

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

**FRATERNAL ORDER OF POLICE)
(ANDREW JACKSON LODGE NO. 5),)
MATTHEW DEAN BOGUSKIE,)
NOBLE TAYLOR, HAROLD MILTON)
BURKE, III, ROBERT ALAN YOUNG)
And JAMES ANTHONY GAFFORD,)**

No. M2018-01717-COA-R3-CV

Petitioners/Appellants,)

**Davidson County Circuit Court
No. 18C2158**

v.)

**THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY & DAVIDSON COUNTY)
ELECTION COMMISSION,)**

Respondents/Appellees, and)

COMMUNITY OVERSIGHT NOW,)

Intervening Respondent/Appellee.)

BRIEF OF THE METROPOLITAN GOVERNMENT

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METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

The question in this case is whether Community Oversight Now gathered a sufficient number of signatures to have their proposed charter amendment appear on the November 6, 2018 ballot. The Davidson County Election Commission determined that they did gather enough signatures. The Trial Court agreed. The number of signatures needed to place a proposed charter amendment on the ballot depends on how many people voted in the “preceding general election”.

The Supreme Court recently determined that the phrase “general election” as used in the Metro Charter encompasses more than the every four year “general metropolitan election”. *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 55 (Tenn. 2018). Did the Trial Court err in finding that the preceding general election did not have to be an every four-year general metropolitan election?

STATEMENT OF THE CASE

Plaintiffs (“the FOP”) filed this lawsuit on August 21, 2018. (T.R. 1). Community Oversight Now was permitted to intervene by agreed order. (T.R. 37).

The Metropolitan Government filed its brief on September 10, 2018, addressing the merits of the dispute. (T.R.342). Community Oversight Now filed a Motion to Dismiss based on standing. (T.R. 326).

The Court dismissed the case in an order entered September 19, 2018. (T.R. 391). Plaintiffs appealed on September 20, 2018. (T.R. 414). Community Oversight Now filed a motion to alter or amend the same day, which was denied in an order entered September 21, 2018. (T.R. 439).

FACTS

On August 1, 2018, Community Oversight Now submitted a petition to amend the Metropolitan Charter. (A.R. 1) A statement with the petition stated that it contained an estimated 8,269 signatures. (*Id.*).

An amendment to the Metropolitan Charter may be proposed through a petition process that garners a certain number of registered voters' signatures. The number of signatures required depends on how many people voted in the "preceding general election":

This Charter may be amended subsequent to its adoption in the following manner: An amendment or amendments may be proposed ... upon petition filed with the metropolitan clerk, signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election, the verification of the signatures to be made by the Davidson County Election Commission and certified to the metropolitan clerk. (Emphasis added).

Metropolitan Charter § 19.01 (T.R. 50).

On August 15, 2018, the Election Commission met and determined that the preceding general election was the August 4, 2016 election. (A.R. 30). In the August 4, 2016 General Election, 47,074 registered voters cast their ballot. (T.R. 43). Therefore, 4,708 signatures would constitute ten percent of these voters. Davidson County Election Commission determined that there were at least 4,801 valid signatures accompanying the Community Oversight Board Petition. (T.R. 30). The Commission voted at their August 15, 2018 meeting to accept these verified signatures as meeting the requirements of Metropolitan Charter § 19.01. (*Id.*).

ARGUMENT

I. STANDARD OF REVIEW.

A motion to dismiss is reviewed de novo. *West v. Schofield*, 468 S.W.3d 482, 489 (Tenn. 2015). Interpretation of the Metropolitan Charter is a question of law. *Cty. of Shelby v. Tompkins*, 241 S.W.3d 500, 505 (Tenn. Ct. App. 2007).

II. THE TRIAL COURT CORRECTLY DETERMINED THAT SUFFICIENT PETITION SIGNATURES WERE GATHERED.

A. THE SUPREME COURT HAS HELD THAT THE “PRECEDING GENERAL ELECTION” IN METRO CHARTER § 19.01 MAY BE A “GENERAL METROPOLITAN ELECTION” OR A “GENERAL ELECTION.”

The number of signatures needed to place a proposed charter amendment on the ballot depends on how many people voted in the “preceding general election”:

This Charter may be amended subsequent to its adoption in the following manner: An amendment or amendments may be proposed ... upon petition filed with the metropolitan clerk, signed by ten (10) per cent of the number of the registered voters of Nashville-Davidson County voting in the preceding general election, the verification of the signatures to be made by the Davidson County Election Commission and certified to the metropolitan clerk.

Metropolitan Charter § 19.01 (T.R. 50).

There are only two appellate decisions interpreting the phrase “general election” as used in the Metropolitan Charter – the *Wise* and *Wallace* cases. *Wallace* summarized *Wise* and noted outright that the phrase “general election” as used in the Charter encompasses more than the every four year “general metropolitan election”:

That the intent of the drafters of the Charter was to draw a distinction between “general metropolitan elections” and all other “general elections” is evidenced by the use of these distinct phrases within section 15.03 to address different events. We do not read the use of the distinct phrases “general metropolitan election” and “general election” to be merely accidental. Rather, we view the two phrases to have been intentionally and thoughtfully employed to refer to different elections. The former phrase refers to the particular general election at which the Mayor, Vice Mayor, Councilmen-at-Large, and District Councilmen are elected in August of each fourth odd-numbered year, beginning

in 1971, as called for in section 15.01 of the Charter. In contrast, the latter phrase refers more broadly to any municipal general election, including but not limited to general metropolitan elections. In other words, “general metropolitan elections” are one unique type of the broader category of municipal “general elections.” All municipal “general elections.” however, are not “general metropolitan elections.”

Wallace v. Metro. Gov't of Nashville, 546 S.W.3d 47, 55 (Tenn. 2018) (emphasis added, citing *Wise v. State ex rel. Wise v. Judd*, 655 S.W.2d 952 (Tenn. 1983)).

B. THE FOP IS MISTAKEN WHEN IT ASSERTS THAT THE AUGUST 6, 2015 METROPOLITAN ELECTION MUST BE TREATED AS THE “PRECEDING GENERAL ELECTION.”

The FOP takes the position that the August 6, 2015 election (the general metropolitan election where the Mayor, Vice-Mayor and Council are elected) must be the “preceding general election” used to calculate the 10% figure needed.

But this interpretation ignores the holding of *Wallace*, which is that the Charter uses the term “general election” broadly to include more than just general metropolitan elections:

[G]eneral metropolitan elections” are one unique type of the broader category of municipal “general elections.” All municipal “general elections,” however, are not “general metropolitan elections.” ...
Our holding in *Wise* was that the phrase “preceding general election” as used in section 19.01 of the Charter refers to *municipal* general elections....

Wallace at 55–58 (emphasis in original).

Chancellor Kilcrease was correct in *Wise* when he included both the August 1982 election (a general municipal election) and the August 1979 election (a general metropolitan election) as qualifying elections, and selected the August 1982 election, and its 9,473 signature threshold, as the most recent preceding election that would be used to determine if there were sufficient signatures.

Applying *Wise* and *Wallace*, the Charter does not treat the phrase “general election” as synonymous with “general metropolitan election.” The August 4, 2016 election (which included the

election of the Metropolitan¹ Assessor of Property²) meets the Charter's definition of "general election," and is closer in time than the August 2015 election. Therefore, it is the correct general election to use to calculate the number of signatures necessary for a Charter amendment petition.

¹ The FOP states that Nashville is the first consolidated government, but this is not correct. New Orleans (1805), Boston (1821), Philadelphia (1854), San Francisco (1856), New York (1890's), and Denver (1902) are some of the consolidated governments that preceded Nashville. <https://www.mtas.tennessee.edu/knowledgebase/consolidation-city-and-county-governments-look-history-and-outcome-based-research>.

² The FOP argues that the election of the Metropolitan Assessor of Property is a state election. However, this argument was not raised below and cannot be raised for the first time on appeal. *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009).

In addition, this argument is incorrect. The FOP's claim that a county office is a "state election" relies on a definition (T.C.A. § 2-1-104(a)(28) that is clearly drafted to distinguish it from the definition of "federal election" (T.C.A. § 2-1-104(a)(9). If Plaintiffs' logic prevailed, all "district" offices (Metro Council) would also be state elections. This would be a skewed reading of state law.

In another skewed reading of state law, the FOP refer to T.C.A. § 2-13-208(a)'s discussion of non-partisan municipal elections without mentioning 208(b), which addresses metropolitan governments and offices and states that the Charter controls certain offices.

Plaintiffs assert that the Metro Charter preserves the Office of Assessor with the duties assigned by state law, but do not recognize that the Metropolitan Assessor is a uniquely local office with unique duties created by the Metropolitan Charter. *Winter v. Allen*, 212 Tenn. 84, 95, 367 S.W.2d 785, 790 (1963) (“[W]e hold that it is the duty of Metropolitan County Tax Assessor to make assessments of merchants' ad valorem taxes and that the Metropolitan Trustee shall collect such taxes, such duties, functions and responsibilities thereof being effectively and constitutionally transferred from the office of County Court Clerk by said Charter to the said Tax Assessor and Trustee.”).

In addition to the unique duties assigned by the Metropolitan Charter, the Metropolitan Government is responsible for the Assessor's salary and legal liability. *See State ex rel. Winstead v. Moody*, 596 S.W.2d 811, 813 (Tenn.1980) & *Pharris v. Looper*, 6 F. Supp. 2d 720, 730, 1998 WL 276131 (M.D. Tenn. 1998). The Metropolitan Assessor is a uniquely local metropolitan office. There is no merit in the suggestion that it is insufficient or unworthy for use as a measurement for the number of signatures needed to amend the Metropolitan Charter.

C. THE FOP IS MISTAKEN WHEN IT ASSERTS THAT THE SPECIAL ELECTION TO FILL THE MAYORAL VACANCY (THE MAY 24, 2018 ELECTION) MUST BE TREATED AS THE “PRECEDING GENERAL ELECTION.”

The FOP takes the alternative position that the May 24, 2018 special election to fill the mayoral vacancy is the “preceding general election” that should be used for calculating the 10% number required by Charter § 19.01. (T.R. 1, ¶ 32).

The FOP attempts to define “general election” as any non-primary election. This is a colloquial definition of general election, but is not the more specific meaning of the phrase as it is used in the Metro Charter. Charter Articles 15 and 19 discuss several types of elections: general, metropolitan general, referendum elections and special elections. In *Wallace*, the Supreme Court held that the use of distinct phrases is evidence that the intent of the drafters was to draw a distinction between them. Applying this interpretation, the Supreme Court determined a special election was necessary to fill the mayoral vacancy, pursuant to §15.03³ of the Charter.

The May 24, 2018 election was a *special* election, as ordered by the *Wallace* Supreme Court in its final paragraph: “The Commission is hereby ordered to set a special election in accordance with Tennessee Code Annotated section 2-14-102(a).” *Wallace* at 58. **State law treats special elections and general elections as different types of elections:**

³ Charter §15.03 requires special elections to fill a mayoral vacancy that will exist more than 12 months prior to the next general metropolitan election and makes a distinction between special and general elections:

If in such special election to fill a vacancy for the unexpired term of the office of mayor or district council member, or in the general election at which time a vacancy in the office of vice mayor or councilmember-at-large, no candidate shall receive a majority of all the votes cast for such office, a runoff election shall be held five (5) weeks subsequent to the first special election to fill a vacancy in accordance with the provisions hereinbefore set forth in the case of a general metropolitan election. The provisions of section 15.01 hereof with respect to voting in general metropolitan elections and with respect to qualifying as a candidate shall apply to special elections and to general elections at which time a vacancy is filled. (emphasis added).

Special elections shall be held when a vacancy in any office is required to be filled by election at other times than those fixed for general election.

TENN. CODE ANN. § 2-14-101. **Therefore an election cannot be both a special election and a general election.**

The fact that an election cannot be both a special election and a general election was emphasized by the Supreme Court in *McPherson v. Everett*, a case involving when to fill a vacancy in the office of County Clerk. 594 S.W.2d 677 (Tenn. 1980). The state election administrator had instructed counties to fill any county vacancies with the May presidential primary, “as a special general election for such office for the unexpired term.” *Id.* at 679. The Supreme Court disagreed stating: “*There is no such process as a ‘special general’ election. This is a contradiction in terms.*” *Id.* at 680, fn. 8 (emphasis added).

This distinction is also commonly recognized as black letter law:

- See ELECTION, Black's Law Dictionary (10th ed. 2014) [“**general election** (16c) 1. An election that occurs at a regular interval of time. — Also termed *regular election*.”]
- See ELECTION, Black's Law Dictionary (10th ed. 2014) [“**special election** (1836) An election that occurs in an interim between general elections, usu. to fill a sudden vacancy in office.”]

Special and general elections are distinct creatures and are incompatible in the context of state law and the Metropolitan Charter. *McPherson v. Everett, supra*, TENN. CODE ANN. § 2-14-101; Metropolitan Charter Articles 15 & 19. For this reason, the special election held on May 24, 2018 cannot be the “preceding general election” to measure the signature threshold.

D. THE ELECTION COMMISSION WAS CORRECT WHEN IT DETERMINED THAT AUGUST 4, 2016 WAS THE MOST RECENT PRECEDING GENERAL ELECTION.

A review of elections discussed in the Petition shows that the Election Commission was correct when it determined that August 4, 2016 was the most recent preceding general election. The fourth

column below shows why an election is or is not the preceding general election:

Date of election	Offices on ballot	Number of votes cast	Preceding general election?
May 24, 2018	Mayor of Metropolitan Nashville & vacant Metro District Council position	82,368	No, because this was a special election. There is no such thing as a special general election. <i>McPherson v. Everett</i> , at 679.
November 8, 2016	U.S and State offices, City Commissioners for Belle Meade, Forest Hills, and Goodlettsville	252,926	No, because these were state and federal elections, not Metropolitan Government elections. <i>Wallace</i> explains that state and federal elections cannot be the “preceding general election”: Our holding in <i>Wise</i> was that the phrase “preceding general election” as used in section 19.01 of the Charter refers to municipal general elections, not to state or federal general elections. <i>Id.</i> We did not hold, nor did we intend to hold, that the phrases “general metropolitan election” and “general election” are synonymous for purposes of section 15.03 of the Charter. <i>Wallace</i> at 58. Belle Meade, Forest Hills and Goodlettsville are “smaller city” municipalities that exist within a metropolitan government.
August 4, 2016	Primary election for U.S. and State offices, vacant Metro District Council position, Metro Assessor of Property, School Board	47,074	Yes, because the election of the Metro Assessor of Property is a municipal general election. <i>Wallace</i> holds that the phrase “general election” includes more than just general metropolitan elections: [G]eneral metropolitan elections” are one unique type of the broader category of municipal “general elections.” All municipal “general elections,” however, are not “general metropolitan elections.” <i>Wallace</i> at 55.
August 6, 2015	Mayor of Metropolitan Nashville, Vice-Mayor,	104,757	No, because the August 4, 2016 election meets the definition of preceding general

AOP was on the August 2020 ballot! →

	5 Metro Council at Large positions and 35 District Metro Council positions		election, and is closer in time.
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III. MOOTNESS.

The Metropolitan Government relies on and incorporates by reference its filings with this Court that were made in response to Community Oversight’s Motion to Dismiss.

CONCLUSION

The FOP is attempting to narrow the definition of “general election” to mean solely “general metropolitan election.” But the *Wallace* Supreme Court has already held that general elections, as used in the Charter, are a broad category, which include (but are not limited to) general metropolitan elections.

There is no basis for defying the *Wallace* holding and creating a new definition of general election in this case. Applying the *Wallace* Court’s decision, the Election Commission correctly determined that the August 4, 2016 general election is the preceding general election that is used to measure the number of signatures required for a charter amendment petition. The Trial Court’s order upholding the Election Commission’s decision should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded by agreement via email to Austin L. McMullen, Bradley Arant Boult Cummings, LLP, 1600 Drivision St., Suite 700, Nashville, TN 37201 at amcmullen@bradley.com , David L. Raybin, Raybin & Weissman, P.C., 424 Church St., Suite 2120, Nashville, TN 37219 at draybin@nashvilletnlaw.com Jamie R. Hollin, 511 Rosebank Avenue, Nashville, TN 37206 at j.hollin@me.com and Daniel A. Horwitz, 1803 Broadway, Suite #531, Nashville, TN 37203 at daniel.a.horwitz@gmail.com on this 8th day of November, 2018.

/s/ Lora Fox
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