THE ALABAMA MUNICIPAL
JOURNAL

May 2004 Volume 61, Number 11

Purchasing Computer Software and the Competitive Bid Law

See Municipal Trouble Shooter, page 11

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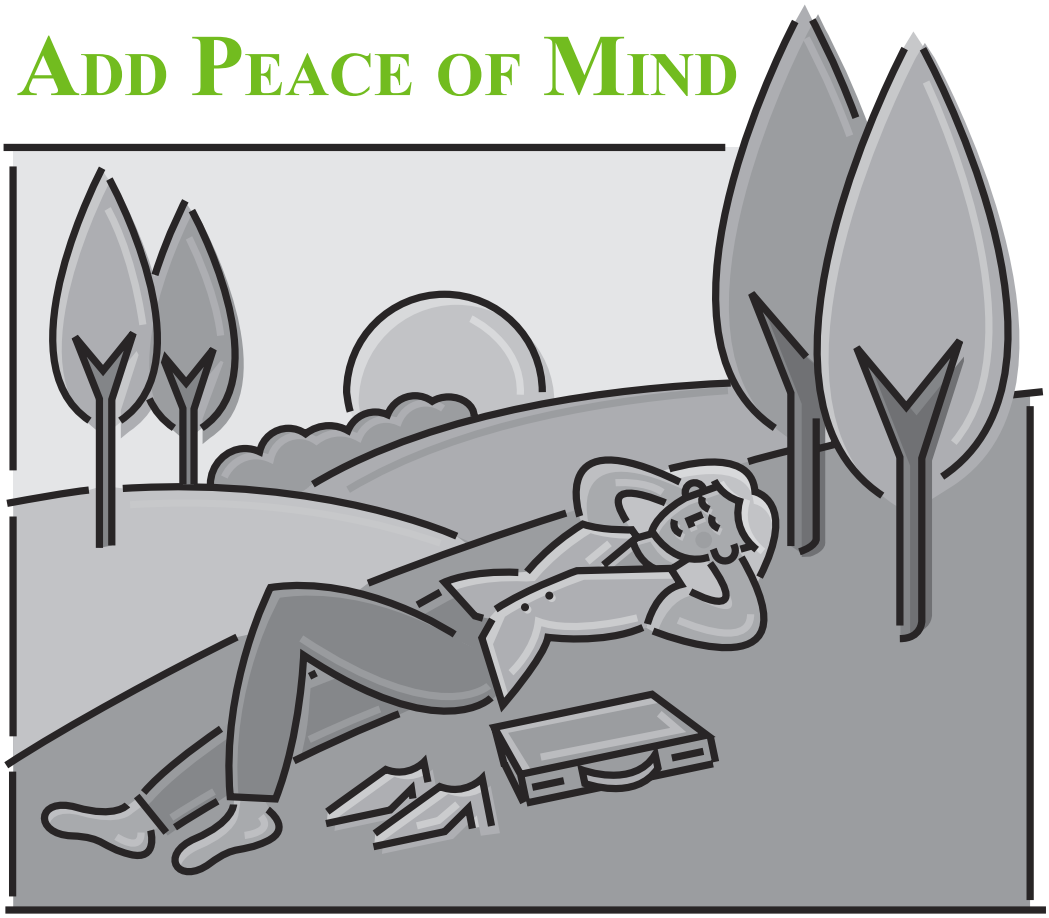

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The President's Report

Dan Williams
Mayor of Athens

Beating the Odds

One of the many perks of being the President of the Alabama League of Municipalities, is the opportunity to travel to different areas of our Nation for meetings pertaining to the business of our League. These trips are always beneficial to me as a full-time Mayor because I get to converse with many other Mayors from different states. Our Staff also benefits from the information provided at these meetings and, quite often, are participants in the presentations.

Such was the case recently when Kay and I traveled to Lexington, Kentucky, for the Southern Municipal Conference 2004 Leadership Meeting. It is about five hours from our home and we enjoyed the pleasant drive up I-65 to Lexington. The weather was beautiful and traveling through Tennessee and half the state of Kentucky was made more enjoyable because of the countless Redbud trees in full bloom, their pink color contrasting with the dark Evergreens along I-65

Lexington is a city of approximately 250,000 people, located sort of mid-state, and is the home of the University of Kentucky. It was our first visit to Lexington, but I was already very impressed with this town. How many towns do you know of that allow a 300-pounder to play first-string quarterback on the state's football team? I'll bet that Lexington is the only one, and this gives hope to all of us who are a few pounds over what the experts think we should weigh.

Lexington is also the home of fast horses and pretty women. I hope I got that right. Anyway, I saw a lot of both and I'll say more about the horses later.

This meeting was very enjoyable and the main topic was how we can involve the youth in the different states in our League activities. I know Perry and our staff have been working on this project and I think the information disseminated at this meeting will be helpful. You will, in the future, be receiving more specific information from our League as to how the involvement of young people will take place.

We heard folks from the National League of Cities report on youth programs in several states as well as Congressional legislation that is applicable to our youth.

One state has a Teen Parent Program designed to keep teen parents in school until they graduate from high school. This program offers services to the young parent and child while the parent is still in school.

One state has a person from the League who acts as a Circuit Rider, going from town to town to talk with mayors and leaders about youth involvement. Member cities apply to participate in the state program. One interesting presentation was the mayor and founder of Ray City, Georgia, a new town of 600 people near an Air Force base. He founded a youth program that teaches basic survival skills to the city's young people and offers them the opportunity to broaden their horizons because most do not have the opportunity to do so.

One city in Kentucky has a program with the local National Guard to take "at risk" students into local Armories for classroom training. The young people are paid to attend, but must open a checking account at a bank and develop a budget. This city also has a Challenge Softball program for handicapped youngsters. City Recreation teams work with these children.

A Lake Jackson, Texas, youth group hosted the Olympic Softball Team for its fund-raiser and had numerous work projects, socials and booths at the State Convention. They also participated in the community's Relay For Life Project. A panel of two mayors; one State Board of Education member; one high school principal; and a high school Junior presented an interesting discussion on youth, education and involvement. Some of their thoughts and advice for getting youth involved in government were: Youth service projects must have someone who wants to guide them and see them become successful; there is a correlation between successful students and involvement in extracurricular activity; parents and adults should have high expectations of our youth; City Government should reach out, connect and focus on youth; and successful schools are located in thriving communities. Emphasis was also placed on School Boards, Planning Commissions and other officials planning together for the locations of future schools.

Well, it was a great meeting but we did have some fun while in Lexington. We were treated to an afternoon of racing at Keeneland Racetrack. Believe me, we got to see how our betters live and spend their leisure time and money. We ate in the dining room that overlooks the beautiful track and watched the races. The horses are fast and beautiful, some more than others.

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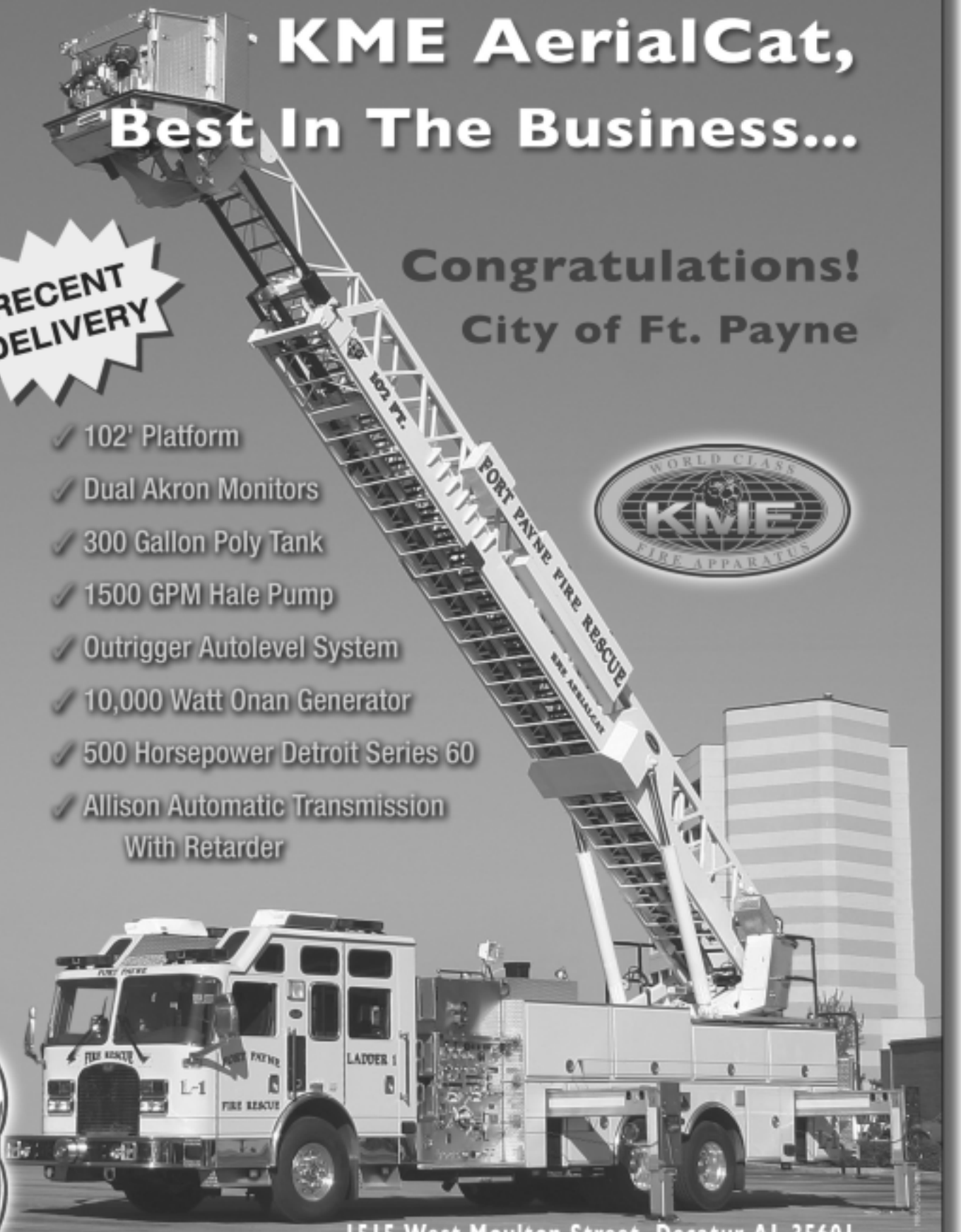

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Beating the Odds

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This being my first trip to a horse race, I decided to place a small wager and it took me a while to figure out how to bet. The first thing I did was to bet the Daily Double, which is to pick the winner of the first and second race on the same ticket, before the first race begins. After much scientific analysis, I selected the favorites in the first two races and wagered them. After thinking a bit more, I also bet on the first favorite to place – that is, to come in first or second. Then after more thought, I picked two other horses in the first race to show – that is – to come in first, second or third. I had now invested about twenty dollars on the first race, but I felt covered and safe and had many combinations to win. I told Kay that I might just move up there and go to the track every day to make my living.

Then the gates opened and out they came! It was magnificent to watch the thundering herd come out of the last turn, heading for home, with everyone shouting and yelling for their horse to win. I was yelling, "Who won? Who won?" Kay had to point out the block-long, twenty foot-high score board directly in front of me with the information. The horse I had picked for the winner of the first race came in seventh or eighth! That blew my daily double, and I also lost my win pick on him and the other two horses to place and show. That three-hundred pound quarterback could outrun any of my three horses! My twenty bucks were gone and there were seven more races to go. Kay suggested I probably could make a living up there by following the horses with a barrel and scoop. She has no confidence in my ability to gamble. Well I kept a good record of my wagering activity and at the end of the day lost a total of fifteen and one-half dollars. Not too bad for a day of great fun and being a first timer at the track.

However, the worst thing that happened was upon our arrival back at the hotel. A young mayor from Florida introduced himself and his wife to us and informed us that his wife's father and mother are citizens of my town. His father-in-law is my 90-year-old mother's preacher at her church. My first thought was that they would tell the preacher and his wife that they saw me gambling at the track and the preacher would relay this tidbit to my dear, sweet mother – who equates gambling and imbibing with abusing widows and orphans and serving in the State Legislature. My only hope is that this fine young couple doesn't gossip, but if they do, then maybe the preacher doesn't. You know, gossip is a sin, too. ■

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Municipal Overview

By
PERRY C. ROQUEMORE, JR.
Executive Director

NLC Pushed Priorities During Recess

Congress has been away, but the National League of Cities hasn't been idle. With the House and Senate returning from Spring Recess on April 19, NLC and its member officials have been aggressively advocating for three crucial issues that directly affect municipal government: transportation reauthorization, the Hagel-Harkin Amendment to IDEA and Internet tax legislation.

During the recess, NLC encouraged its members to meet with their Representatives and Senators in their districts and home states to focus on those priorities. "The work state municipal league directors and city and town officials did during the spring recess will help us make our case on these important priorities over the coming weeks," NLC President Charles Lyons, selectman from Arlington, Massachusetts, said. "We recognize that making strong connections with members of Congress in their home states and districts is essential to our effectiveness as a lobbying organization in Washington."

Transportation Reauthorization

One of the first things Congress is expected to do when it reconvenes is appoint a conference committee to reconcile the House and Senate transportation bills.

In February, the Senate passed a $318 billion bill – the Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2003 (SAFETEA) – that would put $255 billion into highways and $56 billion into transit.

On April 2, the House passed the Transportation Equity Act: A Legacy for Users (TEA-LU). The $275 billion bill allocates $217.5 billion for core spending on highways, $51.5 billion for transit programs and $6 billion for highway safety programs.

NLC supports the funding level in the Senate bill. NLC also believes a six-year transportation bill is needed because:

• Long-term regional and local projects require fiscal stability and policy consistency.

• Guaranteed funding from the Highway Trust Fund and the current 80/20 federal-local matching commitment must be maintained.

• The authority of local governments and regional planning organizations to develop transportation projects must be protected.

• Local governments must have direct access to necessary funding to build projects that target critical needs such as congestion reduction.

Hagel-Harkin Amendment

Passed in 1975, the Individuals with Disabilities Education Act guaranteed disabled students a free and public education in the least restrictive environment possible. Though the law authorized the federal government to pay for 40 percent of the costs incurred by school districts to educate disabled students, Congress has never fully funded the law.

The Administration's 2005 education budget proposes a $1 billion increase in IDEA funding, which would bring the total to $11.7 billion, or half of the full funding level. Sen. Chuck Hagel (R-Neb.) and Sen. Tom Harkin (D-Iowa) plan to introduce an amendment to the IDEA reauthorization bill that will provide $2 billion per year for eight years in mandatory funding, in addition to the amount appropriated by Congress. NLC strongly supports the passage of the Hagel-Harkin Amendment and passage of an IDEA reauthorization bill.

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Internet Tax Legislation

Frist has also said he will bring the Internet Tax Non-Discrimination Act, S. 150, to the Senate Floor for debate the week of April 26. Part of that debate will focus on the Internet Access Tax Ban Extension and Improvement Act, S. 2084, which was introduced by Sen. Lamar Alexander (R-Tenn.) and Sen. Thomas Carper (D-Del.) as a substitute for S. 150.

NLC supports the Alexander-Carper amendment because it extends the federal ban on local and state taxation of Internet access in a way that is fair and neutral to state and local governments; it defines Internet access in a manner that does not jeopardize the existing authority of local governments to tax telecommunications services; and because it secures local government ability to collect telecommunications taxes and franchise fees for a two-year period.

NLC opposes S. 150 and considers it a preemption of local taxing authority and an unfunded mandate. NLC also believes S. 150 does not extend the existing moratorium on Internet access taxes or tweak it to accommodate emerging technologies. Instead, the bill expands the existing moratorium by decreasing local taxing authority.

NLC Accepting Howland Awards Nominations

NLC is now accepting nominations for the 15th annual James C. Howland Awards sponsored by CH2M HILL and NLC which recognizes cities and towns that have enriched the quality of life in their communities. This prestigious award honors all population sizes and is divided into four winning categories: under 50,000; 50,001 – 150,000; 150,001 – 500,000; and over 500,000. Criteria for this award are based on program innovation, local government implementation and the measurable benefit to the community and local government.

Nominees will be announced in an August 2004 issue of *Nation's Cities Weekly*. Each population category will have two winners, Gold and Silver, and will be notified in September 2004.

If you know of any outstanding programs, please encourage them to apply. For more information, or to receive a nomination form for the James C. Howland Award, contact Ann Kelly at 202-626-3139 or e-mail **Kelly@nlc.org**. Nomination forms and information are also available at www.nlc.org. You must be a member of NLC to apply. Nominations are due **June 17, 2004**. ■

The Municipal Troubleshooter

The Purchase of Computer Software and the Competitive Bid Law

By: Mary Ellen Wyatt Harrison, Staff Attorney, ALM

Many questions arise when a municipality is in the process of purchasing new computer equipment, especially when the purchase includes computer software. State statutes provide:

> "…all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving seven thousand five hundred dollars ($7,500) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of seven thousand five hundred dollars ($7,500) or more, made by or on behalf of…the governing bodies of the municipalities of the state, and the governing boards of instrumentalities of counties and municipalities…shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." See Ala. Code § 41-16-50(a) (1975).

Exceptions to the foregoing section can be found in Ala. Code § 41-16-51. One of those exceptions specifically states, "Purchases of computer and word processing hardware when the hardware is the only type that is compatible with hardware already owned by the entity taking bids and custom software." See Ala. Code § 41-16-51 (a)(11). Further Ala. Code § 41-16-51(a)(13) exempt "contractual services and purchases of commodities for which there is only one vendor or supplier." Section 41-16-51(a)(11) is the subject of much debate, and the subject of this article.

It should also be noted that the law forbids the division of a purchase or contract of $7,500 or more into parts to avoid competitive bidding thereon; however, the law does not prevent the division of invitations to bid. Such partial contracts are declared to be void. See Op. Att'y Gen. to Hon. Thomas A. Dujanovic, September 13, 1973; see also 128 Ala. Att'y Gen. Quarterly Rep. 15.

Hardware

Hardware is defined by Merriam-Webster as "the physical components (as electronic and electrical devices) of a vehicle (as a spacecraft) or an apparatus (as a computer)." See Merriam-Webster Online Dictionary (2004). The physical aspects of a computer are the keyboard, monitor, speakers, mouse, etc. Typically the purchase of the physical aspects of a computer must be bid. For example, if the municipal governing body determines that it wishes to purchase computers for the clerk and police chief, and they are simply going to order a basic computer, the purchase should be bid.

There is one exception to this general rule. If the physical aspect of the computer being ordered is the only type computer equipment – anywhere – that is compatible with the computer hardware presently owned, then the purchase is exempted from the bid law. For example, if the clerk's has a unique operating system and the council wishes to update the physical aspects of his or her computer, and there is one type of computer equipment that is compatible and only one vendor who can supply the equipment, the purchase is exempted from the bid law. However, in that same situation, if there are multiple vendors who can supply the equipment, it must be bid if the purchase amount will exceed $7500.

Software

Software is defined by Merriam-Webster as "the entire set of programs, procedures, and related documentation associated with a system and especially a computer system; *specifically* **:** computer programs." See Merriam-Webster Online Dictionary (2004). The general rule is that the purchase of software that is available from more than one vendor is subject to the bid law if the purchase will exceed $7500 unless the awarding authority can document a professional exemption under Section 41-16-51(a)(3). See Op. Ala. Att'y Gen. No. 99-00139. Another exception to the general rule is provided in Ala. Code § 41-16-51(a)(11), which states that the purchase of custom software is specifically exempted from the bidding process. Custom software is software that requires customizing and formulation by a professional. See Op. Ala. Att'y Gen. No. 99-139. Further, "software that will require substantial creative work by a professional/vendor to comply with unique specifications could constitute custom software within the meaning of Section 41-16-51(a)(11)." See Op. Ala. Att'y Gen. No. 94-00023. Software is customized if it is created or significantly altered to fit the needs of the buyer. An example of when a purchase for software should be bid is when a municipality purchases Microsoft Office for all of their employees. Microsoft Office is an off-the-shelf

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computer software program that can be purchased from multiple vendors. An example of a computer software purchase that is not required to be bid is when the municipality is purchasing accounting software that requires substantial creative work by the vendor to fit the needs of the municipality making the purchase.

There isn't a hard and fast rule as to when the purchase of software should be bid; therefore, whether software can be considered custom is a factual question that must be answered by the parties involved based on the facts and circumstances surrounding the purchase of software.

Conclusion

Ultimately, when purchasing computer hardware or software, a municipality should do the appropriate research before deciding whether the purchase should be subjected to bids. Further, the bid law states that contracts entered into in violation of its provisions shall be void. Anyone who violates the provisions of the bid law shall be guilty of a Class C felony. Class C felonies are punishable by a prison sentence of not more than 10 years nor less than 1 year and 1 day. Additionally, a prosecution for any offense in violation of the competitive bid law must be commenced within six years after the commission of the offense. ■

ENVIRONMENTAL OUTLOOK

By Gregory D. Cochran
Director, Intergovernmental Relations

Jefferson and Shelby Counties Meet Ozone Standards

The federal government has told Alabama that – after struggling for 26 years – Jefferson and Shelby counties have cleared the U.S. Clean Air Act's ozone standard.

It required hundreds of millions of dollars; extensive research; and changes from the gas pump to the power plant, but last month the Alabama Department of Environmental Management announced it had received word from the federal government that its air monitor information had passed all reviews to give the area the all-clear.

Ozone is a corrosive chemical that causes lung damage, asthma attacks and premature death. It is also linked to birth defects and the onset of childhood asthma. In recent years, studies have shown that it is even more dangerous at lower exposures over long periods; therefore, EPA abandoned its approach of measuring only the peak ozone level each day. As a result, cities are being forced to lower their ozone by about 40 percent.

The Birmingham area is very close and meets the standard at nine out of 10 area ozone monitors. All of Jefferson County's air quality monitors met the new standards for the three years under review. Only the one in Helena failed. As a result, Alabama had asked that Jefferson County be allowed to divorce itself of Shelby County and be found in compliance with both the old and the new ozone rules. However, EPA will not allow that. Dividing a metro area could have been considered only if Jefferson County had shown that it did not contribute to the air pollution to the south. Instead, the state acknowledges that the ozone pollution in Helena drifts down from Birmingham.

Scientists claim, ozone is caused primarily by pollutants from power plants and cars. Since Birmingham began its ozone reduction work in 1978, vehicles on the road, power use and population growth all have increased considerably. Multi-million-dollar changes in power plants to reduce nitrogen oxide, or Nox, and cleaner-burning gasoline being used in vehicles ultimately resulted in the victory.

The Clean Air Act's restrictions on new polluting businesses are gone with the ozone pollution. ADEM and EPA hope the Birmingham area will have little trouble meeting the new standard quickly. The community will not be required to make any further changes specifically for ozone.

ADEM Unveils New Strategic Plan

The Alabama Department of Environmental Management wants to be the premier environmental agency in the nation, according to a draft strategic plan distributed in March. Under its mission statement, the document stated that ADEM should "protect and improve the quality of Alabama's environment and the health of its citizens."

A coalition of new members of the Environmental Management Commission, the board that oversees ADEM, last year proposed writing a strategic plan for the agency, saying that every successful business and department must have a plan.

In a series of meetings around the state, the public was invited to provide comments on the strengths, weaknesses, opportunities and threats facing the department and commission. A subcommittee drafted the plan now before the commission.

Among its recommendations for becoming the premier agency, the draft called for: developing a more defined enforcement and penalty policy; expanding pollution prevention programs and providing incentives for recycling and pollution prevention; creating a standing committee to monitor the Legislature and assist the director and ADEM staff in meetings with the governor and legislators on key issues, including ADEM funding; establishing a committee to evaluate the director and provide comments on the performance of senior ADEM staff; re-evaluating ADEM's website; and finding additional ways for the public to receive and provide information.

The report also recommended finding ways to get more money for ADEM through fees on solid waste dumped in the state's landfills. It also suggested the department evaluate its permit fees to ensure they are in line with other states and

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cover all permissible costs of ADEM. Other recommendations included improving diversity within ADEM, reaching out more to media and making technology a priority.

Interior Secretary Praises Tortoise Refuge

U.S. Interior Secretary Gale Norton recently came face to face with an Alabama gopher tortoise. The first-time meeting between the chief supervisor of the federal endangered species program and one of the South's most unusual threatened species took place on the Mobile Area Water and Sewer Service property 15 miles west of Mobile.

Norton arrived in Alabama, as part of a swing through the Southeast to tour U.S. Fish & Wildlife Service refuges. The Fish & Wildlife Service and the National Park Service are two of several agencies overseen by the Department of the Interior.

The tour included a boat trip around Big Creek Lake, the city's drinking water reservoir and the adjacent gopher tortoise conservation bank, a refuge for the threatened turtle that was established jointly by MAWSS, Fish & Wildlife and the Environmental Defense Fund.

Alabama Gov. Bob Riley joined Norton by the lake later in the day, holding a joint press conference to tout Alabama's efforts to encourage more hunting and fishing in the state.

The core of the MAWSS gopher tortoise refuge is a 222-acre conservation bank where tortoises threatened by development are relocated. Landowners who request that the tortoises be removed from their property are required to pay a fee to maintain the tortoises at the conservation bank. An additional 1,163 acres adjacent to the bank has been brought under conservation management – a result of a cooperative agreement between the Mobile water service and Fish & Wildlife.

For 30 years, MAWSS has agreed to restore and manage the larger area as a longleaf pine meadow, aided by a grant from Fish & Wildlife that provides the water service about $100,000 over the next three years.

Scientists said that the population of 10 to 15 tortoises originally on the refuge land was too small to remain "viable" – that is, the tortoises would have eventually died out because there weren't enough to reproduce healthy offspring. Tortoises brought to the refuge must go through a strict screening process to prevent the spread of disease.

The gopher tortoise once was a common inhabitant of the longleaf pine forests of the Southeast. But scientists say that longleaf forests now cover less than five 5 percent of their original acreage, and the animals that depended on those open, meadow-like forests have declined as well. Most of Alabama's rare, declining or endangered land-dwelling animals – gopher tortoises, indigo snakes, red-cockaded woodpeckers, fox squirrels, Bachman's sparrow and pocket gophers, to name a few – depended on healthy longleaf forests.

The decline of gopher tortoises is often described as one of the most critical losses from the longleaf forest. The burrowing habits of gopher tortoises provided refuges for a wide variety of animals and may have even played an important role in maintaining certain plant communities. Scientists note that one of the most critical ingredients in keeping a gopher tortoise happy is fire. Natural fires, which prevailed for thousands of years in the Southeast, kept the woods sunny and open and relatively free of thickets and shrubs. In those open woods, low grasses and fruit-bearing plants develop eye-level to the gopher. But in thick, modern woods which are never burned, the gophers can barely move about, much less find low plants to eat. ■

THE LEGAL VIEWPOINT

By Ken Smith
Deputy Director/Chief Counsel

Municipal Drug Testing

Disclaimer: *The League encourages municipalities which have or are considering implementing a drug testing policy to obtain guidance from their municipal attorney. The information contained in this article should not be considered as a substitute for obtaining individual legal advice and assistance. Use of this information is voluntary and is at the sole risk of the user. The League, its employees and officers disclaim any liability or responsibility for use of the material contained in this article.*

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches by the government. The restraint on government conduct generally bars officials from conducting a search or seizure without individualized suspicion.

Drug testing of public employees presents a number of problems for municipalities. The municipal interest in maintaining a drug-free workplace is clear. Having drug-free employees helps reduce accidents and avoid liability. These broad desires, however, may not be sufficient without specific evidence of an existing drug problem. Additionally, the municipal interest in testing must be measured against the employees' expectations of privacy, and their right to be free from unwarranted searches.

The issue of drug testing remains unsettled. Courts around the country have addressed drug testing and come to various – and sometimes conflicting – conclusions. This article addresses some of these significant decisions regarding drug testing and makes suggestions on how to draft and enforce a policy that will withstand legal challenge.

Federal Regulations

Unlike private employers, public employers have constitutional and other constraints on implementing suspicionless drug tests. Generally, public employers may drug test employees where a compelling governmental interest outweighs the reasonable expectation of privacy, or where there is individualized suspicion. Federal and state statutes mandating drug testing alone may not provide an adequate basis for suspicionless drug tests.

The Omnibus Transportation Employee Testing Act is the only federal act that mandates drug tests of employees. This Act requires testing of employees holding a commercial driver's license and those who perform "safety sensitive" jobs. This Act generally preempts state and local laws. Even this Act, though, may not justify drug testing. For instance, in *Gonzalez v. Metropolitan Transportation Agency*, 174 F.3d 1016 (9th Cir. 1999), the Ninth Circuit Court of Appeals held that even mandated drug tests must satisfy the federal constitutional requirements.

Various other federal statutes also address illegal drug use in the workplace. In 1988, Congress passed the Drug-Free Workplace Act of 1988. This Act, though, does not mandate drug testing. The Americans With Disabilities Act (ADA) neither encourages nor prohibits drug tests by employers. Under the ADA, drug testing is not a "medical examination," so an employer may conduct a pre-employment drug test after a conditional offer of employment is made.

Similarly, Title VII of the Civil Rights Act, as amended in 1991, allows the implementation of rules to prevent the employment of those currently using illicit drugs. While these statutes do not prohibit drug testing, workplace drug and alcohol testing of government employees and job applicants remains subject to constitutional protection.

National Treasury Employees Union v. Von Raab

In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the United States Supreme Court recognized that in certain cases, individual suspicion is not necessary. In these cases, "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement," the Court noted, "it is necessary to balance the individual's privacy expectations against the government's

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interest to determine whether it is impractical to require a warrant or some level of individual suspicion in the particular context."

In other words, the Court distinguished between tests conducted solely as part of a criminal investigation and tests conducted for administrative purposes. The Court found that a somewhat lower standard governs review of administrative searches that are not based on individualized suspicion. Of course, the search must still be reasonable under the circumstances and must further a governmental interest that outweighs the individual's right to privacy.

Von Raab involved a U.S. Customs Office regulation that required employees in three areas to submit to mandatory urinalysis for drug usage. The interests protected in *Von Raab* were "ensuring that frontline interdiction personnel are physically fit, and have unimpeachable integrity and judgment," and the protection of the public from the use of deadly force by Customs agents impaired by drugs. Based on these clearly articulated governmental interests, the Court upheld testing of employees directly involved in drug interdiction or enforcement and those who are required to carry weapons. The Court refused to rule, however, on whether employees who handled classified material should be tested.

Skinner v. Railway Labor Executives

The regulation examined in *Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989), required testing of employees on trains involved in serious or major accidents and authorized testing of employees who broke certain safety rules. The Court held that "the compelling governmental interests served by the [Federal Railroad Administration] regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee." This is because any attempt to gather evidence that the employee was impaired would likely result in the loss or deterioration of evidence.

The privacy expectations of railway workers, the Court also noted, are reduced by reason of their employment in an industry that is heavily regulated to insure safety. While the Court went on to say that employees in heavily-regulated industries do not always give up their privacy interests, the governmental interest in regulating the conduct of railway employees to insure safety overrode the privacy interests in this case.

Vernonia School District v. Acton

Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995), involved a school district regulation requiring drug testing of all students who wanted to participate in interscholastic sports. The U.S. Supreme Court sustained this testing requirement, holding that in the context of high school students, a local government bears huge "responsibilities, under a public school system, as guardian and tutor of children entrusted to their care." The Court also relied on district court findings of fact that a sharp increase in drug usage by students had created an immediate crisis, and that high school athletes were not only drug users, but were also considered leaders of the "drug culture." The Court also noted that students have a lesser expectation of privacy in a school setting than do other members of the population. Based on these factors, the Court upheld testing student-athletes in this context.

Chandler v. Miller

In 1990, the Georgia legislature passed a law requiring every candidate seeking to qualify for nomination to a state office to certify that he or she has tested negative for illegal drugs. Under this statute, in order to qualify for a place on the ballot, candidates had to present a certificate from a state-approved laboratory, in a form approved by the Secretary of State, reporting that the candidate submitted to a urinalysis drug test within 30 days prior to qualifying for nomination or election, and that the results were negative.

Libertarian Party candidates objected to this requirement and filed suit challenging the law, arguing that the law violated their First, Fourth and Fourteenth Amendment rights. The District Court denied relief. A divided Eleventh Circuit Court affirmed. The Eleventh Circuit acknowledged that the drug tests constituted searches, but held that, following *Von Raab* and *Skinner*, the government's interest in drug-free elected officials outweighed any privacy rights involved.

In *Chandler v. Miller*, ___ U.S. ___, 117 S.Ct. 1295 (1997), the United States Supreme Court reversed the Eleventh Circuit decision. Clearly, the Court said, the drug tests constituted searches. Just as clear to the Court was the fact that the tests were not based on any individualized suspicion. Every individual who wanted to run for one of the enumerated state offices had to pass the drug test regardless of whether the government had any rational basis for believing that the person was taking illegal drugs.

The Court did not, however, throw out all suspicionless drug testing. The Court pointed out that "where the risk to the public is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable ... ' But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."

Knox County Ed. Ass'n. v. Knox County

In *Knox County Ed. Ass'n. v. Knox County, Tenn., Bd. of Ed.*, 158 F.3d 361 (6th Cir. 1998), *cert. denied*, __ U.S. __(1999), the Knox County School Board implemented two different levels of testing: (1) suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to, "safety sensitive" positions within the Knox County School system, including teaching positions; and (2) "reasonable suspicion" drug and/or alcohol testing of all school employees.

The Sixth Circuit Court of Appeals upheld both types of testing. In doing so, the court had little problem finding that school professionals occupy "safety sensitive" positions, and noted that:

> "With regard to the government's interest in testing, the Supreme Court has traditionally focused its analysis on two central factors: (1) whether the group of people targeted for testing exhibits a pronounced drug problem; and, if not, whether the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and (2) the magnitude of the harm that could result from the use of illicit drugs on the job."

The court pointed out that "under *Skinner*, the test for whether employees hold safety sensitive positions is whether the employees 'discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'"

The court went on to say that, "Courts have found similar risks inherent in several other positions, including: nuclear power plant workers, seamen operating oil tankers, a meter repairman for a gas company, a firefighter and emergency medical technician, a process technician at a petro-refining facility, police officers, a bus driver, and pipeline operators."

The court said that, "Although the position of school teacher may not fit neatly into the prototypical "safety-sensitive" position, we do not read the definition of 'safety-sensitive' so narrowly as to preclude application to a group of professionals to whom we entrust young children for a prolonged period of time on a daily basis. Simple common sense and experience with life tells us 'that even a momentary lapse of attention can have disastrous consequences,' particularly if that inattention or lapse were to come at an inopportune moment." (Citations omitted.)

The court was also concerned with the privacy interests of the employees. The resolution of this issue, the court said, depends upon two key factors: focusing on two central factors: (1) the intrusiveness of the drug testing scheme; and (2) the degree to which the industry in question is regulated.

Although the court expressed concern about the intrusiveness of the test in question, the court again upheld the government's right to test education professionals, and stated that "the Court believes that when people enter the education profession they do so with the understanding that the profession is heavily regulated as to the conduct expected of people in that field, as well as the responsibilities that they undertake toward students and colleagues in the schools." In the eyes of the court, the degree of regulation diminishes their expectations of privacy. The type of regulation the employees were subjected to did not have to concern safety issues.

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, ___ U.S. ___, 122 S.Ct. 2559 (2002) , the United States Supreme Court considered a case where the Tecumseh, Oklahoma, School District (School District) required all middle and high school students to consent to urinalysis drug testing in order to participate in any extracurricular activity. The Court applied the *Vernonia* test set out above and upheld the district's authority to test the students. The Court held that the district did not have to have probable cause to test, that reasonableness was sufficient because the testing was not related to any criminal activity. The Court examined the special intrusions students who participate in extracurricular activities voluntarily accept and found that this created a lowered expectation of privacy on their part. The Court was also persuaded by the fact that the only penalty for a positive test was a restriction on participation in extracurricular activities and that follow-up testing was conducted prior to barring them from participating at all. Finally, the Court held that the district had presented adequate evidence of a drug problem in the district to justify testing.

Drug Testing Analysis

So, where does the journey across the treacherous high-wire act of drug testing leave municipalities? What steps can a municipality take to bolster support for the testing of employees?

1. First, it is clear that testing an employee for illegal drug usage amounts to a search for constitutional purposes. The presumption, based on the Fourth Amendment to the United Stated Constitution, is that **in order to conduct a search, a government agency must obtain a warrant from a court or magistrate upon a showing of probable cause**. Any analysis of municipal drug testing authority must start from this point.

2. In order to determine what standard of review to apply to the tests, **the municipality must determine the purpose for the test; that is, whether the test is performed for law enforcement or for administrative purposes**. A more stringent standard applies where the need for the test is conducted for a law enforcement purpose.

3. Assuming that the test is for administrative purposes – which would include employment issues such as hiring, promotion and determining post-accident fault – **the next step is to demonstrate a special need for the test**.

In *Chandler*, the U.S. Supreme Court pointed out that the special need for drug testing must be substantial and important enough to override the individual's privacy interest and vital enough to justify waiving the Fourth Amendment requirement of individualized suspicion. The key is showing a proper governmental purpose. The municipality must be able to clearly articulate this goal. Under the Court's ruling in *Chandler*, it is not enough that the municipality merely wants to demonstrate that its workforce is drug-free.

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If a special need exists, testing can be justified if that need outweighs the employee's privacy interests that are protected by the U.S. Constitution. Certain conclusions can be drawn from the cases. Following *Von Raab* and *Skinner*, for instance, it seems clear that courts are more likely to uphold suspicionless testing of employees in public safety and safety-sensitive positions than they are of other municipal employees. Therefore, testing these employees is easier to justify. It also appears to be clear that municipalities can justify testing employees if they have reasonable suspicion to believe that the employee is using drugs while on the job.

But what about other situations? How does the municipality go about justifying its need to test employees in non-public safety positions, or where there is no articulable individualized suspicion? The municipality must be able to show why testing the particular class of employees is necessary.

• What public purpose is served by subjecting employees holding specific types of jobs to an intrusive governmental search?

• If public protection is the goal, what damage could be done by these employees if they are acting under the influence of drugs?

• Why won't testing these employees based on reasonable suspicion satisfy the governmental need?

Answering these questions can be troublesome. The threat posed by public safety officers such as police officers who will be driving public vehicles and carrying weapons is clear. But, is the public threatened by a clerical employee who cannot type or answer the phone if he or she is using drugs?

Obviously, the municipality wants such employees removed from the workplace, but it seems unlikely that a court will find that this need outweighs the privacy interests that are impacted by testing without reasonable suspicion. This is especially true where there is direct, daily supervision of the employee because this makes it more likely that the supervisor can observe indications of drug use to support reasonable suspicion. Most cases will, of course, fall somewhere between these two extremes.

Implementing a Drug Testing Policy

Before implementing a drug testing policy affecting a class of employees, the municipality should be able to show that the municipality has a problem with drug use among these employees. Therefore, the municipality must examine its own history of drug use among the employees in question. Proof of unlawful drug use can help clarify and substantiate the need for drug testing.

The testing process must also be narrowly drawn – not so intrusive that a court is offended by the process, but designed so that the drug user cannot escape being caught by simply abstaining for a period before the test.

The cases referenced in this article indicate that drug testing is legally feasible in certain, limited circumstances.

• Testing based on reasonable suspicion would be allowed.

• Post-accident testing where the employee was at fault – especially where the accident was the result of a failure in judgment by the employee – would also probably be upheld.

• Testing where there is a strong public purpose – and the emphasis should be on finding a viable, articulable reason that is justified by facts – would most likely be upheld.

Setting up a Testing Policy

The following information was prepared by Sheryl S. Hayashida, and appeared in the article "Suspicionless Drug Testing," in the Mar/Apr. 2000 issue of *Municipal Lawyer* magazine, published by the International Municipal Lawyers Association. Anyone considering implementing a drug testing policy should review the questions and procedures below

Always remember, though, drug testing truly is high wire walking. Court decisions have not been consistent on the right of public employers to test their employees. The information contained in this article will assist you in creating a defensible drug testing policy. As always, it is best to seek the advice of your municipal attorney to verify the current state of the law on drug testing before adopting or testing any employee. Doing otherwise is not walking a high-wire – it's doing so without a net.

Drafting a Testing Program

The following checklist should be considered in preparing a drug and alcohol testing program:

• What is the current policy, oral or written, on drugs and alcohol?

• Is there a drug problem that can be documented? How is the problem being manifested (e.g., absenteeism, productivity or safety concerns)?

• What type of a program would best address the problem? Has a thorough legal analysis been completed?

• Have less intrusive alternatives to drug testing been considered?

• Is the cost associated with the problem great enough to warrant the cost of drug testing?

• What positions should be included for drug testing?

• What types of testing will be administered (pre-employment/transfer, promotion, return to duty, random, for cause, post-accident)?

• Who will administer the drug test and what procedures should be implemented to meet constitutional challenges?

• What will be done with employees or applicants who fail, or refuse to take, the test?

• What will be the impact on the morale of the affected employees?

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Legal Notes

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ATTORNEY GENERAL OPINIONS

Public Works Bid Law: The use of asphalt obtained through the award of a public works contract is restricted for use on public works projects. Further, no public works project, the total of which would exceed $50,000, may be split into parts involving sums of less than $50,000 in order to avoid bidding. However, in those situations involving the use of public employees, the portion of the project attributable to those public employees would not be subject to the public works bid law. 2004-083.

Sales Tax: A municipality may impose a sales, use, or gross receipts tax upon a waterworks board incorporated pursuant to Section 11-50-230, et seq., of the Code of Alabama 1975. 2004-091.

Courts: When a district attorney refuses to prosecute a felony charge, regardless of whether it has been properly transferred from the municipal court to the district attorney or otherwise, the prosecution of that charge is effectively abandoned. As such, a municipal court does not have jurisdiction to hear the case. However, under Section 36-15-14 of the Code of Alabama 1975, the city attorney or other investigating agency may refer the case to the Attorney General, and the Attorney General will review the matter to determine whether or not to prosecute. 2004-097

Competitive Bid Law: Under federal law and regulations, a city may not require a general contractor, submitting a bid on a public works project funded, in part, by federal transportation monies received by the State, to provide the contractor's license number on bid documents before submission of the bid or before the bid is considered for an award of a contract. However, a city may require proof of a license upon or subsequent to the award of a contract. 2004-099.

Planning Commission: While a city council may delegate to the planning commission the responsibility to review site development plans and make recommendations, the council may not delegate the function of making a final determination of whether a plan meets all state and local laws. 2004-103

Public Records: A mugshot in a computer database is a public record and must be provided to bail bonding companies under the Open Records Law unless it falls within a recognized exception. 2004-108.

Courts: Where a city has adopted state misdemeanors as municipal ordinance violations, municipal courts have jurisdiction to hear cases charged under Section 13A-9-13.1 of the Code of Alabama 1975 because negotiating a worthless negotiable instrument is a Class A misdemeanor. 2004-109.

Cemetaries: A city may accept a deed to a street through a privately owned cemetery from a private landowner after determining that a public purpose would be served. 2004-110.

ETHICS COMMISSION ADVISORY OPINIONS:

AO-NO. 2004-07: A member of a city council, who is employed by an insurance agency, may not vote, attempt to influence or otherwise participate in any matters coming before the city council involving a client of their employer, if either the employer or the councilmember stands to benefit from council action.

AO-NO. 2004-08: Members of a city council may vote on a rezoning issue affecting the neighborhood in which they or a family member resides, as there is no personal gain, nor will the members be affected any differently than the other residents of the neighborhood.

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Federal Legislative and Regulatory Issues

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Grants.gov

The federal government has designed a website to help facilitate the grant process. Grants.gov simplifies the grants management process and creates a centralized, online process to find and apply for over 900 grant programs from the 26 federal grant-making agencies. Grants.gov is intended to streamline the process of awarding of some 900 different federal grant programs worth over $360 billion annually to state and local governments, academia, not-for-profits, and other organizations. The aim is to produce a simple, unified source to electronically find, apply, and manage grant opportunities.

All federal agencies are now required to post all competitive grant opportunities to the site. There will also be significant focus on advancing the grantor and grant community system-to-system interface, allowing local governments to directly communicate with the Grants.gov system. Grants.gov will also begin to expand its uses to add progress reporting.

A grant seeker should visit the Grants.gov website and search for grant opportunities. Once a match is found, the organization will download the grant application package, completes it offline, and then submits it through the Grants.gov site. The application is time stamped and the appropriate federal agency has immediate access to it. The web address is **www.grants.gov**, and questions about the system can be emailed to **info@grants.gov**.

House Committee Passes Version of TEA-LU

The House Transportation and Infrastructure Committee passed a six-year, $275 billion surface transportation reauthorization bill on March 24, 2004. The next step for the latest version of the Committee's original $375 billion measure is to the full House for debate and a final vote. The bill is $100 billion less than the original, but it retains the basic policy and program structure from the original version.It provides six-year budget authority of $217 billion for highways and $51.5 billion for transit.

The bill also:

• Includes a minimal increase in core transportation program funding for all states.

• Retains the 80-20 funding split between highways and transit.

• Preserves a 90.5 percent minimum guarantee return to states.

• Includes a new "re-opener" provision that would allow Congress to revisit transportation spending levels within the next two years.

Chairman of the House Committee, Don Young (R-Alaska), indicated his willingness to revisit the spending level issue as early as November following this year's elections. Reaching agreement on the overall funding level for transportation reauthorization could impede final passage.

Transportation Bill Approved by House

By a vote of 357 to 65, the U.S. House of Representatives approved H.R.3550 on April 2, 2004. House of Representatives Bill 3550 is the Transportation Equity Act: A Legacy for Users (TEA-LU), a six-year $275 billion highway and transit reauthorization bill. At press time, it was projected that after recess the Senate and House leadership will appoint a conference committee to develop a compromise bill that melds H.R. 3550 and the Senate's version, S.1072, which authorizes $318 billion over six years. There is a threat of a White House veto of any compromise bill that exceeds $256 billion, and the immediate need to pass another short-term TEA-21 extension – the most recent one expired on April 30.

The bill, as approved by the House, obligates $217.5 billion for core spending on highways, $51.5 billion for transit programs, and $6 billion for highway safety programs. The House bill maintains the 80-20 funding split between highways and transit and retains the 80-20 matching share for all projects.It also creates a new rural road safety program, a new highway block grant program and a new safe schools transportation program. In addition to the $275 billion, there is an additional $4.5 billion in mandatory spending for emergency relief in disaster areas.

Efforts during the House debate to increase the overall size of the bill failed as did an amendment sponsored by

representatives from donor states to change the division of highway and transit funds among states. Donor states collect more gas tax revenues than they receive in federal spending on core transportation programs, and their representatives remain unhappy with the fairness of the bill's funding system that sets aside billions of dollars outside the minimum guarantee formula for special projects. As passed, H.R. 3550 maintains the 90.5 percent minimum guarantee return to states, but it applies to a smaller base of funding. One amendment added to the bill would help explain federal transportation funding to the public. The amendment requires the United States Department of Transportation to educate the public on how transportation dollars are spent.

TSA, Truckers Group Team Up To Protect Highways

The Transportation Security Administration (TSA) is teaming up with the American Trucking Associations (ATA) in a new $19.3 million cooperative agreement that will expand ATA's Highway Watch program. The program trains highway professionals, such as over-the-road truck drivers, to identify and report safety and security situations they encounter on the nation's highways.

"Our drivers see a lot through their windshields," said ATA President and CEO Bill Graves. Now, "if something looks out of line, they can quickly get the information to the right people for appropriate action." It makes sense, he said, to have a plan that "coordinates the efforts of the entire transportation sector to keep our highways safe and secure."

Under the cooperative agreement, ATA will expand its current national call-in center to handle an increasing volume of calls and coordinate state Amber Alert missing children programs with Highway Watch. In addition, commercial truck and bus drivers, school bus drivers, highway maintenance crews, toll booth operators and others will receive instruction on recognizing and reporting suspicious activity.

Senate Passes Child Care Amendment to TANF

The Snowe-Dodd Amendment to the Temporary Assistance to Needy Families (TANF) reauthorization bill passed in April by a 78-20 vote. Senator Shelby voted in favor of the amendment; however, Senator Sessions did not vote in favorably for the amendment. The amendment was sponsored by Sen. Olympia Snowe (R-Maine) and Sen. Christopher Dodd (D-Conn), and will provide $6 billion over five years for mandatory child care funds. The funds will be available to families leaving welfare for work and for low-income working families.

The passage of this amendment is a major victory for municipalities. A 2002 Economic Policy Institute Policy indicated that single mothers with young children who receive child care assistance are 40 percent more likely to be employed after two years than mothers who do not receive assistance. The extension of Customs User Fees, which are fees collected on imported goods, will offset the cost of the bill.

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President Bush objected to the amendment saying that it was unnecessary. The administration supports passage of the TANF reauthorization legislation that includes increased work hours for TANF participants. Policy experts have indicated that the increased work hours will raise the need for child care. The House version of the bill that passed a little over one year ago provides only an additional $1 billion in child care assistance. The TANF block grant expired on September 30, 2002. Congress has voted to extend the program in its current form in a continuing resolution which will expire on June 30, 2004.

Ridge Pledges Support in getting Homeland Security Funds in Hands of First Responders

Tom Ridge, Homeland Security Secretary, has pledged to continue to work with municipal governments with getting homeland security funds into the hands of first responder's faster. NLC's Local Senior Advisory Council has identified a series of obstacles that occur when moving the funds from the federal government to municipalities. All states have said that they have obligated the funds to the local governments; however, it is unclear that the obligated funds have been freed up and passed on to local governments.

Oversight of DHS Grant Programs will Reach Higher Levels

Department of Homeland Security (DHS) audit investigators will be scrutinizing the agency's preparedness and first responder grant programs over the coming year to assess how well states are managing the grants.

The DHS Office of Inspector General (OIG), Clark Kent Ervin, says that although the agency has been getting preparedness and first responder funds to the states in a timely manner, states, local jurisdictions and first responder organizations have been slow to spend the money. Ervin says in his most recent report, "Review of the Status of Department of Homeland Security Efforts to Address Its Major Management Challenges," that his office is planning to continue a series of audits of preparedness and first responders grant programs. The purpose of the audits are to assess states' management of grants from the Department of Homeland Security.

According to the OIG, as of Feb. 10, 2004, the majority of the $2.4 billion in FY 02 and 2003 first responder grant funds awarded have not been used. For FY 03, the OIG notes, only 13 percent of the funds awarded have been spent. For the most part, the OIG reports, delays in getting funds to first responders were not a result of DHS processing. However, the OIG notes, "DHS needs to require more meaningful reporting by grantees and develop performance standards so that it can track their progress more accurately." In addition, the OIG notes that when the department was created on March 1, 2003, a hodge-podge of existing grant programs was consolidated under DHS authority. As a result, program managers needed to develop meaningful performance measures to determine whether the grant programs actually improved state and local ability to respond to terrorism and natural disasters.

The OIG reports that the Department of Homeland Security has "made significant strides" in this area, particularly in consolidating the preparedness grant programs. However, the OIG warns, "problems remain, and means must be found to ensure that first responder funds are being used effectively and getting to those who need them in a timely manner."

The OIG has noted that DHS is faced with developing an effective, integrated system that will manage grants; however, the OIG feels that it will take the department time to meet this objective. Copies of the OIG report, OIG-04-21, are available at www.dhs.gov/dhspublicdisplay?theme=89&content=3388.

Additional Members Appointed as Homeland Security Advisors

Two additional members have been appointed to represent state and local interests on the Homeland Security Advisory Council (HSAC). Department of Homeland Security (DHS) Secretary Tom Ridge has named Alaska Governor Frank Murkowski and Nevada Attorney General Brian Sandoval to the State and Local Officials Senior Advisory Committee. Ridge also has appointed Fraternal Order of Police Grand Lodge President Chuck Canterbury to the position of vice chair on the Emergency Response Senior Advisory Committee. The Homeland Security Advisory Council and the Emergency Response Senior Advisory Committee assist HSAC in keeping the interests of state and local governments and first responder communities in mind while working to improve national security

House Passes Department of Justice Reauthorization Bill

The House of Representatives passed legislation (H.R. 3036) that would reauthorize the Department of Justice and its related programs through fiscal year 2006. For fiscal year 2005, the bill authorizes $20.1 billion in appropriations. For fiscal year 2006, the bill increases that amount to $20.4 billion.

In addition to the funding, the bill makes significant changes to a number of grant programs administered by the Office of Justice Programs (OJP). For example, the bill contains an authorization of $3.1 billion over three years for the Community Oriented Policing Services (COPS) program. The bill also streamlines the program by requiring that local governments submit one application in any given year.The bill merges the Local Law Enforcement Block Grant program, the Byrne Formula Grant Program and the Byrne Discretionary Grant

program into one new Byrne Memorial Justice Assistance Grant Program (BMJAGP).

The new program has been granted $1.095 billion for the program's first year. For remaining years, the program will be given such sums as are necessary to carry out the program. The program also allows local governments to use program funds for all the same purposes as under the former programs. The BMJAGP will allow local government to expend their grant monies over four years. Under the previous programs, local governments were directed to expend the monies on a yearly basis. The new method will allow local governments to bank grant funds and earn interest over the four-year life of the grant. H.R. 30036 also authorizes the Weed and Seed program. Under this program, states, local governments, neighborhood communities and community-based organizations can use grant monies to fight violent crimes and drug abuse in high crime areas nationwide. Additionally, some of the funds will be available for revitalization purposes. Overall, the bill provides more than $56 million for the program's first year and those sums that are necessary to carry out the program until 2006.

National Institute of Justice Continues Examination of Bullet Proof Vests

The National Institute of Justice (NIJ) is conducting an evaluation of the reliability of body armor, which is more commonly referred to as bullet proof vests. NIJ has concluded the first part of its examination and found that there may be degradation occurring in the ballistic performance of used Zylon-based armors. Those findings, however, are based on a small sampling and NIJ researchers now plan to undertake a much larger sampling of armors from various climatic regions, age categories and manufacturers to determine whether Zylon-based armor degrade, to what extent they degrade and what factors may be causing the degradation."

The National Institute of Justice examination is part of the Department of Justice's Body Armor Safety Initiative, launched last fall by United States Attorney General John Ashcroft. The initiative is designed to review the reliability of body armor currently in use and to look at the future of bullet-resistant technology and testing. A copy of NIJ's "Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities" is available online at http://www.vests.ojp.gov**.**

Voice over Internet Protocols Proceeding

The Federal Communication Commission (FCC) has recently released a Notice of Proposed Rule Making Proceeding (NPRM) on the proper regulatory classification of Voice over Internet Protocols (VoIP). This rule has far reaching implications on cities, because it may affect local government's authority to classify VoIP as an interstate information service. These concerns include but are not limited to the erosion, and eventual loss, of local telecommunications taxes and right-of-way fees from IP-based networks, as well as utility and other local gross receipts taxes applicable to telecommunications services and the erosion of traditional local land use and zoning authority over telecommunications and communications facilities.

VA Seeks Cemetery Grant Applications

The Department of Veterans Affairs (VA) is currently accepting applications for fiscal year 2005 projects to establish, expand or improve state-run cemeteries for veterans. Through its State Cemetery Grants Program, which received $32 million in fiscal year 2004, the VA intends to provide state governments with funds to supply gravesites for at least 90 percent of the veteran population living within 75 miles of the site. States are required to own the land on which they intend to establish or expand a cemetery. Cemeteries constructed with program funds should be able to provide at least 20 years of service.

Priorities for fiscal year 2005 include:

- projects needed to avoid disruption in burial service that would occur at existing veterans' cemeteries within four years;
- projects for the establishment of new veterans' cemeteries;
- planned, phased developments prior to need; and
- other improvement projects.

Funds cannot be used for repair, maintenance and operating costs. Pre-applications describing the location, design and primary features of the cemetery – as well as the need for the project – are required for requests seeking more than $100,000. Pre-applications are due July 1, 2004. For more information on this opportunity, visit www.cem.va.gov/scgkit.htm**.**

Foundation News: Foundation Strives To Keep Music Alive

Music education plays a significant role in the emotional and intellectual development of a child. Budgetary constraints have been threatening and shutting down musical programs and opportunities throughout the nation's communities and schools. To address this issue and keep music alive in schools, the Mr. Holland's Opus Foundation was established by the film's composer, Michael Kamen. The Foundation is named in honor of the acclaimed motion picture about a dedicated music teacher's impact on generations of students.

The foundation provides assistance to underserved communities so that they can begin – or continue – to provide

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Over 600 Public Sector Organizations Rely on PeopleSoft

"PeopleSoft has shown a strong understanding of public sector business processes and the ability to transform technology into business advantage. The value of PeopleSoft's internet architecture is immense. It drastically reduces the cost of our maintenance, upgrades, and end user training." —Laura Larimer, Chief Information Officer, State of Indiana

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- 600 public sector organizations—including 16 state governments.
- 650 higher education institutions.

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State governments, such as Indiana's, are already realizing the power PeopleSoft provides its public sector customers. "PeopleSoft has shown a strong understanding of public sector business processes 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."

Keeping Compliant

Every public sector organization must accommodate an intricate web of regulations and reporting requirements. At PeopleSoft, we make it our business to keep up with changing mandates so that you can consistently meet them. PeopleSoft solutions adapt easily to the needs of state and local government because we've invested the resources necessary to understand your complex business processes. We satisfy regulatory requirements in our software—like GASB 34 and Section 508—so that you can ensure compliance and set controls for your practices and policies. With PeopleSoft, you have complete and accurate data on which to base decisions and the tools to make those decisions collaboratively.

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For more information on PeopleSoft for Public Sector, contact us at 1 888 773 8277 and ask for your regional government account executive.

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Municipal Drug Testing ——— continued from page 18

Policy and Procedure Dos and Don'ts

After establishing the legal right to test, the public employer should adopt a policy statement and develop administrative procedures. A clear written policy should defeat legal challenges alleging inadequate notice of the rule and the consequences of violating the rule. Consider the following:

1. Have a clear statement of what conduct is prohibited. Disseminate it to all employees and job applicants, if applicable.

2. State that off-duty use, possession or sale, especially if it leads to a criminal conviction, may bring discredit to a public employer.

3. State that each employee is expected to report his or her observations or knowledge about a possibly impaired employee or other violations of the policy. On-going training about the effects of drugs should be implemented.

4. Identify positions subject to testing. Generally, a suspicionless drug testing program should be in response to evidence of a problem and it should be narrowly drawn.

5. Do not require a pre-employment drug test until a conditional offer of employment is made. The test may reveal a medical condition by disclosing prescription drug use, implicating ADA concerns. Disclosure of lawful drugs should not be required unless and until a positive test result is confirmed.

6. State what steps will be taken if the results are positive.

7. Ensure that the test is designed to reduce the intrusiveness of collection. The DOT requirements are most helpful and should ensure accuracy to protect the employee and the employer.

8. Provide for a split sample. This gives the employee an opportunity to confirm or challenge the results.

9. Establish a chain of custody.

10. Do not return an employee who has previously tested positive to work until there has been a negative test result and an evaluation.

11. Clearly state what discipline, if any, may be imposed on the employee who tests positive.

12. Conduct an investigation or a search where warranted. There is a diminished expectation of privacy if the employees are clearly told what is government property (e.g., desks, lockers) and what may be subject to search.

13. Consistently apply the policy and procedures.

14. Notify employees of the availability of an employee assistance program (EAP) or other employer-assisted rehabilitation program, if applicable.

15. Identify the rights afforded the employee, e.g., the right to reasonable confidentiality of medical information, to access the EAP, to obtain a copy of the positive test result, and to request a split sample.

16. Have employees sign an acknowledgment of the receipt of the policy, including a commitment to abide by the policy.

17. Be aware that drug testing may raise concerns under the Health Insurance Portability and Accountability Act (HIPPA). You may have to require an employee to sign a consent form in order to obtain results from the testing facility. Employers should make sure their testing complies with HIPPA.

Citations to Other Cases:

Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 11 A.D. Cases 538 (6th Cir. 2001)

Terminated truck driver sued employer, carrier that leased drivers from employer, clinic, and drug testing firm, alleging violation of Federal Omnibus Transportation Employee Testing Act ("FOTETA"), defamation, and invasion of privacy. District Court granted summary judgment for all defendants and stayed proceedings as to employer due to employer's bankruptcy proceedings. Driver sought interlocutory appeal. Court of Appeals held that, among other things: (1) random drug testing is not unreasonable search; (2) there is no implied private right of action under FOTETA; (3) communications concerning drug test were not invasion of privacy.

Baron v. City of Hollywood, 93 F. Supp. 2d 1337 (S. D. Fla. 2000)

A city's policy of requiring all of its employees to submit to a drug test as a condition of employment violates the Fourth Amendment. The city showed no "special need" for the suspicionless testing of all of its employees. Such testing was, therefore, "unreasonable."

Peterson v. Mesa, AZ, 83 P.2d 35 (Ariz. 2004)

The Arizona Supreme Court has held that random, suspicionless drug testing of firefighters, based upon a city's generalized and unsubstantiated concern with deterring and detecting alcohol and drug use, unreasonably intrudes upon the privacy interests of firefighters in violation of the Fourth Amendment. ■

Legal Notes

continued from page 19

JUDICIAL INQUIRY COMMISSION OPINIONS

SYNOPSIS 03-828: A part time municipal judge may donate legal services to a charitable organization.

SYNOPSIS 03-829: A municipal judge may hear a misdemeanor charge involving the alleged assault of a former employee by a current city employee at City Hall if he feels he can act impartially in the matter.

a variety of music education programs for their children. Through its Special Projects program, the Mr. Holland's Opus Foundation provides grants in the form of repairs to, or purchases of, new musical instruments. Though no monetary awards are distributed, the grants are valued at between $500 and $5,000 each.

After-school programs, youth orchestras and community schools of the arts are eligible for funding, provided they have not received a grant from the Mr. Holland's Opus Foundation within the last five years. Programs outside the United States, teacher salaries or music lessons, and events, concerts and festivals are not supported by the foundation. A new music program that submits an application for repairs or instruments must be part of an umbrella organization that has existed for at least three years.

Applicants must: submit a written plan on how they will use the instruments donated by the foundation; participate in ongoing fundraising activities; present a compelling need for instruments; establish plans for maintaining and safeguarding instruments to keep them in good working order; possess, or have access to, adequate facilities for lessons, practices, rehearsals and instrument storage; and guarantee that participants using repaired or donated instruments from the foundation will have time to practice either at the program or at home.

Music programs that lack financial support are of the highest priority to the foundation. The application process involves questions related to: the age group and number of students served by the program; the community in which the program is offered; the types of ensembles/courses offered to students of the program (e.g., small chamber group, marching band, concert band, jazz band, orchestra, or theory/history/appreciation course); cost estimates for requested instrument repairs; the type, quantity, make and cost of new instruments being requested; other sources of funding for the program; music staff involved in the program; and the number of paid and volunteer teachers.

A description of the program's commitment to music – including attitudes and levels of support from the community, parents and school administrations – is required as part of the application.

A letter of support from a parent's association, parent/teacher association, music supporters' group or any parent organization affiliated with the program must be included as well. A letter from a parent of a student or program alumnae is also acceptable. Applicants also have the option of submitting up to three newspaper articles, printed programs or other support materials to provide the foundation with more information on the program and its activities. Additional information on the application process and requirements is available online at www.mhopus.org/special.htm.

Applications are accepted year-round. But applicants are advised that the delivery of an instrument could take up to five months. For more information, contact the foundation at (818) 784-6787; e-mail, info@mhopus.org.

AIDS Services, Medicines Funded by HHS

The Department of Health and Human Services (HHS) has awarded more than $1 billion in grants to states and territories in an effort to provide medical care, support services and prescription drugs to people living with HIV/AIDS. The 2004 fiscal year awards are funded under Title II of the Ryan White Comprehensive AIDS Resource Emergency (CARE) Act. The grants were awarded based on the number of HIV/AIDS-infected persons living in each state or territory, and over $280 million basic grants were awarded. In addition, $728 million was awarded to purchase medications through state-run AIDS Drug Assistance Programs. HHS also awarded $7 million under the Minority AIDS Initiative based on the number of minorities living with HIV/AIDS in an area over a two-year period. An additional $10 million was given to cities with significant populations of people living with AIDS. These grants are given to metropolitan areas that report between 500 and 1,999 cases of AIDS. HHS still intends to award $21 million under the Supplemental Drug Treatment Program. For more information on CARE Act funding, visit www.hhs.gov.

The ACF and the CFNP Support Nutrition Needs of the Poor

Nearly $2.4 million is up for grabs and available to organizations interested in fighting hunger while also promoting good nutrition and health in needy populations. Through the Administration for Children and Families' (ACF) Community Food and Nutrition Program (CFNP), approximately 50 organizations will receive up to $50,000 each to improve the capacities of community-based, local, statewide and national programs to link low-income people to food and nutrition programs.

Funds can be used to: coordinate private and public food assistance resources wherever inadequacies exist; help low-income communities identify potential sponsors of child nutrition programs and initiate such programs in underserved or unserved areas; and develop innovative approaches at the state and local level to meet the nutrition needs of low-income individuals. Low-income communities are defined online at www.aspe.hhs.gov/poverty/04poverty.shtml. Community Food and Nutrition Projects funded by the Administration for Children and Families must adhere to this definition. Grants may not be used to fund food purchases. Public and private nonprofit organizations can compete for CFNP grants. Faith- and community-based organizations that serve underserved populations are included in the eligibility pool and encouraged to apply. ■

Speaking of Retirement

Planning For Retirement Checklist

8 to 12 months before retirement

- Attend a *Retirement Preparation Seminar*
- Request an Estimate of Benefits from an RSA counselor
- Make sure that the RSA has your correct home mailing address
- Make a plan for what to do after retirement
- Request updated statement from RSA-1 Deferred Compensation Plan, if applicable

6 to 11 months before retirement

- Review your health care and insurance options
- Check on Medicare (www.medicare.gov) if applicable
- Gather information on Social Security (www.ssa.gov)
- Consider making an appointment with an RSA counselor
- If you contribute to RSA-1 Deferred Compensation Plan, contact their office and inquire about your options for withdrawal and review beneficiary designations

3 to 5 months before retirement

- Notify your employer of your intention to retire
- Request the *Application for Retirement: Part I* from either your payroll officer, the RSA or download the form from our Web site at www.rsa.state.al.us
- Study the Benefit Options and decide the best one for you
- Review your insurance options
- Review your estate plan
- Study the regulations for *Postretirement Employment* under RSA

1 to 3 months before retirement

- The *Part I: Application for Retirement* must be submitted (must be **received** no more than 90 days nor less than 30 days prior to your retirement date)
- RSA will mail you *Part II: Retirement Benefit Option Selection and Tax Forms Packet* once your *Part I* has been received and processed
- Begin completing any necessary paperwork or obligations with your employer
- Consider your decisions on tax withholding
- Contact RSA-1 Deferred Compensation Plan if you intend to defer from your sick and annual leave payment
- Complete RSA-1 Deferred Compensation Plan withdrawal forms if you intend to begin distribution at retirement

2 weeks to 1 month before retirement

- *Part II: Retirement Benefit Option Selection and Tax Forms Packet* must be submitted prior to the effective date of retirement

(If Part II is not received prior to your retirement date, by law, you will receive the Maximum Monthly Benefit. This choice is irrevocable.)

Direct Deposit is strongly encouraged for all retirees. It is the safest way to ensure your money is available for you at the earliest possible time.

Retirement Systems of Alabama
1-800-214-2158
Extension 399 for ERS and 499 for TRS
Extension 299 for RSA-1 and
498 for PEEHIP
www.rsa.state.al.us

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.

Obituaries

Rep. Harrell Blakeney

Rep. Harrell Blakeney, former councilmember of Thomasville, died March 9, 2004. He was 83.

After serving several terms on the Council, Blakeney was elected tot he Alabama House of Representatives in 1982 and served for 12 years. He was a veteran of World War II and retired from the Alabama National Guard. He is survived by his wife, one son and one daughter. ▪

Clifton L. "Bug" Wood, Jr.

Clifton L. "Bug" Wood, Jr., former councilmember of Fairfield, died March 22, 2004. He was 79.

Wood was a veteran of World War II and served on the Council from 1972 to 1980. He retired from US Steel employed from 1953 to 1983 and he was a member of Dominion Baptist Church where he was a past ordained deacon.

Winfred Jones

Winfred Jones, councilmember of Calera, died April 7, 2004. He was 82.

In addition to completing almost 16 years as a city councilmember, Jones also served during World War II and the Korean War, earning the Purple Heart, among others. He also served on the Calera Planning and Zoning Board and he attended First Baptist Missionary Church. He is survived by three daughters and two sons. ▪

Dolores Oates

Dolores Oates, former councilmember of Daphne, died April 12, 2004.

A resident of Daphne for 42 years and a member of Christ the King Catholic Church, she served on the Daphne City Council from 1976 to 1984. She is survived by husband, daughter and grandson. ▪

The League extends its deepest sympathy to the families of our municipal colleagues.

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