THE ALABAMA MUNICIPAL
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Alabama's Minor League Baseball: A Major Event

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Montgomery's Riverwalk Stadium
Photo by: Niko Corley

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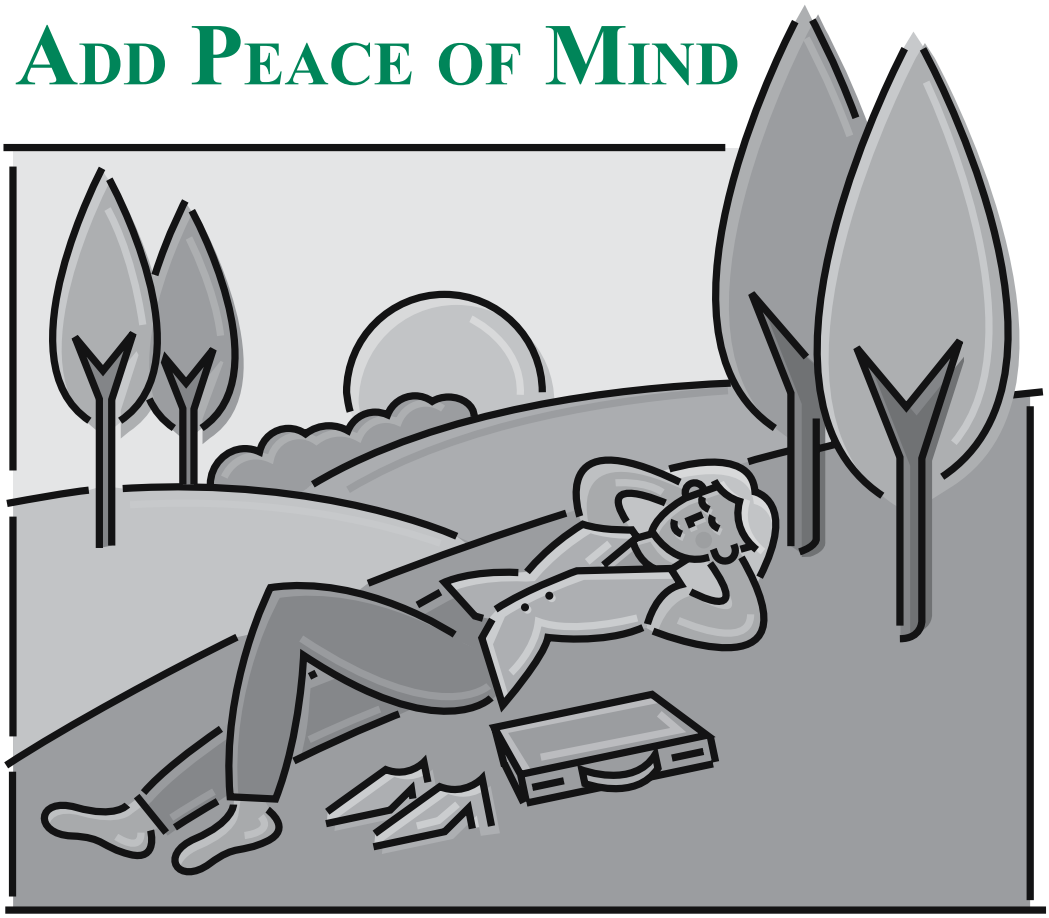

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Alabama's Minor League Baseball: A Major Event

By Niko Corley, Communications Coordinator

Montgomery's Riverwalk Stadium is nestled between the Alabama River and the city's historic downtown area.
Photo by: Niko Corley

For Stars, Barons, Biscuits and BayBears fans, except for the league's title, there's nothing "minor" about their teams. In fact, given the long lines, high ticket and concession prices and mile-away parking synonymous with major league games, taking in a game in any one of Alabama's four minor league baseball stadiums is more accessible, more affordable and less of a hassle. And it's a whole lot of fun.

On many days, you'll see fans scrambling for buttermilk biscuits fired from a biscuit bazooka or gorging themselves on famous Dreamland barbecued ribs. Still others will be playing in mounds of fluffy white snow that, while artificial, make for real entertainment.

And entertainment is what the minor league baseball industry is all about. Minor league ball is uniquely lighthearted as far as professional sports go; quirky mascots in wild costumes are attractions themselves, their antics just one of the things keeping fans amused between play and during games. Except for the nine innings of play and the same basic equipment, modern minor league baseball has as little in common with major league baseball as American football has with the European sport of the same name.

According to Minor League Baseball Director of Media Relations Jim Ferguson, in the years immediately following World War II, minor league ball was a major part of the national culture. In fact, Ferguson says, "just about every city in America had a team."

In 1949 for instance, 448 teams from 59 leagues played ball as 39 million fans (a record that stood for more than 50 years) looked on. Attendance peaked in the "glory days" of the post-war period but steadily declined through the 1950s and the following decades, when an increase in televised major league games began whittling away at minor league attendance. With the ability to watch more and more major league games from the comfort of their own homes, fewer and fewer fans got out to see their local minor league teams knock around the diamond.

This was a problem ball players, owners and managers were reminded of every time their teams took the field. To regain its former glory, minor league ball would have to rethink how it did business and change its approach as an entertainment venue.

"In the mid to late '80s, there was resurgence," Ferguson said. "To take off, it needed to become a family entertainment thing."

Minor league ball today is nothing if it isn't family friendly. From between-inning activities to playgrounds and video arcades, fans get much more than nine innings of baseball with the purchase of a ticket. When these additional

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The President's Report

Lew Watson
Mayor of Lincoln

The Sales and Use Tax

Last month this column touched on some of the revenue sources our cities and towns rely on to fund services we provide to our communities. For most of our communities the primary revenue source is the sales tax. In your community it may be an occupation tax, business license or some other source. This month I will review the sales taxes and discuss on the Municipal Business License Reform Act of 2006.

Almost all municipalities in our state impose a sales tax. At one time, many communities collected a sales tax that was in effect a gross receipts tax. Most communities now impose a true sale and use tax as opposed to the gross receipts tax. Sale and use taxes cover many aspects of business and are typically divided into Consumers Use Tax, Lodging Tax, Sales Tax, Rental Tax and Sellers Use Tax. The Alabama Department of Revenue defines each of those tax categories as follows:

Consumers Use Tax – "The consumers use tax is imposed on tangible personal property brought into Alabama for storage, use, or consumption in the state when the seller did not collect seller's use tax on the sale of the property."

Lodging Tax – "The lodging tax is a privilege tax on persons, firms, and corporations engaged in renting or furnishing rooms, lodgings, or other accommodations to transients for periods of less than 180 days of continuous occupation and apples to all charges for providing such accommodations. This tax also applies to charges for personal property used or furnished in such rooms or lodgings."

Sales Tax – "Sales tax is a privilege tax imposed on the retail sale of tangible personal property sold in Alabama by businesses located in Alabama."

Rental Tax – "Rental tax is a privilege tax levied on the lessor for the leasing or renting of tangible personal property."

Sellers Use Tax – "Sellers use tax is imposed on the retail sale of tangible personal property sold in Alabama by businesses located outside of Alabama which have no inventory located in Alabama, but are making retail sales in Alabama via sales offices, agents, or by any significant recurring contact or nexus with Alabama."

Additional information on each of these taxes may be found at the website for the Alabama Department of Revenue, **www.ador.state.al.us/**.

If your municipality has not reviewed the type of sales taxes you are collecting and the rates, this would be a good time to examine those. If you are wondering how your rates compare with other communities, that information is also available on the Alabama Department of Revenue website.

As was discussed last month, the state legislature has adopted a new business license act that will become the law for all municipalities on Jan. 1, 2008. Communities may elect to adopt the provisions of this act on Jan. 1, 2007. Each of you should have received a notice of the next training session to be conducted by the League. This session will provide an overview of business license basics and information on the 2006 Business License Reform Act. Understanding the provisions of this act is critical to preparing your business license ordinance for possible enactment this year and mandatory enactment next year. One of the provisions of the act is the delivery license, discussed in the following paragraphs.

The Municipal Business License Reform Act of 2006 requires municipalities to establish a special delivery license allowing certain out-of-town taxpayers to make deliveries into the municipality and police jurisdiction. The purchase of the special delivery license permits businesses with no physical presence in the municipality or its police jurisdiction to deliver merchandise into the police jurisdiction or municipality without having to purchase any other license for delivery. The license amount cannot exceed $100, although this may be adjusted every five years based on the standard outlined in the act.

In order to qualify for the special delivery license fee, the gross receipts from all deliveries into the municipality and its police jurisdiction cannot exceed $75,000 during the license year. If deliveries exceed $75,000, the taxpayer does not qualify for this special license. At its discretion, a municipality may, by ordinance, increase the amount of permitted deliveries up to $150,000. Again, this figure may be revisited every five years based on the standards contained in the act. Common carriers, contract carriers or similar delivery services making deliveries on behalf of others do not qualify for the delivery license.

As defined in the act, delivery includes any requisite set-up and installation. To be included, set-up or installation must be required by the contract between the taxpayer

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The Sales and Use Tax

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and the customer or be required by state or local law. In addition, any set-up or installation must relate solely to the merchandise delivered. If the taxpayer or the taxpayer's agents perform set-up or installation that does not qualify under this definition, the taxpayer must pay any required license fee rather than the delivery license.

Municipalities may, by ordinance, require the taxpayer to purchase a decal for each delivery vehicle that will make deliveries within the municipality or its police jurisdiction. The charge for such decal cannot exceed the municipality's actual cost.

If the taxpayer fails to meet the criteria that qualify him or her for the special delivery license at any time during the license year, the taxpayer must, within 10 days of the failure, purchase all appropriate licenses for the entire license year.

More information on the delivery license and the other provisions of the act will be discussed at the next League training program. If you are not presently enrolled this would be an excellent class to begin your training for the Certified Municipal Official Designation. If you have not received notice of this program, information may be obtained from the League website, **www.alalm.org,** or by calling the League at (334) 262-2566. ■

Have you registered for an upcoming CMO session in your area?

See page 11 for details.

Municipal Overview

By
PERRY C. ROQUEMORE, JR.
Executive Director

Cities Utilize the Internet to Prepare Citizens for Pandemic Flu

Recently, the League wrote to our municipal officials about the threat of an avian flu pandemic. This month's article provides additional information on this timely topic prepared by Larry Foxman for NLC's *Nation's Cities Weekly*.

How will cities inform and educate their citizens in the event of an avian flu pandemic? One tool many cities are turning to is the Internet.

According to *Wired* – a magazine that gives in-depth coverage of the people, companies and ideas that are transforming the nation – approximately 75 percent of Americans have Internet access at home, making it a smart idea for municipalities to provide information, including emergency and disaster planning, on their city websites. Either by developing their own avian flu websites or providing links to information developed by county, state or federal organizations, cities of all populations can provide factual and often real-time information to their citizens.

Cities Provide Easy Access

Some larger city websites already offer avian flu information. But many of these websites create a maze for visitors by placing avian flu information in a series of municipal department webpages. Pages buried too deeply within a site can lead to user frustration and will probably not be accessed.

One website that quickly cuts to the chase is that of the city of Long Beach, CA. Located on the city's webpage (**www.longbeach.gov**), a "news ticker" scrolls important topics, such as the "Facts About Avian Flu."

he link connects users to a series of pages maintained by the Long Beach Department of Health and Human Services, offering a list of definitions, frequently asked questions, community news and other resources.

The information is provided in a straightforward presentation reflecting the current "watch and wait" status of the federal government.

Informing the Masse

Large cities and small towns alike play host to immigrants and visitors from non-English speaking countries. While not every language of every immigrant or tourist can be provided, many city officials do try to accomodate for large communities of non-English speakers when creating information resources.

Many municipalities regularly provide information in both English and Spanish, but the city of Minneapolis, MN, goes one step further. Since 1975, Minneapolis has hosted one of the largest Hmong populations in the United States. Two decades later, Minneapolis became known as the nation's de-facto "capital" of the Somali community.

To address the information needs of these two large ethnic populations, the Minneapolis Emergency Preparedness webpage (**www.ci.minneapolis.mn.us/emergency/**) provides information in the customary English and Spanish, but also in Hmong and Somali.

The Red Cross also provides emergency preparedness information for non-English speakers. On its website **www.redcross.org/services/disaster/0,1082,0_504_,00.html**, you can find disaster services information in 14 languages.

Small Cities — Big Knowledge

With a population of 83,000, Newton, MA, is a small town with limited resources, but what it does have is a website where citizens can get information on emergency preparation and pandemic flu.

While not as interactive or flashy as websites offered by larger cities, Newton's health department website (**www.ci.newton.ma.us/health/index.htm**) still serves a valuable and necessary purpose — providing information to the public.

The website includes the Massachusetts Department of Health's "Public Health Fact Sheet on Influenza" and links to additional resources.

The linked websites, maintained by state and federal agencies, eliminate the cost for the city of Newton to duplicate these resources.

Details: For more information on preparing for a possible avian flu outbreak, contact NLC's Municipal Reference Service at (202) 626-3130 or at **mrs@nlc.org**. Comments or ideas on unique emergency preparedness or avian/pandemic flu websites are welcome.

News, resource links, reports, publications and workshops on the topic of avian/pandemic flu are also available on NLC's website, **www.nlc.org/Newsroom/press_room/news_alert/10359.cfm**. The webpage is updated often, so check back regularly. ■

Baseball

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forms of entertainment emerged in stadiums, attendance numbers rebounded.

"It was not a spectacular jump but more of a steady climb," Ferguson said.

While the number of teams has shrunk to 160 and the number of leagues to 14, attendance has risen to post-WWII levels, and, in 2004, the all-time record set in 1949 was broken. The glory days of minor league baseball are back, and arguably, these days are better than ever for everyone involved, municipalities included.

A minor league team's presence can be a major economic boost for a city, drawing crowds that not only attend the game but are often patrons of local businesses in the vicinity of the ballpark. It's not uncommon for fans to gather at nearby bars and restaurants for a pre-game toddy or bite to eat, and many establishments, hotels included, also do well with the post-game crowd. Regardless of whether it's before or after the game, local businesses benefit greatly from the increased foot traffic that comes as result of a team's presence.

Besides increasing profits for local businesses, minor league teams also create new jobs in a community. Beyond stadium construction and maintenance jobs, many more jobs are created in the areas of merchandising, concessions and food and beverage supply. Jim Tocco, director of broadcasting and marketing assistant for the Montgomery Biscuits, said around 250 "game day" employees are brought in to work Riverwalk Stadium each game. The community has benefited from this, Tocco says, and from the increased demand for certain services.

"We have brought a lot of good part-time jobs to the area," Tocco said. "…We're the biggest restaurant in town [on game day], and we run the foodservices ourselves."

But ballpark fare alone doesn't fill stadiums on game days, even though adding barbecue ribs, biscuits, ice cream, nachos and pretzels to the standard menu of burgers and dogs has pleased most fans. These days, arcades, playgrounds and a multitude of other entertainment activities are common in minor league stadiums across the country, and help teams draw larger-than-ever crowds, as evidenced by the Birmingham Barons in 2005, when the team celebrated their 18th consecutive season of drawing more than 250,000 fans.

Greg Rauch, general manager for the Montgomery Biscuits, says for the size market his team is in (less than 250,000 people), they have done well, with annual attendance around 310,000.

"Per capita we draw very well versus other minor league teams in the country," Rauch said, adding that while the Biscuits may trail the Jacksonville Suns (both Southern League teams) in attendance by around 200,000 annually, the Suns' market is much larger than Montgomery's, at around one million people.

For many baseball fans, both old and new, the addition of driving ranges, video arcades, fan-mascot activities and snow parks make a night at the ballpark something all age groups, from toddlers to seniors, can enjoy.

"It's good wholesome fun, with activities, playgrounds and fun diversions for kids," Michael Briddell, executive assistant to Montgomery Mayor Bobby Bright, said of Montgomery's Riverwalk Stadium. "There is also an area for laying down a blanket where you can convene as a family."

So just what has adding family-friendly entertainment done for minor league teams? Well, take the Biscuits for example. Only two years old, Riverwalk Stadium's construction helped the city gain ground on its downtown redevelopment project along the Alabama River, and also helped begin a general downtown revival, attracting businesses and opening eyes to the potential of Montgomery's downtown area as a major center for commerce.

"The stadium, coupled with riverfront development, has been a magnet for investment," Briddell said.

Indeed it has. Since the stadium's construction and the beginning of redevelopment in downtown Montgomery, a number of previously unoccupied buildings in the area have been renovated into luxury lofts, all within walking distance of the stadium, bringing a long-gone residential component back to the city center.

For Montgomery, attracting a AA baseball team was a breath of fresh air for the community. According to Briddell, the Biscuits' presence and the improvement of Montgomery's downtown area will also prove valuable in helping the Capital City retain more of its younger residents.

"We are growing a new generation of baseball fans and [fans of] going to downtown Montgomery. They won't go off, get college degrees and move away," Briddell said.

Only four municipalities in Alabama have minor league teams, and unless a new major league team is created, the demand for minor league teams is met for the time being. Teams move around from time to time and cities that attract a ball club usually don't have a suitable stadium already built. While a municipality's construction of a stadium is a massive undertaking, the results speak for themselves.

"We get our money back two-fold, but more importantly we built something for the public to enjoy," Reggie

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CMO Sessions Scheduled

Working with Outside Entities
Business License Basics
2006 Business License Reform Act

Cost: $100 – includes lunch

Sept. 6, 2006	**Auburn Univ. at Montgomery**
Sept. 7, 2006	**Loxley Civic Center**
Oct. 3, 2006	**Huntsville Marriott**
Oct. 4, 2006	**Birmingham Marriott**

Who should attend this CMO program? Anyone interested in business licenses and the new business license legislation passed this year, as well as tactics for working with outside entities within your municipality (volunteer fire departments, separately incorporated boards, planning commissions, etc.). Within the next two years, each municipality in Alabama will have to amend its business license ordinances to comply with the new law. This session will explain business licenses as well as instruct you on complying with the new legislation. Working with outside entities can be difficult at times but with the right instruction, you can learn how to best utilize the contributions of these valuable groups. Specifically, this CMO program is for municipal officials, but city revenue department employees and city clerks may also find it of value, although only local elected officials can gain CMO credit hours for this session.

For more information, contact Theresa Lloyd, CMO Program Administrator, at theresal@alalm.org or by calling 334-262-2566.

The Legal Viewpoint

By Ken Smith
Deputy Director/General Counsel

Takings Cases, Part II

Editor's Note: This is Part II of a two-part article. The first installment was published in the July 2006 issue of The Alabama Municipal Journal.

The Fifth Amendment to the Unites States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." In the last quarter century, this clause began to assume a more prominent role in constitutional jurisprudence, particularly with respect to the limits of state and local regulatory power. Any discussion of the Takings Clause should begin with the history that led to its enactment and the way case law has developed

As originally drafted, the Fifth Amendment restricted only the federal government. It was not until the Civil War that the federal Constitution limited the powers of the state (and thus local) governments against their own citizens through the passage of the Thirteenth, Fourteenth and Fifteenth Amendments.

When most people think of a government "taking", they think of the government actually and physically appropriating an individual's property. Until 1922, the courts shared that view. In 1922, the United States Supreme Court decided *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922). This was the first case that recognized governmental regulation of a person's property or activity on their property could also amount to a "taking" under the Fifth Amendment. The Court in *Mahon* recognized that in some instances, government regulation of property may be so onerous that its effect is tantamount to a direct appropriation or ouster, and therefore compensable under the Fifth Amendment. In famous quote from the U.S. Supreme Court, Justice Holmes remarked, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." The question is, how far is too far?

Of course, not all government regulation will result in a taking under the Fifth Amendment. Government regulation – by definition – involves the adjustment of rights for the public good. *Andrus v. Allard* 444 U.S. 51 (1979). Government could hardly function if it were required to pay every time a person's property rights were diminished

Regulatory takings can take two major forms; takings that result from applying a regulation to an individual property owner on a case-by-case basis, and those regulatory takings that may be characterized as *per se* regulatory takings.

***Per Se* Regulatory Takings**

In those instances where the government, by regulation, requires an owner to suffer a permanent invasion of the property, however minor, a *per se* taking has occurred, and the government will have to compensate the landowner under the Fifth Amendment. See, for instance, *Loretto v. Teleprompter Manhattan CATV Corp.*, *458* U.S. 419 (1982), where a state law required landlords to permit cable companies to install cable facilities in apartment buildings.

A second type of *per se* taking takes place where the government adopts regulations that deprive an owner of "all economically beneficial use" of the property. This was the situation in *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992). In *Lucas*, the South Carolina legislature adopted a statute that prohibited the plaintiff from building any permanent, habitable structures on two parcels of land he had purchased for that express purpose. The Court held that where regulations completely deprive an owner of "all economically beneficial use" of his property, the government must pay just compensation – unless background principles of nuisance and property law independently justify restricting the intended use of the property.

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***Penn Central* Regulatory Takings**

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) involved a regulation enacted by the Pennsylvania legislature to prohibit mining of coal under streets, houses, and places of public assembly. The coal company held mineral rights to many properties in northeast Pennsylvania and had sold the surface rights to others. The coal company argued that a taking had occurred under these regulations because it was unable to mine the coal. The U.S. Supreme Court agreed and said that, while property may be regulated, if the regulation goes "too far", it constitutes a compensable taking. Though no compensation was ordered in that case, the law was deemed invalid.

It wasn't until 1978, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the U.S. Supreme Court again considered the *Pennsylvania Coal* takings analysis. Unless the regulatory taking of is the *per se* variety, all other regulatory takings challenges are governed by the standards set forth in this case. In *Penn Central*, the city of New York restricted the development of individual historic landmarks, in addition to restrictions imposed by the applicable zoning ordinances. When New York prevented Penn Central from constructing a 55-story addition atop Grand Central Station, a designated historic landmark, Penn Central claimed a regulatory taking. In this case, the Court had to determine whether the local government went "too far." The Court listed several factors that it deemed significant in determining whether a regulation affects a taking under the Fifth Amendment. Primary among those factors are:

· the economic impact of the regulation on the claimant;

· the extent to which the regulation interfered with distinct investment-backed expectations; and

· the character of the government action (e.g. whether it involved a physical intrusion or whether it merely affected property interests).

Three years later, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court established a two-part test to determine whether a regulation amounted to a taking. *Agins* involved a facial challenge to a municipal zoning ordinance. The city enacted an ordinance placing certain property owned by Agins in a zone dedicated to single-family residences, accessory buildings or open-space uses. The ordinance also specified certain density limitations. In *Agins*, the Supreme Court took a large, what now appears to be unwise, step in developing the "takings" jurisprudence. The Court in *Agins* decided that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." Thus, this new "substantially advances" analysis emerged as an additional test of whether a governmental regulation constitutes a taking.

Lingle v. Chevron USA, Inc.

Until recently, both the three-factor *Penn Central* test and the two-prong alternative test of *Agins* stood together as confusing, distinctive tests to be applied in takings cases as part of U.S. Supreme Court jurisprudence. The Court, though, in *Lingle v. Chevron USA, Inc*, 125 S. Ct. 2074 (2005), took the opportunity to clarify its takings jurisprudence by eliminating the "substantially advances" inquiry as a test in its own right. Thus, the Court finally made plain that whether a regulation "substantially advances" a legitimate state interest is not a constitutional test for the purposes of the Takings Clause of the Fifth Amendment.

Lingle came out of the state of Hawaii, due in part to its relative isolation from the United States mainland. At the time this lawsuit began, there were only two refineries and six gasoline wholesalers in the state of Hawaii. Chevron controlled 60 percent of the market for gasoline produced or refined in the state as well as 30 percent of the wholesale market on Oahu, the state's most populated island.

Gasoline in Hawaii is sold from some 300 service stations. About half of these were leased from oil companies by independent "lessee-dealers." Chevron sold most of its gasoline on the island through these lessee-dealers. Typically, these lessee-dealer arrangements involved the oil company purchasing or leasing the land from a third person and constructing a service station on the land. The station was then leased to the dealer on a turnkey basis. Chevron charged the lessee-dealer a monthly rent, which usually amounted to a percentage of the dealer's margin on retail sales of gasoline and other goods. Chevron also required the lessee-dealers to enter into an exclusive supply contract obligating the lessee-dealer to purchase provisions from Chevron.

The Hawaii Legislature, apparently concerned with the effects of market concentration on retail gasoline prices, passed a statute that had the purpose of protecting independent dealers by imposing certain restrictions on the ownership and leasing of service stations by oil companies. Most notably, Act 257 limited the amount of rent that an oil company could charge a lessee-dealer to 15 percent of the dealer's gross profit from gasoline sales plus 15 percent of the dealer's gross sales of products other than gasoline.

Chevron sued the governor and attorney general of Hawaii in their official capacities, claiming, for purposes of this appeal, that Act 257 affected a taking of Chevron's property in violation of the Fifth and Fourteen Amendments to the U.S. Constitution. Chevron alleged that the statute did not substantially advance a legitimate state interest and therefore failed the *Agins* test.

The Supreme Court, while not expressly overruling *Agins*, soundly rejected application of the "substantially advances" test announced in *Agins*. The court noted that the "substantially advances" test is not really a test of whether a taking has occurred, but more precisely is a test in the nature of due process, and that it has "no proper place in our takings jurisprudence."

The "substantially advances" formula suggests a means-ends test: it asks whether a regulation of private property is effective in achieving some legitimate public purpose. While this inquiry might be relevant in a due process analysis (a regulation that fails to serve any legitimate governmental objective may be so arbitrary or capricious that it runs afoul of the Due Process Clause), such a test is not a valid method of determining whether private property has been "taken" for purposes of the Fifth Amendment. The test reveals nothing about the magnitude or character of the burden a government regulation imposes upon private property rights – this is the crux of the Fifth Amendment analysis. Instead of addressing the regulation's effect on private property, the "substantially advances" formula probes the regulation's underlying validity, and is not the proper focus for a takings analysis.

To fully grasp the impact of the *Lingle* case, we must first examine other previous takings cases in more detail. With regard to conditions involving dedication or transfer of property interests, the U.S. Supreme Court used the first prong of *Agins* in *Nollan v. California Coastal Commission*, 43 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to require that there be a "nexus" between the anticipated effects of a land use and the real property exaction. The Court required that there be an individualized determination, at least in quasi-judicial cases, with the burden being on the government, to show that there was a "rough proportionality" between the impacts of the land use proposal and the real property exaction.

Nollan and *Dolan* involved Fifth Amendment challenges to adjudicative land use exactions – government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. *Dolan* concerned a permit to expand a store and parking lot conditioned on the dedication of a portion of the property for a "greenway," including a bike/pedestrian path. In *Nollan*, a permit to build a larger residence on the beach was conditioned on dedicating an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line.

While the Court certainly drew upon the language of *Agins* in these cases, the Court in *Lingle* noted that in neither case did it actually rely upon the "substantially advances" test. "Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions – specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." Moreover, "*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings."

The Court also said that such cases involve a special application of the doctrine of "unconstitutional conditions," which provides that "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."

In *Lingle*, the Supreme Court reaffirmed that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed only under one of four theories, each well established in Supreme Court jurisprudence. A "physical" taking and a *Lucas*-type "total regulatory taking" are both categories of regulatory action that generally will be deemed *per se* takings for the purposes of the Fifth Amendment. Outside of these two relatively narrow categories, regulatory takings challenges are governed by the standards set forth in *Penn Central*. Although each standard has given rise to its own problems, they have served as the principal guidelines for resolving these claims. Examples of this include *Palazzolo v. State of Rhode Island*, 533 U.S. 606 (2001) and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), where, after failing to find a *per se* taking, the Court defaulted to the three-prong *Penn Central* analysis. Additionally, as a final form of regulatory challenge, a plaintiff may allege an uncompensated taking where a land-use exaction violates the standards set out in *Nollan* and *Dolan*.

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The *Lingle* Court went on to note that, although "our regulatory takings jurisprudence cannot be characterized as unified," the inquiries represented by *Loretto*, *Lucas* and *Penn Central* have a common touchstone:

> "Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."

Finally, the Court, foreshadowing a more in-depth discussion of this issue in *Kelo v. City of New London*, acknowledged that the "substantially advances" test would empower and might even require courts to substitute their predictive judgments for those of elected legislatures and expert agencies. Consequently, the Court abandoned the "substantially advances" analysis as a valid method of identifying regulatory takings. The Court clarified that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property must proceed under one of the other theories recognized by the court and discussed above—by alleging a physical taking; a *Lucas*-type "total regulatory taking"; a *Penn Central* taking or a land-use exaction violating the standards set forth in *Nolan and Dolan*.

Rancho Palos Verdes v. Abrams

Congress enacted the Telecommunications Act of 1996 ("TCA") to promote competition and higher quality in American telecommunications services and to encourage rapid deployment of new telecommunications technology. One of the means by which Congress sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications such as antenna towers. One of the most litigated sections of the TCA is §332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction and modification of such tower facilities. Section 332 further provides that any person who is affected by a final action or failure to act by a state or local government that is inconsistent with section 332 may commence an action in any court of competent jurisdiction within 30 days of such action or inaction.

In *Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453 (2005), Abrams owed a home in Rancho Palos Verdes, California. In 1989 Abrams obtained a permit to construct a 52.5-foot antenna on his property for amateur radio use. At the time, the city was unaware that Abrams also

used the antenna to facilitate commercial two-way radio communications (which required a conditional use permit). In 1998, Abrams sought permission to construct a second tower. During its consideration of the application, the city discovered the unauthorized commercial use. The city immediately obtained a restraining order against any further commercial use of the facility and later denied Abrams' application for a conditional use permit based on its perception that the new tower would "perpetuate adverse visual impacts" in the area.

Abrams filed suit in U.S. District Court seeking injunctive relief under §332 of the TCA and a civil rights action under 42 USC §1983 and 1988. The District Court concluded that the city's denial of the conditional use permit was not supported by substantial evidence and was essentially an act of spite by the community. It ordered the city to grant the conditional use permit. The Court also held that §332 of the TCA provided the exclusive remedy for the city's actions and refused to grant damages under §1983 and attorney's fees under §1988. Abrams appealed. The Court of Appeals for the 9th Circuit reversed and remanded the case for a determination of §1983 damages and §1988 attorney's fees.

The U.S. Supreme Court accepted the case on certiorari. The Supreme Court noted that § 1983 "means what it says" *Maine v. Thiboutot* 448 U.S. 1 (1980), and reiterated that §1983 does not provide an avenue for relief every time a state or local actor violates a federal law. The Court went on to state that a §1983 action could be maintained only where the plaintiff can demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs. Even if the plaintiff establishes this entitlement, the suit may still be defeated if the defendant can demonstrate that Congress did not intend §1983 as a remedy

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for the violation of that particular federal statute.

There is no doubt that §332 of the TCA created individually enforceable rights. The critical question for the Court was whether these rights were intended to co-exist with those rights held under §1983. Section 332 of the TCA is an express private means of redressing a wrong, and this type statutory pronouncement is usually indicative of Congressional intent to exclude the remedy from the more expansive remedies available under §1983. The Court noted that the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.

Because of the specificity of the remedy and procedure established in §332 of the TCA, the Court felt that Congress intended the provisions of §332 to be the exclusive means of redressing grievances. The Court concluded that enforcement of §332 through §1983 would distort the Congressional scheme, which provided for expedited judicial review and limited remedies created by §332.

San Remo Hotel v. City Of San Francisco

Although *San Remo Hotel v. City of San Francisco*, 125 S. Ct. 2491 (2005), concerns a land use issue, the case was disposed of on civil procedure grounds. The case presents the question of whether federal courts may craft an exception to the full faith and credit statute, 28 USC §1738, for claims brought under the Takings Clause of the Fifth Amendment.

This litigation was initiated in response to an ordinance enacted by the city of San Francisco that required payment of a $567,000 fee to convert the San Remo Hotel from a facility that provided long-term housing for elderly, disabled and lower income individuals to a tourist hotel. The plaintiffs originally filed a state court action, and then stayed it pending resolution of their federal court takings challenges, which were based on facial and as applied takings grounds. Petitioners then filed suit in federal court alleging various due process and takings violations under the Fifth and Fourteenth Amendments, and seeking damages under 42 USC §1983. The District Court held that the facial takings claim was untimely under the statute of limitations and the as-applied claim was not "ripe" because petitioners had not litigated their takings claim in state court as required by *Williamson Planning Commission v. Hamilton Bank* 473 U.S. 172 (1985).

On appeal, the 9th Circuit Court abstained from deciding the case because a return to state court inverse condemnation claim could conceivably moot the federal claim. Petitioners then returned to state court where they revived their dormant lawsuit and made additional claims under the Fifth Amendment, most importantly claiming that the regulation imposing the conversion fee did not substantially advance a legitimate governmental interest. This case was fully litigated and appealed in the California state courts, which analyzed the plaintiff's claims as a matter of state and federal constitutional law.

Following their appeal to the California Supreme Court, petitioners sought to resurrect their federal takings claim on which the 9th Circuit had decided to abstain. The District court ruled that the claim could not be heard in the federal court based upon its interpretation of 28 USC §1738, and general principles of collateral estoppel or issue preclusion. It said that the statute, enacted to implement the Full Faith and Credit Clause of the U.S. Constitution, prevented the federal courts from hearing the case, because the issue had already been fully litigated in a state court and the federal courts are required to give full faith and credit to decisions of state courts, even on matters of federal law. The Supreme Court took the case and affirmed the District Court. ■

Legal Clearinghouse

Ken Smith
Deputy Director/General Counsel

Editor's Note: This column replaces what previously ran as "Legal Notes." We will continue to provide legal summaries within this column; however, additional background and/or pertinent information will be added to some of the decisions, thus calling your attention to the summaries we think are particularly significant.

As in the past, we caution you *not* to rely solely on a summary, or any other legal information, found in this column. You should read each case in its entirety for a better understanding. "Legal Clearinghouse" will further include legal items that should be examined but may not warrant a lengthy article under "The Legal Viewpoint."

Alabama Association of Municipal Attorneys Meeting Planned

The AAMA fall conference has been scheduled for Oct. 26 – 28, 2006, at the Bay Point Marriott Resort in Panama City, FL. Although the agenda has not yet been determined, this year's meeting promises to be exciting and informative.

The fall conference begins at 3 p.m. on Thursday, Oct. 26, with a joint session for attorneys, prosecutors and judges. A reception follows the Thursday afternoon session so that you can meet informally with other municipal legal representatives. On Friday and Saturday mornings, two separate concurrent sessions will be held, one for attorneys and another for prosecutors and judges. As always, you are free to attend either session or switch between sessions as desired.

You should definitely plan to bring your family to this year's meeting. Bay Point is truly a first-class resort. Friday and Saturday afternoons are free for exploring or just relaxing. Overlooking beautiful St. Andrew's Bay, Bay Point offers top-rate golf courses, as well as a number of swimming pools and outstanding restaurants. Bay Point even has a sandy beach on the bay where you can arrange for a wide array of thrilling water sports, including wave runner rides and dolphin tours. Additionally, the resort has a marina on-site and can arrange fishing trips. Also, the Bay Point spa offers a full set of treatments options. For more information about Bay Point, visit their web site, **www.marriottbaypoint.com/index.cfm**.

I hope you will make plans now to attend the AAMA fall conference. A registration form is located within this publication or online at the League's web site, **www.alalm.org**. To make room reservations, you can call the reservations department at (800) 644-2650. Standard room rates are $119 per night. Bay View Rooms are available for $139 per night, and one-bedroom golf villas are $139 per night.

Please be sure to mention that you are with the Alabama Association of Municipal Attorneys so you will be included in our room block. AAMA can incur substantial penalties if our room block is not met.

You can also register for rooms online. Please visit the League web site, **www.alalm.org**, for online registration links. From there, you simply click on the link for the type of room you want and follow the instructions to facilitate the reservation process. You will be directed to the property's home page with the code already entered into the appropriate field. All you have to do is enter your arrival date to begin the reservation process.

Note the special AAMA rate is available for three days prior-to and for three days following the conference. However, you can only make reservations for days before or after the conference by telephone. You will have to call the Bay Point reservations department at (800) 644-2650 to make reservations for those dates.

Legal Summaries

This month, several significant decisions have been released. The U.S. Supreme Court issued a number of decisions affecting police operations, ranging from the rights of parolees to whether evidence must be excluded. The U.S. Supreme Court also released *Burlington Northern & Santa Fe Railroad Co. v. White*, a decision concerning whether an

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employer's attempt to rectify an alleged improper suspension by reinstatement and recovery of back pay eliminated retaliatory discrimination charges. The Court held that it did not, a decision with potentially far-reaching implications, depending on future interpretation and application.

The Eleventh Circuit Court of Appeals dealt with alleged religious discrimination under the Religious Land Use and Institutionalized Persons Act (RLUIPA), in ***Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County***. In making a determination that a rezoning denial did not violate RLUIPA, the court essentially equated proving RLUIPA claims to that required to prove an equal protection violation, requiring proof by the plaintiff of a similarly situated secular party that had received better treatment.

And in the area of the competitive bid law, the attorney general issued an opinion dealing with when the use of brand names is justified. The attorney general held that brand names can be used if they are intended to indicate the level of quality desired and not to exclude bidders offering other brands. This Opinion, 2006-098, also dealt with the issue of when requests for bids can be separated without violating the bid law. The League encourages employee and officials who will be dealing with these issues to read this opinion carefully.

COURT DECISIONS

Housing: In *Housing Authority of Birmingham v. Pritchett*, 927 So.2d 825 (Ala. Civ. App. 2005), the Court of Civil Appeals held that the question of whether a tenant had committed a criminal offense that justified her eviction by warning drug dealers of the presence of police officers was properly submitted to the jury.

Religious Land Use and Institutionalized Persons Act (RLUIPA): The Eleventh Circuit Court of Appeals held that a church that alleged it was improperly denied a zoning variance stated a claim under 42 U.S.C. Section 1983, but did not state a RLUIPA claim because the church failed to point to a similarly situated secular party that had received better treatment. ***Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County***, ___ F.3d ___, 2006 WL 1493825 (11th Cir. 2006).

UNITED STATES SUPREME COURT DECISIONS

Employees: In *Burlington Northern & Santa Fe Railroad Co. v. White*, ___ U.S. ___, 2006 WL 1698953 (2006), the U.S. Supreme Court held that an employee's suspension without pay could amount to retaliatory discrimination under Title VII, even if the suspension was revoked and the employee was given back pay.

Search and Seizure: The U.S. Supreme Court held that a statute requiring all parolees to submit to warrantless and suspicionless searches and seizures by any law enforcement officer at any time does not violate the Fourth Amendment. *Samson v. California*, ___ U.S. ___, 126 S.Ct. 2193 (2006)

Search and Seizure: In *Hudson v. Michigan*, ___ U.S. ___, 126 S.Ct. 2159 (2006), the U.S. Supreme Court held that the Fourth Amendment does not require exclusion of evidence seized when a police officer failed to comply with the knock-and-announce rule during the execution of a search warrant.

Courts: The Sixth Amendment allows those accused to confront and cross-examine witnesses against them. Testimonial evidence against the accused cannot be used at trial unless the witness is unavailable. In *Davis v. Washington*, ___ U.S. ___, 126 S.Ct. 2266 (2006), the U.S. Supreme Court held that statements made in the course of a police interrogation are "nontestimonial" and may be admitted into evidence if the primary purpose of the interrogation is to meet an ongoing emergency. If there is no ongoing emergency, though, statements are testimonial and barred.

CITATIONS TO CASES FROM OTHER JURISDICTIONS

Search and Seizure: The Second Circuit Court of Appeals invalidated, as a violation of the Fourth Amendment, a strip search of a female student based on a tip from another student that the girl had hidden drugs in her pants and the fact that the accused student had previous non-drug disciplinary problems. *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006).

First Amendment: The Ninth Circuit Court of Appeals upheld a Honolulu municipal ordinance banning most advertising by aircraft, finding that the ordinance is a viewpoint-neutral regulation of speech in a nonpublic forum. *Center for Bio-Ethical Reform v. Honolulu*, 448 F.3d 1101 (9th Cir. 2006.)

ATTORNEY GENERAL'S OPINIONS

Boards: A gas board incorporated pursuant to Section 11-50-310, et seq., Code of Alabama, 1975, may make monetary donations to nonprofit organizations if the board determines that the funds will be used for activities that are necessary, appropriate and consistent with the purposes for which the board was created. 2006-090.

Sales Taxes: A county commission cannot use the proceeds of sales tax revenue received under the provisions of Act 2004-325, which authorizes the county to spend the funds to maintain and improve the road system of the county, for work on a state highway. 2006-091.

Boards: Because constitutional provisions that restrict municipal authority do not apply to separately incorporated boards, the Birmingham-Jefferson Civic Center Authority,

as a public corporation, may provide an incentive bonus to employees of the authority. 2006-092.

Elections: The probate judge has no authority to include a municipal advisory referendum on the June primary election ballot. 2006-075.

Boards: A utilities board governed by section 11-50-310 of the Code of Alabama is entitled to pay its board members a fee for their services in accordance with the limitations established in either section 11-50-15 or 11-50-313, but not both. The general provision of section 11-50-313 states that the governing body of the municipality is responsible for setting the fees of the chairperson and members of the public utility board. Each municipal officer that is a board member is entitled to receive the same fee as any other citizen in the same position, as long as the board ratifies the action. The board members may receive a director's fee and/or insurance, but the total of either or both may not exceed the statutory provision of either section 11-50-15 or 11-50-313, whichever is applicable. Section 36-12-2 of the Code of Alabama mandates that the board keep accurate and detailed documentation regarding the business of the board. 2006-076.

State Licenses: An individual who has had his or her certificate of licensure or certificate of internship revoked should not be required to meet the same licensure requirements as those who have never been licensed or certified. The Board of Licensure for Professional Engineers and Land Surveyors has discretion as to whether to reissue the license or certificate and may compel the individual to meet some or all of the current requirements for licensure as evidence of his or her qualifications for reinstatement. The board should, however, treat all applicants for reissuance who are similarly situated equally. 2006-078.

Elections: For the 2006 primary election cycle, a voter may use a single application to request absentee ballots for the June 6 primary election and for the July 18 primary runoff election. Unless the law is changed, after the 2006 primary election cycle, a voter will be required to fill out one application to vote absentee in the primary election and a separate application to vote absentee in any primary runoff election, unless he or she is an individual voting pursuant to the Uniformed and Overseas Citizens Absentee Voting Act
(UOCAVA). 2006-101. NOTE: The change in the date municipal officials take office has not yet been precleared by the Justice Department. Until this is precleared, since municipal run-off elections are held less than 30 days from the date of the general election, the League feels this opinion does not apply in municipal elections.

Ordinances: Once a governing body adopts, by resolution or ordinance, the state misdemeanor set out in section 22-27-7 of the Code of Alabama as a municipal violation, the municipality may criminally prosecute people that fail to adhere to the rule. 2006-102.

Courts: A municipal judge may order the abatement of a nuisance as a condition of probation for the violation of a municipal nuisance ordinance. 2006-103. NOTE: This opinion modifies Opinion No. 2006-022.

Officers: Pursuant to section 11-54-86 of the Code of Alabama, a member of the industrial development board may not serve both as an officer or employee of the municipality and as a director on an industrial development board. As such, if a member of the industrial development board is later elected to serve on the city council, that person must choose which position he or she would like to maintain. 2006-104

Industrial Development: A county industrial development authority has statutory authority to determine whether a proposed use falls within the definition of a project as defined in section 11-92A-1(11) of the Code of Alabama. This includes the power to determine whether a proposed industrial facility within the Standard Industrial Classification code qualifies as a project. A determination by an industrial development authority that a proposed use is within the definition of a project shall be conclusive. 2006-106.

Zoning and Planning: Pursuant to Act 71 (1977), the city council of Phenix City is authorized to appoint the members of the Phenix City Planning Commission. 2006-107. NOTE: This opinion interprets a local act applicable only to Phenix City.

Bid Law: The state may issue an Invitation to Bid (ITB) with bid specifications that contain brand names, products and other offerings associated with particular products and/or services as long as the specifications are related to the use of the products and/or services and the objectives of the state.

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Legal Clearinghouse

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The state may include these particular bid specifications if they are intended only to indicate a level of quality. If the state determines that separate bid specifications are required to handle separate functions, the state may issue multiple ITBs and award separate contracts for products and/or services that run contemporaneously. To justify the narrow specifications in each ITB issued, however, the state must have a reasonable basis for the specifications that are related to the use of the products and/or services and the objectives of the state. 2006-098.

Because the city of Guntersville is a Class 7 municipality, section 11-43-12.1 of the Code of Alabama permits the city to do business with a company that is owned by the mayor when that company is the only domiciled vendor of that personal property or service within the municipality and the cost does not exceed the sum of $3,000. If the cost of the purchase of personal property or service exceeds the sum of $3,000, then the company owned by the mayor may bid on providing the personal property or service to the city. 2006-099.

Have you registered for an upcoming CMO session in your area?

See page 11 for details.

Midyear Municipal Law Seminar Registration Form

October 26-28, 2006 ♦ Bay Point Marriott Resort

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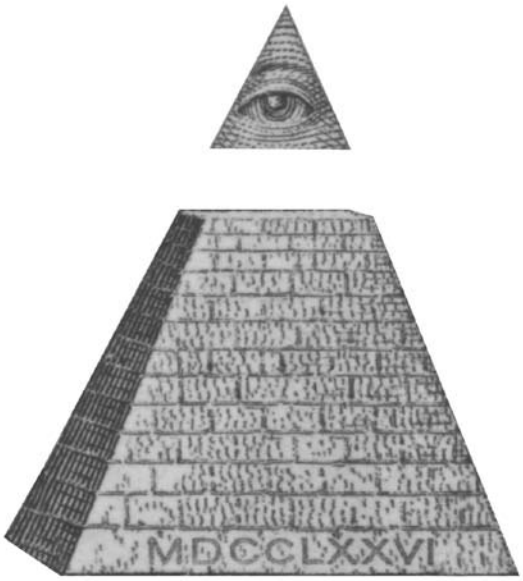

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Baseball

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Copeland, president of the Mobile City Council, said, speaking about the city's construction of the BayBears' Hank Aaron Stadium.

In Alabama, the national pastime has been drawing crowds since the state's first team, the Birmingham Coal Barons (now the Barons), first began play in 1885. Indeed, baseball is very much a part of Alabama's history and despite the fact the state has never hosted a major league team, big-name athletes like Hank Aaron, Satchel Paige, Ozzie Smith, Jose Canseco and Michael Jordan grew up or played ball here at some point.

On the fans' side, Hoover mayor Tony Petelos has been going to Barons' games his entire life. His own children have developed a liking for baseball he says, through family ballpark outings, and he enjoys the atmosphere of Barons' games now with a new appreciation.

"It's so nice to buy a hot dog and watch a game," Petelos said. "It's another activity we can have our young people go to without worrying about what they're doing."

Despite how exciting it can be for adults to watch the home team come back and win a close game at the bottom of the ninth, keeping children entertained that long can be difficult. Huntsville Stars' Director of Media Relations Bryan Neece says having a playground, arcade or similar diversion in the stadium is safer for children than being in another environment doing other activities.

"If you drop them off at the mall, who knows what's going to happen?" Neece said.

Minor league baseball has become much more than a spectator sport, and in most cases, teams and stadiums have become part of the community. Between creating jobs, bringing in new revenue and fostering civic pride, teams become embedded in municipal culture.

"Hoover wouldn't be the same without the Barons and the Met," Petelos said.

And as far as the label "minor" league ball?

"At one time it was probably used as a derogatory term," Ferguson said, "but minor league ball has been a big success story." ■

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- Dr. Bronner and his investment staff invest your monies in either fixed income investments, stocks or a combination of both. You decide how.
- Your designated beneficiary(s) is entitled to receive all remaining funds in your account in the event of your death.
- You can "catch up" contributions if you are within three years of your normal retirement age.
- If your employer pays for sick and annual leave, you may defer those monies to your RSA-1 account.
- You have very flexible withdrawal payment options available. You determine the option most favorable to you.
- You can rollover your DROP account to RSA-1 at retirement to defer federal taxes on these monies. You can then use RSA-1's flexible withdrawal options.

Remember

- There are limits on the maximum amount you may defer per year.
- All deferrals are payroll deducted.
- You must either retire or terminate employment to begin withdrawals except in extreme hardship cases.
- There are no penalties for withdrawals.
- Your tax burden will be at your current level of income, which in most cases is lower in retirement.

Why Save?

- Experts estimate you will need around 70-80% of your final income at retirement.
- People live longer than ever before. If you live to age 65, you could expect to live 20 more years. You could easily spend 1/3 of your life in retirement.
- Inflation reduces your purchasing power.
- While some expenses will decrease in retirement, others such as medical expenses could increase.

Prepared by the Communications staff of the Retirement Systems of Alabama.
To have your questions answered in "Preparing for Retirement", please address them to:
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P. O. Box 302150, Montgomery, Alabama 36130-2150

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