.A. § 8-47-125.

Ouster Cases

Reference Number: CTAS-658

State ex rel. Wolfenbarger v. Moore, 2010 WL 520995 (Tenn.Ct.App. 2010) (county commissioner ousted for committing perjury).

State, ex rel. Estep v. Peters, 815 S.W.2d 161 (Tenn. 1991) (school superintendent ousted for knowingly or willingly misapplying public funds and failing to make required financial reports to the county commission).

Tennessee ex rel. Leech v. Wright, 622 S.W.2d 807, 817 (Tenn.1981) (road superintendent ousted for knowingly and wilfully permitting county equipment to be used by private company, knowingly and wilfully permitting a county employee to work for a private company at the same time that he was being paid by the county, and failing to comply with competitive bidding procedures).

Jordan v. State ex rel. Williams, 397 S.W.2d 383 (Tenn. 1965) (county commissioner ousted for utilizing for his own benefit equipment and supplies of the Shelby County Penal Farm and labor of its inmates).

Edwards v. State ex rel. Kimbrough, 250 S.W.2d 19 (Tenn. 1952) (sheriff ousted for knowingly and willfully neglecting his duty to "suppress affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace").

State ex rel. Ten Citizens of Campbell County v. Smith, 11 S.W.2d 897 (Tenn. 1928) (chairman of the county board of education ousted upon finding that he failed to countersign thousands of warrants authorized by the board of education, as required by law, but instead provided his secretary a rubber stamp with which to sign the chairman's name to the warrants).

State ex rel. Milligan v. Jones, 224 S.W. 1041 (Tenn. 1920) (director of school district ousted where there had been no meeting of the board of directors after the director had been elected, and he had repeatedly signed the names of all the directors to school warrants, he had failed and neglected to take care of the school property, and he had hauled coal from the school grounds).

State ex rel. Thompson v. Reichman, 188 S.W. 225 (Tenn. 1916) (sheriff removed from office for neglect of office).

Highway

Reference Number: CTAS-105

Most county highway departments in Tennessee are subject to a set of general state statutes known as the County Uniform Highway Law (CUHL). The CUHL can be found at T.C.A. § 54-7-101 *et seq.*. You can access the law at the Tennessee Code Annotated link above. **PLEASE NOTE:** The CUHL was substantially rewritten in 2012. The new law, enacted by Public Chapter 689, became effective January 1, 2013. [Click here to view Public Chapter 689.](#)

The County Uniform Highway Law does not apply in Shelby, Davidson, Knox and Hamilton counties. T.C.A. § 54-7-102. Those counties operate their highway or public works departments pursuant to either a metropolitan government charter (Davidson), county charter (Shelby, Knox) or private act (Hamilton). Although the CUHL deals with many important aspects of the county highway department, it does not deal with all aspects, such as how the head of the department is selected or who purchases for the department. Therefore, most counties also have private acts that deal with issues not addressed by the CUHL. Some of these private acts were enacted prior to the adoption of the CUHL in 1974 and have provisions that conflict with the CUHL. In those instances, the CUHL will override any conflicting provisions in the private act unless a rational basis exists for suspending the general law for the particular county. Op. Tenn. Att'y Gen. 99-058 (March 10, 1999).

The organization of the highway department varies from county to county. Some counties have a policy making body of a few members known as the county highway commission (or by some similar title) while others do not. Almost all counties have a department head or chief administrative officer (CAO), as that person is referred to in the County Uniform Highway Law found at T.C.A. 54-7-101 *et seq.*, (hereafter CUHL). The titles for chief administrative officer vary from county to county but the most common title is county highway superintendent.

Method of Election. The CUHL does not provide for the method of election of the chief administrative officer or other highway officials. Therefore, the method of election may be provided by private act. Such

a private act must be in effect in order for a popular election to take place. In counties with a county charter or a metropolitan government charter, the charter determines whether or not a separate highway department exists, and whether the department head is a popularly elected or appointed official with a term of office or an appointed position subject to removal by the appointing authority.

Term of Office. The CUHL specifies that in those counties in which it applies, the chief administrative officer shall serve a term of four (4) years. Elected chief administrative officers are to take office on September 1, following their election. T.C.A. § 54-7-105. The terms of office of other highway officials, such as highway commissioners or members of a road board, in counties under the CUHL, are set forth in private acts affecting the particular county.

Qualifications-Highways

Reference Number: CTAS-232

The **Qualifications** for holding the office of county highway superintendent, or chief administrative officer by whatever title, are determined by the general law and are covered under the **General Information** tab of the County Offices topic. Under the CUHL, at T.C.A. § 54-7-104, the chief administrative officer must have:

1. A high school education or general equivalency diploma (GED) [Note: This is only satisfied by having an actual diploma from a high school or an equivalent degree recognized by the Tennessee State Board of Education.], and
2. At least one of the following:
 - (a) Be a graduate of an accredited school of engineering, with at least two (2) years of experience in highway construction or maintenance;
 - (b) Be licensed to practice engineering in Tennessee; or
 - (c) Have had at least four (4) years' experience in a supervisory capacity in highway construction or maintenance; or a combination of education and experience equivalent to (a) or (b), as evidenced by affidavits filed with the board.

The CUHL does not apply to Shelby, Davidson, Knox and Hamilton counties. T.C.A. § 54-7-102. The qualifications of department heads in these counties are determined by private act or according to the metropolitan charter, in the case of Davidson County.

The CUHL provides that incumbents in office on December 31, 2012, who have met the qualifications for the office of chief administrative officer applicable to them in effect at the time of their last election shall be able to succeed themselves in office without meeting the qualifications set forth in this section for as long as such incumbents continuously hold office. If such incumbent leaves office for any reason and then subsequently is elected or appointed to the office of chief administrative officer, such incumbent shall then be subject to the qualifications set forth in this section.

Under prior law, if the chief highway administrator was an elected official, the highway committee of the county legislative body certified to the county election commission that each candidate's qualifications were acceptable prior to the candidate's name being placed on the ballot. This law changed in 1989, so that the state coordinator of elections, not the county highway committee of the county legislative body, examined the candidates' qualifications and certified them to the county election commission. The law changed yet again in 1997 with the creation of the Tennessee Highway Officials Certification Board. This board consists of one member appointed by the Secretary of State, one member appointed by the director of the Tennessee chapter of the American Public Works Association, one member appointed by the Governor from a list of nominees submitted by the professional engineering society of Tennessee, one member appointed by the Comptroller and one member appointed by the director of the Tennessee County Services Association. This body reviews the qualifications of all candidates for the position of chief administrative officer of the county highway or public works department. This includes appointed as well as elected positions.

Candidates for a popularly elected office of chief administrative officer still file affidavits and such other evidence of their qualifications with the state coordinator of elections at least fourteen (14) days prior to the qualifying deadline for candidates in the election. The coordinator of elections forwards the materials to the board which rules on the qualifications and certifies that a candidate is qualified to be placed on the ballot. A certificate of qualification must be filed with a candidate's qualifying petition prior to the qualifying deadline. Subject to the approval of the Secretary of State, the Tennessee Highway Officials Certification Board may promulgate rules to be followed by persons wishing to submit themselves for cer-

tification as qualified to seek the office of chief administrative officer of the county highway department. The current board has established some rules and guidelines for submitting qualifications to the board. Persons appointed to the office of highway superintendent are required to file proof of their qualifications with the board prior to their appointment. T.C.A. § 54-7-104.

Challenges to qualifications must be filed in writing with the certification board by noon on the third day after the qualifying deadline in counties filling the position by popular election. The local appointing authority determines the deadline for challenges where the position is filled by appointment. T.C.A. § 54-7-104.

Oath of Office and Bond-Highways

Reference Number: CTAS-235

Oath of Office is covered under the **General Information** tab of the County Offices topic. **Bonds** are covered under the **General Information** tab of the County offices topic.

Compensation-Highways

Reference Number: CTAS-234

The chief administrative officer must receive at least the minimum salary stated under T.C.A. § 8-24-102. If two or more CAOs are elected or appointed with equal duties, the compensation is divided equally between them. T.C.A. § 54-7-106. The legislative body may at any time increase or decrease the salary of the CAO as long as it is maintained at or above the minimum salary level. T.C.A. § 54-7-106. The salary of the CAO must be at least 10 percent greater than that of the general officers of the county. T.C.A. § 8-24-102(g).

The CUHL places authority over county highway department personnel with the CAO. The CAO may employ qualified administrative personnel necessary to handle correspondence, maintain accurate records of receipts and expenditures, equipment, supplies, materials, maintenance performed, and other items necessary to operate the highway department. The CAO determines the total number of employees (within the limits of the available budget), personnel policy and work hours, job classifications, and policies and wages within the classifications. The compensation established should be consistent with pay in similar services in the county and surrounding area. T.C.A. § 54-7-109. In addition, the wages must comply with the federal Fair Labor Standards Act regarding minimum wage and overtime compensation as well as other federal and state statutes dealing with personnel.

Additional information about **compensation** is covered under the **General Information** tab of the County Offices topic.

Duties-Highways

Reference Number: CTAS-106

County highway commissions, often called road boards, are not required by general law. They are created by private act. Some road boards are popularly elected and some are appointed by the county legislative body. Private acts may grant road boards a role in budgeting and purchasing for the road department. Private acts cannot, however, authorize road boards to encroach upon the personnel policy powers or day-to-day administrative authority of the CAO over the personnel of the highway department or encroach upon other powers given to the CAO by the CUHL, such as authority over the county road system.

Personnel Management

Reference Number: CTAS-112

In the counties under the CUHL, the chief administrative officer is given the following authority under T.C.A. § 54-7-109:

It is the duty of the chief administrative officer to employ qualified administrative personnel as required to handle all administrative functions, including maintenance of financial records, inventory of equipment, supplies, and materials, preservation of maintenance records, maintenance of the

official county road list, and all other functions necessary for the operation of the highway department.

The chief administrative officer is authorized to determine the total number of employees of the highway department, to determine personnel policies, hours of work, to establish job classifications, and to establish policies and wages within the classifications. The compensation established by the chief administrative officer should be in keeping with the compensation paid for similar services in the county and surrounding area.

This act clearly places authority over county highway department personnel with the chief administrative officer in CUHL counties. In other counties not under the CUHL, the private acts, county charter or metropolitan charter must be consulted to determine who has personnel authority.

The department head in all counties must be aware that the department's personnel policies must not conflict with the Federal Fair Labor Standards Act (FLSA) or the anti-discrimination laws. And of course, the number of personnel hired and their compensation is limited by the budget available. Department heads must also conform to T.C.A. §§ 5-23-101 through 5-23-112, which requires all county officials to establish certain basic personal policies, have the policies reviewed by an attorney and file the policies with the county clerk. Failure to do so will allow the county commission to create these policies for the official or, as an alternative, the official may choose to join in a county-wide policy.

Relocation of Utilities

Reference Number: CTAS-2464

Sometimes a county road project will require the relocation of utilities placed within the county right-of-way. Utilities can be required to move their facilities if relocation is necessary for the road project. The question often arises as to who is responsible for paying the costs associated with the utility relocation. Tennessee follows the common law rule that in the absence of a statute providing otherwise, public utilities must remove their facilities at their own expense *Pack v. Southern Bell Tel. & Tel. Co.*, 387 S.W.2d 789 (1965); *State v. Southern Bell Tel. & Tel. Co.*, 319 S.W.2d 90 (1958) (cert. denied by U.S. Supreme Court, *Memphis Transit Co v. Tennessee ex rel Leech*, 359 U.S. 1011 (1959)); *Bristol Tenn. Housing Authority v. Bristol Gas Corp.*, 407 S.W.2d 681 (1966); *Metropolitan Development and Housing Agency v. South Central Bell Telephone Co.*, 562 S.W.2d 438 (Tenn. App. 1978).

Statutory authority exists for the state to reimburse utilities for their costs in relocating facilities involved in projects undertaken by TDOT. T.C.A. § 54-5-804. This statute authorizes, but does not require, reimbursement. In contrast, T.C.A. § 13-20-303 requires municipalities, housing authorities and other public bodies of the state to reimburse utilities for relocation costs if the relocation is related to a redevelopment or urban renewal project. Aside from these two statutes, there does not appear to be any statutory authorization or requirement to reimburse utilities for relocation expenses.

Duties of the Chief Administrative Officer

Reference Number: CTAS-110

In counties under the CUHL, the chief administrative officer of the county highway department has general control over the location, relocation, construction, reconstruction, repair, and maintenance of the county road system as well as the other administrative tasks which are conferred by the general law, plus any other authority granted by private act which does not conflict with the general law. T.C.A. 54-7-109.

In many counties without a highway commission, a committee of the county legislative body is often formed as a liaison and advisory board, but in CUHL counties, this committee only recommends actions to the chief administrative officer and advises the county legislative body as a whole on road matters.

Supervision of Road Work

Reference Number: CTAS-107

In CUHL counties, the chief administrative officer is generally responsible for the use and control of all machinery, tools, supplies and material owned or used by the county in the construction, reconstruction, repair, and maintenance of county roads and bridges. T.C.A. § 54-7-112. Although not as clearly stated

in the general law, it appears that the CUHL considers the chief administrative officer responsible for the operational control of all road and bridge work whether or not the chief administrative officer is in personal supervision of a particular project.

In keeping with this general operational supervision of the county roads and bridges, T.C.A. § 54-7-201 authorizes the chief administrative officer in CUHL counties to remove or cause to be removed any fence, gate, or other obstruction from the roads, bridges, and ditches of the county and to clean out and clear all ditches along or adjacent to the county roads. Any person who refuses to remove such an obstruction from a county right-of-way upon direction of the chief administrative officer is guilty of a misdemeanor.

Utilities that have the right or permission to place transmission lines, telephone or telegraph lines or poles on or along the right-of-way of any county road must do so under the direction of and with the permission of the chief administrative officer. T.C.A. § 54-7-201.

The chief administrative officer is empowered to employ legal counsel or solicit the use of counsel retained by the county to prosecute or defend litigation caused by or necessary to the operation of the county highway department. T.C.A. § 54-7-110.

Annual Work Program

Reference Number: CTAS-108

In CUHL counties, the chief administrative officer is required to prepare and submit to the county legislative body and to the State Department of Transportation an annual work program to be financed under the state aid highway system program. The priorities for proposed work should consider the degree of deficiencies in the structural condition, capacity, and safety of existing roadway, traffic volume, and the desirable level of service necessary for schools, religious institutions, industry, recreational facilities, and other major uses. T.C.A. § 54-7-111.

Duties of Popularly Elected Highway Commissions

Reference Number: CTAS-113

The authority given by private act to highway commissions must be consulted along with the CUHL to determine what powers such highway commissions may exercise. The private acts are effective with regard to the county highway commission and county highway department except where they conflict with the general law (particularly the CUHL). County highway officials in doubt as to the officer or commission with authority over a particular issue should consult with their own attorney, the county attorney, or the legal staff of The University of Tennessee's County Technical Assistance Service (CTAS).

Duties of Appointed Highway Commissions

Reference Number: CTAS-114

County highway commissions that are not popularly elected, such as those elected by the county legislative body, or appointed by the county mayor/executive, may serve as an advisory body to the chief administrative officer. Appointed highway commissions may play a role in budgeting in some counties. In determining the exact role of the appointed highway commission, the private act establishing duties of the appointed highway commission must be carefully studied in light of the CUHL and other general laws.

Inventory and Other Records

Reference Number: CTAS-109

The CUHL states that the chief administrative officer shall make or cause to be made a complete inventory of all machinery, equipment, tools, supplies and materials and file copies of the complete inventory with the county governing body and the chief executive officer of the county within sixty (60) days after taking office and thereafter a revised current inventory must be submitted by September 1 of each year effective the preceding July 1 of each year. This inventory also shall be maintained by the chief administrative officer and made available to the Comptroller for audit purposes. T.C.A. § 54-7-112.

All machinery, equipment, and tools are required to be plainly marked as the property of the county highway department. Each item must be numbered with the number entered on the inventory filed by the chief administrative officer. The county mayor/executive is obligated to examine these inventories for compliance with the law and may withhold funds from the county highway department until the chief administrative officer is in compliance. T.C.A. § 54-7-112.

Another type of record that the highway department must be careful with are personnel records. An employee's, including a former employee's, home telephone and personal cell phone numbers, bank account information, health savings account information, retirement account information, pension account information, Social Security number, residential address, driver's license information (except where driving is a part of the employee's job), and similar information for the employee's family and household members are confidential. Where this confidential information is part of a file or document that would otherwise be public information, such information shall be redacted if possible so that the public may still have access to the non-confidential portion of the file or document. T.C.A. § 10-7-504(f) & (g).

Purchasing-Highways

Reference Number: CTAS-115

The CUHL provides some rules in regard to purchasing, but it does not specify the purchasing agent for the county highway department. The CUHL statute on this subject, T.C.A. § 54-7-113(c)(3), states that the CUHL rules on purchasing found in this statute do not have the effect of repealing existing statutes, including private acts, which establish purchasing provisions for a county road department; however, no county road department is required to publicly advertise and competitively bid purchases of \$10,000 or less even if such bids are now required by public or private act.

Therefore, in CUHL counties, the purchasing agent for the department may be the chief administrative officer of the highway department or some other official under the provisions of a private act, the county purchasing agent under the optional 1957 County Purchasing Law (T.C.A. § 5-14-101 *et seq.*), or the Director of Finance under the County Financial Management System of 1981 (T.C.A. § 5-21-101 *et seq.*). However, in CUHL counties without specific purchasing policies under these other authorities, purchasing should be done in accordance with the procedures found in T.C.A. § 54-7-113(c).

The following purchasing procedures apply to all CUHL counties that have not established any other private act or general law purchasing procedure prior to July 1, 1980:

1. All purchases of \$10,000 or more must be publicly advertised and competitively bid;
2. Purchases of like items that individually cost less than \$10,000 but are customarily purchased in lots of two or more must be advertised and bid if the total purchase price of these items is expected to exceed \$10,000 during any fiscal year;
3. Repair of heavy road building machinery or other heavy machinery for which limited repair facilities are available need not be bid;
4. Purchases of any supplies, materials, or equipment for immediate delivery may be made without bidding in actual emergencies arising from unforeseen causes but such emergencies shall not include conditions arising from neglect or indifference in anticipating normal needs;
5. Leases or lease-purchase arrangements requiring payment of \$10,000 or more, or continuing for 90 days or more, must be advertised and competitively bid [Also, leases and lease-purchase agreements must be approved by the county legislative body. T.C.A. § 7-51-904]; and
6. All purchases costing less than \$10,000 may be made in the open market without newspaper notice, but, wherever possible, should be based upon at least three competitive bids.

T.C.A. § 54-7-113.

County highway departments are authorized to purchase used or secondhand articles from any federal, state or local governmental unit or agency without public advertisement and competitive bidding. They are also authorized to purchase used or secondhand articles from any private individual or entity without public advertisement and competitive bidding as long as they document the general range of value of the item through a listing in a nationally recognized publication or through an appraisal by a licensed appraiser and the price is not more than five percent (5%) higher than the highest value of the documented range. T.C.A. § 12-3-1202. See also Attorney General Opinion 13-044 (6/10/13) (stating that the general range of value may not be documented using advertised prices found on the Internet).

County governments may purchase goods and services through a competitive reverse auction process that allows offerors to bid on specified goods or services electronically and adjust bid pricing during a

specified time period in accordance with T.C.A. § 12-3-1208. Before initial use of a reverse auction, the county must file a plan with the Comptroller stating the technology to be used, whether a third party will conduct the auctions, describing the policies and procedures to be used, documenting internal controls, and stating whether additional operating resources will be needed and if so, indicating prior approval of the local governing body. Items and services that cannot be purchased through a reverse auction are: construction services (except maintenance, repairs, and renovations costing less than \$25,000); architectural or engineering services; new or unused motor vehicles (except school buses, garbage trucks, fire trucks, ambulances, and other special purpose vehicles); and new or unused construction equipment.

Counties are also authorized to enter into negotiated contracts, including joint contracts with other counties and/or municipalities, with a bank, investment bank or other similar financial institution to stabilize fuel expenses. Any contract entered into under this section must be for a term of no more than twenty-four (24) months. T.C.A. § 7-51-911.

The CUHL does not specify the officials who must sign warrants on the county highway fund for funds to be disbursed. This is a matter left to the private acts or local option laws and will vary from county to county. In some counties, co-signatures of the chief administrative officer and the county mayor/executive are required, but in a large number of counties, the lone signature of the chief administrative officer of the highway department will be honored by the trustee.

Contracts with other Governmental Entities; No Private Use of Equipment

Reference Number: CTAS-116

T.C.A. § 54-7-202 generally prohibits the use of county highway department equipment or material for any purpose other than a county highway purpose. Work on private roads or for private purposes is strictly forbidden. Neither can rock, crushed stone, or any other road material be sold or given away. If any employee of the county road department uses any truck, equipment, or any rock or material for personal use or sells or gives anything belonging to the county away, the chief administrative officer is obligated to discharge the employee immediately. The county highway department cannot legally gravel churchyards, privately-owned graveyards, or privately-owned roads leading either to churchyards or to privately owned cemeteries. Tenn. Op. Atty. Gen. 84-300 (November 8, 1984).

The CUHL prohibits a county official from using county equipment to perform work on a private road or for private purposes even if the county is reimbursed for the work. T.C.A. § 54-7-202(c). The only exception regarding working on a private road exists when a local board of education or the appropriate postal authorities request in writing that the county highway department provide a route and a turnaround area. The county highway department is not required to honor such a request, but may do so if the county obtains the written permission of the owner of any property to be used for the postal service or school bus turnaround. The county highway department and the postal authority or board of education shall determine whether all or part of the cost of such work will be reimbursed to the county highway department before any work commences on the project. T.C.A. § 54-7-202(g).

The county legislative body may authorize the county road department to “perform work” for other governmental entities, provided that the cost of the projects are reimbursed to the county road department. T.C.A. § 54-7-202(d)(2). For example, the county legislative body could authorize the county highway department to repair certain city streets for a certain fair cost, as this is to be “work performed.” However, the rock could not be sold to the city for a certain sum. Likewise, the county legislative body could allow the county highway department to gravel a school parking lot, but would have to cause a transfer of funds from the school fund to the highway fund.

Cities and counties may perform certain tasks jointly by interlocal agreement. Joint purchases could be made by interlocal agreement to buy a greater quantity in an effort to lower costs.

County highway departments may perform work on private residential property on behalf of the county in order to clean up property after natural disasters pursuant to T.C.A. § 7-51-1601. The county legislative body must approve the work being done prior to it being performed by the highway department and the highway department must be reimbursed for its costs associated with the clean up.

While TDOT is responsible for maintaining roads and bridges within state parks, counties may enter into agreements with TDOT to perform the maintenance work under T.C.A. § 54-1-126.

A county highway department may receive “gifts” of materials, property, services, funds or supplies for the benefit of the county highway department which can be used or disbursed in good faith in accordance with the terms of the donation. Any funds so received must be paid into the county trustee’s office, credited to the county highway fund, and disbursed according to law as other funds of the county highway department. Also, the county highway department may adopt a policy to authorize private persons or entities to repair county roads to bring a road damaged by that person or entity up to the condition or standard of the road prior to the damage caused by the private person or entity. T.C.A. § 54-7-115.

Asphalt Plants

Reference Number: CTAS-117

Under a statute enacted in 2005 (2005 Public Chapter 344 amending T.C.A. § 12-8-101), counties and municipalities may individually or jointly own or operate a hot mix asphalt facility but only if certain conditions are met. A financial feasibility study, conducted jointly by all participating local governments, using factors specified by the statute must be completed and reviewed by a three-member feasibility oversight committee consisting of members named by the Comptroller, the Tennessee Road Builders Association, and the Tennessee County Highway Officials Association. The completed study must be filed with the Comptroller and the county mayor/executive and be available for public inspection. The committee’s function is to review the feasibility study to determine if all appropriate costs are included and publically disclosed. The committee either approves the study or disapproves the study if it is deemed incomplete and lacks substantial information to provide an accurate estimate of the costs and benefits of owning and operating a plant. The committee is to itemize any deficiencies and return the study to the local government or governments for modification and resubmission. If after a second submission a majority of the committee determines the study to be incomplete, it will be forwarded to the county or municipal governing body with a negative recommendation within thirty (30) days after the meeting. Any minority report must also be forwarded. The county legislative body or municipal governing body then determines whether or not to approve or deny any action required to acquire an asphalt facility. The resolution or ordinance requires a two-thirds majority vote before any public funds may be expended on a hot mix asphalt facility. Asphalt produced from such a public facility must be used exclusively for paving public streets, roads or highways under control of the unit of local government that owns the plant. Asphalt facilities owned by local governments on March 29, 1976, and all metropolitan governments are exempt from the additional requirements of 2005 Public Chapter 344. All local governments acting under the new public chapter that own and operate an asphalt facility are required to solicit bids annually for hot mix asphalt products but may reject any and all bids. T.C.A. § 12-8-101.

All counties and municipalities that did not own or operate an aggregate facility for the production of crushed limestone, commercial lime, agricultural lime, sand, gravel, or any other product resulting from the processing of aggregate on June 7, 2005, are prohibited from acquiring such a facility unless the county or municipality prepares a financial feasibility study comparable to the one required for asphalt facilities and a review procedure substantially similar to the one for asphalt facilities is used. The acquisition of such an aggregate facility also requires a two-thirds majority vote of the county legislative body or municipal governing body as appropriate. A local government that owns and operates an aggregate facility may transfer materials to another entity of that local government only if a study has been completed to determine the actual costs of producing that material and reimbursement of actual costs is made. Otherwise, it is unlawful for crushed limestone, commercial lime, agricultural lime, gravel, or any other product resulting from processing of stone, produced in whole or in part by any governmentally owned or operated plant, quarry, crusher, or stone processing plant to be sold, traded, bartered, lent, or given away. T.C.A. § 12-8-101. A violation of this section results in a Class C misdemeanor. T.C.A. § 12-8-102. However, counties may sell agricultural lime to farmers for their own farming activity. T.C.A. § 12-8-103.

County Roads

Reference Number: CTAS-840

County Public Roads v. Private Roads

Reference Number: CTAS-841

One of the main duties of the chief administrative officer of county highways is to exercise supervision over the construction, repair and maintenance of county roads. T.C.A. § 54-7-109. The chief administrative officer must be careful not to work on private roads. T.C.A. § 54-7-202 forbids the use of any county highway materials or equipment to improve or repair private roads, with the limited exception for school bus and postal vehicle turnarounds. A chief administrative officer who authorizes or knowingly permits county equipment to be used for private purposes is guilty of a misdemeanor. T.C.A. § 54-7-202.

All roads running through a county are not county public roads. Some are private roads, others are state highways or city streets. Private roads are the most difficult to distinguish from county public roads. Private roads are generally one of two types. First, a private road may be one used by only one or a few property owners, such as a driveway; or second, it may be a road which the landowner allows the general public to use but which has never been formally accepted by the county legislative body as a county road, or which the landowner has never given the public any rights, either express or implied.

A public highway or road is "such a passageway as any and all members of the public have an absolute right to use as distinguished from a permissive privilege of using [the] same." Standard Life Ins. Co. v. Hughes, 315 S.W.2d 239, 242 (1958). In this case, the court stated that a road may become public in one of the following ways:

1. Act of a public authority.
2. Express dedication by the owner.
3. Implied dedication--Use and acceptance by the public with the intention of the owner that the use become public.
4. Adverse use continuing for twenty (20) years, creating a prescriptive right.

Accordingly, unless the public has acquired an absolute right to use the road in one of the ways mentioned above, any public use is either by permission or license, not by right, and the road remains a private road.

Classification of County Public Roads

Reference Number: CTAS-842

According to T.C.A. § 54-10-103, the county legislative body is charged with classifying public roads. Before the county legislative body classifies a public road for the county road system, the chief administrative officer of the county highway department is required to submit a detailed listing of all county roads to the legislative body. The listing should include a summary of all changes from the road list previously submitted. More detail about the contents of these reports is discussed below. The chief administrative officer is also to include any suggestions and recommendations for changing road classifications with this report. This section (T.C.A. § 54-10-103) along with several other sections and court cases, concludes that the county legislative body is the proper entity to designate or accept roads as county roads. A road may be a "public" road without being designated as a "county" road by the legislative body. County highway officials may work only on county public roads. They do not have the authority to decide which roads will be county roads. They may only make recommendations to the county legislative body about which roads should be county roads.

The Tennessee Code provides a means by which county officials and any interested citizens can determine exactly which stretches of road are county roads. After receiving reports and recommendations of the highway superintendent, the county legislative body is required to make and maintain a list of all county roads, classify the roads according to width, and then file that list in the county clerk's office. Those code sections relating to the road lists are very old and some counties have not kept an up-to-date road list. In the past, there was less need for the road list, but since the passage of the County Uniform Highway Law (CUHL), that list has become vital for the protection of highway officials. With an up-to-date road list on file, highway officials will know exactly which roads they can maintain and which roads they cannot legally work on. Interested citizens will also have a means of finding out which roads may

be maintained by the county. The road list should be amended on an on-going basis throughout the year to ensure it accurately reflects the current inventory of county roads. T.C.A. § 54-10-103.

One major purpose of the road list is to protect the highway officials. For that reason, it is very important not to begin work on a road until it has been officially classified by the legislative body and added to the county road list. In this regard, there may be some confusion in counties that have a planning commission. In such counties, road approval by a planning commission is one step in the acceptance process, but that alone is not enough to make a road a county road. A road is not a county road until the county legislative body has formally classified it, regardless of the action taken by the planning commission. For their own protection, highway officials should not begin work on any road approved by the planning commission until it has also been accepted through the classification process by the county legislative body. T.C.A. § 13-3-406.

The county legislative body is responsible for updating and maintaining the county road list, based on the information and recommendations of the chief administrative officer. The road list is not extremely difficult to compile. It should contain eight (8) items of information regarding each road on the list:

1. Type of road (county or state-aid road)
2. State-aid road description (only for county roads included in the state-aid road system)
3. Local name of road
4. Beginning and ending point of road (describe by reference to geographical features)
5. Miles (length of road to nearest 1/10 mile)
6. Class (classify according to width as set out in T.C.A. §§ 54-10-103 and 54-10-104)
7. Right of way width (in feet)
8. Roadbed width (in feet)

T.C.A. §§ 54-10-103, 54-10-104.

Frequently, only a portion of a total road may be classified as a county road. In such cases, the beginning and ending points, total miles, and other road list items should refer only to the part of the road that is a county road. As was mentioned above, the road list provided to the county legislative body should include a summary of changes to the road list. The summary shall provide the road name, the date the change in classification was approved and the reason for the change.

Opening, Changing and Closing County Roads

Reference Number: CTAS-843

The statutory law regarding acceptance of new county roads and the closure of existing county roads is very confusing and the county attorney should be consulted to determine the proper procedure to follow in the particular county. However, some general observations may be helpful. The CUHL must be reconciled to the greatest degree possible with the old general law on opening, closing and changing roads found in T.C.A., Title 54, Chapter 10, as well as other general law such as the general law granting certain powers to regional planning commissions and the state department of transportation in some instances. In 1995 the legislature passed a simpler [alternative method of closing roads](#).

The Attorney General has opined that in counties under the CUHL, the CAO of the county highway department, or the elected highway commission or board in the counties with such an elected board (if a private act grants general control of the county road system to the elected board), has general control of the county highway system and this includes approving the acceptance of a new road, changing the route of an existing road or closing an existing county road before such a change may take place. Op. Tenn. Atty. Gen. U89-10 (January 31, 1989) (It should be noted that since that opinion was issued, the CUHL was amended to delete references to such authority held by elected highway commissions or boards.) However, this is not the only step involved. The county legislative body must pass on additions or deletions to the classifications of county roads in the county road list after receiving the recommendation of the CAO. T.C.A. § 54-10-103. However, if a road has obtained a public character under one of the methods in the [Standard Life Ins. Co. v. Hughes](#) case, it is doubtful whether the CAO or elected highway board may prevent the county legislative body from adding such a road to the county road list or prevent a court from declaring the road public and part of the county road system. [Hackett v. Smith County](#), 807 S.W.2d 695 (Tenn. Ct. App. 1990); [Rogers v. Sain](#), 679 S.W.2d 450 (Tenn. Ct. App. 1984).

One aspect of the [Hackett v. Smith County](#) case which has become significant due to later decisions limiting the application of the case is the fact that the county road commissioner certified on the plats that the streets, utilities and other improvements were installed in an acceptable manner according to county

specifications and that a bond had been posted to insure the completion of all required improvements. In December 2003, the Court of Appeals decided a similar case coming out of Franklin County. In Shahan v. Franklin County, 2003 WL 23093836 (Tenn. Ct. App.), a developer and residents of a subdivision sued the county over the maintenance of roads within the subdivision. The county declined an offered dedication of the roads and further denied building permits for additional structures in the subdivision due to the inadequacy of the roads. At that point, the developer and residents sought a declaration of responsibility for road maintenance. The developer asserted that, as in the Hackett case, there had been an implied dedication accepted through public use. Although the court agreed that there was evidence of public use of the roads, it held that the doctrine of implied dedication did not apply because the roads were in an unapproved subdivision.

The court did recognize the Hackett case, however, and described it as the proper limited application of the doctrine of implied acceptance of a dedication in the subdivision setting. The court ruled that the doctrine may be invoked in regards to subdivision property when a local government has declined or refused to accept property after a developer has complied with all applicable regulations. Because of this case, it is more vital than ever for counties to have established subdivision regulations which include thorough specifications for roads and streets. Reading Hackett and Shahan together, subdivision roads can be expected to become the responsibility of the county unless it can be demonstrated that the developer failed to comply with minimum road standards.

If bonds are issued for construction of county roads or bridges, the approval of the CAO, the county legislative body and the Tennessee department of transportation must be obtained. T.C.A. §§ 54-9-139, 54-9-202. Also, the regional planning commission has authority to approve plats of subdivisions which may contain plans for roads or streets and may set standards for such roads or streets in the subdivision. T.C.A. §§ 13-3-401, 13-3-402, 13-3-406. However, the statutes specifically state that the approval of a plat by the regional planning commission shall not be deemed to constitute or affect an acceptance by any county or by the public of the dedication of any road or other ground shown upon a plat. T.C.A. § 13-3-405; Foley v. Hamilton, 659 S.W.2d 356, 360 (1983).

The old general law found in T.C.A., Title 54, Chapter 10, Part 2, dealing with petitions to open, change or close public roads must be considered when dealing with certain changes to the county highway system. As stated earlier, this old law must be reconciled to the extent possible with the newer statutes found in the CUHL. For example, before a road is closed, adjacent landowners or those controlling the land touched by the proposed road must be notified. T.C.A. §§ 54-10-202, 54-10-203. Since these changes may involve damages to property owners, a jury of view is provided to determine if damages exist and to what extent. T.C.A. § 54-10-204. The exact workings of the petition process, jury of view, any necessary hearings and other procedural matters should be worked out with the consultation of the county attorney as to reconcile the conflicting statutes to the greatest extent possible.

The basic problem with the general law, found in T.C.A. §§ 54-10-201 *et seq.*, is that it was adopted in 1891 when all counties were required to have highway commissioners who supervised all road work in their respective districts. The law requiring these commissioners was repealed in 1963, but the provisions for accepting and closing county roads were not amended to reflect this change. Therefore, these sections still refer to the authority of highway commissioners within their respective districts. Only one or two counties in the state still have district highway commissioners as contemplated by this statute. In spite of these difficulties, the procedure established under these statutes was referenced in a 1963 court case and appears to be applicable to some extent. The procedures of this chapter may be summarized as follows:

1. A resident of the county may make an application to the highway commissioner of the district through which the road runs to open, change, or close a road through a signed petition. T.C.A. § 54-10-201.
2. A highway commissioner may, without a petition, proceed to open, change, or close a road which is deemed necessary for the public interest. T.C.A. § 54-10-213.
3. Before a road can be opened, closed, or changed, at least five (5) days' notice must be given to all interested parties of the time the road is to be changed. Landowners and those controlling land touched by the road are interested parties. T.C.A. § 54-10-202.
4. Once notice has been given, the highway commissioner in whose district the road runs will pick two other freeholders of the same district who have never been consulted on the issue and who will take an oath of impartiality and these persons will constitute a jury of view. T.C.A. § 54-10-204.
5. The jury of view will assess the damages to any property affected by the closing of the road. T.C.A. § 54-10-205.

6. Any aggrieved party may appeal the action of the jury of view to the Court of General Sessions and from there to circuit and appellate courts. In case of an appeal, the jury of view will forward all the papers in the case to the General Sessions Court. T.C.A. § 54-10-206.

Some counties use the highway committee of the county legislative body to carry out this procedure, with the full membership of the legislative body approving or rejecting the actions of the committee. However, it is noteworthy that the Attorney General, in Opinion No. U89-10, dated January 31, 1989, although stating that the provisions of Chapters 7 and 10 (CUHL), Title 54, T.C.A., must be read together, states that most of the duties to open or close a county road rests with the chief administrative officer of the county highway department where the county does not have a popularly elected highway commission, because of the more recent passage of the CUHL, which will supersede the older law when they are in conflict. However, the Attorney General opined that Chapters 7 and 10 of Title 54, T.C.A., must be reconciled whenever possible. Therefore, the procedure to be followed when opening or closing county roads remains confusing under the current law.

Alternative Procedure for Opening, Changing and Closing County Roads

Reference Number: CTAS-844

There is a local option law found at T.C.A. § 54-10-216 which provides for a much easier process for opening, changing and closing county roads. The alternative procedure must be adopted by a two-thirds majority vote of the county legislative body to become effective in a given county. Counties operating under this section have the following method available to them for opening, changing and closing county roads:

1. An application to open, change, or close a designated public road within the county is made in writing to the chief administrative officer.
2. Upon receiving an application, the chief administrative officer must give notice of the application to all interested parties. Interested parties include landowners and those controlling land touched by the road subject to the application.
3. The chief administrative officer must then make a recommendation to the regional planning commission, or a committee of the county legislative body if no such regional planning commission exists, regarding whether the public road should be opened, changed, or closed.
4. After receiving the recommendation of the chief administrative officer, the regional planning commission or committee of the county legislative body must make its recommendation to the county legislative body and must attach the recommendation of the chief administrative officer. Before making any recommendation with respect to opening, changing, or closing a road, the regional planning commission, or committee of the county legislative body, must provide notice of the action either by written notice mailed to affected property owners or by notice advertised in a newspaper of general circulation in the county not less than fourteen (14) days before the recommendation is made.
5. After receiving the required recommendations, the county legislative body may, by resolution adopted by a majority of its members, order the opening, changing, or closure of the public road.

If a county chooses to operate under this alternative procedure and does not have a regional planning commission, a standing committee of the county legislative body will perform the functions of the planning commission. The standing committee must be comprised of five (5) county legislative body members selected by the chair of the county legislative body each year on or before September 1. The committee will only be formed if no regional planning commission exists to perform the functions of the planning commission under the alternative procedure law and will operate for the sole purpose of considering applications to open, change, or close a county road.

Adoption of the alternative procedure does not preclude interested parties from seeking damages arising from the opening, changing, or closing of a county road to which they are otherwise entitled under the law.

As used in T.C.A. § 54-10-216, "change", with respect to the changing of public roads, does not include any proposed or actual reduction of the maximum gross weight limits of freight motor vehicles operating over public roads.

Weight Limits

Reference Number: CTAS-831

The county may provide for a system whereby overweight or oversize vehicles may travel on county roads after obtaining a permit to so travel. This permit system must be in conformity with rules and regulations promulgated by the commissioner of transportation.

State Highways - Weight Limits

Reference Number: CTAS-1840

Although county officials have certain powers with regard to weight limits on county roads, this authority is derived from authority possessed by the State Department of Transportation. The ability to regulate weight limits on county roads must fit within the overall scheme of state laws and regulations. For that reason, the following is a summary of the power and authority exercised by the Department of Transportation.

T.C.A. § 55-7-101 - Operation of Vehicles Injurious to Highways Must Conform to Regulations -- No vehicle, truck, engine, or tractor of any kind, whether such vehicle be propelled by steam, gasoline, or otherwise, shall be permitted to operate upon any street, road, highway, or other public thoroughfare which, either by reason of its weight or the character of its wheels, will materially injure the surface or foundation of such street, road, highway, public thoroughfare, including the bridges thereon, unless and until the owner or operator of such vehicle of any kind shall have complied with such rules and regulations as may be prescribed by the departments of transportation and safety relating to the use of such highways by such vehicles.

Statutes regulating the size, weight, and load of motor vehicles traveling on Tennessee highways are codified as Title 55, Sections 55-7-101 -- 55-7-209.

Section 55-7-103 describes when maximum weight limits may be lowered:

Maximum Weight May be Lowered, When - Notices to be Posted -- (a) From January 15 to April 15 of each year, and at any other time by reason of repairs, weather conditions, or recent construction of the road, the maximum weight herein permitted would damage the road, the [state] department of transportation may specify any lower maximum weight which, in the discretion of such department, is necessary in order to protect such streets, roads, highways, or other public thoroughfares from unnecessary injury or damage.

(b) Notice of such reduction in weight load shall be given by the department by posters posted at the termini of the road and all detours for one (1) week before such reduction of load becomes effective.

Violation of regulations contained in Sections 55-7-101--55-7-103 is a Class C misdemeanor and, upon conviction, subject to imprisonment for not greater than thirty (30) days or to a fine of not more than fifty dollars (\$50.00). (Sections 55-7-104, 40-35-110, 40-35-111) In addition, it is illegal to move an overloaded vehicle until the load has been reduced to bring it into legal compliance, or a special permit obtained. Failure to comply is a Class C misdemeanor.

Sections 55-7-107--55-7-109 relate to securing of loads of vehicles hauling timber, pulpwood, logs (T.C.A. § 55-7-107) and loose material hauled in an open truck bed (T.C.A. § 55-7-109), and penalties for violation of these sections. Sections 55-7-201 and 55-7-202 outline maximum length, width and height regulations.

MAXIMUM WEIGHT LIMITS

Section 55-7-203 sets out weight limits currently established for public highways in Tennessee, as follows:

Gross Maximum Weight Limit 80,000 lbs.

Single Axles 20,000

Tandem Axles 34,000

The maximum weight limits for vehicles equipped with emissions-reduction technology may be increased by the weight of that technology up to 550 lbs. or the maximum amount allowed by federal law.

Section 55-7-203(c) sets out special provisions for nondivisible overweight loads.

Weight limits for the interstate system are slightly different than those outlined above for state highways. (For a complete explanation of weight limits, please refer to Section 55-7-203).

In addition, Section 55-7-203(b)(7), relates to allowances for error on logging trucks, farm trucks, and certain other vehicles:

(b)(7) For purposes of enforcement of this section, weight restrictions shall be deemed to have a margin of error of ten percent (10%) of the true gross or axle weight for all logging, sand, coal, clay, shale, phosphate, solid waste, recovered materials, farm trucks and machinery trucks when being operated over the state highway system other than the portion designated as the interstate system.

The various types of trucks listed in that statute are defined specifically in the law. The application of the margin of error rule to trucks hauling certain types of materials (machinery, sand) is limited to specific circumstances or distances.

OVERWEIGHT, OVERSIZE, OVERLENGTH LOADS

The law not only sets the maximum axle and gross weight limits allowed on Tennessee highways, but also authorizes that "...the commissioner of transportation shall have the authority to grant special permits for the movements of freight motor vehicles carrying gross weights in excess of the gross weights set forth in Section 55-7-203, or dimensions in excess of the dimensions set forth in Sections 55-7-201 and 55-7-202, and shall charge a fee in accordance with the schedules contained in subsection (h) for the issuance of a permit for each movement." (T.C.A. § 55-7-205(a)) These special permit fees are charged in accordance with the following schedules set out in Section 55-7-205 (h):

Excessive Width:

Not More Than 14 Feet \$ 20.00

Over 14 Feet - Not More Than 16 \$ 30.00

Over 16 Feet -- \$ 30.00 plus \$ 5.00 for each additional foot or fraction thereof greater than 16 feet.

Houseboats over 17 feet – two thousand five hundred dollars (\$2,500), plus one hundred dollars (\$100) for each additional inch or fraction thereof greater than seventeen feet (17').

Excessive Height or Length: \$ 20.00

Excessive Weight: \$ 20.00 plus \$.06/Ton per Mile

Evaluation of Bridges and Similar Structures:

> Movements weighing over 165,000 but not more than 250,000 pounds: \$ 100.00

> Movements weighing over 250,000 but not more than 500,000 pounds: \$ 300.00

> Movements weighing over 500,000 pounds: Actual Cost

A permit shall be available from the department of transportation on an annual basis for overdimensional and/or overweight vehicles except for those vehicles specifically permitted and used to transport cotton seed modules, overdimensional boats used for noncommercial purposes and mobile homes.

EXCEPTIONS TO SIZE AND WEIGHT PROVISIONS

Section 55-7-205 (a) allows certain exceptions pertaining to size and/or weight limits as follow:

Farm Equipment:

....It is not necessary to obtain a permit nor is it unlawful to move any vehicle or machinery in excess of the maximum weight and height....used for normal farm purposes only where the same is hauled on a farm truck....or such vehicle or machinery is being transported by a farm machinery equipment dealer or repairman in making a delivery thereof of new or used equipment or machinery to the farm of the purchaser thereof, or in making a pickup and delivery of such farm machinery or equipment from the farm to a shop of a farm equipment dealer or repairman for repairs and return to the farm, and such movement is performed during daylight hours within a radius of fifty (50) miles of the point of origin thereof and no part of such movement is upon any highway designated and known as a part of the national system of interstate and defense highways of any fully controlled access highway facility.

Utility Companies:

No fee authorized by this section shall be charged for the issuance or renewal of such special permits to retail electric service owned by a municipality or electric cooperative corporation, or to any telephone company or to contractors when they are moving utility poles doing work for such utilities. Upon compli-

ance with the appropriate rules and regulations, such electric services, telephone companies, and their contractors when they are moving utility poles may be issued special permits for stated periods not exceeding one (1) year.

PENALTIES FOR VIOLATIONS

Under T.C.A. § 55-7-206, each violation of Sections 55-7-201--55-7-203, each violation of restrictions on the maximum gross weight of freight motor vehicles adopted by the commissioner of transportation (Section 55-7-205), and each violation of rules and regulations adopted by the commissioner of safety under that section, is a Class C misdemeanor. In addition, when any freight motor vehicle is found to be in violation of only T.C.A. § 55-7-203(b)(3), a fine of twenty-five (\$25.00) is to be imposed. (Section 55-7-206(d)(1)).

County Roads - Weight Limits

Reference Number: CTAS-1847

COUNTY OFFICIALS' AUTHORITY - OVERWEIGHT, OVERSIZE VEHICLES

Section 55-7-205(a)(8)(B) provides that the county legislative body shall have the same authority to lower weight limits as the commissioner of transportation as it relates to county roads:

The county legislative body shall have the same authority as to county roads; provided, however, that any proposed reduction below the weight limits set by the commissioner pursuant to this section shall require a two-thirds (2/3) vote of the county legislative body and shall be based upon the same criteria as used by the commissioner.

This is the authority to reduce the maximum gross weight of freight motor vehicles operating over lateral highways and secondary roads where through weakness of structure in either the surface of the road or of bridges, the maximum loads provided by law, injure or damage such roads or bridges. T.C.A. 55-7-205(a). Whereas the regular maximum weights for freight motor vehicles are set on a weight per axle basis, with the gross maximum weight limit being 80,000 lbs., the lower weight limits may be a certain gross amount per vehicle.

As lowering weight limits on county roads is done by county legislative body vote, violations of the weight limits could subject the offender to a civil monetary penalty of up to \$500 for violation of rules and regulations of the county if so specified by the resolution of the county legislative body. (Section 5-1-121). Subsequent court decisions probably place limits on this monetary penalty. See *Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001). According to the Tennessee Supreme Court in that case, a punitive fine levied by a local government cannot exceed \$50 unless the defendant is allowed to have a jury trial. Higher fines could be enforced if they are remedial in nature rather than punitive, but this distinction is difficult to make. Therefore, a county should generally limit monetary penalties to \$50 or less per violation. Penalty provisions of any regulations should be carefully considered by the county attorney.

Furthermore, the weight limits that are set should be reasonable and based on the best information available regarding the weight that the road or bridge will withstand. The Department of Transportation can assist highway departments by conducting engineering studies that can be used to support the need for reduced weight limits.

Signs should be placed at appropriate places along the road or prior to entry upon a bridge to give the public reasonable notice of the lowered weight limits. In addition, appropriate county officials are also authorized to issue special permits for transporting oversize and/or overweight loads on county roads in conformity with rules and regulations prescribed by the commissioner of transportation.

Underground Utilities Damage Prevention Act

Reference Number: CTAS-2201

The Underground Utilities Damage Prevention Act, found at Title 65, Chapter 31, Part 1, was substantially revised in 2015. The revised law establishes a system of civil, rather than criminal, enforcement for failing to follow the statutory procedures for notifying the Tennessee One-Call system prior to engaging in excavation activities. The new law does carve out an exception for "routine road maintenance activities." If the work of the highway department falls within this exception, the department is not statutorily required to notify the One-Call system. Failing to provide notification, however, could create safety haz-

ards and expose the county to liability. Penalties for violations of the act include training and civil monetary penalties of up to \$5,000 per incident. The act does provide that local governments will not be fined unless they engage in a pattern of willful noncompliance. The act also establishes an enforcement board and an executive committee, which is responsible for levying the penalties.

Vandalism

Reference Number: CTAS-2178

Under T.C.A. 54-7-207, it is an offense for any person who is not authorized to construct or repair a county highway structure to knowingly carve upon, write, paint or otherwise mark upon, deface, rearrange, or alter any county highway structure. It is also an offense for any person who is not authorized to construct or repair a county highway structure to knowingly, in any manner, destroy, damage, knock down, mutilate, mar, steal or remove any county highway structure. "County highway structure" is defined as "any county highway, highway facility, building, bridge, overpass, tunnel, barricade, fence, wall, traffic control device, right-of-way, sign or marker of any nature whatsoever erected upon or maintained within or adjacent to a county highway or the county highway right-of-way."

Violations of this section are Class A misdemeanors. Class A misdemeanors carry a sentence of not greater than eleven (11) months, twenty-nine (29) days in jail or a fine not to exceed two thousand five hundred dollars (\$2,500), or both. Criminal actions are to be brought by the district attorney general of the judicial district in which the damage occurred.

Section 54-7-207 also creates a civil cause of action for damage caused by violations of that section. This allows counties to seek restitution for damage to their roads. Civil actions are to be brought by the county attorney or an attorney employed by the chief administrative officer of the county highway department.

This section also provides for a \$250 reward for persons who report information to a law enforcement officer that leads to the apprehension and conviction of a person for a violation. The reward money comes from the fines collected under the section. The proceeds from the fines are to be collected by the court clerks and then deposited in a dedicated county fund. The fund shall not revert to the county general fund at the end of a fiscal year but shall remain for the vandalism enforcement rewards. Excess funds, if any, may be expended for litter control programs on adoption of an appropriate resolution by the county legislative body.

This section applies to all counties.

Public Fords, Ferries and Bridges

Reference Number: CTAS-846

Counties may supervise fords, ferries and bridges. T.C.A. § 54-11-101 *et seq.* Additionally, counties may issue bonds for the construction of county highways, roads and bridges and pledge up to 50% of the state-aid grant funds derived from the state gasoline tax for the retirement of such bonds. However, state funds used in matching federal funds may not be included in this amount. T.C.A. § 54-9-201. The legislative body may build a bridge or bridges over and across any stream or river running through the county. T.C.A. § 54-11-207. The CAO has the authority to temporarily close roads or bridges as necessary for new construction or repair. Op. Tenn. Atty. Gen. 81-618 (December 7, 1981).

Sources of Revenue for the Highway Department

Reference Number: CTAS-2007

All counties rely heavily on county-aid highway funds and to a lesser degree on state-aid highway funds to support the activities of the county highway department. These basic state sources are supplemented from time to time by special state sponsored activities such as bridge funds which are in turn sometimes supported in whole or part by federal funds. Many counties also appropriate local tax revenue for the use of the county highway department. Petroleum products taxes and state severance taxes are chief sources of revenue for the county highway department. The most common local sources are the property tax, wheel tax and mineral severance tax. All revenue, from whatever source, must be budgeted and appropriated by the county legislative body before the county highway officials can use the funds. Although

counties may borrow funds through notes or bonds, ultimately this borrowing must be paid off from revenue from one or more of these sources.

The property tax is the most common form of county tax. In some counties a portion of the total property tax rate is allocated to the county highway department. Many counties have a special property tax by private act with proceeds earmarked for the highway department. The property tax is one of the few taxes wherein the rate of the county tax is not limited by state law and is subject to the discretion of the county legislative body.

These taxes are described in more detail under the [Revenue](#) topic.

Relationship to Other County Officials-Highways

Reference Number: CTAS-832

Interaction with County Mayor/Executive

Reference Number: CTAS-833

The CUHL does not specify which county officer should write warrants upon the county highway fund. This authority is usually provided in a private act. When such a private act does not specify the proper officer, the county mayor/executive has authority to write the warrant under T.C.A. § 5-6-108(5). Some private acts provide for co-signature. If a county has adopted the optional County Fiscal Procedure Law of 1957, a director of budgets and accounts issues a disbursement warrant upon receipt of an invoice and verification by the department head receiving the merchandise. T.C.A. § 5-13-107. Similarly, the director of finance in counties which have adopted the 1981 County Financial Management System (T.C.A. §§ 5-21-101, *et seq.*) oversees the disbursement of funds. Therefore, the chief administrative officer of the county highway department in many counties must interact with other county officers in regard to disbursement of highway funds.

The highway officials must prepare a budget estimate for each fiscal year. Depending upon the budgeting system in the county--the 1957 Budgeting Law, 1981 Financial Management System, private act system or only the general law--the county highway official will prepare a budget and submit it to either the county mayor/executive, director of budgets and accounts, or director of finance, who compiles a budget document for review by a committee or the full county legislative body. The deadline for submitting the budget is April 1 unless otherwise provided by law or county legislative body resolution.

Interaction with County Legislative Body

Reference Number: CTAS-834

County highway officials interact with the county legislative body in several significant ways, including budget approval, classification of county roads, and approval of leases and lease-purchase agreements.

The county legislative body may approve a budget for the highway department as submitted or may reduce the total or vary amounts according to major categories or even by line item. The budget forms are set by the Comptroller. During the year, the county legislative body may amend the current operating budget.

The highway department cannot work on private roads, except to provide routes and turnarounds for postal vehicles and school buses upon written request by the appropriate authorities. T.C.A. § 54-7-202. The county legislative body is mandated to classify the public roads in the county. T.C.A. § 54-10-103. The highway officials need to work closely with the county legislative body to develop an accurate road list so that it will be clear which roads the county highway department is authorized to maintain. The county legislative body must receive a detailed listing of all county roads from the chief administrative officer of the county highway department before making a road classification.

County highway officials cannot execute a lease or lease-purchase agreement for equipment or other property without the approval of the county legislative body. T.C.A. § 7-51-904. As prior approval of the county legislative body is not contemplated by the statute, it is suggested that the lease be bid according to regular purchasing procedures with the clear recital that no bid award is final until approved by the county legislative body. Therefore, lease agreements can be signed if they contain a clause such as:

“subject to approval of the county legislative body.” The lease or lease-purchase can then be submitted in such a manner that the county legislative body has the full contract and all of its terms before them. If approved, the chairman of the county legislative body can so endorse the agreement and the contract will be binding.

Interaction with State Offices and Departments

Reference Number: CTAS-835

At the state level, county highway officials will find that they interact regularly with employees (agents) of the Tennessee Department of Transportation and the Comptroller’s Office. In 1995, the legislature added a new section to the CUHL which created a presumption that the chief administrative officer of each county highway department is authorized to sign binding agreements with the state department of transportation on behalf of the county. The presumption is only overcome by provision of notice by the county legislative body that the chief administrative officer does not have the authority to sign the agreements. The department of transportation must acknowledge receiving the notice for it to be effective. T.C.A. § 54-7-116.

State-Aid Highway Program

Reference Number: CTAS-836

The state-aid highway program is a state program whereby the Tennessee commissioner of transportation, after consultation with local officials, designates those highways and roads which are considered of sufficient importance to be included in the system of state-aid highways. T.C.A. § 54-4-402. Under this program, the county highway officials are required to submit annually a program specifying the type of work to be performed locally on the state-aid highway system. The types of qualifying work may include the planning, engineering, right-of-way acquisition, construction, improvement, and rehabilitation of roads and bridges. T.C.A. § 54-4-403. State funds are appropriated to the state-aid highway program and allocated to the 95 counties as follows:

- 50% divided equally
- 25% divided according to county population
- 25% divided according to county area

Typically, under this program, the county has to match the state funds in an amount of 25%, although the county contributions may be in-kind. T.C.A. § 54-4-404. For projects initiated during fiscal years 2015-16 and 2016-17; however, counties were authorized to use unexpended state-aid funds for a portion of the local match. The amendment to T.C.A. § 54-4-404, enacted as the "County Road Relief Act of 2015", required counties to provide at least 2% of the project cost from county funds or in-kind work, or a combination of both. In 2017, this provision was extended until July 1, 2019.

Upon the request of county highway officials, the department of transportation may agree to act as the agent of the county to carry out any phase of work authorized on the state-aid highway system, or all preconstruction activities may be performed by the county highway department if done according to state standards, or the county may award a construction contract to a private company in accordance with state regulations on bidding, or the county may negotiate with the department to perform the work. T.C.A. § 54-4-405. The state department of transportation (DOT) may lease its equipment to the county according to terms agreed upon by the commissioner and the county highway department. T.C.A. § 54-4-402.

All roads designated as part of the state-aid highway system must be maintained by the county highway department. If the county fails to maintain these highways according to DOT standards, then the commissioner may withhold state-aid funds until the roads are restored to proper condition. T.C.A. § 54-4-406.

County-Aid Funds

Reference Number: CTAS-837

The state provides to counties rather large sums of money in the form of “county-aid funds” primarily from the state gasoline tax. County-aid highway funds may be used in the building, repairing and improve-

ment of county roads and bridges or for the funding of mass transit systems (not to exceed 22.2% of total). T.C.A. § 54-4-103. There are further restrictions on the use of these funds detailed in the gasoline tax distribution statute, T.C.A. § 67-3-901. If a county is to receive its full allocation of county-aid funds under the basic formula: 50% equally to all counties, 25% according to population, and 25% according to area, the county must appropriate for road purposes from local revenue sources an amount equal or greater than the average of the preceding 5 years from local sources. The county highway officials must certify these items to the DOT each year. It should be noted here that some counties have not appropriated local revenue in the past 5 years; if so, the state will not diminish the county-aid funds so long as this fact is certified by the county officials. Also, the portion of the gasoline tax proceeds from 3¢ of the total gasoline tax (effective since 1985) which become county-aid funds must be used for the purposes of resurfacing and upgrading county roads, including paving of gravel roads. T.C.A. § 67-3-901.

1990 Bridge Grant Program

Reference Number: CTAS-838

The 1990 Bridge Grant Program enables the county highway department to replace or rehabilitate certain bridges when the commissioner finds that a bridge is structurally deficient or functionally obsolete. T.C.A. § 54-4-503. Typically, the state share is no more than 80% of the approved project cost and the local government share must be at least 20% of the approved project cost, and may be provided by local government funds and in-kind project work approved by the commissioner, or either of them, wholly or partly. However, the County Bridge Relief Act of 2014, Public Chapter 573, authorized counties to use unexpended state-aid bridge grant funds to pay the county portion of project costs. The Act required counties to provide at least two percent of the project cost from county funds or in-kind contributions. This funding formula was initially available for projects initiated in fiscal years 2014-15 and 2015-16 but was put in place permanently in 2016. T.C.A. § 54-4-507.

In order to participate in the program, the county highway department must be in compliance with any Department of Transportation recommendations concerning the posting and enforcement of load limits, and the closure of structures, based on the National Bridge Inspection Standards (including ineligibility for a geographic area to participate for the following fiscal year if no county in the area has taken necessary action to assure maximum utilization of the program). T.C.A. § 54-4-504. Once the local governments in a geographic area have addressed project priorities established by the Commissioner of Transportation, application may be made for permission to expend moneys allocated for other roadway purposes. The Commissioner must approve any such expenditure and may require that certain conditions be met in conjunction with the expenditure. T.C.A. § 54-4-506. Projects undertaken under this program must be maintained by the county or other local government where the project lies. T.C.A. § 54-4-508. If the local government fails to maintain these projects in accordance with reasonable standards established by the Commissioner of Transportation, the Commissioner may withhold all funds otherwise available under the bridge program until the insufficiently maintained project is restored to proper condition.

Audits

Reference Number: CTAS-839

County highway departments are subject to regular audits by the Comptroller. These are complete financial, inventory, and activity audits. As noted earlier, an inventory of all machinery, equipment, tools, supplies, and materials owned or used by the county highway department must be kept and made available to the Comptroller and filed with the county legislative body and the county mayor/executive within 60 days of the chief administrative officer taking office and annually thereafter by September 1 reflecting the state of the inventory on July 1 of each year. Failure to file can result in a cutoff of county-aid funds. Also, as noted earlier, audit reports by the Comptroller are forwarded regularly to the local District Attorney General for his or her review.

Industrial and Economic Development

Reference Number: CTAS-618

Industrial Development Corporations

Reference Number: CTAS-619

Industrial development corporations were authorized by the General Assembly to maintain and increase employment, increase agricultural and industrial production, and reduce pollution. These corporations can figure prominently in a county's economic development activities. They are considered to be public instrumentalities of their creating municipalities (which can be a county, city or a combination of both), and thus, any property owned by an industrial development corporation is tax exempt. T.C.A. § 7-53-305. Counties and municipalities are authorized to appropriate funds to make contributions or loans with reasonable interest, to industrial development corporations in the county. County legislative bodies are also authorized to borrow funds for the purpose of making contributions or loans to industrial development corporations. T.C.A. § 6-54-118.

The powers and duties of industrial development corporations are set forth in T.C.A. § 7-53-101 *et seq.* These statutes are to be broadly construed to further the health, welfare, and safety of citizens. T.C.A. § 7-53-102. Industrial development corporations are authorized to acquire projects, improve and/or maintain projects, lease projects, sell projects and enter into loan agreements relating to projects to facilitate their economic development goals. T.C.A. § 7-53-302. What constitutes a "project" is defined in T.C.A. § 7-53-101 and includes examples such as manufacturing facilities, office buildings, public buildings, healthcare facilities, amusement parks, and multifamily low-income housing. Industrial development corporations are authorized to sell, exchange, convey or donate any or all of their property. T.C.A. § 7-53-302. Industrial development corporations can also issue bonds or otherwise borrow money, mortgage or pledge projects as collateral for their bonds or notes, and pledge revenue or receipts from projects. T.C.A. § 7-53-302. It is important to note that industrial development corporations cannot pledge the general taxing power of the creating municipality without the municipality first obtaining a certificate of public purpose and necessity and then holding an election in which 75% of the voters approve pledging the municipality's credit. T.C.A. § 7-53-306 and T.C.A. § 7-53-307.

Industrial development corporations have two additional powers which are important economic development tools--the power to enter into payment in lieu of tax (PILOT) agreements and the power to enter into tax increment financing (TIF) agreements.

Industrial Development Corporation Board of Directors

Reference Number: CTAS-2473

After a certificate of incorporation has been issued by the secretary of state establishing an industrial development corporation for a county, the corporation is managed by a board of directors of any number not less than seven as established in the certificate of incorporation. The directors must be qualified voters and taxpayers of the county. T.C.A. § 7-53-301. The Attorney General has opined that "taxpayers of the county" includes individuals making payment of any type of tax--not just property tax. Thus, membership cannot be limited to only landowners within the county. Tenn. Op. Atty. Gen. No. 99-142.

The directors of a county-sponsored industrial development corporation are elected by the county legislative body for terms of six years except for the initial election of three groups of directors with terms of two, four and six years to create staggered terms. No director of a county-sponsored industrial development corporation may be an officer or employee of the county. T.C.A. § 7-53-301. County officials may serve on the board of directors of a joint industrial development corporation; however, county employees are not eligible to

serve on joint corporation boards. T.C.A. § 7-53-104. Directors serve without compensation except for reimbursement of actual expenses incurred in performance of their duties. T.C.A. § 7-53-301.

Payment in Lieu of Tax Agreements

Reference Number: CTAS-2472

Payment in Lieu of Tax (PILOT) agreements can be a very important economic development tool. It is important that they are structured correctly and that they are only entered into when it is in the best interests of the county.

Cities and counties are constitutionally prohibited from granting tax abatements to non-exempt persons. Thus, such abatements are accomplished by going through an industrial development corporation. Property (real or personal) that is included as part of a "project" can be transferred to an industrial development corporation, which would make such property tax exempt. The industrial development corporation would then lease the property back to the entity involved in the project and upon receiving the proper delegation of authority from the creating municipality (which can be a city, county or a combination of both), the industrial development corporation could then enter into a PILOT agreement with that entity.

Industrial development corporations can negotiate, accept or waive payments in lieu of taxes only after receiving a formal delegation of authority from their creating municipality(ies). Such municipality can require that each negotiated PILOT agreement come back before the legislative body for final approval. T.C.A. § 7-53-305.

No PILOT agreement providing for the acceptance or waiver of payments in lieu of taxes, including any renewal or extension of such agreement, may result in a corporation's lessee making payments in lieu of taxes in an amount less than the applicable ad valorem taxes for a period that is greater than twenty (20) years plus a reasonable construction or installation period not to exceed three (3) years, unless both the commissioner of economic and community development and the comptroller of the treasury have made a written determination that the agreement is in the best interest of the state. T.C.A. § 7-53-305.

Before an industrial development corporation approves a PILOT agreement, the corporation must hold a public meeting relating to the proposed agreement after notice is provided by the corporation or governing body, as may be required by law, at least five (5) days prior to the date of such public meeting. Such notice must include the time, place, and purpose of the public meeting. The corporation must also attach to each agreement an analysis of the costs and benefits of the agreement, in such manner and under such conditions as shall be prescribed by the commissioner of economic and community development or the commissioner's designee. T.C.A. § 7-53-305.

PILOTs for retail projects must meet certain criteria set forth in T.C.A. § 7-53-305. There are also special provisions for PILOTs from industrial development corporations formed by municipalities that do not levy their own property tax. T.C.A. § 7-53-305.

Tax Increment Financing Agreements

Reference Number: CTAS-2474

Industrial development corporations are authorized to prepare and submit to the municipality of their creation (which can be a county, city or combination of both) an economic impact plan. T.C.A. § 7-53-312. The plan must identify the boundaries of the economic impact area affected by the plan as well as identify the industrial park or project located within the economic impact area. The definition of "project" is found at T.C.A. § 7-53-101. The plan must discuss the expected benefits to the municipality from the development of the economic impact area subject to the plan and provide that the property taxes collected on property in the plan area, including taxes on personal property, above the base year amount (the "increment") will be allocated to a separate fund of the industrial development corporation and used for industrial development purposes or to pay debt service on the industrial development corporation's obligations. Further restrictions on the use of the incremental tax proceeds are set forth in T.C.A. § 9-23-108. The plan may include an amount greater than the base year amount to be allocated to the taxing local governments. T.C.A. § 9-23-103.

The industrial development corporation's board must hold a public hearing after giving two weeks' notice before submitting the plan to the municipality. The governing body of the municipality that created the corporation must approve the plan. For taxes collected within the economic impact area by another municipality, the governing body of that municipality must also approve the plan. T.C.A. § 7-53-312.

After the approval by a municipality of an economic impact plan, the clerk or other recording official of such municipality must transmit to the appropriate assessor of property and to each affected taxing agency, a copy of the description of all property within the area subject to the economic impact plan and a copy of the resolution approving that plan. If the plan is approved by any taxing agency other than the creating municipality, the clerk or other recording official of that taxing agency must also provide a copy of the resolution approving the plan to such assessor of property and taxing agencies. A copy of the plan and any resolutions approving the plan must also be filed with the comptroller of the treasury, and an annual statement of amounts allocated in excess of the base tax amount must be filed with the state board of equalization. T.C.A. § 7-53-312.

Industrial development corporations are required to transmit to the appropriate assessor of property for each taxing agency and the chief financial officer of each taxing agency a copy of the description of all property within the area subject to the plan (including parcel numbers with respect to real property), a copy of each resolution of each taxing agency approving the plan and the base tax amount with respect to all property subject to the plan. They must also file a copy of the information with the comptroller; and by October 1, they must file with the comptroller an annual statement of all tax increment revenues allocated to the tax increment agency with respect to each active plan. T.C.A. § 9-23-106.

Any plan may provide that a total of up to five percent (5%) of incremental tax revenues may be set aside for administrative expenses, including expenses incurred by the industrial development corporation and the tax agency administrative offices (assessor of property and/or trustee or other tax collecting official) in administering the plan, and including a reasonable allocation of overhead expenses. T.C.A. § 9-23-105.

No allocation of tax increment revenues may be made with respect to any property for a period of more than twenty (20) years in the case of an economic impact plan, or thirty (30) years in the case of a redevelopment plan or community redevelopment plan as defined in § 9-23-102, unless both the commissioner and the comptroller have made a written determination that a longer period is in the best interest of the state. If the written determination approving or declining the longer term is not rendered within thirty (30) days, the longer term is deemed approved. T.C.A. § 9-23-104.

In any year in which the taxes on any property are less than the base and incremental taxes, only those taxes actually imposed and collected will be paid to the respective taxing agencies. T.C.A. § 9-23-103.

Tennessee Regional Megasite Authority Act of 2007

Reference Number: CTAS-620

T.C.A. § 64-6-101 *et seq.* provides for the creation of regional megasite authorities which may acquire land and improve, finance, operate, maintain, and market megasites (sites certified as being suitable and available for development for significant economic and industrial development pursuant to T.C.A. § 64-6-103).

Regional megasite authorities may be created by two or more counties and/or municipalities and are set up pursuant to either T.C.A. §§ 64-6-104, 105 or § 64-6-110. Term limits have been imposed on board members regardless of the method of creation. T.C.A. §§ 64-6-105, 110.

Land Use, Planning and Zoning

Reference Number: CTAS-521

Comprehensive Growth Planning

Reference Number: CTAS-589

County Growth Plans

Reference Number: CTAS-590

In 1998 the Tennessee General Assembly passed Public Chapter 1101, which requires a coordinated planning effort among a variety of public and private entities throughout the state. The legislation also reforms procedures and requirements for annexation and incorporation. Public Chapter 1101 was codified in T.C.A. § 6-58-101 *et seq.* The law calls for the development of a comprehensive growth plan in each county, covering projected growth for 20 years.

Designation of Zones

Reference Number: CTAS-591

T.C.A. § 6-58-104(a)(2) specifies that the comprehensive growth plan must identify the following three (3) types of areas if they exist within the county:

1. Urban Growth Boundary (UGB) - a reasonably compact area that contains the corporate limits of a municipality and the adjoining territory where high density commercial, industrial, or residential growth is expected.
2. Planned Growth Area (PGA) - compact sections outside incorporated municipalities and outside growth boundaries where high or moderate density growth is expected, if there are such areas in the county; new incorporations may occur only within these regions. A county has authority to provide services within a PGA and to set a separate tax rate for these services.
3. Rural Area (RA) - territory that is not within another zone and that is to be preserved for uses other than high density development.

Several factors must be taken into account in determining the boundaries of these three (3) areas:

1. Population growth projections, to be developed in conjunction with the University of Tennessee;
2. Current and projected costs of infrastructure, urban services, and public facilities needed for development and methods to finance these needs;
3. The need for additional land area for high density development, after considering the feasibility of redeveloping all sites within the current boundaries;
4. The effect of development upon agricultural land, forests, recreational areas and wildlife management areas; and
5. The likelihood of eventual incorporation into a municipality.

T.C.A. § 6-58-106(a).

Extraterritorial Planning Jurisdiction

Reference Number: CTAS-592

A city that has been granted power to zone beyond its corporate boundaries (T.C.A. § 13-3-102) cannot zone outside of its UGB, regardless of the five-mile limit. However, if the county has no zoning and the city has not received extraterritorial zoning authority under the statute cited above, then the municipality may zone beyond its city limits only with the approval of the county legislative body. This rule includes territory that is outside the city limits but inside the UGB. The county retains authority to enact zoning (T.C.A. § 13-7-101 *et seq.*) within a PGA, an RA, and a UGB (although presumably only that Section of the UGB that is outside of municipal boundaries). The new law does not expand a county's zoning authority or enact statewide zoning.

Agreements Regarding Powers

Reference Number: CTAS-593

Counties and cities are authorized to make agreements to refrain from exercising powers, including annexation and receipt of revenue. After five (5) years, agreements to refrain from exercising powers may be renegotiated or terminated upon ninety (90) days notice. The act explicitly allows written contracts between municipalities and owners (developers) regarding annexation, validating those in existence on the effective date of the act.

Amendment of Growth Plan

Reference Number: CTAS-594

Unless there are "extraordinary circumstances," the initial growth plan remains in place for three (3) years. After the three years, the growth plan may be amended as often as necessary. T.C.A. § 6-58-104(d)(1). Municipal or county mayors are to propose amendments to the growth plan. The mayor proposing the amendment is to file notice of the amendment with the county mayor and mayors of all the municipalities in the county. Upon receiving the notice, the county mayor shall reconvene or reestablish the coordinating committee within sixty (60) days. The coordinating committee then has six (6) months from the date of its first meeting on the proposed amendment to submit its recommendation to the local governing bodies. The amendment shall become part of the county's growth plan after being approved by the local governing bodies and the local government planning advisory committee. The burden of proving the reasonableness of the change is on the party proposing it.

Joint Economic and Community Development Board

Reference Number: CTAS-596

In addition to the coordinating committee that is formed to formulate a growth plan and any amendments to it, the law requires a board with representatives from both public and private segments of the community to engage in long-term planning and maintain communication among the various interest groups.

Composition. The final makeup of each board is to be established by interlocal agreement, but at a minimum must include the county mayor, the mayor or city manager of each city in the county (in a county with multiple cities, the smaller cities may rotate for representation, according to interlocal agreement), and an owner of greenbelt property. A county or city mayor or city manager may designate an alternative representative on the board and its executive committee so long as the alternative has experience or education in administration, economic or community development, or planning and be able to speak for the represented official.

Executive Committee. The executive committee is to be selected by the entire board but must consist of at least the county mayor and the mayors of the larger municipalities.

Term of Office. The terms are to be determined by interlocal agreement, with a maximum of four (4) years; all terms must be staggered except for those of elected officials, whose terms of service on the board coincide with their terms of office.

Meetings. The full board must meet a minimum of four (4) times a year, and the executive committee must also meet at least four (4) times annually with an executive committee meeting occurring at least once in each calendar quarter. Both bodies are subject to the open meetings law and are required to keep minutes and attendance.

Funding. Costs are shared jointly among participating governments according to a statutory formula based upon population. The board may accept donations and grants. It must adopt a budget by April 1 each year; if a participating government does not contribute its share, the board may establish sanctions. Before applying for any state grant, local governments must certify their compliance with these provisions.

Exception. If a county has previously formed a similar agency, it may apply to the local government planning advisory committee for an exception to these provisions.

Donation of Funds. A joint economic and community development board is authorized to transfer or donate funds that it has received from participating governments and outside sources to other public or non-profit entities within the county to be used for economic or industrial development purposes. T.C.A. § 6-58-114.

Annexation

Reference Number: CTAS-598

In 2014, the law on annexation was substantially revised. Public Chapter 707 made several significant changes to the methods used by municipalities to annex unincorporated territory. Under Public Chapter 707, municipalities may no longer annex by ordinance and may only annex by resolution pursuant to

T.C.A. 6-51-104, which generally requires written consent of the affected property owners or approval by referendum. No annexations by resolution of property being used primarily for agriculture will be permitted unless written consent of the property owners is obtained. Municipalities may, by resolution, propose annexation of territory that does not adjoin the boundary of the main part of the municipality if the territory is within the urban growth boundary and is either to be used for industrial, commercial or residential purposes in the future or owned by a governmental entity. Such resolution can only be ratified with written consent of the property owners. T.C.A. § 6-51-104.

A municipality may expand its urban growth boundaries to annex a tract of land without reconvening the coordinating committee or receiving approval from the county or any other municipality if: (1) The tract is contiguous to a tract of land that has the same owner and has already been annexed by the municipality; (2) The tract is being provided water and sewer services; and (3) The owner of the tract, by notarized petition, consents to being included within the urban growth boundaries of the municipality. T.C.A. § 6-58-118.

Finally, counties having a metropolitan form of government will be permitted to expand their urban services districts using any method authorized by their charter. This includes methods in general law which are referenced in the charter and which were applicable at the time the charter or charter amendment was approved. T.C.A. § 6-51-123.

Notice of Annexation

Reference Number: CTAS-599

Before any territory may be annexed, the governing body of the municipality must adopt a plan of services establishing, at a minimum, the services to be delivered and the projected timing of the services. Upon adoption of the plan of services, the municipality must forward a copy of the plan of services to the county mayor in whose county the territory being annexed is located. T.C.A. § 6-51-102. The municipality must also forward a copy of the annexation resolution to the county mayor. T.C.A. § 6-51-104. The county mayor must also be notified by the annexing municipality of the final decision in any *quo warranto* proceeding contesting a proposed annexation or the outcome of any referendum regarding annexation. T.C.A. §§ 6-51-103, 6-51-105. The county mayor is required to notify the appropriate departments and offices of the county regarding information received from the municipality pertaining to a proposed annexation. T.C.A. §§ 6-51-102 through -105.

Annexing municipalities are also required to provide a copy of the annexation resolution, along with a copy of the portion of the plan of services dealing with emergency services and a detailed map designating the annexed area, to any affected emergency communications district upon ratification of a resolution to annex. T.C.A. § 6-51-119.

Once an annexation resolution is approved by referendum, the annexing municipality is required to record the resolution with the register of deeds in the county or counties where the annexation was adopted or approved. The annexing municipality must also send a copy of the resolution to the comptroller and the assessor of property of each county affected by the annexation. T.C.A. § 6-51-121.

Distribution of Taxes after Annexation

Reference Number: CTAS-601

When a city annexes property that generates wholesale beer taxes or local option sales taxes, the amount of revenue produced at the time of the annexation continues to go to the county for a period of 15 years. Any increases over this amount are distributed to the annexing municipality. Note that this does not affect the distribution of the first half of the local option sales tax, which continues to go to education funding.

Formula for Distribution. If the business operated for a full twelve (12) months before annexation, the county receives the monthly average for that period. If the business operated for at least one (1) full month but fewer than twelve (12) months before annexation, the county receives the average amount of each full month of operation. If the business operated for less than a month before annexation, or if it began operation within three (3) months of annexation, then the revenue for the first three (3) months is averaged and the county receives that amount.

Exceptions. There are several exceptions to the distribution formula. If the wholesale beer tax or the local option sales tax is repealed, revenue amounts from the repealed tax will end; similarly, if the distribution to municipalities is reduced by the General Assembly, revenue amounts will be decreased proportionally. Finally, if a business closes or relocates, thereby reducing tax revenues, the city may petition the Department of Revenue no more than once annually for a reduction in amounts. A county may voluntarily waive rights to the revenue.

County Responsibility. Upon annexation, each county is responsible for identifying tax-producing properties and providing a list of them to the Department of Revenue. Counties should also monitor the impact of annexations on all revenue-generating properties within the affected area. Some of the taxes received from such areas are not administered by the Department of Revenue. For example, certain of the taxes are collected and remitted by beer wholesalers. If the county does not monitor such transactions and inform the appropriate parties, it may lose out on tax revenue to which it is entitled.

T.C.A. § 6-51-115.

Incorporation

Reference Number: CTAS-602

New municipalities may be created in Tennessee only inside a planned growth area as designated in a comprehensive growth plan. Any new municipality must enact a property tax at least equal to its share of state taxes and must adopt a plan of services within six (6) months of incorporation. Before an incorporation election may be held, the county legislative body must approve the city limits and urban growth boundary for the proposed municipality. T.C.A. § 6-58-112.

Consolidation of City and County Governments

Reference Number: CTAS-603

After the passage of 1998 Public Chapter 1101, the law allows creation of a consolidation charter commission upon petition by qualified county voters equal to ten percent (10%) of the votes cast in the county for governor in the last gubernatorial election. (Previous law required the county and principal city to call for a consolidation commission.) The law also specifies procedures for appointment to the charter commission (under one (1) method, the county mayor appoints county members, subject to confirmation by the county legislative body). T.C.A. § 7-2-101.

Regional Planning Commission

Reference Number: CTAS-605

In addition to comprehensive growth planning, there are other planning provisions in Tennessee statutes. The Department of Economic and Community Development has created and defined the boundaries of other planning regions, which are drawn without regard to county lines or other existing boundaries. T.C.A. § 4-3-701 *et seq.* For each planning region the department also creates a regional planning commission, or a municipal planning commission may direct regional planning under certain circumstances. T.C.A. §§ 13-3-101, 13-3-102. In actual practice, most planning regions consist of a single county.

Membership of Planning Commission

Reference Number: CTAS-606

Except for planning regions consisting of a single county, the Department of Economic and Community Development determines the number of members (not fewer than five (5) nor more than fifteen (15)) on any regional planning commission. T.C.A. § 13-3-101. Before a member can be designated by the department, he or she must first be nominated in writing by the county mayor or the chief elected officer of a municipality within the planning region. The nominations for newly created or vacant positions on the commission must be received by the department within 30 days after the position becomes available.

Members of planning commissions in single county planning regions are chosen by the county mayor, subject to the approval of the county legislative body. Members of local legislative bodies may serve; however, members from county and municipal legislative bodies must be fewer in number than a majority

of the commission. And, with a few exceptions, public employees and officeholders must also make up less than a majority. T.C.A. § 13-3-101.

Each regional planning commission is to elect a chair from among its appointed members. T.C.A. § 13-3-103. The legislative body of a county or municipality in which the commission operates may establish compensation for regional planning commission or zoning board members. T.C.A. § 13-3-101.

The statutes do not specify times or places for planning commission meetings, but they do address terms of office as well as procedures for removal and vacancies. T.C.A. § 13-3-101.

In the absence of any provision in a metropolitan or county charter (or private act or interlocal agreement), the county mayor, county executive or metropolitan mayor or executive shall, in accordance with T.C.A. § 5-6-106, have the authority to appoint a person meeting certain qualifications as planning director. The planning director shall have the power and authority to hire and fix the compensation, within the funds appropriated by the legislative body for this purpose, of such other employees and staff as he or she may deem necessary for the work of the planning commission. T.C.A. § 13-3-103.

Duties and Powers of Planning Commission

Reference Number: CTAS-607

The regional planning commission is charged with several specific duties. It is required to adopt a general plan for the physical development of the region, copies of which must be certified to the Department of Economic and Community Development and to the legislative bodies of each county and municipality in the region. T.C.A. §§ 13-3-301, 13-3-304. Furthermore, the planning commission is to advise county and municipal governing bodies in such areas as public improvement programs and construction of roads, bridges, and other public structures. The regional planning commission should coordinate its efforts with those of any municipal planning regions within its area, cooperate with authorities in neighboring states and regions, and, in general, perform any functions needed to promote regional planning.

T.C.A. § 13-3-104. In exercising several of its duties, including the adoption of a regional plan, subdivision regulations and zoning ordinances, planning commissions are charged with identifying areas with inadequate or nonexistent public or private services and facilities necessary for development to occur and including such considerations in the plans, regulations and ordinances.

One of the most important duties of the regional planning commission involves plat approval. After the commission has developed and filed a regional plan, any subdivision, except one lying inside municipal borders, must be approved by the regional planning commission before it may be recorded by the county register. The regional planning commission may delegate its plat approval authority to the commission's staff. T.C.A. § 13-3-402. Regional planning commissions must approve or disapprove a plat within 60 days after the initial consideration by the commission at a regularly scheduled session, with an exception for holidays and unexpected office closings. Plats must be placed on the commission's agenda within thirty (30) days of the plat's filing or placed on the agenda for the next regularly scheduled commission meeting after the thirty (30) day period. These deadlines may be waived by the applicant. T.C.A. § 13-3-404. What constitutes a subdivision is defined in T.C.A. §§ 13-3-401(4) and 13-4-301(4).

A representative of the commissioner of the state Department of Environment and Conservation (usually the county health officer) must approve subdivision plats when subsurface sewage disposal is to be used before the planning commission approves the plat. T.C.A. § 68-221-407. A plat may be submitted only by the owner of the land (as defined in T.C.A. § 13-3-402) or by a governmental entity, and all plats must include the most recently recorded deed book and page numbers for all property included in the plat. T.C.A. § 13-3-402. A plat must contain the personal signature and seal of a registered land surveyor or a registered engineer before the plat is eligible for filing in the register's office. T.C.A. § 66-24-116. Amendments, modifications, and corrections to recorded subdivision plats must have the approval of the appropriate regional or municipal planning commission to be eligible for recording with the county register of deeds, except that a survey of an easement or survey attached to an easement granted to a governmental entity may be recorded without planning commission approval, even if it modifies a plat of a recorded subdivision. T.C.A. §§ 13-3-402, 13-4-302.

All of these matters – platting regulations, road and utility requirements, and procedures for submission of plats – are addressed more specifically in T.C.A. § 13-3-403 *et seq.* However, these provisions do not apply to any subdivision plat registered prior to February 14, 1935, or to land partitioned by a court of competent jurisdiction. T.C.A. §§ 13-3-407, 13-3-408. Furthermore, these sections do not repeal or impair private acts relating to planning requirements. T.C.A. § 13-3-409.

Additionally, regional planning commissions are required to adopt rules for the transaction of their business which must include the selection of additional officers from among its members it deems appropriate to fulfill the organizational needs of the regional planning commission, the requirements for the regional planning commission to make findings of fact, statements of material evidence and reasons for its actions as part of each motion or action of the regional planning commission and the keeping of a record of its resolutions, transactions, motions, actions, and determinations. T.C.A. § 13-3-103.

In order that the regional planning commission may accomplish its functions, it is granted certain statutory powers. One of the most significant is the authority to adopt regulations governing the subdivision of land within its jurisdiction; these regulations provide the requirements for plat approval. Counties may require legislative body approval of subdivision regulations or amendments enacted by the regional planning commission. T.C.A. § 13-3-403. Additionally, T.C.A. § 13-3-403(b) authorizes regional planning commissions to condition final plat approval on the completion of infrastructure improvements or in lieu of such completion, submittal of a bond, letter of credit, or other method of assurance, in form, in amount, and with conditions and surety satisfactory to the regional planning commission. The bond, letter of credit, or other method of assurance shall provide for and secure to the public and the local government the actual construction and installation of the infrastructure improvements within a period specified by the regional planning commission and expressed in the bond, letter of credit, or other method of assurance. The county attorney is required to enforce any bond, letter of credit, or other method of assurance by all appropriate legal and equitable remedies, and moneys collected on the bond, letter of credit, or other method of assurance shall be paid into the county's treasury. Upon the order of the regional planning commission, the moneys must be applied to the construction and installation of the infrastructure improvements.

Also, the planning commission is entitled to relevant information from local officials, and its members may enter upon property for examination or survey. T.C.A. §13-3-104. The commission may hire employees, with some restrictions, and it may contract with planners and other experts. Expenditures of the commission are governed by T.C.A. § 13-3-103. Under certain circumstances the planning commission also has the power to combine substandard lots under one owner into one standard lot. T.C.A. § 13-3-402. The planning commission may also grant variances to subdivision regulations. T.C.A. § 13-3-402.

Additionally, T.C.A. §13-3-413 authorizes regional planning commissions to promulgate provisions in subdivision regulations and recommend zoning ordinance amendments for the establishment of review and approval powers for site plans and the establishment under the zoning provisions for review and approval of planned unit developments, overlay districts, mixed use developments, condominiums and other types of sustainable design and development of property. Infrastructure and internal development improvements such as public and non-public roads, water and sewer lines, landscaping, green space, sustainable design features and other improvements as required by the planning commission, either through its subdivision regulation or through the local government's zoning ordinance, shall be subject to bonding or other methods of guaranteeing their installation. The planning commission may set and hold the guaranteeing instruments or may designate another governmental body that duty and function.

T.C.A. §13-3-413 also provides for vested rights in preliminary development plans or final development plans or building permits if preliminary plans are not required. Under §13-3-413, the vesting period for building permits is as specified in the permit and the vesting period for development plans is three years from the date of preliminary plan approval. If an applicant receives final development plan approval, then the applicant is eligible to receive two additional years. Section 13-3-413 also specifies that the total vesting period may not exceed 10 years unless the local government grants an extension and the maximum vesting period for multi-phase developments is 15 years (for all phases); however, this time period can also be extended by the local government. Additionally, §13-3-413 provides that the development standards in effect at the time of plan or permit approval will apply to the property during the vesting period. Section 13-3-413 also specifies certain circumstances in which vesting rights can be terminated.

Community Planning

Reference Number: CTAS-608

In addition to regional planning, the General Assembly has also provided means through which unincorporated communities may adopt unified planning strategies. T.C.A. §§13-3-201 through 13-3-203. Any region of less than 10 square miles in area and with more than 500 inhabitants may petition the Department of Economic and Community Development to create a community planning commission, which

has all the powers and duties of regional and municipal planning commissions. T.C.A. §§ 13-3-201, 13-3-202.

County Zoning

Reference Number: CTAS-609

Zoning Regulation

Reference Number: CTAS-610

The county legislative body is authorized to regulate land areas outside incorporated municipalities in such matters as the location and size of buildings; the percentage of a lot that may be occupied; the size of yards, courts, and other open spaces; the density and distribution of population; and the uses of buildings and land. T.C.A. § 13-7-101. To carry out this authority the county legislative body may implement the zoning plans created by the regional planning commission.

After a planning commission certifies a zoning plan, including both the text of a zoning ordinance and a zoning map, then the county legislative body must hold a public hearing on the plan. Statutory requirements regarding notice, publication, and amendment procedures must be observed before the zoning ordinance can take effect. T.C.A. §§ 13-7-104, 13-3-105.

In formulating a zoning scheme, the regional planning commission may develop a single plan or successive plans for parts of the county it deems appropriate for development. These plans divide the territory of a county lying outside incorporated municipalities into zoning districts. All regulations must be uniform for each class of building throughout the district, but the regulations in one district may differ from those in another. The zoning plan may also provide for the transfer of development rights. T.C.A. § 13-7-101(a)(2). If the county legislative body chooses to enact the zoning plan for more or less territory than that encompassed in the plan certified by the planning commission, then it must resubmit the plan to the commission for approval. If the revised plan is disapproved by the commission, then at least two-thirds (2/3) of the entire county legislative body membership must vote for its approval for the revision to pass. T.C.A. § 13-7-102.

Amendments

Reference Number: CTAS-611

The county legislative body is authorized to amend zoning regulations, although any amendment must first be submitted to the regional planning commission, which has thirty (30) days to pass the amendment or to offer suggestions. If the planning commission disapproves, the amendment becomes effective only through a subsequent majority vote of the county legislative body. Before final adoption, the county legislative body must hold a public hearing, giving at least fifteen (15) days notice (thirty (30) days in Shelby County) in a newspaper of general circulation in the county and including a summary of the proposed amendment. T.C.A. § 13-7-105.

Board of Zoning Appeals

Reference Number: CTAS-612

The county legislative body is also authorized to create a board of zoning appeals to make special exceptions to zoning regulations, assist in settling boundary line disputes, interpret zoning maps, and consider similar questions. T.C.A. §§ 13-7-106 through 13-7-109. The county legislative body appoints three, five, seven or nine regular members of the appeals board, along with one or more associate members who can sit for regular members under some temporary disability. A joint board of zoning appeals may be appointed by two or more counties. Compensation and length of terms are determined by the county legislative body within certain statutory guidelines. Vacancies are filled for the unexpired term and in the same manner as the original appointments. The county legislative body may remove any member for cause upon written charges and after a public hearing, and may specify rules governing organization, procedure, and jurisdiction of the board. T.C.A. § 13-7-106. The board of zoning appeals may also adopt supplemental rules of procedure if these are consistent with state statutes and rules adopted by the

county legislative body. T.C.A. § 13-7-107. Land use decisions made by the board of zoning appeals, other than variances, must be consistent with the regional plan if the county legislative body adopts the general regional plan in the form of a resolution. T.C.A. § 13-3-304.

County Building Commissioner

Reference Number: CTAS-522

The county is authorized to establish the position of county building commissioner, who is appointed by the county mayor and confirmed by the county legislative body. The building commissioner considers building permit applications and issues permits to those who comply with zoning regulations. Before any structure within the region is built, altered, or used, it must fully conform to all zoning regulations, and this compliance must be evidenced by a building permit. T.C.A. § 13-7-110. Building permit rules may also be enacted by private act. Any grant or refusal of a permit, or any other decision of the building commissioner, may be appealed to the board of zoning appeals. T.C.A. § 13-7-108. In the event any building official is denied permission to make an inspection, the official may obtain an administrative search warrant from a person authorized by law to issue warrants or from any court of record in the county where the official works. T.C.A. § 68-120-117.

Special Zoning Provisions

Reference Number: CTAS-613

The county legislative body is also authorized to establish a historic zoning commission (T.C.A. § 13-7-401 *et seq.*), as well as special zones for flood control and solar energy systems. T.C.A. § 13-7-102. These special zoning statutes, as well as the general zoning statutes, do not apply to land used for agricultural purposes as long as any structures on the land (including residences of farmers and farm workers) are incidental to the agricultural purpose unless the property is near state federal-aid highways, public airports, or public parks. T.C.A. § 13-7-114. However, counties participating in the national flood insurance program are required to regulate buildings and development (including those related to agriculture) located within a special flood hazard area (one hundred-year floodplain) to the extent required to comply with the national flood insurance program. T.C.A. § 13-7-114(c).

Counties are also authorized to include provisions in their zoning ordinances allowing for temporary family healthcare structures as a permitted accessory use in any single-family detached dwellings. Persons seeking to install such structures are required to obtain a permit from the county and the county is authorized to charge a permit fee of up to \$100. The structures would have to comply with all applicable local codes and ordinances. No advertising would be allowed on the structure or the property. Structures would have to be removed within 30 days after their use ceases to be necessary. Local governments are authorized to charge a fine of up to \$50/day for failure to timely remove the structure. Local governments are also authorized to revoke permits and/or seek injunctive relief for noncompliance with the statute. T.C.A. §§ 13-7-501 through 505.

Enforcement and Application

Reference Number: CTAS-614

Any person or company who violates zoning regulations is guilty of a misdemeanor, and each day the violation continues constitutes a separate offense. In addition, the county legislative body, attorney general, district attorney general, county building commissioner, or neighboring property owner (who would be specially damaged) may initiate appropriate action to prevent or remove the unlawful construction or use. T.C.A. § 13-7-111. Also, under the 1995 County Powers Act, the county legislative body has the authority to establish monetary penalties for violation of lawful county regulations, including zoning regulations. T.C.A. § 5-1-121.

The provisions of T.C.A. § 13-7-101 *et seq.* specify that these zoning provisions do not repeal or modify any private act enacted before 1935 that relates to zoning regulations. T.C.A. § 13-7-115. However, whenever a private act imposes more rigorous standards than those required by statute, then the private act will govern. Conversely, whenever the statute is more stringent, then the provisions of the statute prevail over those of the private act. T.C.A. § 13-7-112.

Counties may not regulate, which includes the requirement of building permits, buildings or other structures that are incidental to the agricultural enterprise and are located on agricultural land, unless such buildings or structures are located on agricultural lands adjacent or in proximity to state federal-aid highways, public airports or public parks. Buildings used as residences by farmers and farm workers are considered to be "incidental to the agricultural enterprise". T.C.A. § 13-7-114. However, counties participating in the national flood insurance program are required to regulate buildings and development (including those related to agriculture) located within a special flood hazard area (one hundred-year floodplain) to the extent required to comply with the national flood insurance program. T.C.A. § 13-7-114(c).

Counties also may not mandate the allocation of affordable or workforce housing units in existing or newly constructed developments through zoning regulations or other land use regulations or decisions. T.C.A. § 66-35-102.

Municipal Zoning Outside City Limits

Reference Number: CTAS-615

A municipality has statutory authority to enact zoning regulations for territory adjacent to but outside of its boundaries if that area has no zoning already in force. T.C.A. § 13-7-302. In order to enact zoning outside its municipal boundaries, the municipal planning commission must also be designated as the regional planning commission (T.C.A. § 13-3-102), and the municipality must file notice of intent with the county mayor at least six (6) months before the final enactment of the ordinance. T.C.A. § 13-7-303. If the county subsequently adopts zoning covering that territory, the municipal zoning is automatically superseded and repealed. T.C.A. § 13-7-306. According to the comprehensive growth planning law, a city may not zone outside its urban growth boundary once this boundary is in place. T.C.A. § 6-58-106(d).

Adoption of Building Codes

Reference Number: CTAS-616

The county legislative body may enact a resolution that adopts by reference any prepared building, plumbing, gas or fire prevention code. At least 90 days before the adoption of a resolution incorporating a code by reference, three copies of the code must be filed in the office of the county clerk. No resolution that adopts a code by reference will be effective until it is published in a newspaper of general circulation. T.C.A. § 5-20-102. Any code adopted by reference must be retained on file as a public record. T.C.A. § 5-1-116. These provisions apply only to the unincorporated area of a county and to those incorporated cities and towns within the county that do not elect to adopt their own codes regulating the same subject areas. T.C.A. § 5-20-106.

The adopting resolution may also incorporate by reference the administrative provisions of any code, or may include in the adopting resolution any suggested administrative provisions found in a code. If a code does not contain administrative provisions, the administrative provisions of another code may be adopted and included in the resolution. However, the penalty clause contained in such a code may not be incorporated by reference. T.C.A. § 5-20-105(a). Any official within the existing framework of county government may be charged with enforcing the code, including but not limited to officials who administer zoning regulations. T.C.A. § 5-20-103. A violation of any code is a misdemeanor. T.C.A. § 5-20-105(b). Additional enforcement power is vested in the county attorney or other designated county official who may, in addition to other remedies provided by law, obtain an injunction to prevent violation of any provision of the code. T.C.A. § 5-20-104.

Pursuant to T.C.A. § 68-120-101(a)(8), if a local government seeks to require sprinklers in residential construction, such requirements must be adopted by a 2/3 vote only after reading such ordinance or resolution in open session of the legislative body at meetings specially called on two (2) different days that are no less than two (2) weeks apart. Also requires that mandatory sprinkler requirements shall be voted on in an ordinance or resolution separate from any other ordinance or resolution addressing building construction safety standards.

The state fire marshal will recognize and accept certification of state, county and municipal employees from the National Fire Protection Association or the International Code Council, as satisfying the standards and qualifications for fire prevention and building officials. A county or other employing governmental entity must have all newly employed applicants for fire safety and building inspectors certified within 12 months of employment. T.C.A. § 68-120-113. Additionally, 2007 Public Chapter 582 enacted

T.C.A. § 68-120-118, which requires that all persons entering into employment after July 1, 2008 as inspectors to enforce plumbing, mechanical and fuel gas codes be certified by the state fire marshal. Inspectors hired after July 1, 2008 have up to 12 months from their date of employment to obtain certification; those who were already employed on July 1, 2008, are deemed to meet the certification requirements for 3 years from the date of certification, but will have to meet the requirements upon re-certification at the end of the initial 3 years. All certifications must be renewed every 3 years. The state fire marshal is directed to issue rules and regulations regarding standards and qualifications for certification, as well as a form application for certification.

Tennessee Clean Energy Future Act of 2009

Reference Number: CTAS-617

In order to increase the state's energy efficiency, the Tennessee General Assembly enacted the Tennessee Clean Energy Future Act of 2009. 2009 Public Chapter 529. As part of this Act, the legislature amended T.C.A. § 68-120-101, which provides for minimum statewide building construction standards.

Minimum statewide building construction standards existed before the passage of the Act. The standards, which include provisions relating to structural strength and stability, means of egress, and fire safety, are set by the state fire marshal and apply to state, city, county, and private buildings other than one and two family dwellings. The standards do not, however, apply to buildings in local jurisdictions that have adopted and are enforcing the International Building Code and either the International Fire Code or the Uniform Fire Code. Local jurisdictions can lose this exemption if they fail to adequately enforce the codes or if the codes they have adopted are not current within seven years of the latest edition (unless otherwise approved by the state fire marshal). For those buildings and jurisdictions that are subject to the state standards, the state fire marshal enforces the codes by reviewing and approving plans and specifications and charges fees to cover the costs.

As part of the effort to improve energy efficiency in the state, the Act amended T.C.A. § 68-120-101 to add energy efficiency as an area that must be addressed in the minimum statewide building construction standards. The Act also added one and two family dwellings to the list of structures that are covered by the statewide standards. The Act did, however, exempt renovations to such one- and two- family dwellings from the statewide standards. In addition, the Act made it clear that the statewide standards will not include mandatory sprinklers for one and two family dwellings but local governments may adopt more stringent standards should they choose to do so.

The biggest, and most complex, changes to T.C.A. § 68-120-101 related to exemptions available to local governments. A new provision in T.C.A. § 68-120-101, not found in the prior law, allows local governing bodies to exempt their jurisdictions from the application of minimum statewide standards to one and two family dwellings regardless of whether the local jurisdiction is enforcing its own codes or has no codes at all. This exemption requires a two-thirds (2/3) vote by the local governing body and expires 180 days after the next local legislative body election (or at an earlier date set out in the resolution). Thus, should a county legislative body choose to opt out of the application of minimum statewide standards to one and two family dwellings in its jurisdiction, the exemption will only last from the effective date of the resolution until 180 days after the next county legislative body election. At such time, the county legislative body will have to pass another resolution (again, by a two-thirds (2/3) vote) should they choose to continue the exemption.

Should a local governing body change its mind about exempting its jurisdiction's one and two family dwellings from minimum statewide construction standards, the Act does permit local governing bodies to reverse their action at any time by a simple majority vote. Taking such action would make one and two family dwellings subject to the minimum statewide construction standards. Under the Act, local governing bodies are required to transmit any resolutions done under T.C.A. § 68-120-101, whether they are opting out or back in, to the state fire marshal's office.

Effective May 4, 2017, residents in counties that have opted out of statewide residential building codes are authorized to request the state fire marshal to inspect their buildings for compliance with the statewide code. T.C.A. § 68-120-101(b)(1).

As in the prior version of T.C.A. § 68-120-101, local government jurisdictions can be exempt from statewide standards by enforcing standards themselves. The Act revises the criteria for this exemption. Under the Act, in order for local government jurisdictions to be exempt from the minimum statewide standards, they must demonstrate one of the following:

1. The local government has chosen to adopt and enforce building codes for all types of buildings and it has adopted the International Residential Code (for one- and two-family dwellings), the International Building Code (for all other types of buildings), and either the International Fire Code or the Uniform Fire Code; or
2. The local government has chosen to adopt and enforce building codes for all types of buildings other than one- and two-family dwellings and it has adopted the International Building Code and either the International Fire Code or the Uniform Fire Code; or
3. The local government has chosen to adopt and enforce building codes for one- and two-family dwellings only and it has adopted the International Residential Code and either the International Fire Code or the Uniform Fire Code.

To remain exempt, local jurisdictions must adequately enforce the codes and review plans and specifications and conduct inspections. And, as with the prior law, the codes adopted by local jurisdictions must be current within seven years of the date of the latest editions.

The Act provides that the state fire marshal will enforce minimum statewide standards with respect to buildings for which the local jurisdiction has not adopted and is not enforcing codes. For example, if a local jurisdiction has adopted and is enforcing codes for all buildings other than one and two family dwellings, the state fire marshal will enforce the minimum statewide standards for the one and two family dwellings (unless the governing body has exempted out one and two family dwellings as explained above)

The provisions of the Act amending T.C.A § 68-120-101 became effective on July 1, 2010.

Medical Services

Reference Number: CTAS-546

County Board of Health

Reference Number: CTAS-547

The primary agencies for local health services are the county board of health and the county health department. Each county is authorized to establish a board of health that is charged with the following duties: governing the policies of the health department, enforcing state health regulations, adopting rules to promote the general health of the county, and preparing an annual budget. The board must consist of the following members:

1. The county mayor;
2. The county director of schools or his or her designee;
3. Two physicians nominated by the county medical society;
4. One dentist nominated by the county dental society;
5. One pharmacist nominated by the county pharmaceutical society;
6. One registered nurse nominated by the county nurses' association;
7. The county health director (*ex officio* member);
8. The county health officer (*ex officio* member); and
9. A veterinarian and a citizen representative (optional members).

T.C.A. § 68-2-601.

Violation of health board regulations is a Class C misdemeanor, punishable by a fine not to exceed \$50 and by imprisonment for up to 30 days, or both. If the county fails to establish an active board of health, the commissioner of health and environment may establish a health advisory committee. T.C.A. § 68-2-601.

County Health Department

Reference Number: CTAS-548

Unlike the board of health, the county health department is a required agency. It is to be headed by the county health director, who is appointed by the commissioner of health and is compensated, at least in part, by the state. The commissioner also appoints a county health officer who must be a physician. If

the county health director is a physician, he or she may also serve as the county health officer. T.C.A. § 68-2-603.

The county legislative body must provide necessary office facilities and funds for the functioning of the county health department. T.C.A. § 68-2-604. All private acts relative to county boards of health or county health departments remain in effect after the passage of T.C.A. §§ 68-2-601 *et seq.*, 68-2-606.

Healthcare Facilities

Reference Number: CTAS-550

In order to operate in Tennessee, every publicly or privately owned hospital, nursing home, recuperation center, ambulatory surgical treatment center, mental health hospital or home for the aged is required to be licensed by the state Department of Health. T.C.A. § 68-11-201 *et seq.* A county may operate such facilities if they are licensed and maintained according to rules established by the state Department of Health. T.C.A. §§ 68-11-204, 9-21-105(21)(A). The state health care licensing board has exclusive jurisdiction to regulate this area so that any conflicting regulations adopted by local governments are inoperative. The state health care licensing board must approve all new healthcare facilities before construction work may begin. T.C.A. § 68-11-202.

Public School Nurse Program

Reference Number: CTAS-551

This program was created as a part of the Department of Health for the purpose of improving school performance, lowering the dropout rate, and safeguarding the health and well-being of students in Tennessee public schools. Nurses within the program are administratively assigned to various county and district health departments or local education agencies, but remain under the control and direction of the executive director of the school nurse program. This plan does not preempt local education agencies from continuing to employ and supervise school nurses who are not employees of the program. T.C.A. § 68-1-1201 *et seq.*

Disposition of Unclaimed Dead Bodies

Reference Number: CTAS-2121

Tennessee Code Annotated §§ 68-4-102 - 68-4-103 govern the disposition of unclaimed bodies of persons dying in charitable or penal institutions, publicly supported institutions, and those “delivered to a public official for burial or cremation at public expense.” The requirements are very generally summarized as follows:

- “Immediately” notify the nearest or other relative of the person, if any relative is known.
- Hold the body for 96 hours after notification of relative.
- If the body is unclaimed after 96 hours, notify the chief medical examiner.
- If the chief medical examiner does not demand the body within 72 hours, the body “shall be buried as provided by law or cremated in accordance with § 68-4-113.”

Pursuant to T.C.A. § 68-4-113, the coroner, medical investigator or county medical examiner may direct the cremation of an unclaimed dead body, provided that the proper notice is given and the body is held for the time period provided in T.C.A. § 68-4-103.

If the disposition of the remains of the decedent becomes the responsibility of the county, the public officer or employee responsible for arranging the final disposition of the decedent's remains shall have the right to control the location, manner and conditions of disposition. T.C.A. § 62-5-703(11).

Counties are authorized to appropriate moneys for the burial or cremation expenses of any poor person dying in the county, leaving no means to pay for the same. T.C.A. § 5-9-101(4).

Before the county can pay for a pauper's burial, an affidavit must be filed with the county showing the cost, and that the person was buried in the county, and that the claimant has no other means of obtaining payment. T.C.A. § 5-9-311.

Risk Management and Liability Problems

Reference Number: CTAS-759

Risk Management

Reference Number: CTAS-760

Risk management for county governments is essentially the same as it is for business or industry, even though the risks may be different. The purpose of risk management can be simply stated: Planning for the negative consequences of any decision, process or action. An effective risk management program is based on this simple concept. A shorthand way of thinking of these negative consequences is to think of them as losses. Preventing losses should be the concern of everyone in county government, from the highest elected official to every worker earning an hourly wage.

Preventing Losses Saves Money

Reference Number: CTAS-761

The function of a county government risk management program is two-fold. First, the program organizes the process of preventing losses. Some losses such as tornado damage cannot be prevented. Some losses occur because normal control measures fail. The second part of the risk management function, therefore, is to reduce the severity of losses that do happen. Risk management, as a critical component of any sound organization, can save money so that county commissioners can allow budget adjustments and keep tax increases low. A working program allows county mayors, county commissioners, and other officials, as well as general county employees, to provide better essential services, and to improve the overall performance of county government in the eyes of the public it serves.

Policy Statement

Reference Number: CTAS-762

The primary role of county mayors and county commissioners in risk management is to develop the county's policy in handling risks. This policy should be stated in a written policy statement which will serve as a guide with clear and unambiguous direction to the persons in charge of implementing the risk management program, which functions under the terms of this written document. An understanding of several factors is necessary in order to formulate this policy statement.

First, county officials must understand the overall goal of a risk management program. As a component of any sound management plan, the goal of risk management is to protect the financial integrity of the county. Officials must understand that eventually, after starting a risk management program, all officials and county employees will have to do things that they haven't done before. They will have to stop doing things that they are accustomed to doing. Funds will be spent and accounted for in different ways, and relationships among local government officials and employees will be altered. They must decide and understand what will be the underlying principles and standards of an operating program in their particular county. Without a strong commitment from top county officials and perhaps from other influential persons in the county, such as long time employees, the program will most likely fail.

With these understandings in mind, county officials should express their support in a written document to be formally adopted by resolution. This document is usually called the risk management policy statement. In the policy statement, any new practices and any changes in lines of authority can be clearly set forth. The policy statement should include all the objectives of the program and the methods to be used in attaining the objectives. Important detailed procedures may be outlined. For example, the way an employee accident is reported and the way a claim against the county is to be handled may be explained. The statement should detail the overall insurance program of the county, including loss control and safety programs to be implemented and the type of records to be kept. Finally, the policy statement should adopt a procedure for reporting on the activities of the program and a way for the program to be assessed.

As an alternative to the development of a formal, detailed policy statement the county commission may formulate and adopt a brief statement and then turn the entire matter over to the county mayor to work

out the details and report back to the commission for final approval. A committee can be formed to draft a policy statement. The county mayor can then appoint an employee to be temporary risk manager with the authority to learn risk management concepts, formulate a policy with localized needs in mind and produce a draft for consideration. A provisional policy statement can be adopted with the understanding it will be modified within a predetermined time limit. The advice of trusted insurance agents and brokers, local government attorneys, private company risk managers and other persons knowledgeable about local conditions and problems can be solicited on the best approach to develop the all-important policy statement.

Program Administration

Reference Number: CTAS-763

While the county mayor and county commissioners are coming to grips with the problem of establishing a policy and formalizing a statement, they should decide who will administer the program. In larger, well-financed counties, the ideal administrator is an experienced, knowledgeable, and full-time risk manager. For smaller counties, an alternative method may be necessary.

One such alternative consists of formulating a joint powers agreement among the county government and any or all of the small municipalities within the county. Under the agreement, the services of a risk management consulting firm could be obtained or a single risk manager could be hired for all the jurisdictions. A serious drawback of this method is that a considerable amount of time must be devoted to establishing the scheme. Officials must decide how such a person would be paid and what amount of his or her time would be necessary for each jurisdiction.

Another option is to use an existing employee to perform this function. The job of an employee already performing one or two risk management tasks can be expanded to include the full range of risk management functions, or an employee with the necessary skills and understanding may be trained for the position. For example, the county executive can identify an employee exceptionally good at purchasing insurance or in handling insurance claims. With some additional training, that person's duties can be expanded to include safety programs, then department inspection, then loss analysis, and so on. Through a well-planned course of study and self-training, in conjunction with salary increases and other incentives, such an employee can do well. Any person trained on-the-job must be carefully evaluated, and this type of risk manager would be no exception.

Officials must remember that an employee who gains a position of expanded responsibility or who is upgraded to the role of risk manager needs the requisite complementary increase in authority, in addition to salary boosts. The salary increase is necessary because this type of employee is more likely than most to leave employment once experience is obtained in the risk management field.

Successful risk management consultants generally disapprove of the committee approach to risk management. This approach involves imposing additional burdens on such officials as the county attorney, county executive, administrative heads and major staff employees as a group. They act as a committee, meeting and working out the details of program administration. Usually, each committee person assumes the responsibility for a single part of the program. These officials and employees normally are associated with any risk management program, but their working as a committee unfortunately results in a disjointed and unfocused effort. Although in the end the committee approach may be the only feasible one for a county, it should be avoided if possible. If not possible, then it should be temporary.

Elements of Risk Management

Reference Number: CTAS-764

The general responsibilities of a county risk manager include identifying and evaluating loss exposures, developing risk control programs, and deciding how best to fund risks. Risk management experts think of a full-scale risk management system as a system with four elements:

1. Risk identification
2. Risk evaluation
3. Risk control, and
4. Risk financing

Using the four-element approach is a step-by-step process. The risk manager first must identify a Potential Loss before it can be evaluated.

Evaluation, the second step, is necessary to know how to control the expected loss. To evaluate a potential loss, the risk manager must know what the loss is, determine its severity, and calculate its probable frequency of occurrence.

The third element, Risk Control, is the one most often recognized by county officials. It is subdivided into "loss prevention" and "loss reduction." County officials will avoid much disappointment by admitting in advance and declaring in the policy statement that a risk manager rarely can completely prevent a loss in a given area. A sound risk management program of loss prevention can, however, decrease the frequency of loss in that area. When a loss does occur, the measures taken under the program will reduce the cost or severity of the loss.

The two-fold goal of the Risk Control element of a program is to-

- decrease the frequency of losses and
- reduce their severity once they occur.

Finally, to finance the loss in the proper manner -- after identifying it, evaluating it, and using such control measures as safety programs, inspections, and disaster training -- the risk manager must cover the risk with insurance or with a combination of insurance and risk retention methods.

Of the four elements of a risk management program, the policy-making role of county mayors and county commissioners is greatest in Risk Financing, which is simply arranging a method of paying for losses. No matter how successfully a manager handles loss exposures, the county will always need some type of risk financing program. No loss prevention program is 100% effective so when losses occur, they need to be paid. On the other hand, risk financing can only be effective if efforts have been made to identify, evaluate, and control losses.

The two major categories of risk financing are *retention* and *transfer*. All risk financing techniques are one or a combination of both. Risk retention includes-

- all self-insurance programs
- deductibles
- uninsured losses

and any other method in which the county assumes all or part of a loss.

Risk is transferred through a contract in which one organization agrees to pay for the losses of another organization in exchange for a premium. Insurance is the most common form of risk transfer. County executives and county commissioners must make the final determination of what forms of Risk Financing to use.

Liability Problems

Reference Number: CTAS-765

Liability exposure, particularly personal liability exposure, and also (because of the rapid rise in the cost of insurance) county liability exposure, is one of the most important subjects for county executives and county commissioners to understand. Tort reform has been a popular topic in recent years, but non-tort liability can in many instances be more costly to counties. This Section will discuss both tort and non-tort liability, including certain immunity provisions of law. Liability associated with personnel, one of the fastest growing areas of the law, will be mentioned only briefly in this section.

What is a tort? A tort is a civil action based on a violation of a duty imposed by law. A tort can be the result of an intentional act or a negligent act. An action can be both a tort and a crime, for instance, an assault could result in both criminal liability and civil liability. The plaintiff who claims to have suffered a tort must show an act, intentional or negligent, which violates a duty imposed by law, generally the standard of care an ordinary person would exercise in the circumstances, and damages resulting from the breach of duty. The violation of duty can be through misfeasance (the improper doing of an act), or by nonfeasance (omitting to do an act).

Tennessee Governmental Tort Liability Act

Reference Number: CTAS-766

Prior to 1973, Tennessee counties were subject to the state's sovereign immunity for governmental acts, but were liable for damages resulting from proprietary activities. Governmental acts were those activities that were peculiar to governments, or activities only governments could provide, such as police protec-

tion, fire protection, education or tax collection. Proprietary activities were those that could be provided by private as well as governmental entities, such as water and sewer service, electrical services and mass transit.

In 1973, the Tennessee General Assembly enacted the Tennessee Governmental Tort Liability Act (T.C.A. § 29-20-101 et seq.), which provides that counties are immune under state law from all suits arising out of their activities, either governmental or proprietary, unless immunity is specifically removed by the law. It is important to remember that this immunity does not extend to liability under federal law.

In cases where the county is immune, county officials and employees may be individually liable, but only up to the liability limits established in the Tennessee Governmental Tort Liability Act. T.C.A. § 29-20-310(c). When the case is one where the county can be liable, the official or employee is immune. T.C.A. § 29-20-310(b). Willful, malicious or criminal acts, or acts committed for personal gain, do not fall under the personal liability protective provisions of the Tennessee Governmental Tort Liability Act (nor do medical malpractice actions brought against a health care provider).

Members of all county boards, commissions, agencies, authorities and other governing bodies created by public or private act, whether compensated or not, are absolutely immune from suit under state law arising from the conduct of the entity's affairs. This immunity is removed when the conduct is willful, wanton or grossly negligent. T.C.A. § 29-20-201.

Areas in which the Tennessee Governmental Tort Liability Act removes governmental immunity (i.e., kinds of actions for which the county can be sued) are:

1. Claims arising from the negligent operation of motor vehicles;
2. Claims arising from negligently constructing or maintaining streets, alleys or sidewalks;
3. Claims arising from the negligent construction or maintenance of public improvements; and
4. Claims arising from the negligence of county employees. T.C.A. §§ 29-20-202 through 29-20-205).

There are exceptions to these areas where immunity is removed. These activities, for which the county is immune under state law, but for which an officer or employee may be liable, include claims arising from:

1. The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
2. False imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of privacy or civil rights;
3. Issuing, denying, suspending, or revoking, or the failure to refuse to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;
4. Failing to inspect or negligently inspecting any property;
5. Instituting or prosecuting any judicial or administrative proceeding;
6. Negligent or intentional misrepresentation;
7. Riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; or
8. Assessing, levying or collecting taxes. T.C.A. § 29-20-205.

Persons other than elected or appointed officials and members of boards, agencies and commissions are not considered county employees for purposes of the Governmental Tort Liability Act unless the court specifically finds that all of the following elements exist:

1. The county selected and engaged the person in question to perform services;
2. The county is liable for the compensation for the performance of such services and the person receives all compensation directly from the county's payroll department;
3. The person receives the same benefits as all other county employees, including retirement benefits and eligibility to participate in insurance programs;
4. The person acts under the control and direction of the county not only as to the result to be accomplished but as to the means and details by which the result is accomplished; and
5. The person is entitled to the same job protection system and rules, such as civil service or grievance procedures, as other county employees. T.C.A. § 29-20-107.

A regular member of the county voluntary or auxiliary fire fighting, police or emergency assistance organization is considered to be a county employee without regard to the elements listed above. 29-20-107(d). The county cannot extend immunity to independent contractors or other persons or entities by contract. T.C.A. § 29-20-107(c).

The county may now insure, either by self-insurance or purchasing insurance, or indemnify (up to the new limits set in the Tennessee Governmental Tort Liability Act) its employees and officials for their liability exposure under the Tennessee Governmental Tort Liability Act. T.C.A. § 29-20-310(c).

The following liability limits under the Tennessee Governmental Tort Liability Act (T.C.A. § 29-20-403) are for occurrences or accidents occurring on or after July 1, 2007 and are as follows:

Type of Claim	Limit
Bodily injury or death of any one person in any one accident, occurrence or act	\$300,000
Bodily injury or death of all persons in any one accident, occurrence or act	\$700,000
Injury to or destruction of property of others in any one accident	\$100,000

It is very important to know that these limits do not apply to federal civil rights actions in state or federal courts.

Actions under the Governmental Tort Liability Act must be commenced within 12 months after the cause of action arises (T.C.A. § 29-20-305), like other tort claims. This one-year statute of limitations can be extended when claims involve persons under legal disabilities (incompetents, minors, etc.) or when the injured party has reasonably failed to discover the existence of his or her cause of action against the county, county officials or employees

Liability for Personnel Matters

Reference Number: CTAS-767

Important employment law considerations include hiring, compensation, benefits, termination, retirement, the federal Fair Labor Standards Act (“FLSA”), right-to-know statutes, military and reserve service, jury service, the Occupational Safety and Health Act, the Equal Pay Act, the Immigration Control Act, the insurance provisions of the Consolidated Omnibus Budget Reduction Act (“COBRA”), FICA and FIT withholdings and the Family and Medical Leave Act (“FMLA”).

As employers, county officials must refrain from retaliating or firing based on the employee’s exercise of a protected constitutional right (e.g., freedom of speech), or a statutory right (e.g., filing a workers’ compensation claim). Discrimination must be avoided in every aspect of employment. Under state and federal law, an employer cannot discriminate against an employee or a potential employee based upon race, color, sex, religion, national origin, age or disability (including infectious, contagious or similarly transmittable diseases). Further, any form of sexual harassment is illegal. An individual may file a discrimination complaint with the Equal Employment Opportunity Commission (“EEOC”) or the Tennessee Human Rights Commission (“THRC”).

An employer cannot fire an employee solely for: (1) refusing to participate or remain silent about illegal activities; or (2) using an agricultural product not regulated by the alcoholic beverage commission that is not otherwise prohibited by law (i.e., smoking) if the employee follows the employer’s guidelines regarding the use of the product while at work. T.C.A. § 50-1-304).

Finally, the First Amendment to the United States Constitution applied to the states through the Fourteenth Amendment prohibits patronage dismissals of certain types of governmental employees. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64 (1990). Patronage dismissals are those based upon political activity or affiliation.

Other Non-Tort Liability

Reference Number: CTAS-768

The Tennessee Governmental Tort Liability Act does not apply to many types of actions filed in both state and federal courts. In state court, for example, compensation, breach of contract, inverse condemnation and many other types of common law and statutory causes of action can be the basis of a non-tort action. The limits of the Tennessee Governmental Tort Liability Act do not apply to these non-tort actions.

Breach of Contract

Reference Number: CTAS-769

Counties are responsible for the breach of a contract entered into by the county. The extent of liability in such a contract action depends upon the terms of the contract and the damages suffered by the parties. The county could be required by the courts to perform a contract according to its terms in an action for specific performance.

When an official attempts to enter into a contract on behalf of the county without actual authority to enter into such a contract, the official may then be held personally liable for the performance of the contract.

Other Actions

Reference Number: CTAS-770

There are numerous areas, including search and seizure, voting rights, improper arrest, discriminatory enforcement of statutes and the use of unlawful force, which may result in lawsuits against the county based on the actions of law enforcement and other court personnel. These claims can result in lawsuits in federal court under the federal civil rights act (42 U.S.C. § 1983) or in state court under the same federal statutes or as common law actions. *Poling v. Goins*, 713 S.W.2d 305 (Tenn.1986). A negligent action, unless it rises to the level of gross negligence, will not give rise to an action under (42 U.S.C. § 1983). *Daniels v. Williams*, 106 S.Ct.662 (1986); *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987).

The federal antitrust laws (15 U.S.C. § 1 et seq.) provide that counties will not be held responsible for damages in antitrust actions, but the county can still be enjoined from doing, or mandated to do, certain acts. In general, county officials must take care in actions which restrict competition, such as granting of exclusive franchises, referring the public to particular attorneys or lending institutions, or giving different persons different access to records.

There is an extensive framework of other laws, both state and federal, applicable to counties. Consult your county attorney when you are uncertain about the legal implications of any action you are preparing to take.

Regulatory Powers

Reference Number: CTAS-562

County regulatory powers include all of the following:

[Regulation of Beer Sales](#)

Powers to Prevent and Abate Nuisances

Reference Number: CTAS-563

In 2002, the General Assembly amended a part of the County Powers Act to authorize counties without zoning to exercise the certain regulatory powers granted to municipalities under T.C.A. § 6-2-201(22) and (23). T.C.A. § 5-1-118. The powers are described in the law as the ability to:

- Define, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, businesses, occupations, callings, trades, uses of property and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the municipality, and exercise general police powers; and
- Prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained. T.C.A § 6-2- 201(22) and (23).

The next year, the General Assembly revisited the statute and expanded its application to allow all counties the ability to use these powers after adoption of a local resolution by a two-thirds (2/3) vote of the county legislative body.

Limitations on the Exercise of Regulatory Authority. While this new authority is a broad expansion of county regulatory power, the grant of authority came with several restrictions. The exercise of these powers by counties is limited in a number of ways by both the statute itself and the state and federal constitutions.

Local Adoption

Reference Number: CTAS-564

Even though all counties are eligible to exercise the powers in T.C.A. § 6-2-201(22) and (23), a county may not pass any such regulations pursuant to that authority unless it first adopts those powers by a resolution passed by a two-thirds (2/3) majority of the county legislative body. Also, Chapter 57 of the Public Acts of 2003 clarified that the county must not only pass such a resolution by a two-thirds (2/3) majority but also must pass any subsequent regulations by a two-thirds (2/3) majority. T.C.A. § 5-1-118.

Jurisdiction

Reference Number: CTAS-565

By law, the authority granted to counties by T.C.A. § 5-1-118(c) may be exercised only in the unincorporated areas of the county. Additionally, the law states that it should not be construed to allow any county to prohibit or in any way impede any municipality in exercising any lawful municipal power or authority.

Exempted Activities

Reference Number: CTAS-566

The law also exempts certain businesses and practices from regulation. The powers conferred upon counties by T.C.A. § 5-1-118(c) do not apply to the following activities, which are regulated under other provisions of general law:

- Sale of beer and alcoholic beverages;
- Wholesale of beer;
- Surface mining; production of oil and gas;
- Activities covered by environmental protection laws and regulations dealing with air pollution, atomic energy, solid waste disposal and management, landfills, hazardous waste management, petroleum underground storage, oil spill cleanup, dry cleaning, water, wastewater and sewerage;
- Water management;
- Wells; and
- Dams.

Additionally, T.C.A. § 5-1-118(b) provides that counties may not use these powers to prohibit or regulate normal agricultural activities.

Grandfathered Uses

Reference Number: CTAS-567

In T.C.A. § 5-1-118(c)(3), the law provides further that all court decisions and statutory laws relating to variances and nonconforming uses applicable to zoning ordinances and land use controls shall apply to the enforcement and exercise of these new regulatory powers. For example, if a county determined that the sound of planes taking off and landing at an airport could potentially be a nuisance to surrounding residential properties and passed a regulation prohibiting the location of an airport within one-half mile of a residential property, this regulation may limit the location of future airports in the county, but an airport that was in existence at the time the regulation was passed that violated the distance rule would be allowed to continue to operate as a pre-existing nonconforming use.

Constitutional Limitations

Reference Number: CTAS-568

As with all government action, regulations passed under this new authority must be both written and enforced in such a manner that they do not violate the constitutional rights of people affected by the regulations. For example, the county could not pass a regulation that prohibited passing out literature of a political nature. This would obviously violate a citizen's First Amendment right to freedom of speech.

The county could not pass regulations prohibiting religious ceremonies or the ownership of guns. The regulations could not discriminate on the basis of race, gender, or other protected classes. These limits are obvious. Issues that are more likely to arise would involve challenges that a regulation resulted in taking property without just compensation or failed to provide due process. If the regulation is so burdensome on a property owner that the owner can no longer get use, enjoyment, or value out of the property, a court may find that the regulation effectively "took" the value of the property from the owner without providing compensation. In that case, the regulation may be struck down, or the county may be required to compensate the injured property owner. Due process problems may arise if citizens are not provided a means to dispute or appeal a penalty under the regulation. Part of providing due process in a regulation also involves giving the public adequate notice of the regulation. This standard of adequate notice requires a regulation to be clear in its language and application so that those affected understand the regulation. If a county regulation is so vague that the public cannot ascertain what conduct is regulated or how it is regulated, it may be struck down as unconstitutional.

Enforcement

Reference Number: CTAS-569

The laws passed in 2002 and 2003 did not include any specific provisions regarding how these new regulatory powers would be enforced. Therefore, enforcement will fall under existing statutory authority. As part of the original "County Powers Act," the legislature passed T.C.A. §§ 5-1-121 and 5-1-123. These statutes authorize enforcement of county regulations by monetary penalties and direct that the general sessions court is the proper venue for enforcement of the regulations. In T.C.A. § 5-1-121, the legislature provided that the penalties for violation could be up to \$500 per violation; however, subsequent court decisions probably place limits on this monetary penalty. See *Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001). According to the Tennessee Supreme Court in that case, a punitive fine levied by a local government cannot exceed \$50 unless the defendant is allowed to have a jury trial. Higher fines could be enforced if they are remedial in nature rather than punitive, but this distinction is difficult to make. Therefore, a county should generally limit monetary penalties to \$50 or less per violation. Penalty provisions of any regulations should be carefully considered by the county attorney. The county attorney should also be involved in the development of any regulations as he or she will most likely be involved in enforcing the regulations and defending any legal challenges to the regulations. Attorney General's Opinion 03-024 states that ordinances or regulations passed under T.C.A. 5-1-118(c) are to be enforced by a civil lawsuit brought on behalf of the county. The attorney general further opined that since the statutory scheme does not designate a specific officer to prosecute ordinance violations, it appears that suits to enforce a regulation would be brought by the county attorney.

Other Methods of Enforcement

Reference Number: CTAS-2179

In addition to the authority granted to counties by the County Powers Act, counties may also file suit to abate nuisances pursuant to T.C.A. § 29-3-101 *et seq.* Under this set of statutes, petitions can be brought in the name of the state, upon relation of the attorney general and reporter, or any district attorney general, or any city or county attorney, or without the concurrence of any such officers, upon the relation of ten (10) or more citizens and freeholders of the county wherein such nuisances may exist. T.C.A. § 29-3-102.

The court is authorized to issue a temporary injunction during the proceedings and if the court finds that a nuisance exists at the conclusion of the case, the court will issue an order of abatement. T.C.A. §§ 29-3-105, 110. As part of the order of abatement, the court may assess costs of public services required to abate or manage the nuisance, including, but not limited to, law enforcement costs, if any, caused by the public nuisance. The governmental entity must submit evidence of such costs to the court in order to be reimbursed. T.C.A. § 29-3-110.

Cable TV Regulation

Reference Number: CTAS-570

With the passage of the "Competitive Cable and Video Services Act" of 2008, codified at Title 7, Chapter 59, cable providers now have the option of obtaining either a statewide cable franchise or a local cable franchise from a county or municipality. While the cable act does make major changes to state cable franchise law, many areas of the prior law have been expressly preserved. For example, the act does not alter existing state law relating to local control of the public right-of-way nor does it alter existing law relating to the police powers of local governments. Furthermore, the new act does not alter or restrict the right of counties or municipalities to impose ad valorem taxes, sales taxes, or other taxes of general applicability. One important change that was made, however, was to the customer service provisions. Under the new act, FCC customer service standards will apply to statewide franchise holders, while local franchise requirements will continue to be applicable to local franchise holders. For statewide franchise holders, customer complaints will be handled by the Tennessee Regulatory Authority. Local governments will continue to handle complaints under local franchise agreements.

Before taking any action regarding cable television or other telecommunications services, counties must consult three major pieces of federal legislation: the Cable Communications Policy Act of 1984 (47 U.S.C. § 521 *et seq.*), the Cable Television Consumer Protection Act of 1992, and the Telecommunications Act of 1996. This last act, effective as of February 8, 1996, is the first major overhaul of federal telecommunications law since 1934. The intent of the 1996 act is to reduce regulation of these services on all levels and promote competition within and between the different industries that are beginning to overlap due to new technology. Basically, this means that the distinction between cable, telephone, video and other communications industries is becoming blurred as companies begin offering multiple services and many new companies enter this field.

Local and state regulations that prohibit or have the effect of prohibiting any entity from providing telecommunications services are pre-empted by this federal statute (Section 253, Telecommunications Act of 1996). However, this limitation is not intended to prevent local governments from managing public rights of way and receiving fair and reasonable compensation for the use of the right of way, as long as it is done in a competitively neutral and nondiscriminatory manner. Counties should prepare for the expansion of these fields and begin developing a comprehensive plan for the management of public rights of way.

Federal law provides that a state or other franchising authority (including counties) may also hold an ownership interest in a cable service. 47 U.S.C.A. § 533. However, until recently, counties in Tennessee lacked the authority to operate a cable television franchise. Op. Tenn. Att'y Gen. 88-170 (Sept. 20, 1988).

In recent years, the General Assembly has amended Title 7, Chapter 52, of the *Tennessee Code Annotated* to allow municipalities that operate an electric plant to enter into the telecommunications service field. "Municipality" is defined under that Chapter of the code to include both metropolitan governments and counties. Under T.C.A. § 7-52-401 *et seq.*, municipalities are authorized to provide telephone, telegraph or telecommunications services through the board or supervisory authority that operates the electric system. This industry is highly regulated by both the Tennessee Regulatory Authority and the Federal Communications Commission. Any telecommunications system operated by a county would have to conform to all such regulations and requirements. Also, under T.C.A. § 7-52-601 *et seq.*, the same municipalities are authorized to provide cable television services, two-way video transmission, video programming, Internet services or similar services. Title 7, Chapter 52, Parts 4 and 6, include extensive regulations regarding how such services may be provided and how the utility must be structured. These laws, as well as the federal laws discussed above, should be thoroughly consulted by any local government interested in entering these arenas.

Debris Removal and Weed Control

Reference Number: CTAS-571

Counties are granted permissive authority regarding the removal of overgrown vegetation, accumulated debris, and vacant dilapidated buildings or structures in the county. Owner-occupied residences are not included, except in certain counties designated by narrow population class. T.C.A. § 5-1-115. Owners of the property are to be provided with notice to remedy the situation before the county may act. Counties are granted a lien on the property for the cost of remedying or removing the situation. This statute's enforcement mechanisms include the placing of lien on the property to reimburse the county for the cost of

removing the garbage, litter or refuse and imposing a monetary penalty enforceable in general sessions court. T.C.A. § 5-1-121.

Additionally, counties are authorized to adopt regulations for litter control under T.C.A. § 39-14-508. The regulations promulgated by a county pursuant to this statute may require property owners to conform their property to the regulations by removal of garbage, litter, refuse or rubbish. The statute requires the county to send a statement to the owner itemizing the cost of the removal and provides that the statement shall constitute a lien upon the property if the owner fails to reimburse the county for the cost of the removal within sixty (60) days, sets out the priority of the lien when filed, and specifies that the lien shall be filed with the register of deeds of the county in which the property lies. The full resolution, or the caption and a complete summary of the resolution, must be published after its final passage in a newspaper of general circulation in the county and the resolution cannot take effect until it is published.

Regulation of Adult-Oriented Entertainment and Massage

Reference Number: CTAS-572

The primary state law that grants counties the authority to license and regulate adult-oriented establishments and entertainers is the Adult-Oriented Establishment Registration Act of 1998, T.C.A. § 7-51-1101 *et seq.* This act replaces a former and somewhat similar registration act, which was declared unconstitutional by a federal district court. *Brothers Three Enterprises v. Knox County*, No. CIV-3-89-0035 (E.D. Tenn., N.D., February 4, 1991). This registration law is optional for county governments and may be adopted by a two-thirds (2/3) majority of the county legislative body. An important change to this act occurred in 2008. In 2008 Public Chapter 1085, T.C.A. §§ 7-51-1102, 7-51-1109, and 7-51-1110 were amended to permit county legislative bodies to choose an alternative appeals procedure for denials of adult establishment applications and revocations of permits for adult establishments. Currently, if the **adult-oriented establishment board** affirms the denial of an application or the revocation of a permit, the county attorney files suit for declaratory judgment to confirm the decision was properly made. The county legislative body can now opt into a different procedure in which the aggrieved party shall have the right to appeal the board's decision by common-law writ of certiorari. The county legislative body may rescind its election at any time.

Another general state law governs the location and hours of operation of adult-oriented establishments codified at T.C.A. § 7-51-1401 *et seq.* This law prohibits these businesses, except those offering only live stage shows, adult cabaret, or dinner show type settings, from opening before 8 a.m. or remaining open after midnight Monday through Saturday. On Sundays and legal holidays they must remain closed. Local governments may establish shorter hours of operation, but may not extend the hours. The act provides that these businesses cannot be located within 1000 feet of child care facilities, public/private charter schools, public parks, residences, family recreation centers or places of worship. The act also contains regulations regarding the structure and type of lighting in viewing booths, and specifies penalties for violations.

Although under previous law counties could adopt an optional act to regulate massage services within the county, those statutes have been repealed and superseded by general law enacting a state licensing system in T.C.A. § 63-18-101 *et seq.* Under that law, a state board performs all licensing and regulatory functions that were formerly under the authority of the county board.

Animal Control

Reference Number: CTAS-573

The county legislative body, by resolution, may "license and regulate dogs and cats, establish and operate shelters and other animal control facilities, and regulate, capture, impound and dispose of stray dogs, stray cats and other stray animals." T.C.A. § 5-1-120.

It is unlawful to own, keep or harbor a dog or cat six months old or older that has not been vaccinated for rabies by or under the supervision of a veterinarian. Counties and municipalities are authorized to adopt local resolutions or ordinances to require registration of dogs or cats in their jurisdiction. Any such local laws must include methods for collecting registration fees and must require expenditure of the funds solely to establish and maintain a rabies control program, to conduct animal control activities, to ensure that dogs and cats are properly vaccinated and that biting animals or rabies suspects are observed or confined in accordance with state law and regulations. If the local law meets or exceeds the mini-

mum requirements of the state law, the local law, not the state law, will apply in that jurisdiction. T.C.A. § 68-8-101, *et seq.*

Contractor Permits and Bonds

Reference Number: CTAS-574

A county legislative body, by resolution adopted by a two-thirds majority vote, may require certain contractors to register with a department of codes administration or other appropriate agency and post a permit bond before engaging in activities subject to this law. If adopted, the contractors affected include those who contract to perform the following services:

- Construction, erection, alteration, repair, removal, or demolition of any building or structure or part thereof;
- Repair or replacement of any damage to a building or structure caused by insects or natural disaster;
- Erection or construction of signs or billboards; or
- Construction of swimming pools.

A bond of \$10,000 is required for building permits under \$25,000, and a bond of \$50,000 is required for permits of \$25,000 or more. A bond of \$40,000 is required for all gas/mechanical, plumbing and excavation permits. Also, if adopted, this law requires the contractor to secure a contractor's business license.

Contractors of multiple trades or contractors involved with work on more than one structure may provide one \$50,000 bond to meet the requirements of the law. Nonprofit housing ministries are exempt from this law. T.C.A. § 62-6-137.

Guns on Public Property

Reference Number: CTAS-575

Guns on School Property. Pursuant to TCA § 39-17-1309, it is an offense for any person to possess or carry, whether openly or concealed, any firearm, not used solely for instructional or school-sanctioned ceremonial purposes, in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field or any other property owned, used or operated by any board of education. It is not an offense for a nonstudent adult to possess a firearm, if the firearm is contained within a private vehicle operated by the adult and is not handled by the adult, or by any other person acting with the expressed or implied consent of the adult, while the vehicle is on school property.

Guns in Parks. Pursuant to T.C.A. § 39-17-1311, it is legal for persons with a valid handgun carry permit to carry a handgun while within or on a public park, natural area, historic park, nature trail, campground, forest, greenway, waterway or other similar public place owned or operated by the state, a county, a municipality, or instrumentality of the state, a county, or municipality. However, it is illegal for a person with a handgun carry permit to carry a handgun on such property while it is in use by any board of education, school, college or university board of trustees, regents, or directors for the administration of any public or private educational institution for the purpose of conducting an athletic event or other school-related activity on an athletic field, permanent or temporary, including but not limited to, a football or soccer field, tennis court, basketball court, track, running trail, Frisbee field, or similar multi-use field; and the person knew or should have known the athletic activity or school-related activity was taking place on the property; or failed to take reasonable steps to leave the area of the athletic event or school-related activity after being informed of or becoming aware of its use. See Op. Tenn. Att'y Gen.15-63 (July 29, 2015) (Possession of Firearms in Public Parks Owned by Counties and Municipalities).

Guns in County Buildings. Pursuant to T.C.A. § 39-17-1359, a local government entity or agent thereof is authorized to prohibit the possession of weapons by any person who is at a meeting conducted by, or on property owned, operated, or managed or under the control of the government entity. The prohibition also applies to a person who is authorized to carry a firearm pursuant to T.C.A. § 39-17-1351.

In 2017, the legislature amended the statute by adding the following:

A county is not authorized to enact or enforce a prohibition or restriction on the possession of a handgun by a handgun carry permit holder on property owned or administered by the entity unless the following are provided at each public entrance to the property:

- (1) Metal detection devices;

- (2) At least one (1) law enforcement or private security officer who has been adequately trained to conduct inspections of persons entering the property by use of metal detection devices; and
- (3) That each person who enters the property through the public entrance when the property is open to the public and any bag, package, and other container carried by the person is inspected by a law enforcement or private security officer or an authorized representative with the authority to deny entry to the property.

These restrictions do not apply to:

- (1) Facilities that are licensed under title 33, 37, or 68;
- (2) Property on which firearms are prohibited by § 39-17-1309 or § 39-17-1311(b)(1)(H)(ii);
- (3) Property on which firearms are prohibited by § 39-17-1306 at all times regardless of whether judicial proceedings are in progress;
- (4) Buildings that contain a law enforcement agency, as defined in § 39-13-519;
- (5) Libraries; or
- (6) Facilities that are licensed by the department of human services, under title 71, chapter 3, part 5, and administer a Head Start program.

Guns in Trunks. Notwithstanding T.C.A. § 39-17-1309, T.C.A. § 39-17-1311, or T.C.A. § 39-17-1359, unless expressly prohibited by federal law, the holder of a valid handgun carry permit recognized in Tennessee may transport and store a firearm or firearm ammunition in the permit holder's privately owned motor vehicle while on or utilizing any public or private parking area if-

- (1) The permit holder's vehicle is parked in a location where it is permitted to be; and
- (2) The firearm or ammunition being transported or stored in the vehicle:

(A) Is kept from ordinary observation if the permit holder is in the motor vehicle; or

(B) Is kept from ordinary observation and locked within the trunk, glove box, or interior of the person's motor vehicle or a container securely affixed to such motor vehicle if the permit holder is not in the motor vehicle. T.C.A. § 39-17-1313.

A handgun carry permit holder transporting, storing or both transporting and storing a firearm or firearm ammunition does not violate the law if the firearm or firearm ammunition is observed by another person or security device during the ordinary course of the handgun carry permit holder securing the firearm or firearm ammunition from observation in or on a motor vehicle.

Pursuant to T.C.A. § 50-1-312, no employer may discharge or take any adverse employment action against an employee solely for transporting or storing a firearm or firearm ammunition in an employer parking area in a manner consistent with T.C.A. § 39-17-1313. An employee discharged, or subject to an adverse employment action, in violation of T.C.A. § 50-1-312 (b)(1)(A) shall have a cause of action against the employer to enjoin future acts in violation of this section and to recover economic damages plus reasonable attorney fees and costs.

Except as otherwise provided in T.C.A. § 39-17-1313 for parking areas, nothing in T.C.A. § 50-1-312 shall be construed as prohibiting an employer from prohibiting firearms or firearm ammunition on the premises of the employer.

Cause of Action Against County

A party who is adversely affected by an ordinance, resolution, policy, rule, or other enactment that is adopted or enforced by a county or any county agency, department, or official that violates T.C.A. § 39-17-1314(g) may file an action in a court of competent jurisdiction against the county for:

- (A) Declaratory and injunctive relief; and
- (B) Damages.

T.C.A. § 39-17-1314(g)(1)(applies to any ordinance, resolution, policy, rule, or other enactment dealing with the local regulation of firearms that is adopted or enforced on or after July 1, 2017).

As used in T.C.A. § 39-17-1314(g), a party is "adversely affected" if:

- 1. The party is an individual who:
 - (A) Lawfully resides within the United States;

- (B) May legally possess a firearm under Tennessee law; and
 - (C) Is or was subject to the ordinance, resolution, policy, rule, or other enactment that is the subject of an action filed under subsection (g). An individual is or was subject to the ordinance, resolution, policy, rule, or other enactment if the individual is or was physically present within the boundaries of the political subdivision for any reason; or
2. The party is a membership organization that:
- (A) Includes two (2) or more individuals described in T.C.A. § 39-17-1314 (h)(1); and
 - (B) Is dedicated in whole or in part to protecting the rights of persons who possess, own, or use firearms for competitive, sporting, defensive, or other lawful purposes.

T.C.A. § 39-17-1314(h).

A prevailing plaintiff in an action under T.C.A. § 39-17-1314(g) is entitled to recover from the county the following:

1. The greater of:
 - (A) Actual damages, including consequential damages, attributable to the ordinance, resolution, policy, rule, or other enactment; or
 - (B) Three (3) times the plaintiff's attorney's fees;
2. Court costs, including fees; and
3. Reasonable attorney's fees; provided, that attorney's fees shall not be awarded under T.C.A. § 39-17-1314 (i)(3) if the plaintiff recovers under T.C.A. § 39-17-1314(i)(1)(B).
T.C.A. § 39-17-1314(i).

Distilleries

Reference Number: CTAS-2117

Distilleries for the manufacture of intoxicating liquors can be permitted in counties in two ways: (1) by voter referendum; or (2) without a voter referendum, if either of the following circumstances exist:

- (A) Both retail package sales and consumption of alcoholic beverages on the premises have been approved through voter referendum of the voters in any jurisdiction(s) located within the county; or
- (B) The county is included in the Tennessee River resort district and retail package sales have been approved through voter referendum of the voters in any jurisdiction(s) located within the county.

Distilleries By Referendum

Tenn. Code Ann. § 57-2-103 generally governs the manufacture of intoxicating liquors in Tennessee. Under that statute, the manufacture of intoxicating liquors is permitted in any county where the majority of voters have, by referendum, approved a resolution permitting it within the county. Tenn. Code Ann. § 57-2-103(a) - (c)

Tenn. Code Ann. § 57-2-103(a) - (c) sets forth the procedure that is followed to determine whether such a referendum may be presented to the voters. If 10% of the qualified voters in a county sign a petition to present the question whether the manufacture of liquor will be permitted within a county, the county commission must call an election on the question. Tenn. Code Ann. § 57-2-103(a) - (b). If a majority of the votes are cast in favor of the question, then the manufacture of liquor is permitted within that county. Tenn. Code Ann. § 57-2-103(c).

Distilleries Without Referendum

However, another procedure is set forth in Tenn. Code Ann. § 57-2-103(d). Notwithstanding subsections (a) - (c), it is lawful to manufacture intoxicating liquors or intoxicating drinks, or both, within the boundaries of:

- (A) A municipality if both retail package sales and consumption of alcoholic beverages on the premises have been approved through referendum of voters within such municipality;
- (B) The unincorporated areas of a county, or a municipality which has a population of less than one thousand (1,000) persons in such county, if any jurisdiction located within such county has approved retail package sales through referendum of voters and any jurisdiction located within such county has approved consumption of alcoholic beverages on the premises through referendum of voters or if the county is included in the Tennessee River resort district as defined in §

57-4-102 and retail package sales have been approved through referendum by the voters in any jurisdiction within such county;

(C) Any municipality authorized under § 57-4-102(26) to allow facilities or establishments in such municipality to sell alcoholic beverages or wine for on premises consumption;

(D) Any county or municipality where it was lawful to have manufacturing of intoxicating liquors or intoxicating drinks, or both under this subsection (d) as it read prior to July 1, 2013; or

(E) Any county that has at least three (3) establishments, located in such county or in any municipality in such county, licensed under § 57-4-102(26) to sell alcoholic beverages for on-premises consumption if such county was included in this subsection (d) as it read prior to July 1, 2013.

Tenn. Code Ann. § 57-2-103(d)(1)(A) - (E).

Resolution to Prohibit Distilleries

Notwithstanding subdivision (d)(1), the county legislative body of any such county may adopt a resolution to remove the unincorporated areas of the county from the application of subsection (d) subject to certain restrictions. The county mayor must notify the Alcoholic Beverage Commission if such action is taken and approved by the county legislative body. Tenn. Code Ann. § 57-2-103(d)(2)(A).

This action may be taken by the county legislative body pursuant to subdivision (d)(2)(A) until a written notification is filed with the county mayor by any person as an official notice that the person intends to pursue all lawful avenues to manufacture intoxicating liquors or intoxicating drinks, or both, within the unincorporated areas of the county. Once the notice is filed, no action may be taken by the county legislative body unless such interest is withdrawn or the person's application to manufacture such intoxicating liquors or intoxicating drinks, or both, is denied by the state or federal government. Tenn. Code Ann. § 57-2-103(d)(2)(B). NOTE: Pursuant to Public Chapter 445, a written notification as described above may not be filed with the county mayor until at least 45 days after July 1, 2013.

If a county adopts a resolution pursuant to subdivision (d)(2)(A), the county may at a later date adopt a resolution reversing such action. The county mayor must notify the Alcoholic Beverage Commission if such action is taken and approved. Tenn. Code Ann. § 57-2-103(d)(2)(c).

Sample Distilleries Resolution

Reference Number: CTAS-2119

SAMPLE

RESOLUTION TO REMOVE THE UNINCORPORATED AREAS OF THE COUNTY FROM THE APPLICATION OF T.C.A. § 57-2-103(d).

WHEREAS, *Tennessee Code Annotated*, Section 57-2-103(d)(2)(A), authorizes the County Legislative Body to adopt a resolution to remove the unincorporated areas of the county from the application of T.C.A. § 57-2-103(d), relative to manufacturing of alcoholic beverages; and

WHEREAS, it is in the best interests of the citizens of this county that such action be taken;

NOW THEREFORE BE IT RESOLVED by a vote of the _____ County Legislative Body meeting in _____ session at _____, Tennessee on this the ___ day of _____, 20___, that:

SECTION 1. By action of the County Legislative Body, the unincorporated areas of the _____ County, in accordance with T.C.A. § 57-2-103(d)(2)(A), are hereby removed from the application of T.C.A. § 57-2-103(d).

SECTION 2. The County Mayor shall notify the Alcoholic Beverage Commission that this action has been taken and approved.

SECTION 3. The resolution shall take effect upon passage, the public welfare requiring it.

Adopted this _____ day of _____, 20____.

APPROVED:

County Mayor

ATTEST:

Motor Vehicle Races

Reference Number: CTAS-2460

County legislative bodies are authorized to provide the times, dates, and conditions under which motor vehicle races may be conducted, and establish any other rules relative to the regulation and licensure of automobile race tracks that the county legislative body deems prudent and advisable. T.C.A. § 55-22-102. Special provisions for motor vehicle races in tourist resort counties are set out in T.C.A. § 55-22-105.

The county clerk is required to verify that anyone conducting a motor vehicle race in the county has met the minimum insurance coverage requirements set out in T.C.A. § 55-22-101(a), and the county clerk thereupon issues to the applicant confirmation that the requirements have been met. T.C.A. § 55-22-101(c).

This law does not define “motor vehicle race.” While T.C.A. § 55-22-102 does mention “automobile race tracks,” the Attorney General has found that because the legislature repeatedly used the broader term “motor vehicle,” it did not intend to limit the statute’s requirements to automobile races. As used in this law, “motor vehicle” should be interpreted in its broadest sense, which would include any self-propelled wheeled conveyance not running on rails. Op. Tenn. Att’y Gen. 17-20 (3/21/17).

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