

THE ALABAMA MUNICIPAL JOURNAL

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Councilmember Cynthia McCollum of Madison Elected 1st Vice President, National League of Cities



Councilmember Cynthia McCollum addresses delegates attending the NLC Congress of Cities immediately after being elected 1st Vice President of the National League of Cities during the December 9 Business Session at the Congress of Cities in Reno, Nevada. Photo by Steve Schneider, NLC. **Story, page 4.**

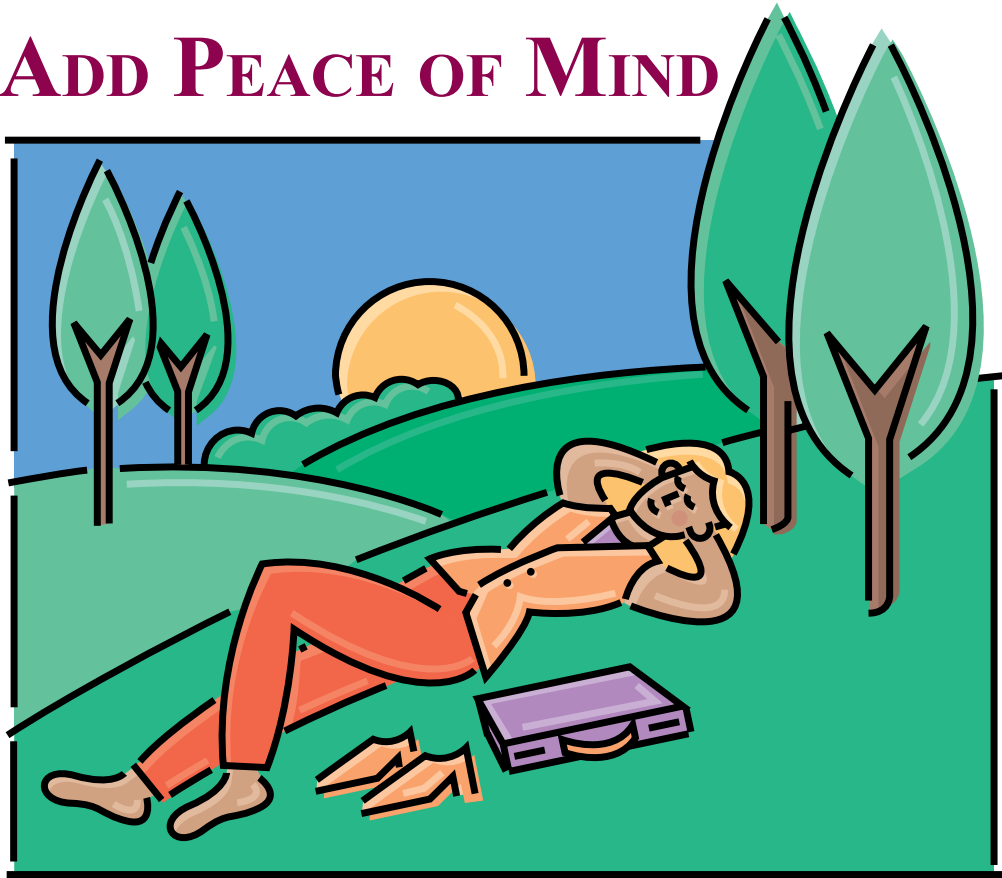
Inside:

- **Bond Financing Sources**
- **Profiles of Five Councilmembers**
- **De Novo Review of City Council Decisions to Deny Applications for Liquor Licenses**

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Cynthia McCollum Elected 1st Vice President of the National League of Cities

By Carrie Banks, Communications Director

Councilmember Cynthia McCollum of Madison was elected 1st vice president of the National League of Cities (NLC) on December 9 at NLC's annual Congress of Cities in Reno, Nevada. McCollum, who is the first municipal official from Alabama to serve as a top NLC officer and is slated to become president of the national organization in 2008, served as 2nd vice president this past year. She is only the eighth woman and the third African-American female to hold this position in the 83-year history of NLC.

McCollum is part of an elite leadership team comprised of NLC president and Indianapolis, Indiana, Mayor Bart Peterson as well as Northglenn, Colorado, Mayor Kathleen Novak, who was elected NLC 2nd vice president.

Accepting the honor, McCollum told delegates attending the Congress of Cities: "I am here because others have uplifted me. I look forward to working on the Peterson team with Bart and Karen. Much work has been done to help all of us deal more affectively with public finance, local housing challenges, emergency preparidness and immigration reform."

McCollum thanked deletages for allowing her the opportunity to serve them and her country: "I am deeply honored, full of expectations and at the same time keenly aware of the responsibilites that I assume today. The National League of Cities provides the glue that holds the strength of the American democratic process together."

McCollum served on the NLC Board of Directors from 2002 to 2004 and was a member of the NLC Advisory Council. She is the past president of the National Black Caucus of Local Elected Officials and has served on numerous NLC committees. She is a member of the

Executive Committee of the Alabama League of Municipalities.

McCollum first won election in 1989 and has served several terms both as Council President and President Pro Tem. Her public life began in 1976 as executive director of the Huntsville Girls Club, an affiliate of Girls Clubs of America. From 1985 to 1990, she worked at the New York Life Insurance Company. McCollum is currently employed by the U.S. Army Material Command Logistics Support Activity at Redstone Arsenal, Alabama, where she works in the office of



1st Vice President Cynthia McCollum with President Bart Peterson
Photo by Steve Schneider, NLC

the Chief of the Enterprise Integration Center.

McCollum's commitment to her community is exemplified by her active service on several boards and committees. She is the vice chair of the US Space and Rocket Center Foundation and is a board member of the North Alabama Gas District. She currently serves as one of five trustees on the Municipal Workers' Compensation Fund, where they manage \$500 million annually. Past board affiliations include Madison County Senior Center, Volunteer Center, Community Action Agency of Madison/Limestone Counties, Kids on the Block, and Family Services Center. She was a founding member of the Madison County, Alabama Big Brothers/Big Sisters, and the Madison Drugs Offer No Tomorrow Program.

Cynthia McCollum is a native of Huntsville, Alabama, with undergraduate degrees in psychology and sociology from Alabama A&M University and graduate studies in executive management from Emory University in Atlanta, GA. She is a graduate of the ninth Huntsville/Madison county leadership class as well as a 2002 graduate of Leadership Alabama. She is a member of Delta Sigma Theta Sorority, Inc. McCollum and her family are members of the Madison Church of Christ. ■



The President's Report

Lew Watson
Mayor of Lincoln

Bond Financing Sources

Continuing our series on bond financing for local governments this month, we will discuss the sources of loan funds available for our municipalities. Prior to this year there were two sources, investment bankers and the Department of Agriculture (USDA). That changed when the League offered a third source, AMFund. Not surprisingly, if you need money for your municipality there are many folks who want to help you borrow money. Hopefully, these articles will assist you in making an informed decision as to what is best for your municipality. This month we will look at both our League program, AMFund, and that of USDA. Next month we will examine the investment banking industry.

The first program we will discuss is our own League bond program, AMFund, which has this month completed its first year. During 2006, 11 municipalities participated in three bond closings, borrowing just under \$22 million in public improvement bonds. By sharing issuance costs and being part of bond issues of sufficient size, individual municipalities borrowing money through AMFund enjoy reduced borrowing costs and achieve attractive interest rates. Through straightforward loan documentation, the borrowing process is simplified greatly, and municipal staff time spent on paperwork is minimized. In addition, AMFund closings take significantly less time, and municipalities get the money they need quicker than is the norm with traditional financing. The program was featured in the November 2006 issue of *The Alabama Municipal Journal*, and a thorough explanation of the bond process and testimonials from program administrators and participants is available there.

Information on the League program may be obtained by going on line (www.alalm.org) and filling out the application or calling the League office and speaking with Greg Cochran, 334-262-2566. The process begins by filing your application with AMFund and mailing it to Greg Cochran at gregc@alalm.org, or Greg Cochran, Marketing Director, AMFund, P. O. Box 1270, Montgomery, AL 36102.

USDA Rural Development programs are available to support community development, infrastructure, homeownership and business development in small towns and communities throughout America. According to Steve Pelham, state director, it is often said that USDA Rural Development is the only agency of government that can literally build a town from the ground up. USDA Rural Development's mission is to increase economic opportunity and improve the quality of life in rural America. During the last six years USDA Rural Development has invested more than \$76.8 billion nationwide, with \$1.7 billion of that invested in Alabama, which has provided homeownership opportunities, supported business development, job creation, provided renewable energy alternatives and community infrastructure, including electric and telecommunication service. Municipalities that meet population criteria are eligible applicants for several USDA Rural Development programs. Some of these are identified below:

The Water and Wastewater Program provides funds to construct, maintain or expand water and wastewater services and is available to public entities with a population of 10,000 or less. The current interest rates are between 4.375 and 4.5 percent, with a maximum loan repayment period of 40 years. Some applicants may also be eligible to receive grant funds. During fiscal year 2006, six Alabama towns received loan and/or grant funds through this program: Akron, Banks, Black, Myrtlewood, Triana and Webb. In addition, the waterworks & sewer boards for the following municipalities also received funding: Ashland, Collinsville, Gordo, Gurley and Heflin.

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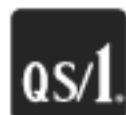
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Municipal Overview

By
PERRY C. ROQUEMORE, JR.
Executive Director

NLC Holds Successful Congress of Cities in Reno

The National League of Cities (NLC) completed a very successful Congress of Cities on December 5-9, 2006, in Reno, NV. Approximately 300 delegates and spouses from Alabama attended the convention. Alabama again had one of the largest delegations at the meeting.

The program had a number of high profile speakers with four general sessions and more than 35 comprehensive workshops, focusing on a variety of critical questions facing local officials.

In his address to conferees, New Orleans Mayor C. Ray Nagin expressed enthusiasm over New Orleans being the host city for NLC's 2007 Congress of Cities. The mayor discussed some of the exciting activities and highlights in store for the conference. Delegates also heard about the current state and future of New Orleans as he talked about rebuilding and restoration efforts. The conference in New Orleans, which is expected to draw more than 8,000 people, could generate between \$8 million and \$10 million in revenues for the city and surrounding area.

Indianapolis Mayor to Lead NLC

Indianapolis, Indiana mayor Bart Peterson was elected president of the NLC for 2007. Our own Councilmember Cynthia McCollum of Madison, Alabama, was elected 1st vice president, and Mayor Kathleen Novak of Northglenn, CO, was elected 2nd vice president by the NLC membership during the business session.

Mayor Peterson has been active nationally in efforts to underscore the important role cities play in ensuring a vibrant quality of life for citizens. He has served as NLC first and second vice president, as well as on NLC's Board of Directors. He has also chaired NLC's Institute for Youth, Education, and Families and was an Early Childhood Successes Champion. Former Indianapolis mayors Richard Lugar and William Hudnut have also served as NLC president during their tenures as the city's mayor.

Peterson said he would focus his attention during the next year on intensifying the advocacy for cities on Capitol

Hill as well as emphasizing "close to home" issues that affect the ability of local officials to govern successfully. He wants to initiate a national dialogue on the connection between media violence and increasing incidents of anti-social or violent behaviors in young people.

"I know there is a significant and growing body of research demonstrating a connection between aggressive, anti-social behavior and exposure to media violence in many children," Peterson said. "Especially with interactive simulated violence, physiological changes occur in the brains of children and adults. Most don't follow up hours of video-game violence with criminal acts, but can we ignore the connection when we have evidence of many who do, and when we see so plainly that our society is cruder and our crime rates are rising?"

Cynthia McCollum is 1st vice president of NLC, the nation's oldest and largest organization representing municipal government. She is a council member from Madison, AL, and served as NLC's second vice president in 2006. McCollum is in line to become president of NLC in 2008. For additional information, see story, page 4.

Kathleen Novak is 2nd vice president of NLC. She is mayor of Northglenn, CO. Novak, who is in line to become president of NLC in 2009, has been active in NLC since 1991. She served on the NLC Board of Directors and NLC's Advisory Council. She has also served on NLC's International Council, chaired the Leadership Training Council and the Conference Planning Committee. She also served on the Finance, Administration and Intergovernmental Relations Steering and Policy Committees. She was instrumental in the creation of the Leadership Training Certificate program.

Novak was first elected as a member of the city council in July 1991, and was elected mayor in January 2002 and then reelected in 2005. Mayor Novak is the ex-officio member of the city's planning commission, serves as the business relations coordinator, and is also the council representative to the Denver Regional Council of Governments and the Transit Alliance.

She is a member of the Colorado League of Cities, has chaired the Denver Metro Mayors Caucus and served on the board of directors of the Denver Regional Council of Governments. She is also a member of the board of directors for the Platte Valley Children's Alliance.

A Northglenn native, Novak has a master's degree in management from the University of Colorado, is an adjunct professor in the graduate school of business and is also the director of the Rocky Mountain program in the graduate school of public affairs. Novak and her husband, Warren, have five children.

Mayors Leon Smith of Oxford and Ted Jennings of Brewton serve on the NLC Advisory Committee. Mayor James Perkins of Selma will serve another year on the NLC Board of Directors.

Congratulation to all of these officials who have been selected to guide NLC for the next year. ■

Profiles of Five Councilmembers

By Niko Corley, Communications Coordinator

Though they differ in size, geographic location and economic impact, Alabama's cities and towns all have one very important, common thread – their locally elected leadership tasked with ensuring each community is working toward a viable future. Councilmembers, in particular, must work as part of a team to prepare and plan for the solvency of their municipalities. Whether they represent a large constituency of several thousand or a small conglomerate of several hundred, all have been elected to represent their community with diligence and integrity as they strive to make their municipalities the very best they can possibly be. To that end, the editorial staff of the *Alabama Municipal Journal* thought it would be interesting to interview five councilmembers from across the state, each representing a different geographical region and population – some fairly new to office; others who have been in office for many years. Here are their stories, alphabetically by last name.

Councilmember Wayne Dunkin, Priceville

Many municipal officials find their way to city hall via community service activities, and Councilmember Wayne Dunkin of Priceville is no different. A few years before Dunkin took office, Priceville's only part-time police officer had his vehicle stolen, and Dunkin helped officials track down the stolen vehicle after overhearing a conversation about the car's location. Because of his help locating the vehicle, he soon became Priceville's first auxiliary police officer and serving in that capacity made him want to take on an even larger role in city affairs.

"Through law enforcement, I got interested in other parts of the city [government]," Dunkin said.

He was soon appointed to a vacant seat on the city council for two years and then ran unopposed and won a full term. After a one-term break, Dunkin ran again and won, and is now in the middle of his fourth full term. In that time, he and the other councilmembers have been able to make a positive difference in the community he believes, with the most important thing they have done and continue to do being securing money for the city's schools.

"We like giving back to the community," Dunkin said. "We've been able to give money back to the schools and we like to see the different things the kids get to do because of it."

Dunkin is a member of the League's Transportation, Public Safety and Communications Committee, as well as a member of Priceville's Parks and Recreation Board, planning commission and sewer board. Dunkin says city revenues at this time don't allow him to attend NLC functions but he fully supports the mayor's going to these national events.

"I think the mayor needs to go to see how big cities operate," Dunkin said.

A clean community in one of the fastest growing areas of Morgan County are just two items on a long list that Dunkin says make Priceville attractive.



"We've also got seven subdivisions underway and no city property tax," both incentives, Dunkin says, for moving to Priceville.

Having earned his basic and advanced CMO's, Dunkin says he can get enough hours to keep up his continuing CMO status simply by attending the League's annual convention. The program, he says, is very beneficial to municipal officials and even though he is at the continuing level and is knowledgeable in many areas of city government, "I still try to go to as many as I can," Dunkin said.

Councilmember Jesse Matthews, Bessemer

Bessemer City Councilmember Jesse Matthews is in his third elected term, but Matthews' history of representing his community goes back much further than just his time on the council.

When the area he lived in was annexed into Bessemer, friends and neighbors needed someone to communicate their needs to the city and Matthews was urged to take on that role. For 13 years, Matthews served as community president, working with the city to address issues such as flooding in

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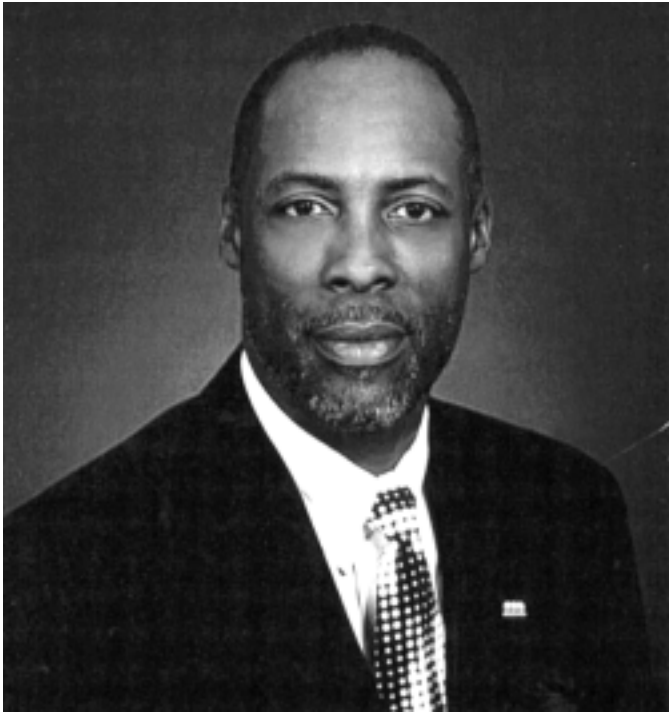


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the area. It was at that point, he says, “I started being vocal.”

The role, he says, allowed him to serve as a representative to the city on behalf of his friends and neighbors and helped prepare him for serving on the city council.

“Being community president really prepared me for office,” Matthews said.

Looking back over his nine years on the city council, Matthews says he is most proud of the installation of a sanitary sewer in his community. Having grown up in the district he represents, Matthews can relate personally to the issues his constituents’ face, such as the need for a dependable sewer system to help control storm runoff and flooding. His hard work pays off, not only for his district but also for himself, as “seeing my constituents satisfied and seeing the city progress” is the best part of the job, Matthews said.

He says the most difficult aspect of keeping a city running efficiently is keeping up the lines of communication between the councilmembers and the mayor.

“When there is no communication or it stagnates... that lack of communication hurts the community,” Matthews said.

When this happens, Matthews says it’s best to put aside differences and more important to keep the bigger picture in mind. He urges his colleagues to come together and work as a team, since everyone is working for the common good of the city.

Community development and well being are two things Matthews labors for, both through quality of life improvements and economic growth. For example, he initiated the creation of McNeil Park, Bessemer’s first park in 30 years, and has worked to get more stop signs and lighting installed in the city. Matthews says Bessemer has seen tremendous growth in recent years, something he believes can continue through building current businesses and recruiting new ones.

“We’re sitting in one of the most prosperous areas of Jefferson County because of [interstates] 459 and 20/59, and either way you’re going to hit Bessemer,” Matthews said.

Matthews serves on the League’s Executive Committee as well as its Community and Economic Development Committee. He is a member of ABC-LEO, has earned both his basic and advanced CMO certifications and has been employed with the Alabama Power Company for 22 years.

Councilmember Janet May, Montgomery

Even before being elected to the Montgomery City Council, Councilmember Janet May had worked for the people of Alabama’s capital city as a contracted consultant for mayors Folmar and Bright. May, currently in her first term on the council, says her interest in elected office pushed her to run for a seat in the state legislature, although unsuccessfully, after which she decided she would not run for office again. She changed her mind, however, after realizing she had a chance at winning a seat on the city council and ran, beating the incumbent who represented her district.

May says the highlight, for her, of being on the Montgomery City Council came when legislation pertaining to landlords and tenants was passed, something she had been involved with and interested in for some time. Serving the public, she says, is what first interested her in elected office.

“The best part of the job is being able to get things done for the people,” May said.

The most difficult aspect of her job, though, is dealing with the politics of the position.

“Once you learn the bureaucracy, serving the people is the easy part,” May said.

Having only been in office two years, May didn’t waste anytime getting her municipal official credentials and has already earned her basic CMO certification. She says the topics in the program are very helpful and meeting other councilmembers and mayors at the CMO sessions and talking with them has helped her do her job more effectively.

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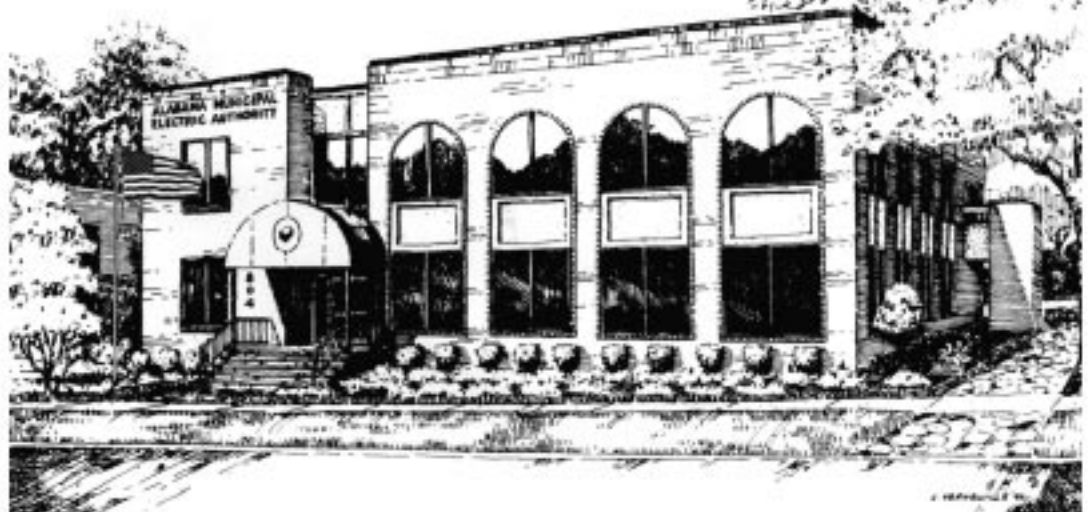
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Councilmember Debbie Quinn, Fairhope

You might say public service is in Fairhope City Councilmember Debbie Quinn's blood; it's certainly in her past. A self-described professional volunteer, Quinn, whose father was also a Fairhope City Councilmember years ago, lends much of her time to countless area nonprofits and aid groups.

Ten years ago, Quinn was appointed to the Fairhope City Council by former mayor Jim Nix, and she has spent the last decade on the council improving the quality of life for Fairhope citizens. For Quinn, who grew up in Fairhope, community heritage and history has always been important, which is evident in her work. Working with the city's planning and zoning commission, of which she was a member for seven years prior to being appointed to the city council, Quinn was able to help create a comprehensive plan for the city that simultaneously preserved the community's heritage and left room for growth and development.

"We've been able to work with the community on saving our heritage and have been able to expand the National Historic District," Quinn said.

For her, preserving the beauty and character of her hometown has proven a theme throughout her career as a public servant.

"I first got involved when I saw changes taking away pieces of Fairhope," Quinn said.

continued next page

"CMO has given me confidence in what I say," May said.

Soon after taking office, May became involved in council reorganization and went around the state to see how other cities' councils operated. The experience gave her insight as to how fellow councils in Alabama were set up and operated.

May is active in local government at the state and national levels, serving on the League's Committee on State and Federal Legislation and on NLC's Central Cities Committee, the latter being a position she was appointed to by NLC President Jim Hunt, who attended and spoke at ALM's annual convention in 2005 and 2006. May says she enjoys networking with fellow municipal officials at the state convention and at NLC functions and benefits greatly from both.

Prior to founding and running a public relations firm, Thomas-May & Associates, and her duties on the Montgomery City Council, May says her entire life used to be volunteer work. She has volunteered her time with many different groups, including the Central Alabama Fair Housing Center, the Sunshine Center, the Center for the Deaf and Blind and the YMCA. May still volunteers with a number of organizations, and between her full-time job, her position on the city council and her volunteer efforts, she says she can sometimes wear herself out.

"When I crash, I really do crash," May said.



The two toughest aspects of her job will likely ring true to municipal officials from all parts of Alabama. Quinn says it's difficult, sometimes, to weigh new growth in Fairhope against the way citizens want the city to grow, and then find a balance. Adding to that, she says building consensus on issues can be difficult, especially between different age and socioeconomic groups. The key, she says, is open dialogue.

"People want to be heard and often we don't give them that opportunity," Quinn said. "You can't prejudge an issue that comes up and you have to listen to your constituents."

Working with the citizens of Fairhope, she says, is what she enjoys the most about being on the city council.

"Meeting with them, talking about issues and feeling that you've done something is the most rewarding part of my job," Quinn said.

Having received both her basic and advanced CMO certifications, Quinn is now working on broadening her knowledge of municipal issues through the continuing CMO program. She says getting involved in the program soon after joining the city council helped her to develop a better, deeper understand of the difficulties cities must overcome.

"CMO is how I got to know people; I was a true 'greeny,'" Quinn said. "It not only helped because of the issues but personally how they affected people and cities – with the program, I didn't feel like the Lone Ranger."

But CMO wasn't the only place Quinn was able to meet people. Her list of volunteer activities is lengthy, a few of which include having been chairperson of the Eastern Shore Chamber of Commerce's Governmental Affairs Committee and being appointed to both the state's Millennium Trails Committee and Alabama's Recreational Trails Program Steering Committee. She is also chair of the Design Alabama Board and was appointed by the League to an Alabama Senate Subcommittee on Historic Cemeteries. Additionally, Quinn helped form and was the first vice-chair of the Friends of the Bon Secour National Wildlife Refuge.

Quinn is past chair of the League's Energy, Environment and Natural Resources Committee and is vice chair of the League's Committee on Finance, Administration and Intergovernmental Relations. She also currently serves on the League's Committee on State and Federal Legislation and is vice chair of NLC's Energy, Environment and Natural Resources Committee.

Quinn encourages cities to join NLC because of the opportunity to network with people from all over the country and find answers to universal problems.

"You discuss the biggest issues, work out problems and build friendships, and when something does come up, you can call those people to help you," Quinn said.

Councilmember Charles Woods, Childersburg

Elected to office in 1988, Childersburg Councilmember Charles Woods has served his municipality for many years. But even before his time on the council, Woods was a concerned citizen who liked to stay involved in issues affecting his city.

"I've been involved in public service all my life, and as for improvements in the city, a run for public office was a way to be at the table," Woods said.

Woods specifically cites maintaining fiscal responsibility in city government, extending the sewer system and developing and maintaining the industrial park as among the greatest accomplishments he and the other councilmembers have made since he's been in office. Municipalities won't get much accomplished unless city leaders work together, Woods says, and cooperation is essential to a city's progress.

"You always have to deploy diplomacy," Woods said, and "you have to respect each councilmember's opinions."

The hardest part of being on the council, Woods says, is finding the revenue to fund the projects for everyone's "wish lists." Raising the tax base is not always possible, and – when coupled with budget constraints – generating enough money for everyone's "wish list" can be difficult. Here as well, cooperation plays a big role, as "staying away from divisive politics," Woods says, helps tremendously.

Woods is a member of the League's Energy, Environment and Natural Resources Committee, the State and Federal Legislation Committee and the AMFund Board. He also works with the Southern Christian Leadership

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THE



VIEWPOINT

Contributed by James B. Rossler
Rossler & Redditt LLC

De Novo Review of City Council Decisions to Deny Applications for Liquor Licenses

Municipalities have traditionally enjoyed broad discretion when it comes to approving or disapproving licenses to sell alcoholic beverages. At the same time, the courts have traditionally had a limited role in reviewing those licensing decisions. These roles have evolved from the recognition that local municipal legislators have the superior opportunity to know the needs of their community and to determine the wisdom and propriety of the matter, and from the constitutional doctrine of separation of powers.

But this traditional balance of power changed in 1995 when the legislature provided that courts should conduct a *de novo* review of liquor licensing decisions of class 1, 2, and 4 municipalities. This article will discuss the constitutional issues involved in these legislative changes and will demonstrate that these legislative changes are an unconstitutional usurpation of local legislative authority.

The power to regulate the sale of liquor is very broad. In *Paulson's Steerhead Restaurant, Inc. v. Morgan*, 273 Ala. 235, 139 So.2d 330 (1962), a proceeding brought to compel the approval of an application for a liquor license, the Alabama Supreme Court held that:

The court will not inquire into the motives of the members of the municipal council in exercising a legislative discretion, except to examine the records of the council. *The discretion to approve or disapprove the issuance of a restaurant liquor license, conferred on the municipal governing body by Title 29, is irrevocable and is of the nature of a legislative discretion.*

Id. at 239, 139 So.2d at 334 (emphasis added).

In recognition of this broad legislative discretion, the scope of judicial review has traditionally been limited to the inquiry of whether the municipality's decision was arbitrary

or capricious, and the burden of proving that the decision was arbitrary or capricious has always been on the license applicant. For example, in *Maddox v. Madison County Commission*, 661 So.2d 224, 226 (Ala. 1995), the Supreme Court held that "the burden of proof in a case like this is on the liquor license applicant to prove that the county commission acted arbitrarily and capriciously, and only if the applicant meets the burden will the commission's decision be reversed." See also, *Hamilton v. Town of Vincent*, 468 So.2d 145, 147 (Ala. 1985) (liquor license applicant failed to carry burden of showing arbitrariness or capriciousness); *Harrelson v. Glisson*, 424 So.2d 591 (Ala. 1982) ("In *Black v. Pike County Commission* . . . we reiterated the polestar requirement of an unsuccessful applicant who wishes to reverse the local issuing authority's denial of a liquor license: the burden is upon the applicant to show that the denial was arbitrary or capricious.").

Beginning in 1995, the state legislature changed the traditional rules of judicial review, requiring that proceedings in the circuit courts to review the liquor licensing decisions of a class 1, 2, or 4 municipal governing body "shall be expedited *de novo* proceedings heard by a circuit judge without a jury." Ala. Code Section 28-1-6 (1995) (applicable to class 1 and 2 municipalities); Ala. Code Section 28-1-7 (1996) (applicable to class 4 municipalities). By requiring *de novo* review, these statutes give the ultimate decision on the licensing of businesses for the sale of alcoholic beverages to a circuit court. See *City of Mobile v. Simsiridis*, 733 So.2d 378, 381 (Ala. 1999). In doing this, the legislature has done precisely what the Supreme Court said it couldn't do in the case of *Ball v. Jones*, 272 Ala. 305, 132 So.2d 120 (1961).

continued next page

The Rule of *Ball v. Jones*

Circuit courts unquestionably have the power to determine whether the legislative actions of a city council are arbitrary or capricious. *City of Birmingham v. Norris*, 374 So.2d 854, 855-56 (Ala. 1979). This standard of judicial review has consistently been applied to zoning decisions. However, in an Act passed in 1957 that only applied to the city of Montgomery, the legislature changed this traditional standard of review and required that an appeal from a zoning decision shall be tried by the circuit court *de novo*. Act No. 57-729, approved September 20, 1957.

In *Ball v. Jones*, the constitutionality of the *de novo* review standard was challenged by the bringing of a petition for writ of prohibition. The Supreme Court granted the petition, holding that allowing *de novo* review of decisions that are committed to the legislative discretion of a municipal governing body would allow the circuit court to supplant the considered judgment of the legislative body and substitute its judgment in violation of the constitutional doctrine of separation of powers.

A trial *de novo* means that the case shall be tried in the circuit court as if it had not been tried before, and that the court may substitute its own findings and judgment for that of the lower tribunal. 272 Ala. at 309, 132 So.2d at 122. Noting that the limitation of judicial review “grows out of the character of the proceedings involved,” the Court in

Ball held:

It seems, therefore, apodictic that any right of appeal from the legislative enactment of the city to the circuit court with a trial *de novo* as provided in said § [Section] 6 was intended to clothe the circuit court with legislative power in the field of passing zoning ordinances, which is strictly a legislative function and inhibited by the stated sections of our constitution, as so well reasoned by all our cases and elsewhere. To transfer this power to the circuit court would clearly be an invasion of the legislative field and beyond the proper functions of the court. The resort to the courts in such cases is to confine the legislative power within constitutional bounds and against arbitrary, unreasonable, or unlawful action, and if there is no occasion for the exercise of that character of review, then there is no duty for the court to perform. To repeat, the enactment of zoning ordinances is a legislative and not a judicial function and the only review which the circuit court could properly undertake would be to determine whether or not the City Commission acted arbitrarily, unreasonably, or unlawfully in enacting the ordinance.

Id. at 310-11, 132 So.2d at 124.

The court then went on to hold that by requiring *de*

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novo review, “the door is thrown ‘wide open’ for a new determination on any other deducible facts as if it had originated in the circuit court.” *Id.* at 313, 132 So.2d at 126. Concluding that this wide open *de novo* review violates the separation of powers and invades the province of the local legislative body, the court concluded:

The principle which we have endeavored to exposit seems so unassailable from the standpoint of logic and sound judicial principle that we will refrain from further comment. We conclude by repeating, a city ordinance is a legislative act. The legislative function with the right of the legislative body to determine the wisdom and propriety of the matter, its superior opportunity to know the needs of the community, and the policy of legislative acts are within the power of the legislative body and the enactment and review of a zoning ordinance, except as hereinabove shown, is a thing apart from the judicial function. Hence, the statute seeking to impose upon the circuit court a non-judicial function, a matter exclusively within the power and discretion of the legislative body of the city, cannot be conferred on the judicial branch of government.

Id. at 314, 132 So.2d at 128.

Like the zoning decision at issue in *Ball*, the decision of a municipal governing body to approve or disapprove an application for a retail license to sell alcoholic beverages is a legislative function. *Ball v. Jones*, 272 Ala. at 312, 132 So.2d at 126 (“Passage of ordinances, whether zoning or not, constitute a legislative act by the city legislative body.”). Both zoning decisions and liquor licensing decisions involve choices and determinations of what type of land uses and building occupancies will be allowed at particular locations within the city. A city council is vested with wide legislative discretion to approve or disapprove of an application, and in making its informed decision a council has the superior opportunity to know the needs of the community and to judge the wisdom and propriety of the matter. Permitting *de novo* review of a council’s decision – thus allowing a court to supplant the council’s decision and substitute its own determination – exceeds the constitutional bounds established by the doctrine of separation of powers.

The only review of a municipal governing body’s denial of an application for a retail license to sell alcoholic beverages which the circuit court can properly undertake would be to determine whether or not the council acted in an arbitrary or capricious manner. This is the traditional standard of review that has been accorded these legislative decisions, and the legislature overstepped constitutional bounds when it mandated *de novo* review of liquor licensing decisions in class 1, 2, and 4 municipalities. By mandating *de novo*

review, the legislature has done what the Supreme Court said it could not do in *Ball v. Jones*.

Burden Shifting

The courts have also held that these statutes alter the traditional burden of proof by placing the burden of proof on the city. In *City of Montgomery v. Glenn*, 749 So.2d 478, 480 (Ala. Civ. App. 1999), the Court of Civil Appeals held that section 28-1-6(b)(2) places the burden of proof on the city. It is unclear why the court reached this issue, because the city of Montgomery is not a Class 2 municipality and therefore the statute does not apply to Montgomery. However, this burden altering is likewise due to be declared unconstitutional as violative of the doctrine of separation of powers. Legislative enactments are presumed to be valid. *Ball v. Jones*, 272 Ala. at 308, 132 So.2d at 122. Because of this presumption, and the deference accorded to the legislative bodies that are entrusted with making these decisions, the courts have traditionally limited the scope of their review to a determination of whether or not the legislative body acted arbitrarily or capriciously, and have traditionally placed the burden of proof on the applicant to make this required showing. *See, e.g., Maddox v. Madison County Commission*, 661 So.2d at 226 (“the burden of proof in a case like this is *on the liquor license applicant* to prove that the county commission acted arbitrarily and capriciously, and only if the applicant meets the burden will the commission’s decision be reversed.”) (emphasis in original).

By shifting the burden of proof to the municipal governing body, the legislature has infringed upon the presumption of validity that courts give to legislative enactments, and the legislature has thus overstepped the bounds of the constitutional doctrine of separation of powers. This burden shifting is akin to telling the criminal defendant that he is presumed innocent, but that he has the burden to prove his innocence. This shifting of the burden simply does not fit within our constitutional framework, and it is likewise an unconstitutional infringement upon the legislative discretion that is conferred upon municipal governing bodies.

Conclusion

These statutes are unconstitutional to the extent that they mandate *de novo* review by a circuit court and shift the traditional burden of proof to the municipal governing body. The *de novo* review mandated by these sections allow a court to supplant the informed legislative decision made by the city council and to substitute its own judgment for that of the legislative body.

By mandating this *de novo* review, the legislature has done what the Supreme Court said it cannot do in *Ball v. Jones*. ■



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WHEN LIVES ARE IN THE BALANCE
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NOTE: Legal summaries are provided 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. 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 SUMMARIES

ALABAMA COURT DECISIONS

Criminal Law: Judicial records have historically been considered public records. Assuming Alabama Criminal Justice Information Center (ACJIC) Act applies to courts, “purge,” within meaning of provision of Alabama Criminal Justice Information Center (ACJIC) Act giving individuals who believe their criminal records are inaccurate or incomplete the right to request that the original agency having custody or control of those records purge, modify, or supplement those records to the extent doing so would remedy the inaccuracy or incompleteness, is something less than complete expungement. *Mobile Press Register, Inc. v. Lackey*, 938 So.2d 398 (Ala., 2006).

Gambling: Statutory definition of gambling, for purposes of statute governing gambling offenses, was not unconstitutionally vague as applied to owners of electronic “readers,” which when integrated with servers, central database, and related computer equipment, comprised a system involving sales of Internet access in conjunction with chances to win cash prizes; readers were manufactured as slot machines and had been modified for use within the particular computerized network, and owner took the risk that its gaming venture would offend the law, such that it was not unfair to require that owner bore consequences of failure. Opportunity for free plays does not negate the element of “consideration” within meaning of statute governing gambling offenses, or obviate an inquiry into the purpose and effect of the operation as the final proof of consideration. *Barber v. Jefferson County Racing Ass’n, Inc.*, — So.2d —, 2006 WL 3462147 (Ala., 2006).

Torts Liability: Although railroad was statutorily required to maintain railroad crossing and “the streets between their rails and for 18 inches on each side,” city owed a duty to motorists to warn them of danger posed by “ditch” that had been dug across road in front of railroad

crossing if the city knew or should have known that the danger existed. *Ex parte CSX Transp., Inc.*, 938 So.2d 959 (Ala., 2006).

Torts Liability: In negligence actions in which the plaintiff seeks compensatory damages for emotional distress, Alabama follows the “zone of danger test,” which limits recovery of mental anguish damages to those plaintiffs who sustain a physical injury as a result of a defendant’s negligent conduct, or who are placed in immediate risk of physical harm by that conduct. Issue of whether elderly homeowners were placed in “zone of danger” by city’s failure to properly maintain storm-water drainage system was for jury in homeowners’ action against city to recover for mental anguish incurred as result of repeated flooding; homeowners testified that they were afraid of being injured, electrocuted, or drowned in knee-high flood waters, homeowners alleged they lost sleep whenever rain was threatened, and homeowners stated a fear that snakes or other animals might enter their homes during floods. *City of Mobile v. Taylor*, 938 So.2d 407 (Ala.Civ.App., 2005).

Zoning: City was entitled to zone extraterritorially under legislative act which expanded territorial boundaries of city’s zoning powers, though city had outgrown the population class set out in the act, as act provided that any city coming under the provisions of the act would thereafter continue to have the authority provided by the act, and Alabama Constitution provided that all general acts of local application on a population basis that were not otherwise unconstitutional would continue to apply despite changes in population. *Bradley Outdoor, Inc. v. City of Florence*, — So.2d —, 2006 WL 2578035 (Ala.Civ.App., 2006).

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UNITED STATES COURT DECISIONS

Employees: No-bypass rule, which was intended to address race discrimination by prohibiting Alabama state officials from bypassing a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles, was not narrowly tailored to redress specific types of alleged racially discriminatory practices, including lack of racial parity, and, thus, the no-bypass rule was violative of equal protection. *U.S. v. Flowers*, 444 F.Supp.2d 1192 (M.D.Ala., 2006).

Searches and Seizures: Under the Fourth Amendment, no consent is required for a well-trained narcotics-detection dog to sniff the exterior of a vehicle incident to a valid stop. Officers reasonably concluded that defendant's consent to search of his vehicle included consent to a canine search of the interior of the vehicle; although he was fully aware of the dog's presence for some time before the canine search began, defendant did not seek to limit the area that could be searched or request that the search be discontinued, and fact that defendant knew officers were searching for drugs allowed them to infer that his consent included consent to search in places in which narcotics could reasonably be hidden. *U.S. v. Woods*, 445 F.Supp.2d 1328 (M.D.Ala., 2006).

DECISIONS FROM OTHER JURISDICTIONS

Civil Rights: Unincorporated association is not a "person" within the meaning of Section 1983 protecting citizens of the United States or other person within the jurisdiction thereof, and, thus, the association is not entitled to bring a claim under Section 1983; while the Dictionary Act of 1871 extended the meaning of "person" to include corporations and municipalities, it did not do the same for unincorporated associations. *Lippoldt v. Cole*, — F.3d —, 2006 WL 3200864 [C.A.10 (Kan.), 2006].

Civil Rights: Officers who grabbed female resident by front of tank top during execution of search warrant, jerked her through door opening, ripped her shirt and refused to allow her to change it for several hours, and pointed guns at her were not entitled to qualified immunity at summary judgment stage in resident's Section 1983 claim alleging excessive force; resident was complying with search, and law was sufficiently clearly established to place reasonable law officer on notice that using this type of force was unlawful. *Hansen v. Schubert*, — F.Supp.2d —, 2006 WL 2792819 (E.D.Cal., 2006).

Criminal Law: The Fourth Amendment did not require police officers, who had a wife's consent to search a couple's home, to ask the husband how he felt about a search before they arrested him and removed him from the scene. Wife's consent to allow officers to search the residence she shared

with her husband was valid, even though husband did not also give consent; before the search was conducted husband was arrested in the house based on probable cause that he committed domestic abuse, he was subsequently removed from home, and was not asked whether he also consented to the search. *U.S. v. DiModica*, 468 F.3d 495, [C.A.7 (Wis.) 2006].

Criminal Law: A statement that is properly determined to be a business record is not testimonial and not subject to Confrontation Clause requirements, since business records cannot be made in anticipation of litigation or include observations made by law enforcement personnel. *U.S. v. Feliz*, 467 F.3d 227 [C.A.2 (N.Y.), 2006].

Discrimination: Sufficient evidence existed for a reasonable jury to find that a nursing home cook diagnosed with Hepatitis C was fired in violation of the American's with Disabilities Act because she was "regarded as" disabled by her employer. *E.E.O.C. v. Heartway Corp.*, 466 F.3d 1156 [C.A.10 (Okla.), 2006].

First Amendment: Statute regulating protests at funerals was predominantly content-neutral, qualifying for First Amendment analysis under intermediate scrutiny standard, even though statute was admittedly enacted in reaction to single church's practice of harassing funeral attendees with messages insulting homosexuals or homosexuality; statute applied to protests advancing speech of any kind, and had content-neutral goal of preventing interference with funerals and protecting attendees from hearing any unwanted messages. *McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D.Ky., 2006).

ATTORNEY GENERAL'S OPINIONS

Utilities: A municipality may not discontinue water service to a customer that is two months or more in arrears for nonpayment of sewer fees when the water service is not owned by the municipality, but a separate entity governed by a board of directors. Remedies available to the municipality, through properly enacted ordinances, include discontinuance of sewer service, criminal prosecution or a lien against the property. 2007-013

Competitive Bid Law: Section 11-102-1 of the Code of Alabama supports the right of a municipality to make purchases through the purchasing cooperative contained in Section 41-16-51(a) of the Code, but does not affect the right of an Emergency Management Agency to make such purchases. There is no authority for entities covered by the Competitive Bid Law to make purchases through a purchasing cooperative other than the one sponsored by NACo as listed in Section 41-16-51(a)(16) of the Code of Alabama. 2007-011

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Bond Financing Sources — continued from page 5

Community Facilities program funds are available to nonprofits and public bodies serving a population of 20,000 or less. Funds may be used to improve or construct public facilities. Examples include schools, libraries, medical facilities, town halls, public buildings and community centers, as well as public services such as fire and rescue facilities and equipment. The current market rate is 4.125 percent, with repayment terms of up to 40 years possible. Some applicants may also be eligible to receive grant funds. More than \$1.6 million in community facility loans and grants were awarded to the following municipalities during fiscal year 2006: Louisville (*firetruck*); Detroit (*renovate a portion of city hall to be used as a medical clinic*); Rutledge (*pumper/tank truck*); Hartford (*improvements to police department/community center*); Hayneville (*backhoe*); Brookside (*municipal complex*); and Brantley (*ambulance*).

USDA Rural Development's business programs increase rural job opportunities, facilitate the development of rural businesses and improve economic development. Cities and towns with a population of less than 50,000 may submit applications for Rural Business Opportunity Grants, Rural Business Enterprise Grants, and the Intermediary Relending Loan Program. These loan and grant funds are not directly available to businesses or individuals. The financial resources of these business programs are often leveraged with those of other public and private credit source lenders to meet business and credit needs in underserved areas. The Intermediary Relending Program provides low-interest loans to establish local revolving funds for rural business activities and development. Funds may be used to assist existing or new businesses. This 1 percent loan, with a 30-year repayment, is available to eligible cities and towns, as well as nonprofits. Rural Business Opportunity Grants may be used to provide technical assistance (training and economic planning) for businesses, entrepreneurs and economic development officials in rural areas. Rural Business Enterprise Grants are used to finance and facilitate the development of small and emerging private business in rural communities. Funding may be used for working capital, real estate, infrastructure, equipment or revolving loan funds. Ozark (*assist existing business*) and Enterprise (*business incubator expansion*) received grants during FY 06.

"Our role is to support and empower local initiative, both public and private. USDA Rural Development programs are used to support vibrant downtowns; construct or make improvements to health care facilities, municipal buildings,

water and wastewater systems and community and day care facilities," Pelham said. "Our programs also assist with First Responder Initiatives – fire trucks, ambulances, police vehicles and emergency centers."

Information on all USDA Rural Development programs and office locations are available on the web at www.rurdev.usda.gov/al, or you may call 334-279-3400. USDA Rural Development has been an exhibitor at the League's annual convention and plans for their agency to be represented at next year's tradeshow as well.

Next month, the private sector. ■

Councilmember Charles Woods

Continued from page 14

Conference and the NAACP; is president of the Alabama Black Caucus of Local Elected Officials; treasurer of the World Conference of Mayors; and is president of the Phyllis Wheatley Community Center in Childersburg.

Both the NLC gatherings and the annual League convention are beneficial to mayors and councilmembers, Woods believes. Whether it's learning about municipal issues on a national level or roundtable discussions with other representatives from Alabama's cities and towns, NLC and League functions provide municipal officials with forums for exchanging ideas. Here in Alabama, Woods credits the League's CMO program with helping municipal officials learn their role in city government and guiding them to prepare their cities for growth, in addition to working together to be effective. "People...can't work independent of each other [in city government]," Woods says, adding "when we come to the table to work for the people there needs to be a oneness." Woods says he has enjoyed taking part in the CMO program and looks forward to there being more CMO sessions for officials already having completed the program.

"I've gotten my basic, advanced, continuing; I'm just waiting on them to announce the master's [CMO]," Woods said. ■

Public Works Bid Law: A contract by the Water and Sewer Authority to install a main sewer outfall line must be bid under Section 39-2-2 of the Code of Alabama, where the project in question will be paid for with public funds by waiving the fees to which the authority is entitled. 2007-007

ETHICS COMMISSION ADVISORY OPINIONS

AO No. 2006-018: A newly-elected member of the County Board of Education may continue to serve as a night school tutor for the school system subsequent to her taking her seat on the board; provided, the conditions of her employment as a night school tutor do not change upon her taking her seat; and, that she not vote, attempt to influence, or in any way participate in any board actions affecting the night school program or the distribution of the grant used to fund the night school program that affect her differently than all other night school tutors.

AO No. 2006-019: A Program Specialist with the Office of Adult Protective Services for the State Department of Human Resources may teach parenting, anger management, domestic violence and alternative behavior classes to clients recommended by the local court system, attorneys and local clergy, when this is not part of her job responsibilities with the Department of Human Resources (DHR), where there is no overlap between her outside

employment and any services offered by the Department of Human Resources, and where there is no potential that DHR clients would be referred to her private business as clients; provided, that all activities relating to this employment are done on her own time, whether after-hours, weekends, etc.; and, that there is no use of any public equipment, time, materials, human labor or other public property under her discretion or control to either assist her in obtaining the opportunities or in performing the functions of the outside employment.

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Joe L. Kiker

Joe L. Kiker, former mayor of Lake View, died May 11, 2006. Kiker was the first mayor of Lake View, serving from April 1998 until May of the following year. He was instrumental in the municipality's founding and worked to create the city's planning commission and governmental utility services corporation.

Douglas N. Bowman

Douglas N. Bowman, former Clio councilmember, died July 26, 2006, at the age of 84. Bowman served on the city council from October of 1996 until he moved from his district and had to resign in August of 1998.

Joseph P. "Joe" Dark

Joseph P. "Joe" Dark, former mayor of Sylacauga, died August 8, 2006. He was 97. Dark, a three-time mayor, also served on Sylacauga's city council. During his time as mayor, Dark promoted education and industrial development in the city. He was a Mason and a Shriner and was a member of the Exchange Club and the Chamber of Commerce. Dark was also on the board of the First National Bank and was a Boys Club board member for 25 years.

Harold J. Gayle

Harold J. Gayle, former mayor and councilmember of Warrior, died September 1, 2006, at the age of 84. Gayle practiced dentistry in Warrior for 47 years and served several terms on the city council, from 1962-1969 and again from 1984 until 1988. In between those terms on the council he served as Warrior's mayor, from 1972-1984. Gayle, an Army Air Corps veteran, was active in the Warrior Lions Club and served on the board of the Warrior Savings Bank.

Guy Thompson

Guy Thompson, former mayor of Opelika, died September 13, 2006. He was 88. Thompson served as a city commissioner from 1972 until 1986 and was elected Opelika's first mayor in 1986, serving until 1988. He played a crucial role in the creation of the Alabama Municipal Electric Authority and is recognized for his involvement in the building of a U.S. 280 extension that linked Opelika with I-85.

Ed Blair

Ed Blair, Heflin city councilman, died September 27, 2006. He was 63. Blair was elected in 2004 and had two years remaining in his term.

John H. Smith

John H. Smith, former mayor of Prichard, died September 30, 2006. Smith served two terms as Prichard's mayor, from 1980 until 1988. Smith had served as president of the Alabama Conference of Black Mayors, secretary-general of the World Conference of Mayors and chairman of the Alabama Republican Council before his death. Before becoming Prichard's mayor, Smith was a field operations supervisor for the U.S. Census Bureau.

Jack R. Hancock

Jack R. Hancock, former Scottsboro city councilman, died October 12, 2006. He was 75. Hancock served three terms on the city council, from 1972-1976 and from 1978-1986. He was a Korean War veteran and, along with his wife, owned and operated an antique store in Scottsboro.

Sam Slade

Sam Slade, former Eufaula mayor, died October 23, 2006, at the age of 86. Slade served as mayor of Eufaula from 1988-1992. He was a World War II veteran and was named one of *The Eufaula's Tribune's* "10 Good Citizens" in 1987. While serving as mayor, Slade worked to improve the city's wastewater system and worked to raise awareness of environmental issues, helping to implement his city's recycling program and tree planting programs. He was also past vice president and director of the Eufaula Chamber of Commerce and past president of the Eufaula Lions Club.

Joe Wallace

Joe Wallace, former mayor and councilman of Linden, died November 28, 2006. He was 83. Wallace served on the city council from 1956 until 1970, when he was appointed to fill the unexpired mayoral term of the late T. Wilmer Shields. Wallace owned and operated Wallace Furniture Company and Marengo Finance Company. He was a U.S. Army veteran and volunteered with the Linden Board of Education, the Veterans of Foreign Wars, the American Legion, the Civitan Club and the Marengo Nursing Home Board.

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