

The Tennessee Journal

The weekly insiders newsletter on Tennessee government, politics, and business

Vol. 46, No. 21
May 21, 2020

Mr. Speaker, tear down this wall? Chambers at odds over access

If the Senate has its way, the Cordell Hull Building will remain on lockdown for all but lawmakers, staff, and the media once committee meetings resume next week. But the House, which wants to allow members to pursue a wider range of legislation, is seeking to let lobbyists and the public return to the facility.

Without an agreement between the two chambers, workers have been preparing either side of the building for the diverging approaches. There have been discussions about designating separate House and Senate entrances to the facility and even establishing a physical barrier between the two sides of the floor where the committee rooms are located.

The lack of an accord over building access follows from a disagreement over what lawmakers should be spending their time doing when they gavel back into session on June 1. The Senate, which wanted to adjourn *sine die* in March instead of taking the 75-day recess, wants to focus on matters related to the budget, the fall-out from the coronavirus pandemic, and a small number of other “time-sensitive” bills. Only the Senate Finance Committee is scheduled to meet next week to lay the groundwork for a rapid conclusion of the session.

The House has a much more ambitious schedule in mind, with an eye toward having various subcommittees meet — and mostly close — next week, while the session itself could last until the third week of June. Under the lower chamber’s approach, hot-button issues could once again move into the spotlight, including bills to make the Bible the state’s official book, ban access to most abortions, and get rid of training and background check requirements to carry handguns in public.

What’s pressing? Most legislation carrying a fiscal note is expected to be disposed of quickly at a time when lawmakers will be required to make deep budget cuts. That’s expected to leave the House with an estimated 100 or so bills to be considered. The Senate wants to limit its agenda to about 30 “mission critical” bills, though interpretations vary about what’s really urgent.

An overhaul of the state’s certificate-of-need system for permitting new hospitals and medical facilities was a

major priority for House Speaker Cameron Sexton (R-Crossville) well before the pandemic brought the issue into focus. The governor through an executive order lifted some of the regulations on creating new hospital beds needed to treat COVID-19 patients, and legislation could follow to make some of those changes permanent. But tackling the issue in a truncated session could prove problematic as there will be limited opportunity for powerful advocates on either side to make their cases.

Similar concerns are being raised about an effort by the business community to push for legislation to shield companies from lawsuits on behalf of workers or customers who become infected with COVID-19 so long as they had followed guidance from the Centers for Disease Control and Prevent and didn’t engage in negligence or intentional misconduct. The details about the language of the legislation, including whether it should be applied to nursing homes, would likely be the subject of weeks of debate under normal circumstances.

Proposed amendments to the Tennessee Constitution need to clear this legislative session if they are to have a chance to appear on the ballot in 2022. A resolution to give lawmakers the power to reject state Supreme Court appointments of the attorney general already passed both chambers last year. But an effort to enshrine Tennessee’s 73-year-old “right-to-work” law had only passed the Senate when the session was put on ice in March. Another proposal aimed at giving crime victims a bigger role in the judicial process appeared headed for House passage, but the measure known as “Marsy’s Law” had yet to be heard in the Senate.

Another issue the upper chamber might agree to hear has to do with the multi-year fight about rules governing peer-to-peer auto sharing. Companies like Turo, which provide an Airbnb-like platform, don’t want to be treated the same as traditional rent-a-car outfits when it comes to issues like insurance and taxes. But rental companies like Enterprise are seeking to keep the upstarts from gaining unfair advantages.

This year’s bill has been driven by the rental industry and was subject to furious negotiations while the session was underway. Marketplace platform advocates

now fear they could be railroaded during the limited-access session and raise questions about why the issue can't wait until next year. Auto rental companies argue their sector is among the most severely affected by the coronavirus as travel has evaporated, and that allowing unfettered competition from peer-to-peer platforms could push them closer to the brink.

The conservative Beacon Center this week began circulating a position paper to lawmakers urging them to focus on making permanent — and expanding — deregulation measures taken through Gov. Bill Lee's executive orders during the pandemic. They include getting rid of certificate-of-need regulations for medical facilities, expanding access to telemedicine, and loosening licensing requirements for healthcare workers. The think tank is also calling for renewed efforts to save on prison costs and reduce infection risks by avoiding incarceration for nonviolent offenders.

Per diem. The interrupted session meant lawmakers had to forgo what would have been up to five more weeks of lodging, meal, and travel allowances. For each one living outside of a 50-mile radius of the Capitol, that would have amounted to about \$5,700 worth per diems, plus an average of \$811 in mileage reimbursements. While the money is meant to defray costs of living in Nashville, many lawmakers find living and dining accommodations that cost far less and pocket the balance. Each full week lawmakers are in session will cost about \$118,500 in per diems and \$15,500 in mileage.

Political considerations. Speculation among the Capitol crowd has focused on whether Sexton has been backing members' desire for a less restrictive session in order to show to GOP colleagues he's not too closely tied to Senate Speaker Randy McNally (R-Oak Ridge), his political mentor and a longtime ally.

From the courts

Voucher appeal arguments won't be heard until new school year begins

The state Court of Appeals denied a motion to lift an injunction on the implementation of the state's new school voucher program while the state pursues a legal challenge of a lower court's ruling that the law is unconstitutional. The decision means the state Education Department isn't allowed to process applications or otherwise dedicate resources to getting Gov. Bill Lee's signature Education Savings Account program off the ground until after the appeal is decided.

The appeals court set oral arguments for Aug. 5, which is one day after the new academic year is scheduled to begin in Nashville and the week before the planned return of students in the Shelby County Schools system. Those are the only school districts where the voucher law applies, and only for students whose parents earn less than 2.6 times the federal poverty guidelines, or \$66,950 for a family of four.

Nashville Chancellor Anne Martin ruled earlier this month the law violated the home rule amendment of the Tennessee Constitution by applying to only two of

95 counties without giving either local governing bodies or voters a say. Attorney General Herbert Slatery's office argues educational matters are the sole purview of the state, and that home rule protections should apply because local school boards are separate from the operation of county government.

Lee caused a bit of an uproar when he initially told reporters he would continue to urge parents to apply for the voucher program while the appeal was underway. Slatery later that day filed a motion requesting Martin to put a stay on the injunction, which she ultimately denied. The judge said from the bench she took no offense from the governor's comments because she assumed he "was not prepared for the question" asked during a press conference. Court watchers perceived that comment as the legal equivalent of "bless his heart."

Some legal twists could affect the case. Voucher supporters could try to appeal the denial of the motion to lift the injunction to the Supreme Court. Or the justices could bypass the intermediate court by reaching down and taking over the entire case. It takes two of five justices to agree to hear an appeal, but three to reach down. It's unclear whether either step would hasten proceedings to the point where the challenge could be decided before the start of the academic year — provided, of course, the pandemic allows schools to start on time.

Candy crushed. Rutherford County law enforcement officials made a big media splash in early 2018 after their "Operation Candy Crush" busted 23 convenience stores for selling gummy candies purportedly containing "marijuana derivatives." But the case almost immediately began to unravel when it turned out there was no evidence the gummies contained anything other than CBD made from legal hemp. The charges against the store owners were dismissed and expunged.

The 6th Circuit U.S. Court of Appeals late last week upheld a lower court's ruling that Rutherford County Sheriff Mike Fitzhugh, District Attorney General Jennings Jones, and assistant DA John Zimmerman aren't immune from being sued by the store owners for unlawful prosecution. Appeals Judge Julia Gibbons of Memphis wrote the opinion in the unanimous decision, which clears the way for the case to head to trial.

According to testimony presented in court, the defendants pushed for the raids despite misgivings by deputies who questioned why they were targeting small businesses but not large retailers like Amazon. The Tennessee Bureau of Investigation also warned it didn't have the testing equipment available to determine whether the gummies contained CBD made from hemp or illegal THC extracted from marijuana.

Zimmerman allegedly urged investigators to "move quickly" because he wanted to get the case to the grand jury before state lawmakers could take up legislation plaintiffs identified as a bill seeking to specify that hemp products are not subject to civil forfeiture. The bill was introduced by Sen. Steve Southerland (R-Morristown) and then-Rep. Raumesh Akbari (D-Memphis) two weeks before the raids were launched. It was taken off notice the following month.

Tennessee News Digest

- A more than two-month shutdown of the Tennessee Aquarium in Chattanooga caused administrators to eat into half of \$5 million in reserve to keep its animals cared for. Under its reopening plan, about 150 visitors an hour, or 1,200 a day, will be allowed into the aquarium. That's down from a high of about 3,750 a day when no restrictions are in place.
- The state Supreme Court on Tuesday broadcast oral arguments in three cases

on its YouTube channel. It was the first time the state's highest court has streamed its proceedings in real time.

- Loudon County Mayor Buddy Bradshaw announced 57 workers at Monterey Mushrooms had tested positive for COVID-19. Most were asymptomatic.
- General Motors announced plans to buy enough solar power from the Tennessee Valley Authority by 2022 to power its entire Spring Hill plant.

- SmileDirectClub Inc. is suing NBC for defamation for a news story questioning the safety and effectiveness of its invisible teeth aligners. The lawsuit seeks \$2.85 billion in damages. The Nashville-based company last year announced plans to more than double its Middle Tennessee employment to 3,600 jobs. SmileDirectClub said its market capitalization fell by \$950 million after the report aired. NBC stands by its reporting.

Capitol police powers. Freshman Rep. Bruce Griffey (R-Paris) requested a legal guidance from the attorney general about whether Capitol police and sergeants-at-arms have the authority to arrest people for violating a state law making it a misdemeanor to obstruct or interfere with public meetings. Slatery opined state troopers have the same enforcement authority at the Capitol as when they're working elsewhere but that sergeants-at-arms have no freestanding powers to make arrests without special authorization by their respective chambers.

Griffey's question specifically asks whether arrests can be made on the second floor of the Capitol on the basis of the law, which makes it a crime for a person to interfere with meetings "by physical action or verbal utterance." Loud protests outside the House and Senate chambers over issues ranging from the Nathan Bedford Forrest bust to abortion rights have become common in recent years. Slatery said nothing in state law prevents arrests from being made during the legislative session under that section of the code, but didn't wade into whether First Amendment protections in the U.S. Constitution might come into play.

Slatery cited a 1988 opinion by then-Attorney General Michael Cody about the arrest powers of the Capitol Hill Police, an entity that has all but disappeared in recent years as the Tennessee Highway Patrol has taken over security at the Statehouse. As recently as 1998, the Capitol Hill Police had its own commander and 26 officers. But they haven't been replaced as they have retired or joined the THP. Only one remains on duty today.

From the campaign trail

Sethi, Hagerty reserve heavy dose of summer television advertising time

With the U.S. Senate race showing signs of emerging from its pandemic-induced hibernation, the campaigns of Republican rivals Manny Sethi and Bill Hagerty are preparing to spend heavily on a coming air war. Sethi has reserved \$1.4 million of advertising time from June 22 through the Aug. 6 primary. Hagerty has put in for \$1.2 million worth of ads starting on July 10.

The spots are scheduled to run on broadcast TV and Fox News. Nothing prevents candidates from canceling or buying more time, though rates generally increase the closer it gets to the airing date. And while this year's race won't come anywhere near the saturation advertis-

ing of the 2018 Senate contest between Marsha Blackburn and Phil Bredesen, the choice advertising slots tend to go quickly.

According to Advertising Analytics, both campaigns have run about \$1.5 million worth of broadcast and cable ads to date. Hagerty has spent another \$242,000 on digital ads and \$46,000 on radio. Sethi has spent about \$88,000 on digital and nothing on radio. Among the remaining GOP candidates, George Flinn has bought \$99,000 worth of digital ads and Byron Bush paid \$96,000 for TV spots earlier this year.

Flame out. Tennessee canceled a \$5 million order for protective masks and gowns from Blue Flame Medical LLC, a company founded by Republican political consultant Mike Gula, after it failed to deliver the equipment at the promised price, *The Wall Street Journal* reported. Gula's company lost hundreds of millions of dollars in business with various states, and the Justice Department has launched a criminal investigation.

Gula launched Blue Flame in March, a sudden shift in professional focus from his previous work as a Washington-based fundraiser for a variety of GOP campaigns and political action committees. The negative coverage sent politicians scouring the disclosures to see which candidates had a professional relationship with him. They include U.S. Rep. Chuck Fleischmann (R-Chattanooga), who paid Gula \$12,858 in the first quarter of this year.

Then there's Sethi, who paid \$10,600 to another Gula company called the Doc Shop in the fourth quarter of last year. Gula in February sent emails to Washington contacts trying to set up meetings with the candidate when he was in town. The Sethi camp said it had signed on with another D.C. fundraiser, Stacie Monroe, and was unaware she was operating the Doc Shop with Gula.

But there's another curious twist. An October email from Gula has emerged in which he tries to round up donors for a Hagerty fundraiser. The Hagerty camp is mystified by the email, saying it had never seen it before this week. Hagerty never met or paid Gula and wasn't in D.C. on the date of the purported fundraiser.

Endorsement. State Rep. Gloria Johnson was endorsed by former Democratic presidential candidate Elizabeth Warren for her re-election bid to House District 13 in Knoxville. House Republican Caucus Chairman Jeremy Faison in a not-so-surprising response endorsed Johnson's GOP opponent, Elaine Davis.

Tennessee Notes & Quotes

■ U.S. Sen. **Lamar Alexander** (R-Maryville) introduced former state House Speaker **Beth Harwell** and East Tennessee State University President **Brian Noland**, President **Donald Trump's** nominees to the Tennessee Valley Authority board, to the Committee on Environment and Public Works. Alexander also introduced Knoxville native **Katherine Crytzer**, whom Trump has nominated as TVA's inspector general.

■ Consumer spending in the Nashville metro area declined 46% between January and the end of April, the country's biggest drop due to the COVID-19 pandemic, according to data compiled by Harvard University's Opportunity Insights. The national average decline was 21% among major metros. Other cities experiencing major spending reductions included Boston (41%), Miami (40%), and Washington (39%). The Memphis area wasn't affected as severely, as spending dropped 11%. The data was collected before most state and city lockdown measures began to be lifted.

■ Gov. **Bill Lee** toured the new overflow site in Memphis for treating coronavirus patients in the building formerly home to the *Commercial Appeal* newspaper. The U.S. Army Corps of Engineers paid for three-quarters of the \$51 million project, with state and federal relief funds making up the remainder. The renovation included 150,000 square feet of tile floors and more than 15 miles of hospital-grade wiring. State emergency management officials began moving 401 hospital beds into the facility last weekend.

■ The state's \$8 million no-bid contract with North Carolina sock maker Renfro Corp. to produce face masks for Tennesseans has come under social media scrutiny in recent weeks. The masks, which are being distributed for free through local health department offices, use a stretch material that can be seen through when held up to light, raising questions about their effectiveness in preventing transmission of COVID-19.

■ The *Knoxville News Sentinel* sent the Tennessee masks to be tested by Northeastern University professor **Amy Mueller**, who determined they can filter between 57% and 63% of small airborne particles, which is within the 53% to 75% effectiveness range of surgical masks. Other cloth masks can block between 47% and 90%. Hospital-grade N95 masks filter 99% of particles.

■ **Karen Pence**, the wife of Vice President **Mike Pence**, visited the Great Smokey Mountains National Park on Tuesday to reopen the road that leads to Clingmans Dome. She was joined by **Kate MacGregor**, the deputy secretary of the U.S. Department of the Interior.

■ Turns out Tennessee wasn't alone in offering local first responders the names of residents who had been infected with COVID-19. Associated Press reporter **Kimberlee Kruesi** found at least nine other states have been doing the same, including Colorado, Iowa, Louisiana, and New Hampshire. Another 25 states share the addresses of people who have tested positive, but not their names. The U.S. Department of Health

and Human Services told states that sharing the information does not violate federal medical privacy laws.

■ An ETSU poll found stark partisan attitudes toward absentee voting. Two-thirds of Democrats said they support voting by mail, while about the same amount of Republicans oppose the practice. Among independents, 43% favored the concept, while 35% were against it.

■ Tennessee education officials plan to follow guidance from U.S. Education Secretary **Betsy DeVos** to route more of the state's share of federal coronavirus relief money to private schools. *Chalkbeat Tennessee* reported the decision was relayed to superintendents on Monday by **Eve Carney**, the state's chief districts and schools officer. Tennessee is in line to receive \$260 million in federal money. Under initial guidance the funds were supposed to be distributed in the same method as through the federal Title I program for low-income families, including those attending private schools. But on April 30, DeVos announced the money should be distributed based on the total number of children enrolled in private schools and not just on the number of low-income students they enroll. The state declined to say how much difference the change will make, but the Shelby County Schools system alone now expects to receive about \$12 million less than previously thought.

■ Former state Rep. **Joe Carr** (R-Lascassas) is leaving his \$135,000-per-year job as assistant commissioner of the Tennessee Department of Environment and Conservation. Carr, whose unsuccessful bids for the U.S. Senate, U.S. House (twice), state GOP chair, and state Senate have made him one of the state's most prolific seekers of office, was an early **Bill Lee** supporter during the 2018 governor's race. He also defended the new governor when some hardliners criticized him for Cabinet choices that included holdovers from former Gov. **Bill Haslam's** administration and others who — like Lee — had made political donations to Democrats in the past. Carr was named to the TDEC position in April 2019.

■ The state Department of Safety has announced it will resume giving road tests to new drivers. Exams booked in mid-May will be scheduled for mid-June.

■ A month-long wait at the DMV? Good to know things are getting back to normal.

■ Graceland reopened on Thursday, limiting visits to the late **Elvis Presley's** home to 25% of capacity after instituting new health and sanitation protocols. **Joel Weinshanker**, the managing partner of Graceland Holdings, told the *Memphis Business Journal* that while the facility would probably lose less money by remaining closed, he felt a responsibility to the region to reopen. He urged others to follow suit.

■ "People who have made a lot of money in Memphis and people who have done very well in Memphis, this is their time to step up." — **Weinshanker**.

■ Laudable sentiment. But now tell us how many tubs of sanitizer it took to disinfect the Jungle Room.