

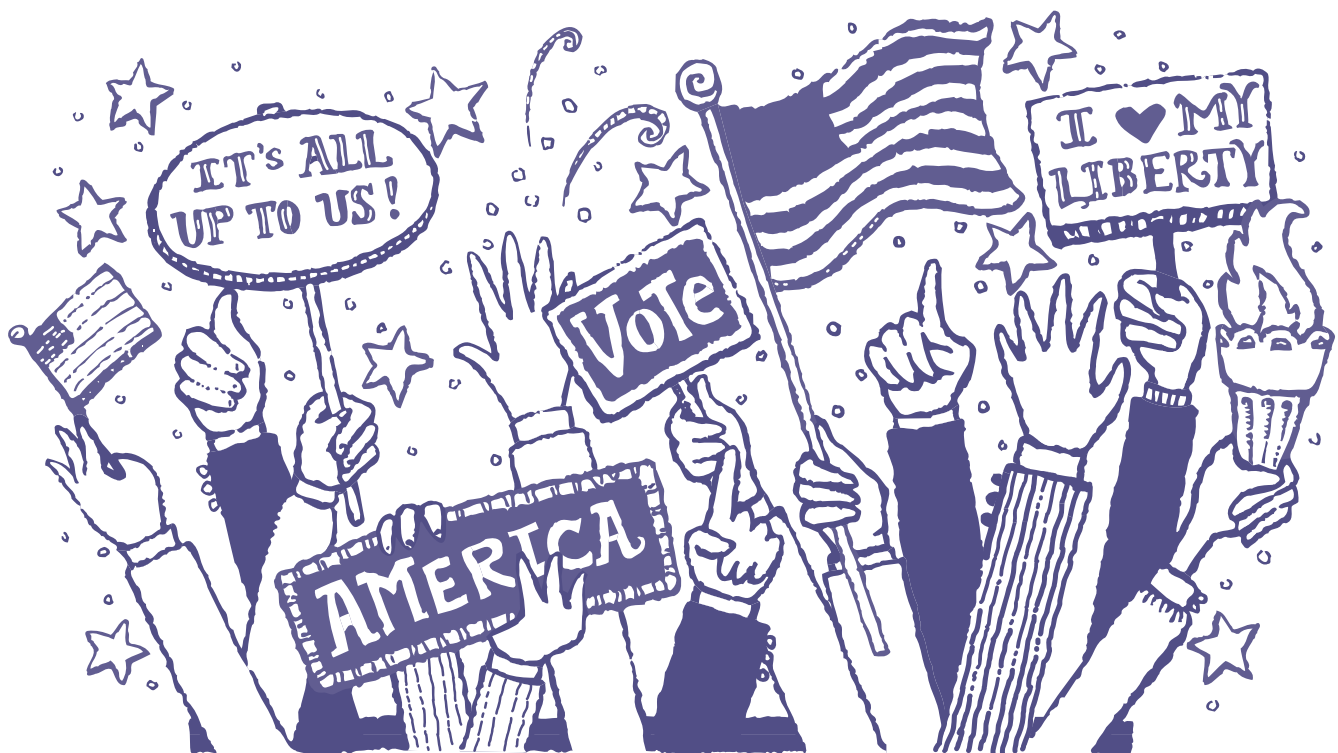
# THE ALABAMA MUNICIPAL JOURNAL

January 2004

Volume 61, Number 7

## Electronic Voting Devices

story page 13



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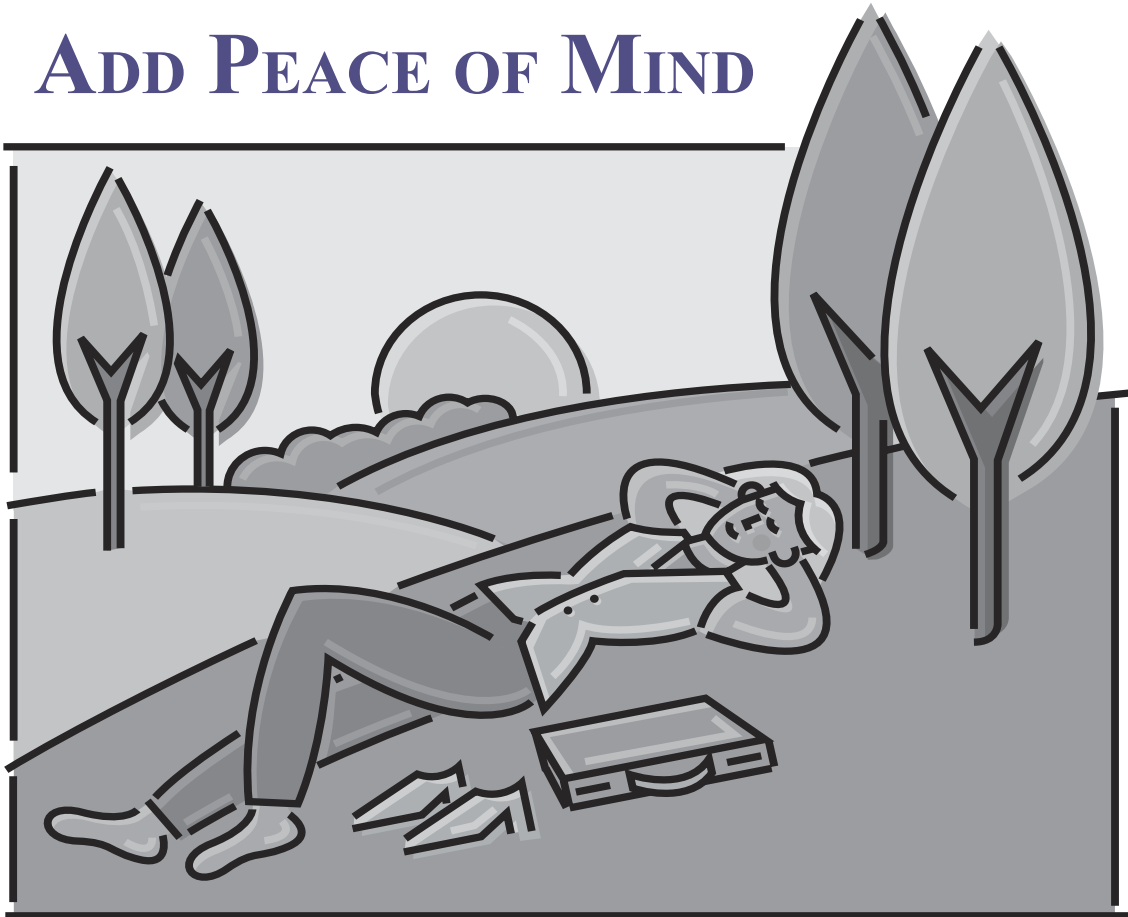
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# THE ALABAMA MUNICIPAL JOURNAL

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January 2004 • Volume 61, Number 7

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# Speaking of Retirement

## Disability Retirement

### What are the qualifications to retire on disability with the Employees' Retirement System (ERS)?

If the career of an ERS member is cut short because of permanent disability, the member may qualify for monthly disability benefits. To qualify, the member must meet **all** the following conditions:

1. The member must have **10 years** of creditable service.
2. The member must be **in-service**. A member is considered in-service if currently working or on official leave of absence for one year, which may be extended for no more than one additional year. Members who terminate employment are not eligible to apply for disability retirement. A member will not receive service credit for periods of leave without pay.
3. The ERS Medical Board must determine the member to be permanently incapacitated from the further performance of his or her duties. The Medical Board bases its determination upon information provided by the member's physician on the Statement By Examining Physician. This statement must be based upon a current examination conducted within **four** months prior to your effective date of retirement.

### Can I apply for disability retirement while I am receiving Workmen's Compensation?

Yes, as long as you are still in-service. Once the in-service period ends, the fact that you are still on Workmen's Compensation does not allow you to apply for disability retirement.

### If I am able to retire on disability, how are my benefits calculated?

Monthly disability retirement benefits are calculated identically to those for regular service retirement. The one exception is that additional credit for sick leave **cannot** be converted into retirement credit unless you also qualify for a service retirement benefit.

### How do I apply for disability retirement?

To apply for disability retirement, request a REPORT OF DISABILITY PACKET and RETIREMENT APPLICATION PACKET PART 1 from the ERS, your personnel department or download the forms from our Web site at [www.rsa.state.al.us](http://www.rsa.state.al.us). The REPORT OF DISABILITY PACKET contains two parts: Part I is the Statement by Examining Physician which must be returned along with the RETIREMENT APPLICATION PACKET to the ERS, and Part II is the Application Authorization which must be completed and given to your physician.

**Both the Statement by Examining Physician and the Retirement Application Packet must be received by the ERS at least 30 days and not more than 90 days prior to the effective date of retirement.**

The member is responsible for notifying the ERS regarding retirement.

### As a State Policeman, am I eligible to retire with disability without having 10 years of service?

A State Policeman with less than 10 years of service may be eligible for disability retirement if **all** the following criteria are met.

The disability must:

1. be the result of employment in the line of duty;
2. be permanent; and
3. prevent the State Policeman from performing his or her current duties or duties of less strenuous nature.

---

Prepared by the Communications staff of the Retirement Systems of Alabama. To have your questions answered in "Speaking of Retirement", please address them to: Mike Pegues, Communications, Retirement Systems of Alabama, 135 South Union St., P. O. Box 302150, Montgomery, Alabama 36130-2150.



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and the ability to transform technology into business advantage,” says Laura Larimer, chief information officer, State of Indiana. “The value of PeopleSoft’s internet architecture is immense. It drastically reduces the cost of our maintenance, upgrades, and end user training.”

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# The President's Report

Dan Williams  
Mayor of Athens

## This Opryland Is Your Land, This Opryland Is My Land

What a Hotel!! As the Guthrie song suggests, it reaches from California to the New York Islands. We have just returned from the National League of Cities Convention which was held at the Opryland Hotel in Nashville, Tennessee. I suppose this is the biggest hotel that most of us have ever lived in for a few days. It is a City within its confines and has everything you will ever need, except a funeral home. However, I'm sure that if you looked in all the nooks and crannies you would probably find one, and they would sell you a pre-paid funeral.

The Convention was great, as usual, with plenty of workshops and seminars to give you more information and ideas than you will ever be able to implement in your City. I enjoyed the opening session with Cokie Roberts, the news analyst, giving her views on the national political scene. Cokie is from a liberal background but I think she always gives a balanced view of the political news through her observations – more so than other Liberal and Conservative Commentators. Everyone enjoyed her stories of Strom Thurmond and others in the Senate over the years.

I suppose the hot topic for this year is Homeland Security. If you remember, the T.V. Cable Industry has been a very hot topic for several years, and still is for a lot of us. I didn't see anything on the Convention agenda about it. I suppose they have presented everything we ever will need to know about it, and have moved on to other topics. Other speakers provided informative thoughts for us and one of the most popular guys, James Carvell, was back to see us. He is about the opposite of Cokie but never fails to entertain the crowd with his remarks that are not too balanced.

I think it was very ironic – or coincidental – that after Homeland Security had been discussed at the Convention, and we had heard some criticism of our Nation's President and military, that upon our awakening on Sunday morning, we were greeted with the news of Sadaam's capture by the 4th Infantry Division. What great news!! I immediately thought of the more than eight thousand Alabama men and

women of the Alabama National Guard who have been called into active duty, and I prayed that this event will lessen the danger to them and shorten the time to be away from home for all our Troops. Let's hope they get the other guy real soon.

I think a lot of folks discovered Nashville for the first time, and I want to thank the National League Staff and the Nashville promoters who made the Convention possible. Nashville is a great town for music and many other reasons. I can drive from my house in Athens to the Opryland Hotel in about one and one-half hours. We go up a few times each year for pleasurable events, especially the music.

Back to the Hotel. It is *so* big that one speaker stated he spoke there last year and this year found a guy trying to find his way out from last year. It was a long way from your room to the Convention Center, and you had better carry all you will need in your pack, because if you forget something, it is a good half-mile back to the room and you'd get lost several times on the way.

I think the best event that I got lost on the way to was the Alabama Reception on Friday night. If I'm correct, someone on our State Staff said Alabama had around four hundred delegates and spouses at the Convention and most came to the reception. I enjoyed seeing all the Old Heads and the new City Officials at the reception. It was a great time and we all lingered for a while.

I'd like to recognize and congratulate Ted Jennings, mayor of Brewton and past president of the League, who was elected to serve a two-year term on NLC's Board of Directors. He joins Cynthia McCollum, councilmember from Madision, who will begin the second year of her two-year term. The Alabama League couldn't ask for better representation on the NLC Board of Directors. And the NLC Board will benefit from two fine, seasoned officials. In addition, Mayor Al DuPoint of Tuscaloosa and Mayor Leon Smith of Oxford – both past presidents of the League – are currently serving on the NLC Advisory Board. Both Al and Leon have served terms as NLC Board members.

I think this Convention was one of the best because I didn't have to fly, and I didn't have to drive all day. So for those reasons, and the fact that I met the ghosts of Roy Acuff and Minnie Pearl on the Magnolia staircase singing "The Great Speckled Bird", and being "so proud to be here", I want to make Nashville the permanent site for the Convention every year. Take care and have a good new year. ■

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# Municipal Overview

By  
PERRY C. ROQUEMORE, JR.  
*Executive Director*

## 2003 Fiscal Survey

The League staff hopes each of you had a great Christmas and New Year. In a few short days, the 2004 Regular Session of the Alabama Legislature will begin. This session will be very difficult as our state leaders tackle the funding crisis in state government.

### Cities Cut Services, Increase Fees to Confront Worsening Fiscal Squeeze

The financial crunch seen in Alabama and Alabama municipalities is not unique to our state. As a result of an increasing squeeze on municipal budgets, many cities and towns across the nation are cutting staff and services and are increasing fees, according to survey of 328 cities by the National League of Cities. The 19th annual survey of city finances found more than four out of five finance directors surveyed (81%) said their cities were less able to meet financial needs compared with the previous year, the largest proportion since 1990.

Spending increases outpaced revenue increases in cities' 2002-2003 fiscal year by 3.1 percent compared to the previous year. The gap in revenues and expenditures was fueled by rising employee health care and pension costs, declines in sales, income and tourist tax revenues, cuts in state aid, and increased demands for spending on public safety and homeland security. City finance officers said the biggest negative factors affecting budgets were:

- Costs of city workers' health benefits (cited by 63 percent),
- Costs of city workers' pensions (30 percent),
- Reduction in state aid (29 percent),
- The local economy (25 percent), and
- Infrastructure needs (25 percent).

Cities are responding by cutting back personnel and government spending in areas other than public safety, curtailing capital and infrastructure investment, raising user fees and charges, and drawing down ending balances, or rainy day funds, which cities set aside for emergencies. In response to the deteriorating fiscal condition of cities:

- Nearly half (47 percent) of all cities increased fee rates in 2003,
- 30 percent reduced city employment,
- 29 percent imposed new fees or charges on services,
- 21 percent reduced actual levels of capital spending, and
- 11 percent reduced city service levels.

Cities have drawn down their ending balances, or rainy day funds, which cities set aside for emergencies. Ending balances as a percentage of expenditures dropped to 17.9 percent, the lowest level in five years. Recently, National League of Cities President John DeStefano, Jr., mayor of New Haven, Connecticut, said the U.S. is under-investing in cities and towns and called for a stronger federal-local partnership to fund programs that help build and preserve the middle class in America. "Under-funded public schools, smaller police forces, deteriorating transportation systems, expensive health care, sprawl – these are public choices that increasingly subvert our American ideal, even as we fight for it overseas."

While there are signs of an improving economy, the effects are unlikely to be felt by cities and towns soon and city officials are anticipating that budgets will be equally pinched next year. "Even if the economy fully recovered tomorrow, cities would still be facing increased fiscal stress over the next year," said Michael Pagano, professor of Public Administration at the University of Illinois at Chicago. "This is because of rising costs for cities and towns such as healthcare and pensions, new responsibilities such as homeland security, cuts in state aid to cover state shortfalls, and continued need to invest in infrastructure."

### NLC Institute for Youth, Education, and Families

Municipal officials across the nation are constantly dealing with issues affecting youth, education and families. The Alabama League of Municipalities is planning several programs in the upcoming year dealing with this timely topic. The Institute for Youth, Education, and Families, a special entity within the National League of Cities (NLC), helps

*continued next page*

municipal leaders take action on behalf of the children, youth, and families in their communities. NLC launched the Institute in January 2000 in recognition of the unique and influential roles that mayors, city councilmembers, and other local leaders can play in strengthening families and improving outcomes for children and youth. Responsive to municipal leaders on a wide range of issues, the Institute focuses on five core program areas:

- education
- youth development
- early childhood development
- safety of children and youth
- family economic security

The Institute is a national resource, providing **guidance and assistance** to municipal officials, compiling and disseminating **information** on promising strategies and best practices, building **networks** of local officials working on similar issues and concerns, and conducting **research** on the key challenges facing municipalities in these core program areas. It collaborates with a broad range of national partners and works with the nation's 49 state municipal leagues to reach local officials in up to 18,000 cities and towns across America.

Through the Institute, municipal officials have direct access to a broad array of strategies and tools that can help them strengthen families and enhance the well-being of children and youth:

**Action kits** offer a menu of practical steps that officials can take to address key problems or challenges.

**Technical assistance projects** in selected communities provide in-depth help to municipal leaders who are committed to taking action on behalf of children and families. Current projects focus on improving public schools, enhancing afterschool programs, developing transitional jobs programs, and promoting youth leadership.

**Partnerships with state municipal leagues** provide newsletter articles, workshop templates, materials, and individualized consultations with state league staff.

NLC's **Your City's Families Conference** and other workshops, training sessions, and cross-city meetings highlight best practices and promising city innovations.

**Targeted research and periodic surveys** of local officials fill critical gaps in the nation's knowledge of the challenges facing cities and towns. The recently formed Families and Communities Panel of the Municipalities in Transition Program will provide research and development dimensions to the ongoing work of the Institute.

The Institute's **web site, audioconferences, and e-mail listservs** help officials stay connected to their peers in other communities and easily share information on progress, pitfalls, and lessons learned.

The Institute for Youth, Education, and Families is the product of extensive planning and development by an NLC committee composed of local elected officials, representatives of major national organizations and corporations, and young people - all sharing a particular interest in the welfare of the nation's children, youth, and families. This Council on Youth, Education, and Families created the initial vision of a special place within NLC that would serve as a national resource for municipal leaders, and it continues to guide and oversee the Institute's work.

By registering with the Institute, municipal officials will receive **access** to networks of colleagues sharing their interests, e-mail **updates** on noteworthy developments, immediate **notices** of new publications and resources, **invitations** to participate in meetings and activities, and **opportunities** to share their successful programs and learn from the successes of others. To register with the Institute to receive periodic mailings and email newsletters, request a form by emailing [rpd1@nlc.org](mailto:rpd1@nlc.org) or leaving a detailed message at 202-626-3014. ■

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# ENVIRONMENTAL OUTLOOK

By Gregory D. Cochran  
Director, State and Federal Relations

## EPA Administrator Outlines Plans for the Agency

**Editor's note:** *This information is reprinted from the EPA website. To read more about the EPA programs, specifically Region 4, you may visit their website at [www.epa.gov](http://www.epa.gov).*

Pledging to replace conflict with common sense and collaboration, EPA Administrator Mike Leavitt, on December 9, 2003, outlined his guiding principles; conveyed his plans and aspirations for the Agency; and previewed a 500-day action plan to significantly improve the nation's air quality. Administrator Leavitt spoke to Agency employees in Washington and by broadcast across the nation.

"Real environmental problem-solving takes place in the productive center, not at the emotional extremes," he said. "The productive center is the place where the best ideas compete and a fair process for decision-making exists."

Leavitt's speech to Agency employees came after three weeks of cross-agency introductions, discussions and briefings. Drawing from an environmental philosophy called Enlibra – a word derived from Latin roots that means "to move toward balance" – Leavitt explained that the eight principles of Enlibra form the prism through which he views environmental issues.

"The Enlibra principles are just common sense, really, and many other people have reached the same conclusions on their own," he said. "But do not underestimate the value of common sense, particularly as the counter to conflict."

Putting words to work, Leavitt previewed a 500-day plan to clean up the nation's air. The plan, to be released soon, provides a road map for how the new Administrator intends for the Agency to achieve the most productive period of air quality improvement in American history.

Specific action steps include supporting the President's Clear Skies cap and trade initiative, acting on 8-hour ozone

non-attainment and working to ensure compliance with ozone and particulate standards, addressing mercury emissions from power plants, and placing stringent controls on off-road diesel engines.

"The cap-and-trade approach shows us again and again that people do more and they do it faster when they have an incentive to do what is in the public's interest," said Leavitt. "More, better, faster, newer ... that's the tune you will hear from me."

Leavitt envisions a new wave of national environmental productivity beginning in America. "It is emerging not from legislative initiatives," he said, "but from people joining together in collaborative networks for environmental teamwork."

Citing the Western Regional Air Partnership as an example of successful regional collaboration, the Administrator heralded the importance of the collaborative process and EPA's role as a convener. Leavitt said that every significant step of environmental progress he has ever been involved with came about through collaboration.

"Collaboration is not code for compromise. It is the pursuit of what's possible, checked only by the realities of what is workable," Leavitt said in his speech. "Collaboration does not eliminate litigation, but it can minimize it. Collaboration doesn't take away hard decisions, but it improves acceptance."

Calling employees "the builders of a 21st century network and the keepers of a 30-year ethic," Leavitt challenged the Agency to work faster, better and more collaboratively than has ever been done before.

"Our work carries an inherent duty to leave things better for the next generation," Leavitt told employees. "That has  
*continued next page*



always been a personal goal of mine, so we are – in the spirit of Enlibra – in balance.”

### Alabama Power Foundation Tree Grants

Communities across Alabama are receiving cash grants to purchase trees for parks, schoolyards and other public spaces under a partnership between the Alabama Power Foundation and the Alabama Urban Forestry Association. In 2003, the program provided \$52,000 in grants to 47 communities in Alabama. Over the past five years, more than \$241,000 in grants have been distributed to more than 246 cities, counties, schools and community groups. To learn more about these grants, go to <http://www.aufa.com>.

### Educational CD-Rom Program

In a joint project between the Nature Conservancy of Alabama and Alabama Power, a new environmental

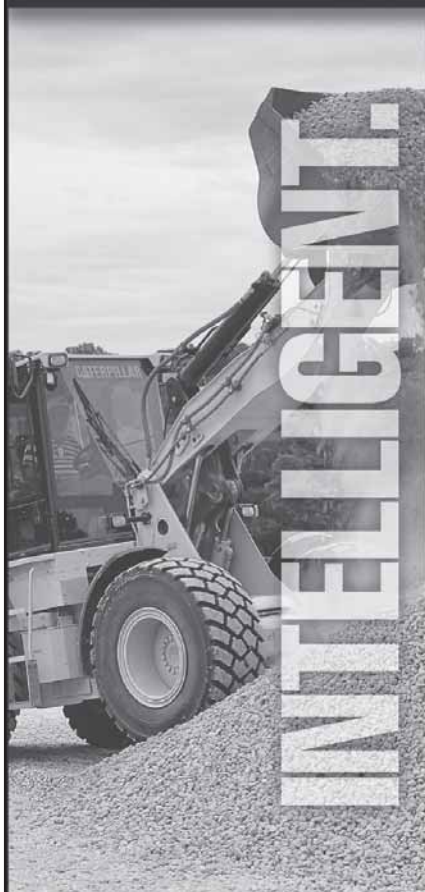
education interactive CD-Rom program titled “Now and Forever Alabama” is now available to educators free of charge. The disks provide details about the Nature Conservancy’s 17 preserves across Alabama. To learn more about the program and how it works, visit [www.nowandforeveralabama.org](http://www.nowandforeveralabama.org).

### New Alabama Forest Service Chief

Steve Rickerson, a 28 year veteran of the USDA Forest Service, has been chosen to oversee the 660,000 acres of National Forests in Alabama. Before becoming Alabama’s supervisor, Rickerson served as deputy supervisor for the Cherokee National Forest. Rickerson replaces Jim Gooder, who recently accepted an assistant director’s post in Minnesota. ■

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By Ken Smith  
Deputy Director/Chief Counsel

# THE LEGAL VIEWPOINT

## Electronic Voting Devices

Although electronic vote counting systems have been around for some time (the state's electronic voting Committee was created in 1983), they were first used by a significant number of municipalities during the elections in 1996. Until this point, voting machines and paper ballots were by far the most popular ways to vote. Only a handful of cities and towns used electronic counters.

The League anticipates that in the 2004 elections most, if not all, municipalities will utilize some form of electronic system. Because statutes cannot be amended rapidly enough to keep up with the rapid technological advances and changes in these counters, the legislature empowered a Committee to develop regulations to govern their use. This Committee has the power to establish rules and regulations for the use of electronic vote counters in Alabama. The Committee also has the authority to examine and certify devices that may be used in elections in the state.

Although the Committee's regulations were created specifically for state and county elections, not municipal elections, the regulations apply in municipal elections. Therefore, clerks and others must be familiar with these regulations if they plan to use electronic vote counters. Additionally, these regulations were significantly amended since the 2000 municipal elections. This article examines these regulations and the statutes surrounding the usage of electronic vote counters. Readers should bear in mind that it is possible these regulations will be amended further before the 2004 election. The League will keep readers informed about future developments.

### Statutory Guidelines

Section 17-24-3, Code of Alabama, 1975, authorizes municipalities to establish the use of electronic vote counters in municipal elections. The municipal governing body must adopt a resolution specifying the type equipment to be used and establishing the procedure for implementation. A copy of the resolution must be filed with the Secretary of State.

In order to be used, an electronic counter must be approved by the Committee. To qualify, a counter must, at a minimum, meet the criteria set out in §17-24-3(b). The Committee is limited to establishing standards for electronic vote counters. The Committee does not have power to establish rules governing existing types of election equipment.

### What is an Electronic Vote Counter?

Even arriving at a description of an electronic vote counter that covers all potential types of counters is difficult. Section 17-24-2(1), Code of Alabama, 1975, defines an "electronic vote counting system" as one "in which votes are recorded on an electronic ballot or on a paper ballot or on a ballot card by means of marking or by means of punching, and such votes are subsequently counted and tabulated by automatic tabulating equipment ..."

The Electronic Voting Committee takes a slightly different approach, making clearer the distinctions between the various machines. According to the Committee, a direct recording electronic voting device is "an electronic device that records and tabulates electronic ballots." Reg. 307-X-1-.01(5). A Marksense Ballot Counter is an "electronic vote counting device that reads and tabulates marksense ballots." A Marksense Ballot is a "machine-readable ballot which utilizes paper for presenting the names of the offices and candidates and statements of questions to be voted and on which the voter marks his or her choices in designated voting response locations." A Vote Recorder is a "device into which a ballot card is inserted and which is used by the voter to punch holes in the card for the purpose of recording votes."

Regulation 307-X-1-.01 also defines:

- central ballot counters, which are marksense ballot counters that read and tabulate electronic paper ballots at a central location where ballots are transported when the polls close, and

*continued next page*

- precinct ballot counters, which are marksense ballot counters that tabulate the votes at the precinct where they are cast.

As can be seen from these definitions, the phrase “electronic vote counters” can indicate a large variety of devices, all of which have only one thing in common: they tabulate votes electronically. For instance, some machines count votes on site. Others are designed with a memory pack that can be transported to a central location to be counted there. Some machines require voters to mark a card. Others require that it be punched.

All of this adds up to the fact that it is probably safe to say that if a municipality is using a device that counts votes electronically, it should assume that the regulations apply to the machine.

That said, a distinction must be made between marksense ballot counters and direct recording electronic voting devices. As noted above, marksense ballot counters use some form of paper ballot. Electronic voting devices, on the other hand, are electronic devices that record and tabulate votes directly, without the use of an electronic paper ballot. Knowing the type machine you are using is important, because Rule 307-X-1-.02 provides that, unless otherwise provided in the rules, the use of marksense ballot counters are governed by the laws dealing with paper ballots whereas the laws regarding voting machines apply to direct recording electronic voting devices. This includes any local legislation applicable to voting centers.

### **Application of the Regulations to Municipal Elections**

In general, regulations of the Electronics Voting Committee refer only to elections conducted by the county. Regulation 307-X-1-.03, though, makes clear that to the extent practicable, the regulations apply in municipalities which use direct recording electronic voting devices or marksense ballot counters. Duties assigned in the rules to a state or county election official are to be performed by the corresponding municipal official. If there is no corresponding municipal official, the clerk performs the duty, unless he or she is “ineligible,” which would probably include a situation where the clerk is a candidate. In municipal elections, references in the rules to the county governing body mean the municipal governing body.

Regulation 307-X-1-.03 also provides that where the rules refer to a statutory provision that conflicts with specific state laws or acts applicable in municipal elections, the municipal election provision prevails.

### **Testing Ballot Counters/Precinct Counters**

Rule 307-X-1-.04 provides that the probate judge (municipal clerk in municipal elections) must have each

precinct ballot counter tested to ensure that it accurately counts votes cast for all offices and measures on the ballot before each election in which the counter will be used. The precinct counter, remember, is one that tabulates marksense paper ballots at the polling place. The testing is open to the public and notice of the time and place of the test must be given. Section 17-24-9(a) states that notice of the test must be given at least 48 hours before the test by written public service announcement, by notice to newspapers and radio and television stations, and by filing notice with the Secretary of State. Notice that the regulation does not specify this type notice, but it is contained in the statute itself. To be on the safe side, a municipality should follow the statute and provide notice as spelled out in the statute. The test must be conducted as close as practicable to the date of the election and not more than 14 days before the election, as required by §17-24-9 of the Code and Rule 307-X-1-.04(1).

Under the rule, party chairmen may be present during the test. Because municipal elections are non-partisan, this rule probably would allow each candidate to be present or have a representative present during the test. Collectively, these individuals and the clerk must prepare a sufficient number of test ballots that are clearly marked as test ballots. The ballots must be voted so that each candidate or measure receives at least two votes. Additionally, at least one ballot must be an over-vote; that is, the ballot must be marked as an attempt to vote for more than the allowed number of candidates in one office. The test ballots may be validated by hand count or by a piece of equipment that has correctly tabulated the original test ballots. The ballots then must be hand counted and the results recorded and retained. (NOTE: If the manufacturer prescribes an alternative test method, the alternate procedure may be substituted for this test, provided that written approval is obtained from the Electronic Voting Committee.)

As an alternative to the public testing of all precinct counters, the following procedure may be used. The clerk or designee shall test each counter prior to the public test and correct the causes of any discrepancies. Representatives of candidates participating in the election may attend this test. The test materials and printed output of this test shall be attached to the counters, which shall subsequently be assembled for the public test. At the public test a sample of counters shall be selected for retesting by drawing lots. At least one counter shall be selected and tested for each ballot configuration. Each candidate in a primary and each party in a general election may select an additional machine representing each ballot type for public testing. If any precinct counter fails to produce a completely accurate count, all counters using the same ballot configuration shall be tested.



The causes of any discrepancies must be corrected before the equipment is sealed and certified ready for the election. Once any required corrections are made and each piece of equipment correctly tabulates the results, the machine must be cleared, setting all counters to zero, and making the machine ready for use on election day. The machine is then sealed by the clerk or representative and is certified ready for use.

Memory packs and memory pack tabulators that will be used during the election must also be tested along with the precinct counters. The data from each memory pack must be read into the tabulator, and the total must then be compared with a total that is hand tabulated from the printed output of the precinct counters for at least one city-wide office, which shall be selected at the time of the test by a random procedure. Candidates for other offices, or their representatives, may audit the test totals for their office. Any discrepancies must be corrected before the equipment is certified and sealed.

After testing all materials (including the results of the hand count, the test ballots, and the printed output from the counters) must be sealed in a box or envelope, which shall be maintained unopened for use in the event of an election contest. The rule provides that this sealed box or envelope is to be kept by the sheriff. The sheriff, though, is not involved in municipal elections. Therefore, it seems that this information should be kept by someone with official election duties. In most cases, the League feels that this should be the municipal clerk.

### **Central Counters**

If the municipality uses central ballot counters rather than precinct counters, each central counter shall be tested as set out above. In addition, any necessary header cards for each ballot configuration which shall be tabulated on that counter must be tested. Further, the counters must also be tested on election day before and after the ballots from the precincts are counted. The election day tests must be conducted by the poll officials assigned to the central counter.

The rule states that the same test ballots that were used during the pre-election test must be used, which raises a question. These test ballots are required to be sealed following the pre-election test, and are to remain sealed unless there is an election challenge. How can they then be used for the election day tests? The rule does not answer this. It seems that two possibilities exist. First, the seal could be broken to conduct the election day test. If this process is used, a written explanation for breaking the seal must be provided. The other possibility is to leave the ballots unsealed until the election day test is conducted. Either method raises the possibility that the ballots might

be tampered with. The more reasonable approach seems to be reopening the seal on election day. At least in this case, the candidates and others will be present when the seal is broken and the materials are protected from improper tampering until this time. The League recommends contacting the supplier of the device that will be used for advice on answering this question.

Provisions in the rules regarding testing for party questions (straight-ticket voting, for instance), and for written ballots may be ignored for municipal elections.

### **The Style of the Electronic Ballot**

Marksense ballots may be any size or design required for use in the counter and may be printed on one or more separate pages or cards.<sup>1</sup> The ballots do not contain a square for the voters' numbers, nor are seals provided for each ballot. Marksense ballots must have one detachable stub, and must be numbered sequentially within the municipality with the sequence number printed on the stub, but not on the ballot itself.

Rule 307-X-1-.06 requires printing a ballot style number on each marksense absentee and precinct ballot. This ballot style number represents the "political race makeup of the ballot." Companies that provide electronic ballots are familiar with this requirement.

Additionally, a sufficient number of secrecy envelopes or folders must be provided. These are used by voters to transport their completed ballots from the voting stations to the precinct counter or ballot box.

### **Custody and Transportation of Equipment**

Sections 17-9-36 and 17-9-37 of the Code, which provide for the custody and transportation of voting machines, apply to electronic ballot counters. In municipal elections, however, these duties are controlled by §11-46-54. Strangely, §§17-9-36 and 17-9-37 state that they are to be followed in municipal elections as well. This seems to create something of a conflict. Fortunately, the sections in Title 17 are very similar to the Title 11 provisions. Therefore, they may be read together to determine the duties that must be followed.

These sections require the municipal governing body to designate a person to have custody over the machines and keys when the machines are not being used. Machines must be properly boxed and covered and stored in a suitable place. The entity which delivered the machines is responsible for transporting the machines to the custodian and must provide sufficient security to protect the machines from tampering or other injury. Municipalities are given the authority to pay the custodian reasonable compensation, and to cover all necessary expenses incurred in transporting

*continued page 23*

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Lorelei A. Lein  
League Counsel

# Legal Notes

## COURT DECISIONS

**Zoning:** A property owner who sold his property before the formal meeting of a city’s planning commission at which his rezoning request was to be considered was not an “aggrieved party” with standing to bring an action challenging the alleged denial of the rezoning request. *Caton v. City of Thorsby*, 855 So.2d 1057 (Ala. 2003).

**Attorney Fees:** Even if a city confers a benefit by bringing an action challenging the distribution of net profits from the Alcoholic Beverage Control Board, it was at the expense of the general public for whose benefit the Legislature passed general appropriation acts and, therefore, the city is not entitled to an award of attorney fees under the common benefit theory. *Alabama Alcoholic Control Bd. v. City of Pelham*, 855 So.2d 1070 (Ala. 2003).

## UNITED STATE SUPREME COURT CASES

**Search and Seizure:** The Fourth Amendment does not prohibit police officers from arresting all occupants of a car when drugs and a roll of cash are found in the passenger compartment, and all the occupants deny ownership. *Maryland v. Pringle*, – U.S. –, 2003 WL 22938461 (U.S. Dec. 15, 2003).

## ATTORNEY GENERAL OPINIONS

**Appropriations:** If a county commission determines that the publication of the testimony of a witness serves a public purpose, the county may use county funds to pay for the cost of the publication. 2004-019.

**Public Works Bid Law:** Works to be performed on public property, or property that will become public property, that are paid for entirely with private funds are not public works

and contracts to perform such works are not subject to the competitive bidding requirements of the Public Works Bid Law. 2004-026. **NOTE:** It is the League’s opinion that if private funds are disbursed by the city or through the city, they would become public funds and thus subject to any applicable bidding procedures.

**Employees:** A mayor in a Class 2 municipality may hire additional administrative personnel under the authority of Section 11-44C-40 of the Code of Alabama 1975. The number of personnel and the amount of their salaries is within the discretion of the mayor as long as the total salary does not exceed \$100,000 or the amount budgeted for these salaries by the council, if more money is budgeted. 2004-031. **NOTE:** This opinion only applies to the City of Mobile.

**Elections:** The qualified electors who sign petitions filed under Section 11-43A-2 of the Code of Alabama 1975, are not required to have actually voted in the last general municipal election. The number of signatures on the petition must equal at least 10 percent of the total number of qualified voters who voted in the last general municipal election held in the municipality. The total number of votes cast should be recorded in the minutes of the council meeting in which the results of the election were canvassed. 2004-034. **NOTE:** Section 11-43A-2 of the Code of Alabama 1975 provides for a petition for an election to change to the Council-Manager form of Government.

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**Bingo:** There is nothing that prohibits a non-profit organization from conducting media bingo in the Town of White Hall, in Lowndes County, or in Jefferson County provided that the game is kept solely on the premises of the nonprofit organization and is directly and solely operated by the organization. The game may not be broadcast to additional locations. 2004-035. **NOTE:** This opinion relates specifically to the Town of White Hall in Lowndes County and Jefferson County, both of which have specific constitutional amendments allowing for bingo.

### ETHICS COMMISSION OPINIONS

**AO NO. 2003-52:** A city police officer may run for the position of county constable; provided that, if elected, all activities relating to his position as constable are conducted on his own time, whether after hours, weekends, or annual leave. Further, he may not use any public equipment, facilities, time, materials, labor, or other public property under his discretion and control to assist him in performing the duties of constable or in running for such office.

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# Federal Legislative and Regulatory Issues

Mary Ellen Wyatt Harrison  
Staff Attorney

## Internet Tax Bill Does Not Pass

Congress adjourned for the year without passing the Internet Tax Non-discrimination Act (S. 150). The Act would have preempted local governments and states from collecting existing taxes on telecommunications services, including gross receipts, rights-of-way and franchise fees. Many state and local government groups lobbied vigorously to oppose the legislation. As it is currently written, the Internet Tax Non-discrimination Act would expand the definition of "Internet access" to prevent states and localities from taxing any telecommunications service "used to provide Internet access," resulting in losses estimated at approximately \$9 billion annually. The Congressional Budget Office (CBO) also reviewed S. 150, noting that state and local governments stand to lose "substantial" tax dollars because of the bill's provisions to change the definition of Internet access. The Internet tax moratorium expired on November 1, and existing state and local taxing authority over this source of revenue is protected, at least in the short term. However, Congressional leaders indicate that the Internet Tax Non-Discrimination Act will be on their legislative agenda when Congress reconvenes this January.

## Omnibus Spending Bill Delayed Until January

After long, contentious negotiations over Medicare reform legislation, Congressional leaders began hammering out an omnibus spending bill to cover the remaining appropriations bills for fiscal year 2004 before adjourning for the Thanksgiving recess. Final action on the omnibus is not expected until January, resulting in a series of continuing resolutions to maintain government operations. The omnibus measure would consist of seven bills, including appropriations for the Departments of Commerce, Justice, State, Labor, and Health and Human Services. Funding for certain local programs will be decided in the omnibus, such as Community Oriented Policing Services (COPS), the Local Law Enforcement Block Grant (LLEBG), Social Services Block Grant (SSBG) and juvenile justice programs.

## Metropolitan Congestion Relief Act Introduced in House

As part of the TEA-21 Reauthorization process, Rep. Eddie Bernice Johnson (D-Texas) has introduced the "Metropolitan Congestion Relief Act" (H.R. 3611) in the House. This measure will target funds to localities to mitigate traffic congestion. The bill, if passed, will require more funding to go directly to local governments and Metropolitan Planning Organizations (MPOs). The bill would double planning funds for MPOs, and it will create a congestion relief program that would fund projects improving congestion in the region. In addition, the bill would create an operational improvement program, which would fund projects to improve the operation of the nation's roadways, transportation demand management techniques and deployment of intelligent transportation systems.

## TEA-21 Reauthorization Bills Introduced in House, Senate

The House Transportation and Infrastructure Committee recently introduced the Transportation Equity Act: A Legacy for Users (TEA-LU), (H.R. 3550). The bill is a \$375 billion reauthorization package for the highway and transit programs that retains the basic structure of TEA-21. If adopted, the legislation would provide \$298 billion for highways and \$69 billion for transit over a six-year period. On the Senate side, the Senate Environment and Public Works Committee recently approved its highway bill, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 (SAFETEA) (S. 1072), which is also the title of the Administration's proposal. This \$255 billion proposal breathes new life into Congressional efforts to move a six-year renewal plan forward, with TEA-21 programs currently operating under a five-month extension law, which ends Feb. 29, 2004. During the Senate's markup, 63 "non-controversial" amendments were accepted by the committee. One amendment increases funding for rail crossing improvements from \$150 million currently given to

*continued next page*

\$200 million. Though neither bill includes any funding mechanisms, both include guarantees that each state will receive a minimum 95 percent return on their gas tax receipts by 2009. Both the Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee expect to move their bills in early 2004.

### **Abstinence Programs Eligible for \$33 Million**

Approximately \$33 million will be invested over the next year in programs that encourage adolescents to practice abstinence. The Health Resources and Services Administration (HRSA) has announced a plan to award up to 70 three-year grants of between \$250,000 and \$800,000 each through its Community-Based Abstinence Education Grants Program. HRSA hopes that through this program, premarital sexual activity, out-of-wedlock pregnancies and the incidence of sexually transmitted diseases (STDs) among youth ages 12 through 18 will be reduced. Public and private entities are eligible for program funds. State agencies that administer the Section 510 Abstinence Education Project Grant, nonprofit organizations, and community- and faith-based organizations also qualify for grants, provided their projects are consistent with HRSA's definition of "abstinence education." Abstinence education, according to the agency, is an educational or motivational program that:

- has as its exclusive purpose, teaching the social, psychological and health gains to be realized by abstaining from sexual activity;
- teaches abstinence from sexual activity outside marriage as the expected standard for all school-age children;
- teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, STDs and other associated health problems;
- teaches that a mutually faithful, monogamous relationship in the context of marriage is the expected standard of human sexual activity;
- teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
- teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents and society;
- teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and

- teaches the importance of attaining self-sufficiency before engaging in sexual activity.

Grants will be awarded only to programs that contain all of these components. Local communities with adolescent populations that strongly support abstinence education will be favored by proposal reviewers, as will former program grantees and applicants located in states where Community-Based Abstinence Education grants are not currently provided. Electronic submission of an application is encouraged. Online forms and guidance can be accessed from <https://grants.hrsa.gov/webexternal/login.asp>. Technical assistance with the online application system is available from (877) GO4-HRSA; e-mail, [callcenter@hrsa.gov](mailto:callcenter@hrsa.gov). Paper applications also can be obtained by calling (877) 477-2123.

The deadline to apply for funding is Feb. 9, 2004. Notification can be made by phone, (301) 443-2204; fax, (301) 443-9354; or mail, Maternal and Child Health Bureau, HRSA, Division of State and Community Health, Parklawn Building, Room 18-31, 5600 Fishers Lane, Rockville, MD 20857.

### **Senate Wants To Continue Paying Alien Jail Fees**

The Senate has cleared legislation that would extend – and increase – reimbursements to state and local governments for expenses related to incarcerating and detaining criminal illegal immigrants through FY 10. The bill is the State Criminal Alien Assistance Program (SCAAP) Reauthorization Act of 2003, S. 460. SCAAP funds cover court, detention, county attorney, clerk and indigent defense costs. Estimates show that state and county governments presently face more than \$13 billion in incarceration costs. Under S. 460, the program would be authorized at \$750 million in FY 04. In FY 05, the authorization would increase by \$100 million, and in each of FYs 06 through 10, \$950 million would be made available for SCAAP. In previous years, between \$500 million and \$585 million have been authorized for SCAAP. In FY 03, Congress appropriated only \$250 million for the program. The FY 04 Omnibus Appropriations Bill would provide \$300 million in SCAAP funding. The measure now heads to the House where an identical bill, H.R. 933, awaits action in the House Judiciary Subcommittee on Immigration, Border Security and Claims.

### **Health Care in Rural Areas To Improve**

The Federal Communications Commission (FCC) has adopted new rules to improve a program that helps rural



health care providers obtain access to modern telecommunications and information services for medical and health maintenance purposes. Through the six-year-old Universal Service Program, health care providers receive discounted telecommunications services at rates equal to those charged for similar services in urban areas.

*The Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking* seeks to strengthen telehealth networks nationwide, improve the quality of public health care services in rural areas and advance national security and public benefits. The FCC also hopes this new rule will increase participation in the rural health care support program, which is capped at \$400 million annually. In FY 01, demand for funding totaled only \$14 million, 3.5 percent of possible discounts. For more information on the new FCC universal service program rule, visit <http://www.fcc.gov>.

**FEMA Offers Guidance on Handling Seniors and Disabled During a Disaster**

The Federal Emergency Management Agency (FEMA) is distributing training materials on caring for elderly and disabled persons during a disaster to emergency planners at the state and local level. The course – G197 Emergency Planning and Special Needs Populations – is in CD ROM format and contains an instructor guide, student manual, visual aids, additional resources, related articles, and manuals on evacuation and emergency procedures for people with disabilities. All FEMA state training officers and regional training managers will receive the course. Social service organizations and special needs advocacy groups can request copies as well by calling (301) 447-1585. ■

*Job Listings*

**ECONOMIC DIRECTOR, City of Phenix City  
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The City of Phenix City, Alabama is seeking a professional Economic Director. Position requires minimum bachelor's degree in Urban Planning or closely related field; seven years of municipal planning experience with five years increasingly responsible managerial or professional experience in an administrative area preferred. Master's degree preferred. Responsible for day-to-day operation of the Economic Development Department to include planning, organizing and analyzing economic development trends and directing research and evaluation of proposal industrial and commercial expansion, retention and recruitment. Resumes may be mailed to: City of Phenix City, ATTN: Barbara Goodwin, Personnel Director, 601 12th Street, Phenix City, AL 36867 FAX 334-448-2712, e-mail: [btillery@ci.phenix-city.al.us](mailto:btillery@ci.phenix-city.al.us).

**CITY CLERK/TREASURER, City of Athens**

Qualifications include but are not limited to: BS Accounting; experience in a comparable position, including financial and business management or related field, financial reporting and tax laws; supervisory experience; excellent management, communication, interpersonal and organizational skills; computer proficiency including Windows, Word and Excel; resident of Athens or willing to relocate; valid Alabama driver's license and safe driving history; and the ability to perform all essential job functions. Salary Range: \$51,802.40 – \$68,400.80. Excellent benefit package including Blue Cross medical and dental insurance and State Retirement Plan. Deadline: Open until filled. City application required: Mail application and resume to City of Athens, Attention: Human Resources Department, PO Box 1089, Athens, Alabama 35612, or e-mail to: [ssey@ci.athens.al.us](mailto:ssey@ci.athens.al.us) or apply in person at Athens Municipal Building, 200 West Hobbs Street, Athens. For further information, please refer to web site at [www.ci.athens.al.us](http://www.ci.athens.al.us) or call 256-233-8737. The City of Athens is a Drug Free Workplace. Pre-employment drug screen and physical required. Equal Opportunity Employer.

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and operating the machines. The governing body must set the compensation.

In addition, the municipality may employ electronic voting specialists to serve as trouble shooters during the election. Individuals employed as specialists must be trained in the operation of the equipment that is being used and in the Committee's electronic voting rules. Specialists may be sent to assist in any precinct, but they may not assume the title or authority of regular poll workers.

## Voters Per Precinct

Limits of 300 voters per ballot box or 600 voters per voting machine (1,200 for electronic voting machines—§11-46-24, Code of Alabama, 1975) do not apply to electronic counters. The municipality must provide sufficient counters, or ballot boxes where central counters are used, to ensure that all voters may vote without undue delay. There must be at least one precinct counter, or ballot box, for each 2,400 expected voters or fraction thereof. The number of expected voters is determined by the largest number of votes cast in that precinct during the last four years. If the manufacturer's recommended maximum number of ballots is less than 2,400, then the recommended number shall be used.

The municipality must also provide a sufficient number of voting stations so that each voter may vote in privacy without undue delay. The number of voters permitted in the voting area may not exceed the number of private voting stations available, unless a voter chooses to vote without using a private voting station.

## Polling Officials

Rule 307-X-1-.10 provides that elections officials are to be appointed in accordance with the provisions of §17-6-1. The appointment and duties of municipal election officials, though, are governed by several Code sections, especially §§11-46-27 and 11-46-24. Because the rules provide that municipal provisions control where there is a conflict, we must look at the provisions in Title 11 to determine the number and responsibilities of the officials.

Section 11-46-27 provides that where paper ballots are used, there shall be one returning officer for each ward and three inspectors and two clerks for each box at each voting place. Where voting machines are used, there shall be an inspector, a chief clerk, and a first and second assistant clerk for each voting machine. In the event that voting centers or central voting places are used, the requirements set out in §11-46-24, as amended, shall control the number of election officials.

In any event, Rule 307-X-1-.10(a) states that there must be at least one inspector and three clerks. The inspector:

- 1) is in charge of the precinct,
- 2) serves as official challenger in accordance with §17-12-2 (§§11-46-38 and 11-46-39 in municipal elections) and

- 3) is the precinct returning officer. The registration list clerk is responsible for checking voters' names against the list of registered voters and marks off the names of those who vote to prevent double voting. If anyone whose name does not appear on the list of registered voters is permitted to vote by certificate or by challenged ballot, the clerk must:

- 1) legibly print their name and address on the voters' list,
- 2) mark through the names to indicate that they have voted, and
- 3) record by the names the means by which they voted (certificate with the source and date or by challenged ballot).

The poll list clerk shall ensure that each voter signs the poll list. If the voter's signature is illegible, the clerk must print the voter's name on the same or a duplicate list so that the signature can be identified. The poll list clerk then gives the voter a marksense ballot, being sure that the stub remains attached to the ballot pad. The ballots must be given out in sequence, beginning with the lowest numbered ballot.

If the voter requests assistance, the ballot clerk must help the voter deposit the ballot in the precinct ballot counter or the ballot box. The clerk must take care to preserve the secrecy of the ballot box.

A municipality may employ additional poll officials as necessary to serve at any precincts and at a central ballot counter or memory pack tabulator where these are used. These additional poll officials are appointed in the same manner as other officials. The duties of these officials are determined according to Rule 307-X-1-.10.

## Election Day

All poll officials are to report to the voting place at least 30 minutes before the polls open. Where precinct counters are used, each counter must be tested according to the manufacturer's instructions to ensure that all vote counters are set at zero and to prepare the equipment for voting. Candidates may have two watchers present to observe the test. Errors must be reported to the custodian and no votes shall be tabulated on the machine until it is repaired or substituted. Once the malfunctioning equipment is repaired or replaced and the test is satisfactorily completed, the inspector, the ballot clerk and any watcher present must sign a certificate to that effect. Although Rule

*continued next page*



307-X-1-.11 doesn't specifically state this, presumably the rule intends that once the test is properly completed, the equipment may be returned to service.

Despite the malfunction, until the machine is repaired—or if it cannot be repaired or replaced—the polls must still open and voting shall proceed. In this case, Rule 307-X-1-.17 (5) provides that where precinct ballot counters are used, voters are to deposit their ballots in a ballot box or other suitable container. The inspector shall notify the custodian, who shall attempt to repair or replace the equipment, and the municipal clerk, who shall maintain a public list of all precincts where there has been an equipment failure. If the counter cannot be repaired, when the polls close, the ballot box shall be opened and the ballots should be counted by hand, determining the voter's choice as set out below, or by feeding the ballots into an operable precinct ballot counter. Poll watchers and members of the media may observe this process.

If a central counter malfunctions, the count is suspended until the equipment is repaired or replaced, or the ballots may be counted by hand, determining the voter's choice as set out below. Poll watchers and the media may observe this process.

Assuming that there is no malfunction, where vote recorders are used, the poll officials shall compare the ballot pages of each recorder with a sample ballot for that precinct to determine that they agree. The officials must also vote every position of a specially marked demonstration ballot and compare the punches with the pages of the recorder to determine that they agree. No recorder may be used in a precinct until it has been properly verified. A vote recorder is a device into which a ballot card is inserted and which is used by the voter to punch holes in the card to record his or her vote.

Where central ballot counters are used, Rule 307-X-1-.11(3) states that the probate judge, the sheriff, and the circuit court must verify that the ballot boxes that are to be used in the election are empty. In municipal elections, this duty should be probably be performed by the municipal clerk and at least one other person designated by the council to perform this function. In many cases, this duty will be performed by the clerk and the election officials. Questions on this process should be addressed to the supplier of the machine that will be used.

Once the boxes are verified as empty, they must be locked and sealed. To avoid allegations of tampering, this should take place immediately after the verification, but must occur before the boxes are issued to the inspectors at the various precincts. The rule provides that the locks may use either a key or a combination, and the seals may be either plastic, metal or any other material, as long as they are numbered. The ballot box must be designed so that no

ballots can be removed with removing the lock. The numbered seal is placed on the insertion door of the box so that no ballots can be inserted into the box without removing the seal.

The clerk and other verification officials must certify in writing that the boxes were empty, locked and sealed prior to the election and prior to the box being delivered to the inspectors at the respective precincts. This certificate must state the date, time and place that the boxes were inspected, locked and sealed, and must include the seal numbers that are used on the boxes. The original of this statement is part of the permanent election file. The rule requires that in state and county elections, the original must be kept by the probate judge. A duplicate copy of the statement is filed with the sheriff. In municipal elections, the original should be on file with the municipal clerk. It is unclear whether a duplicate is necessary in municipal elections. The safest course, though, would be for the council to designate someone in the city or town to retain a duplicate copy. Municipalities may want to contact the machine supplier to see how this has been done in previous elections.

The locking and sealing of the boxes is open to the public. The clerk must notify the public when this will occur. Poll watchers may, of course, attend.

Before the polls open, the inspector at each precinct, along with another election official, shall remove the seal from the box and verify that the box is empty. If the seal has been broken or the box contains any material, the inspector must immediately call the municipal clerk<sup>2</sup> before opening the polls. If the numbered seal is intact, it is placed in an envelope and the inspector then completes the "Ballot Box Inspection Report." This report states that the box was empty prior to opening the polls and is signed by the inspector and the other polling officials at the precinct.

**Under no circumstances should the ballot box be opened at the precinct.**

### **Hand Counts – Determining the Voter's Choice**

In any hand count of an electronic voting device, polling officials must review each ballot to determine the elector's choice for each office to be filled. This determination shall be made pursuant to the standards set forth below. Once the voter's choice is determined, the polling officials shall manually add the elector's votes to the total votes for each candidate for the offices to be filled.

To determine the voter's choice, poll officials must consider the ballot as a whole, taking into consideration the manner in which the voter marked the ballot, when determining the voter's choice. Only choices marked consistently are to be counted. "Marked consistently" refers specifically to the manner in which the voter has expressed

his or her choice, such as the method of marking the ballot. If the poll officials cannot determine the manner in which the voter marked the ballot, the ballot is rejected in its entirety.

### **Ballot Accounting Certificates**

As soon as the marksense ballots are issued to a precinct, the issue authority, or representative, and the inspector must complete and sign the following statement:

“Marksense ballots numbered sequentially from \_\_\_\_\_ (lowest numbered ballot) through \_\_\_\_\_ (highest number ballot) were issued to \_\_\_\_\_ (name of precinct) at \_\_\_\_\_ (time) on \_\_\_\_\_ (date).”

After the last vote is cast, the poll officials shall complete the following statement (which is called the certificate of result):<sup>3</sup>

“Total number of unused ballots: \_\_\_\_\_  
Number of spoiled ballots: \_\_\_\_\_  
Number of votes from public counter of machine (precinct counter only): \_\_\_\_\_ Number of marksense ballots voted: \_\_\_\_\_ (central counters only).”

### **Number of Voters in the Polling Place**

The number of voters permitted in the voting area may not exceed the number of private voting stations available, unless a voter chooses to vote without using the private voting station. But, the limit of ten electors per polling place set out in §17-8-29 does not apply where either marksense ballot counters or direct recording electronic counters are used. Presumably, this restriction is removed in municipal elections as well, although in municipal elections, the number of voters allowed in (at least where paper ballots are used) is governed by §11-46-42.

### **Challenged Ballots**

Challenged ballots are handled the same as they are in elections where electronic counters are not used. In municipal elections challenged ballots are covered by §§11-46-38 through 11-46-41 and 11-46-44. In elections using marksense counters, after the challenged voter has signed the poll list, the poll list clerk shall take a regular marksense ballot, write on it the number adjacent to the voter’s name on the poll list, disable the ballot so that it cannot be counted electronically, and give it to the challenged voter. A challenged ballot may also be cast on a paper ballot as now prescribed by law. When the challenged voter has completed the ballot, it shall be deposited in a separate box or envelope maintained for that purpose by the ballot clerk. In central counter systems, challenged ballots shall be counted by hand by the central count poll officials at the central count location after the polls have closed. In precinct count systems, challenged ballots shall be counted by hand by

the precinct poll officials at the precincts and the results shall be handwritten on the tape printed by the precinct counter which contains the totals.

Where multiple poll lists are used in a voting center, a separate challenged voters’ poll list shall be used so that each number can be associated with only one name.

### **Counting Votes**

An elector’s ballot must be counted for each office to be filed except for each office where it is impossible to determine the elector’s choice for that office. The inability to determine the voter’s choice for any particular office to be filled shall not cause the rejection of votes for other offices where the elector’s choice may be determined. No ballot shall be rejected for any technical error that does not make it impossible to determine the elector’s choice.

In precincts utilizing precinct ballot counters, the counters shall be programmed to return the ballot to the elector if the elector has marked more names than there are persons to be elected to a particular office. The elector shall be provided the opportunity to review his or her ballot and to correct the ballot.

If the elector chooses to correct the ballot, the original ballot shall be spoiled by a poll worker and the elector shall be issued a new, blank ballot. If the elector chooses not to correct the ballot, the elector shall deposit the ballot into a ballot box or other suitable container. After the close of the polls, polling officials shall count the ballot by hand, determining the voter’s choice as set out above. Poll watchers of opposing interests and members of the media, if any are present, shall be permitted to witness this process.

In counties utilizing central ballot counters, the counters shall be programmed to return a ballot to poll officials if the elector has marked more names than there are persons to be elected to a particular office. Each returned ballot shall be counted by hand.

Where precinct ballot counters are used, any ballot returned by the machine in a post-election recount must be counted by hand following the rules for central ballot counters as set out above. The results of this hand count shall be added to the certificate of results, and the ballots shall be bound separately and returned with the other ballots. Where precinct ballot counters are used, if a ballot is defective and the counter is unable to accept or read the ballot, the ballot shall be spoiled and the elector shall be issued a new ballot. In counties utilizing central ballot counters, if a ballot is defective and the counter is unable to accept or read the ballot, the ballot shall be counted by hand. Poll watchers of opposing interests and members of the media, if any are present, shall be permitted to witness this process.

*continued next page*

## Miscellaneous Rules

1) Spoiled ballots must be retained in a separate container. Rule 307-X-1-.14.

2) Write-in votes are not allowed in municipal elections. Rule 307-X-1-.16, and §11-46-43, Code of Alabama, 1975.

## Certification of Results

### Precinct Counters

Where precinct counters are used, once the polls close and the records are sealed, the poll officials must lock the equipment against further voting by following the manufacturer's instructions.

The election officials must also obtain a printout of the votes on each question and office. The first printout shall be torn from the equipment so that all printing during the day, from the initial test before the polls open through the first printout of results shall be on one continuous sheet or roll of paper. Then, other printouts of the results shall be produced and torn out. To each certificate shall be added, if it is not automatically printed, the following information:

- 1) The name of the precinct;
- 2) The date;
- 3) The identifying number (serial number) of the tabulating equipment;
- 4) The value of the public counter (indicating the number of votes cast);
- 5) The name of each candidate next to the total number of votes cast for that candidate;
- 6) The number and short title of each proposition next to the number of votes for and against that proposition.

Any challenged ballots must be counted and the totals added to the certificates of result. All poll officials must sign each certificate of result.

### Central Ballot Counters

Where central ballot counters are used, the poll officials shall record the following information on the Ballot Accounting Certificate:

- 1) The total number of each ballot style issued to the precinct;
- 2) The total number of voted ballots;
- 3) The total number of signatures in the voters poll list book;
- 4) The total number of spoiled ballots;
- 5) The total number of challenged ballots; and
- 6) The total number of unused ballots of each style.

The Ballot Accounting Certificate must be in a form that provides proper accountability for all voted and not voted ballots. All challenged ballots from the precinct shall

not be counted at the precinct, but must be placed in a Challenged Ballot Envelope, along with a copy of the Challenged Ballot Oath and returned to the central count location. The central count location poll workers shall hand count all challenged ballots and record those results on a Challenged Ballot Certificate of Result form. The Challenged Ballot Certificate of Results form shall be verified and signed by the central count poll workers. The original copy of the Challenged Ballot Certificate of Result form must be forwarded to the city council when they canvass the results of the election, and the duplicate copy is to remain with the record of election container.

When the polls close, the precinct inspector must immediately close the ballot box that contains the voted ballots and seal it with a numbered seal provided for this purpose in the election supplies. All other polling officials must verify this sealing of the box. The inspector and at least one other polling official must return the sealed and unopened box containing the voted ballots and the election supplies to the central count location. These officials are to remain at the central count location and assist in the processing of the ballots from their precinct until the certificate of result for their precinct is produced. These officials, along with at least one central count poll official shall verify and sign this certificate of result.<sup>4</sup> The signed certificate of results is distributed as follows:

- 1) The original goes to the municipal clerk, who keeps it for public inspection and/or an election contest;
- 2) one copy goes to the candidates who participated in the election;<sup>5</sup> and
- 3) one copy is sealed with the counted ballots and all

other pertinent election supplies in the record of election container and given to the authority that stores the container.

Posting the certificate of result at the polling place/precinct hall is not required where central ballot counters are used.

### Disposition of Forms

After completing and signing the certificate of result, the election officials shall seal the ballots, certificates, and other records as follows:

### Precinct Counters

- 1) The list of registered voters, the record of assisted voters, the ballot accounting certificate and the first copy of the certificates of result are placed in an envelope addressed to the municipal clerk, who shall keep them for public inspection and/or an election contest, and the list of



registered voters or a copy thereof may be used by the board of registrars in updating their records.

2) All used marksense ballots (both voted and spoiled), all challenged ballots, one copy of the certificate of result, the poll list (which is already sealed in a separate envelope), one copy of each challenged voter's affidavit and each witness' affidavit, and all requests for assistance in voting shall be placed in a large envelope or box, which is sealed and signed across the seal by all inspectors. The inspector shall retain possession of the memory pack until it is read into the tabulator.

Each envelope or box shall be sealed and signed across the seal by the inspectors. On the outside of each envelope the inspectors shall record the precinct or district and the date of the election. The envelopes or boxes shall remain unopened and be returned by the inspector or returning officer immediately in the manner provided for by law. These records are to be retained in accordance with the records retention schedule adopted by the State Records Commission.

### **Central Counters**

Where central counters are used, the same procedure that is used for precinct counters is to be followed except that the certificate of result is not produced at the precinct and a copy of the certificate of result will not be posted at the polling place. After the polls close, the ballot box inspection door is resealed with a numbered seal provided for in the election supplies. The inspector and at least one other polling official shall deliver the sealed and unopened ballot box, along with a copy of the ballot accounting certificate, to the central count location for processing and counting. After the count, the ballots of each precinct shall be sealed in a separate envelope or box which shall be labeled with the name of the precinct, the date of the election, the type of ballots, and the total number contained therein. One copy of the Ballot Accounting Certificate and one copy of the certificate of results shall also be sealed in this envelope or box by the central count polling officials. The envelope or box is then delivered to the authority responsible for holding the records of election container.

### **Retest**

The municipal clerk may order a post-election retest of any precinct ballot counter, central ballot counter, or memory pack tabulator using the same procedures prescribed for the pre-election test. If the retest shows a malfunction or error in the equipment or its program, the clerk must order a recount as described in the next section. In this circumstance, the municipality pays the cost of the recount.

### **Recount**

Any person may petition the canvassing authority (the municipal council) for a recount of any or all precinct returns in the election that the person was a qualified elector. The time period for requesting a recount begins with the production of the certificate of result and ends forty-eight hours after the official canvas of the municipal returns.

The petitioner must be prepared to pay the costs of the recount and must give security to cover these costs. The council is to set the amount of the security based on an estimate of actual costs. These costs must be kept to a minimum by using municipal personnel or volunteer workers whenever possible. In any event, the recount must be conducted under the supervision of a trained and certified poll official. Representatives of opposing interests shall be given at least twenty-four hours notice and be invited to participate in the recount.

The recount should be conducted as simply as the type of equipment and local conditions permit, provided that the following minimum safeguards are followed:

- 1) The box or envelope holding the ballots shall be delivered unopened to the inspector in charge of the recount.
- 2) A representative of the authority with custody of the ballots must be present during the recount.
- 3) The marksense ballot counter must be retested before the recount. The recount shall consist of reading the ballots through the counter. Any ballot that was counted in the original election but is rejected by the counter in the recount shall be counted by hand.
- 4) Representatives of opposing interests have the right to participate in the hand count, and any unresolved disputes over the interpretation of the voter's intent may be appealed to the municipal council.

When the count is completed, the ballots are returned to their container along with a printout of the recount results. The ballot container is then sealed and signed by the inspector conducting the recount any by the representative of the authority with custody of the ballots.

If the recount produces a change in total sufficient to alter the results of the election, the outcome constitutes grounds for an election contest as now prescribed by law. If the recount of the resulting contests alters the result of the election, the cost of the recount shall be borne by the municipality.

### **Absentee Voting**

Marksense ballot counters may be used to count absentee ballots. Absentee poll officials are to be appointed and trained in the same manner as prescribed for regular precinct poll officials in these rules. The number of poll officials needed is determined by the number of marksense

*continued next page*

counters provided. Section 17-10-11, which requires one set of officials for each 200 absentee ballots, does not apply.

The municipal governing body may provide more than one counter based on the recommendation of the absentee elections manager. Beginning not earlier than noon on election day, the poll officials shall perform the duties prescribed in §17-10-11. Where more than 200 absentee ballots are to be counted on one electronic ballot counter, the absentee election manager may authorize poll officials to open the ballot box and begin processing ballots through the counter before the polls close, provided that:

1) Sealed affidavit envelopes are to remain sealed, not counted, and otherwise handled according to state law if one or more of the following conditions are established:

- a) Duplicate votes from the same registered voter;
- b) Failure to have the affidavit notarized or witnessed by two witnesses;
- c) Failure to identify the voter's place of residence;
- d) Failure to identify the voter's reason for voting absentee;
- e) Failure to contain the voter's signature or mark.

2) All other sealed affidavit envelopes have been opened and checked in accordance with law and all inner envelopes containing the ballots have been placed in a sealed ballot box before the ballot box is opened and any ballots are processed; and

3) The absentee election manager takes security measures to prevent the vote totals from being printed before the polls close. The prohibition on counting before the polls close contained in §17-10-11 applies to any attempt to tally votes as the ballots are read into the marksense ballot counter.

### **Direct Recording Electronic Voting Devices**

A direct recording electronic voting device is one that records and tabulates votes directly without the use of an electronic paper ballot. The League understands that these devices are only used in one or two counties in Alabama. Therefore, the following regulations apply only to municipalities in these counties. Municipalities which do not use these devices may ignore this information. Any question regarding the type equipment your municipality uses should be addressed to the company that supplies your equipment.

The use of direct recording electronic voting devices is not governed by Rules 307-X-1-.03 through 307-X-1-.23, except for the following provisions:

- 1) Rule 307-X-1-.03, concerning the applicability to municipal elections,
- 2) Rule 307-X-1-.07, concerning the custody and transportation of equipment,

3) Rule 307-X-1-.18, concerning certificates of results for precinct ballot counters,

4) Paragraph (1) of Rule 307-X-1-.19, concerning the disposition of forms, except as applied to marksense ballots and no ballot accounting certificate is required,

5) Rule 307-X-1-.21, concerning recounts, except as provide below, and

6) Rule 307-X-1-.22, concerning absentee voting.

Regarding recounts, where a direct recording electronic voting device system is not capable of producing a recount of individual votes cast in an election, the municipal governing body shall provide for a retest of the direct recording electronic voting devices using the procedure set out below. If any of the direct recording electronic voting devices fail the retest, and if the machines failing the retest recorded a sufficient number of votes on election day to effect the result of the election, such failure shall constitute grounds for an election contest as now prescribed by law and the cost of the retest shall be borne by the county.

Where a direct recording electronic voting device system is capable of producing receipts of individual votes cast, such receipts shall be deposited by the voter into a sealed container preserved for the performance of a recount or use in an election contest. Such receipts may be recounted either manually or electronically as the technology of the system provides. At the conclusion of the recount, the receipts shall be re-deposited into the container, resealed and preserved with the records of the election.

Unless the direct recording electronic voting device is designed to be locked with a key, the requirements in the Alabama Code relating to the use of the key and key envelope do not apply. However, each device must be sealed before delivery to the polling place and after the polls close.

The clerk must have each direct recording electronic voting device tested to ascertain that it will accurately count the votes cast for all offices and all measures. Each direct recording electronic voting device must be publicly tested before each election in which it is to be used. The date of the public test shall be as close as is practical to the date of the election and not more than fourteen (14) days (required by §17-24-9) before the election. Public notice of the time and place of the test shall be given. Again, the rule does not state how early notice of the test must be given to the public, but Section 17-24-9(a) of the Code of Alabama states that notice of the test must be given at least 48 hours before the test by written public service announcement, by notice to newspapers and radio and television stations, and by filing notice with the Secretary of State. To be on the safe side, a municipality should follow the statute and provide notice as spelled out in the statute. The device shall be tested by casting votes so that each candidate and each position on each amendment or other proposition shall receive at least

two (2) votes. There shall be at least one over-vote in each race. For auditing purposes, the clerk must have produced a paper record of each individual test vote cast that shall be retained with the records of the election associated with that voting device.

The poll officials shall follow the manufacturer's instructions to open the equipment and prepare it for voting. They shall produce a printout showing the initial values of the vote registers. The poll officials and at least two poll watchers of opposing interests, if there are any, shall check the printout to verify that the registers are set at zero and shall sign the printout. The printout must remain attached to the paper roll so that all events of the day shall be recorded on one continuous roll of paper. If any vote registers are not set on zero or if the ballot face is incorrect, the inspector shall immediately notify the municipal clerk or his or her designee. The device shall not be used for voting until it has been repaired. Voters may vote on a substitute device or use paper ballots.

The procedure for challenging voters is the same as prescribed above in reviewing Rule 307-X-1-.15, except that the votes placed on the challenged ballots must be counted by hand by the precinct polling officials after the polls close. The results shall be handwritten on the tape containing the totals from the electronic vote counters. The challenged ballots are then placed inside an envelope and otherwise handled in accordance with state law.

### League Assistance

In the coming months, the League plans to address many of the election issues that are likely to arise between now and the time that the mayors and councils take office next October. Our attorneys will participate in numerous election seminars and we encourage all persons involved in the election process to take advantage of these opportunities to attend and learn as much as possible, and to participate in discussions with League attorneys and other officials, especially those who have been through elections before. We hope to anticipate the problems before they arise and to assist clerks and others who are responsible for conducting fair and impartial elections. ■

### Footnotes

1. Electronic ballots must conform to Sections 17-8-4 and 17-8-5 of the Code. These sections concern political party arrangements and write-in ballots and may be ignored in municipal elections.

2. Again, the rule states that the sheriff should be notified. The League feels that the clerk is in the best position to perform this duty in municipal elections.

3. The Rules repeated refer to the "Certificate of Result Form." It is unclear what form this is referring to, although this form fits the criteria set out in the Rules. Therefore, the League assumes that where the Rules refer to the "Certificate of Result," this is the form that is intended.

4. The results should correspond with the total number of persons voting previously recorded on the Ballot Accounting Certificate.

5. Rule 307-X-1-.19 provides that a copy goes to the parties involved. Because municipal elections are non-partisan, the League assumes that this copy should go directly to the candidates.

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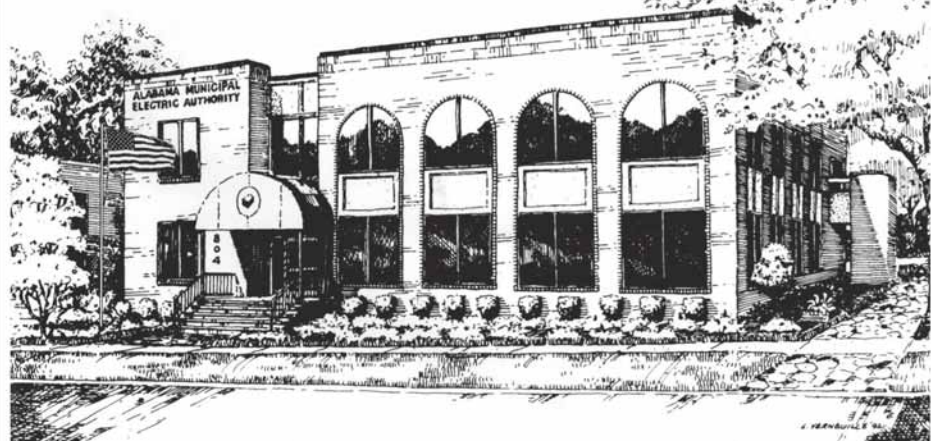
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## Roy Formby

**Roy Formby**, former councilmember of Piedmont City died in early November, 2003. He was 73.

A native of Cherokee County, he owned and operated a service station for many years, was a long-time employee of Bennett-Knight Furniture Co. and owned an automatic car wash. He opened and operated Roy Formby Furniture Co. for more than a decade. In addition, he was a former chair of the Piedmont Housing Authority.

Formby is survived by his stepdaughter, three step-grandchildren and four step-great-grandchildren. ■

## James E. (Jim) Gaston, Jr.

**James E. (Jim) Gaston, Jr.**, former councilmember of Fairhope, died recently.

Gaston was a member of one of the pioneer families of Fairhope, a local businessman and active in community events while serving on numerous boards. He served on the Council from October 1960 until October 1964. ■

## Layton Overstreet

**Layton Overstreet**, former councilmember of Fairhope, died recently at the age of 80.

Overstreet was a former Port Agent for the NMU-Maritime Union who lived and raised his family in Fairhope. Active in community events, he also served on the City's Harbor Board. He was a member of the Council from August 1992 until August 1996. ■

## Antone Peeples

**Antone Peeples**, councilmember of Hobson City, died November 20, 2003. He was 57.

Peeples was elected to the Council in August 2000 and was serving his first term. He served as Chair of the Hobson City Sanitation and License Committee and as a member of the Police and Recreation Committee.

He is survived by his daughter and two sons. ■

## B.L. Abrams, Jr.

**B.L. Abrams, Jr.**, councilmember of Eutaw died December 1, 2003. He was 76.

Abrams served in the U.S. Army and National Guard Reserves as 1st Sergeant for 40 years. He volunteered as Fire Chief of the Eutaw Volunteer Fire Dept. for 28 years. He was one of the founders of the Greene County Ambulance Service and worked as an EMT for 18 years. He had served two terms on the Council – one in the 1980s and the present term beginning in 2000. He was a life-long member of the Eutaw Baptist Church.

He is survived by his wife, three children and six grandchildren. ■

## Robert N. Cauthen

**Robert N. Cauthen**, former councilmember of Orange Beach, died December 13, 2003. He was 78.

Cauthen was a Veteran of the U.S. Army and served in World War II where he received the Purple Heart for injuries sustained in combat. He served on the Orange Beach City Council for eight years, as a councilmember from 1988-1992 and as Chair Pro-Tem from 1992-1996. He was also actively involved with the Lions Club.

He is survived by his wife, two sons and three granddaughters. ■

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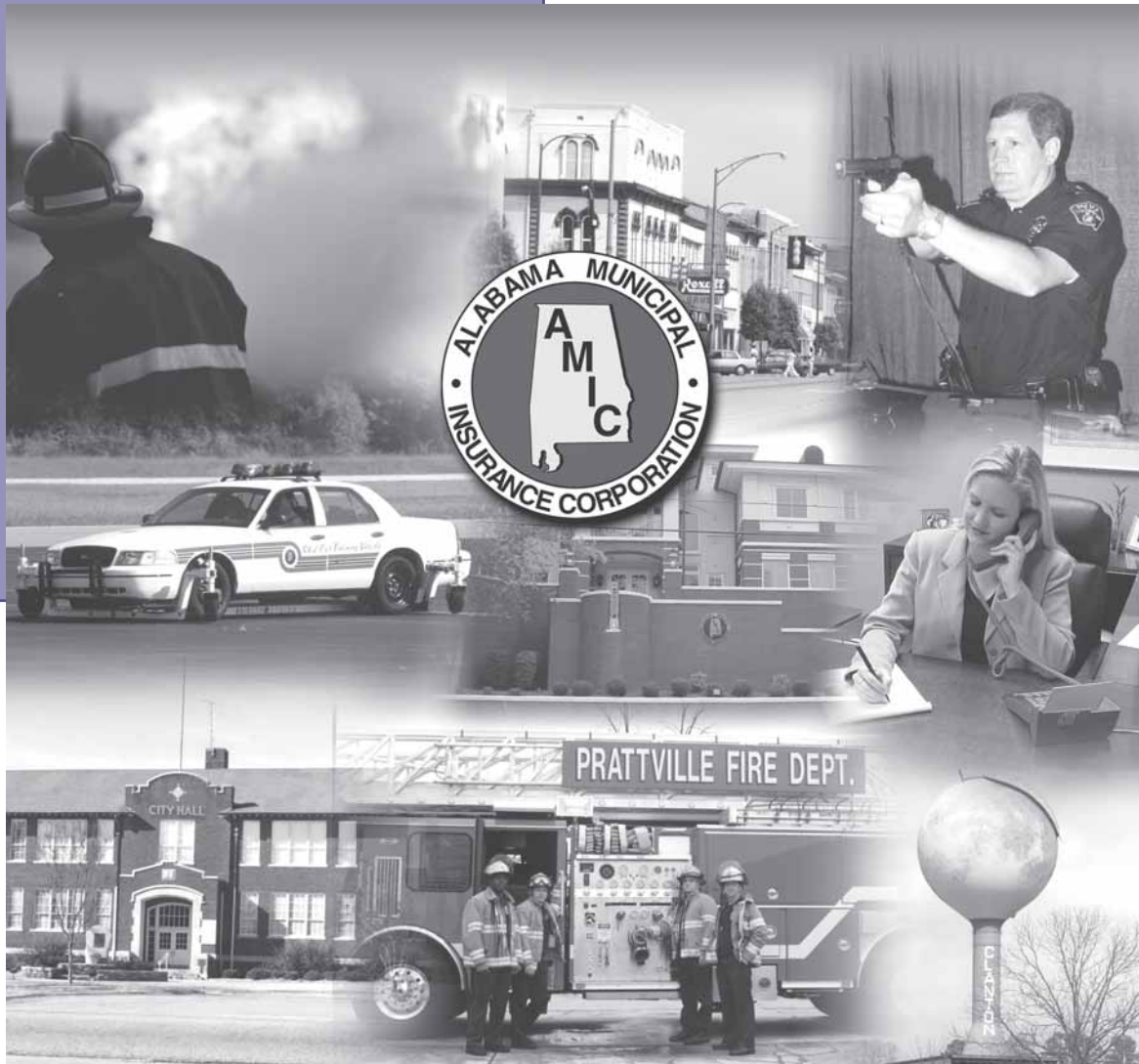
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