



The Alabama Municipal JOURNAL

December 2010

Volume 68, Number 6

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A Message from the

Editor



The final days of 2010 are quickly approaching and so, too, is the close of the League's 75th Anniversary. Throughout this special tribute year, we've made a concerted effort to educate you on the history of the Alabama League of Municipalities – the organization that's officially represented Alabama's cities and towns and the interests of local government since 1935. For me personally, this year has been akin to an incredible treasure hunt as Perry and I researched numerous old files and publications, sorted and identified stacks of photos and dug through boxes of random stuff in an effort to document the League's history for the first time. What we achieved was a 136-page historical publication that was distributed to all delegates attending the 2010 League Convention in Mobile and is now on record in the Alabama Department of Archives and History. In addition, Ken Gabehart, the League's videographer, and I spent hours developing and editing a 24-minute documentary on the League's history which was shown during the annual convention and is also available through our website at www.alalm.org as well as through YouTube at www.youtube.com/watch?v=EeZiYwzkrh4. A copy of the documentary is also on file at the Department of Archives and History. I'm extremely proud of both projects and am pleased that we've now preserved our association's fascinating story (it really is!) for future generations.

This year has not been without its bittersweet moments. As you know, Perry Roquemore, who has been with the League since 1974 and has served as Executive Director since 1986, announced in November that he will be retiring immediately following the League Convention this spring. For an organization that has only had three executive directors in its 75-year history, Perry's decision is significant. However, the League has provided outstanding service to its membership since its inception – and that will certainly continue as the organization and staff adjusts to new leadership in the coming year.

Another significant change on tap for early 2011 is the League's website. For the past month, Karl Franklin, the League's graphic artist, has been working on creating a new design with a more user-friendly format and expanded features. We hope to launch this project in the next few weeks and look forward to your feedback! In addition to a revised website, we are also upgrading the League's headquarters to provide additional office



Executive Director Perry Roquemore surveys the office expansion project at League headquarters (November 6, 2010).

space. As the League has brought more services and functions in-house (such as Loss Control and IT), the staff has grown to accommodate those additional demands. By the beginning of the new year, we should have sufficient work space for everyone.

Be sure to read President Charles Murphy's column this month for a complete list of the members of the Alabama Legislature. As you know, there was significant change following the November 2nd elections. I also encourage you to flip to page 22 and meet the League's Finance Department. These folks do an outstanding job on behalf of the organization and its membership!

Merry Christmas to the entire League family!

Carrie

The President's Report

Charles Murphy • Mayor of Robertsdale



Preparing for the 2011 Legislative Session: Contact your Representatives Now

As you well know, the November 2nd elections resulted in an unprecedented sweep of Alabama's state government. For the first time in 136 years, every constitutional office, as well as both the state Senate and House, will be held by Republicans when lawmakers meet on January 11th for their organizational session, and all but one Alabama Congressional District will be represented by a Republican when Congress convenes next month.

The League congratulates the following local government officials who won their races: Martha Roby, Councilmember Montgomery, will now represent Congressional District 2 in Washington, D.C.; Councilmembers Bill Holtzclaw of Madison and Dick Brewbaker of Pike Road were elected to Alabama Senate Districts 2 and 25; Mayor and League Past President Dan Williams of Athens was elected to Alabama House District 5; Mayor Kurt Wallace of Maplesville was elected to House District 42; and former and current Councilmembers Mike Jones of Andalusia and Napoleon Bracy of Prichard were elected to House Districts 92 and 98.

Since its inception, the Alabama League of Municipalities has maintained a very good relationship with the Alabama Legislature and looks forward to working with our state and congressional representatives during the next legislative session. That being said, it's important that we, as local officials, start making contacts with our state officials now. Please contact your Representatives and Senators, both incumbents and newly elected legislators, and begin communicating with them regarding issues facing municipal government. Keep in mind that the League is nonpartisan and does not contribute to political campaigns. Our relationship with state and congressional officials is maintained through a strong, united voice. After all, elected officials at the local, state and national levels all work for the same constituents; therefore, a continual dialogue is necessary and beneficial for all the people of Alabama. Results of the November 2nd election are listed below.

Statewide Officers

Governor: Robert Bentley (R)
Lt. Governor: Kay Ivey (R)
Attorney General: Luther Strange (R)
Secretary of State: Beth Chapman (R)
Treasurer: Young Boozer (R)
Ag Commissioner: John McMillan (R)
State Auditor: Sam Shaw (R)

Supreme Court 1: Kelli Wise (R)
Supreme Court 2: Mike Bolin (R) Incumbent
Supreme Court 3: Tom Parker (R) Incumbent
Civil Appeals: Tommy Bryan (R)
Criminal Appeals: Jim Main (R)
PSC Place 1: Twinkle Cavanaugh (R)
PSC Place 2: Terry Dunn (R)
Congressional Dist 1: Jo Bonner (R) Incumbent
Congressional Dist 2: Martha Roby (R)
Congressional Dist 3: Mike Rogers (R) Incumbent
Congressional Dist 4: Robert Aderholt (R) Incumbent
Congressional Dist 5: Mo Brooks (R)
Congressional Dist 6: Spencer Bachus (R) Incumbent
Congressional Dist 7: Terri Sewell (D)

Alabama State Senate

22 Republicans, 12 Democrats, 1 Independent

SD1 Tammy Irons (D)
SD2 Bill Holtzclaw (R) CM Madison
SD3 Arthur Orr (R) Incumbent
SD4 Paul Bussman (R)
SD5 Greg Reed (R)
SD6 Roger Bedford (D) Incumbent
SD7 Paul Sanford (R) Incumbent
SD8 Shadrack McGill (R)
SD9 Clay Scofield (R)
SD10 Phil Williams (R)
SD11 Jerry Fielding (D)
SD12 Del Marsh (R) Incumbent
SD13 Gerald Dial (R)
SD14 Cam Ward (R)
SD15 Slade Blackwell (R)
SD16 Jabo Waggoner (R) Incumbent
SD17 Scott Beason (R) Incumbent
SD18 Rodger Smitherman (D) Incumbent
SD19 Priscilla Dunn (D) Incumbent
SD20 Linda Coleman (D) Incumbent
SD21 Gerald Allen (R)
SD22 Marc Keahey (D) Incumbent
SD23 Hank Sanders (D) Incumbent
SD24 Bobby Singleton (D) Incumbent
SD25 Dick Brewbaker (R)
SD26 Quinton Ross (D) Incumbent
SD27 Tom Whatley (R)
SD28 Billy Beasley (D)

SD29 Harri Anne Smith (I) Incumbent
SD30 Bryan Taylor (R)
SD31 Jimmy Holley (R) Incumbent
SD32 Tripp Pittman (R) Incumbent
SD33 Vivian Figures (D) Incumbent
SD34 Rusty Glover (R) Incumbent
SD35 Ben Brooks (R) Incumbent

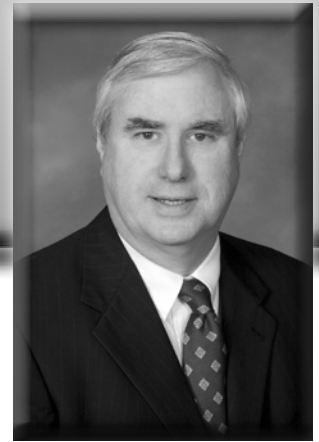
Alabama House of Representatives
61 Republications, 44 Democrats

HD 1 Greg Burdine (D)
HD 2 Lynn Greer (R)
HD 3 Marcel Black (D) Incumbent
HD 4 Micky Hammon (R) Incumbent
HD 5 Dan Williams (R)
HD 6 Phil Williams (R) Incumbent
HD 7 Ken Johnson (R)
HD 8 Terry Collins (R)
HD 9 Ed Henry (R)
HD 10 Mike Ball (R) Incumbent
HD 11 Jeremy Oden (R) Incumbent
HD 12 Mac Buttram (R)
HD 13 William Roberts (R)
HD 14 Richard Baughn (R)
HD 15 Allen Farley (R)
HD 16 Daniel Boman (R)
HD 17 Mike Millican (D) Incumbent
HD 18 Johnny Mack Morrow (D)
HD 19 Laura Hall (D) Incumbent
HD 20 Howard Sanderford (R) Incumbent
HD 21 Jim Patterson (R)
HD 22 Wayne Johnson (R)
HD 23 John Robinson (D) Incumbent
HD 24 Todd Greeson (R) Incumbent
HD 25 Mac McCutcheon (R) Incumbent
HD 26 Kerry Rich (R)
HD 27 Wes Long (R)
HD 28 Craig Ford (D) Incumbent
HD 29 Becky Nordgren (R)
HD 30 Blaine Galliher (R) Incumbent
HD 31 Barry Mask (R) Incumbent
HD 32 Barbara Boyd (D) Incumbent
HD 33 Ron Johnson (R) Incumbent
HD 34 Elwyn Thomas (R) Incumbent
HD 35 Steve Hurst (D) Incumbent
HD 36 Randy Wood (R) Incumbent
HD 37 Richard Laird (D) Incumbent
HD 38 Duwayne Bridges (R) Incumbent
HD 39 Richard Lindsey (D) Incumbent
HD 40 K. L. Brown (R)
HD 41 Mike Hill (R) Incumbent
HD 42 Kurt Wallace (R)
HD 43 Mary Sue McClurkin (R) Incumbent
HD 44 Arthur Payne (R) Incumbent
HD 45 Owen Drake (R) Incumbent
HD 46 Paul DeMarco (R) Incumbent
HD 47 Jack Williams (R) Incumbent
HD 48 Greg Canfield (R) Incumbent

HD 49 April Weaver (R)
HD 50 Jim McClendon (R) Incumbent
HD 51 Allen Treadaway (R) Incumbent
HD 52 John Rogers, Jr. (D) Incumbent
HD 53 Demetrius Newton (D) Incumbent
HD 54 Patricia Todd (D) Incumbent
HD 55 Rod Scott (D) Incumbent
HD 56 Lawrence McAdory (D)
HD 57 Merika Coleman (D) Incumbent
HD 58 Oliver Robinson (D) Incumbent
HD 59 Mary Moore (D) Incumbent
HD 60 Jaundalynn Givan (D)
HD 61 Alan Harper (D) Incumbent
HD 62 John Merrill (R)
HD 63 William Poole (R)
HD 64 Harry Shiver (D) Incumbent
HD 65 Elaine Beech (D) Incumbent
HD 66 Alan Baker (R) Incumbent
HD 67 Darrio Melton (D)
HD 68 Thomas Jackson (D) Incumbent
HD 69 David Colston (D)
HD 70 Chris England (D) Incumbent
HD 71 Artis McCampbell (D) Incumbent
HD 72 Ralph Howard (D) Incumbent
HD 73 Joseph Hubbard (D)
HD 74 Jay Love (R) Incumbent
HD 75 Greg Wren (R) Incumbent
HD 76 Thad McClammy (D) Incumbent
HD 77 John Knight (D) Incumbent
HD 78 Alvin Holmes (D) Incumbent
HD 79 Mike Hubbard (R) Incumbent
HD 80 Lesley Vance (D) Incumbent
HD 81 Mark Tuggle (R)
HD 82 Pebblin Warren (D) Incumbent
HD 83 George Bandy (D) Incumbent
HD 84 Berry Forte (D)
HD 85 Dexter Grimsley (D)
HD 86 Paul Lee (R)
HD 87 Donny Chesteen (R)
HD 88 Paul Beckman, Jr. (R)
HD 89 Alan Boothe (D) Incumbent
HD 90 Charles Newton (D) Incumbent
HD 91 Barry Moore (R)
HD 92 Mike Jones (R)
HD 93 Steve Clouse (R) Incumbent
HD 94 Joe Faust (R) Incumbent
HD 95 Steve McMillan (R) Incumbent
HD 96 Randy Davis (R) Incumbent
HD 97 Yvonne Kennedy (D) Incumbent
HD 98 Napoleon Bracy (D)
HD 99 James Buskey (D) Incumbent
HD 100 Victor Gaston (R) Incumbent
HD 101 Jamie Ison (R) Incumbent
HD 102 Chad Fincher (R) Incumbent
HD 103 Joseph Mitchell (D) Incumbent
HD 104 Jim Barton (R) Incumbent
HD 105 Spencer Collier (R) Incumbent

Municipal Overview

Perry C. Roquemore, Jr.
Executive Director



Department of Justice Approves New Election Law

The 2010 elections on the state and national level have been completed. The League congratulates the winners and wishes them well as they prepare to lead our state and nation.

For the first time in our lifetime, Republicans will control both houses of the Alabama Legislature with strong majorities in each house. It is very important that all municipal officials contact their Representatives and Senators, both incumbents and newcomers, and begin a dialogue with them on the issues facing municipal government.

During the 2010 Regular Session, the Legislature passed HB 161 (Act 2010-687). This Act, which makes a number of changes to municipal election laws, has now been precleared by the Justice Department, meaning that it applies to future municipal elections. Ken Smith has written the excellent article below which discusses these changes.

Recounts

Section 11-46-55.1, Code of Alabama, 1975, establishes the recount procedures in municipal elections. This provision gives individuals with standing in municipal elections the authority to petition for a recount of the municipal election returns. Before the passage of the Act, however, no provision of Alabama law allowed the ballot box to be opened to conduct the recount. Instead, Section 11-46-46 set out two reasons for opening a municipal ballot box. First, a ballot box could be opened in the event of an election contest. Second, the box could be opened to canvas the results in a case where no certificate of the results of the election was returned by the election officials. This provision did not address opening the ballot box in order to conduct a recount. Additionally, Section 17-9-38 provided a third possible reason for opening the ballot box: in the event of a grand jury investigation into the election.

In Opinion 2003-30, the Attorney General ruled that because the statutes in existence at the time did not provide for reopening the ballot box for a recount, the box could only be opened for one of the three reasons

provided above. This meant that in order for election officials to conduct a recount, they often had to obtain a court order before opening the ballot box. Act 2010-687 amends Section 11-46-46 to allow the opening of a ballot box for the purpose of conducting a recount as provided by law. The Act also amended Section 11-46-55.1 to remove language that provided that the recount provision set out therein did not apply to elections conducted using electronic voting devices. This means that the procedures set out in Section 11-46-55.1 apply in all municipal elections, even those using electronic voting.

Provisional Ballots

The Act also corrects an inconsistency in the time for canvassing municipal election returns. Under Title 17, the board of registrars has until noon seven days after the election to return the provisional ballots. Title 11, the municipal election law, stated that the results must be canvassed BY noon seven days after the election. The Act clarifies this conflict by providing in section 11-46-55 that the results must be canvassed starting AT noon seven days after the election.

There are two exceptions to this. A municipal governing body may canvass the results before noon seven days after the election if:

- There were no provisional ballots cast in the election, or
- The board of registrars has returned the provisional ballots early.

In either of these cases, the municipal governing body may canvas the results at any regular or special called meeting held before the Tuesday seven days after the election. The Act also eliminates provisions of the Alabama Code related to challenged ballots that were overlooked when challenged balloting procedures were repealed and replaced with provisional voting in 2004.

Official Qualifications

Section 11-46-25(g) was amended to provide that a person must be a qualified elector at the time they qualify to run for office, rather than merely certifying

that they will become a qualified elector by the time of the election. This will eliminate the problems that arise when a municipality learns on election day that a person who qualified to run for office is not eligible. By that time, expenses have been incurred because ballots have been printed. Further, absentee ballots have often been returned casting votes for that person. Now, the person must be a qualified elector at the time he or she files qualification papers to run for office.

Ballots

Section 11-46-25(h) was amended to provide that if a candidate withdraws from a municipal election where electronic tabulators are used, the individual's name shall be removed in accordance with the manufacturer's guidelines.

Absentee Officials

The Act also corrects an inconsistency in the number of officials who are needed to count absentee election ballots in cities with populations above 10,000. Title 17 provides that municipalities must use "one inspector and at least three clerks," while a provision in Title 11, Section 11-46-27(c), required "three inspectors, two clerks, and a returning officer." The Act makes these provisions consistent. Municipalities with populations above 10,000 now must appoint "one inspector and at least three clerks" to tabulate the absentee ballots.

Compensation of Absentee Elections Manager

The Act amends Section 11-46-57 to make the compensation of the municipal absentee elections manager (the city clerk) optional, rather than mandatory. A city clerk serving as the municipal absentee elections manager was prohibited from receiving additional compensation for performing this duty until 2006, when this prohibition was removed in an elections omnibus bill passed by the legislature.

Rather than restoring the prohibition on providing additional compensation to the clerk, the Act now allows the municipal governing body to decide whether to compensate the clerk additionally for serving as the municipal absentee elections manager. The Act also provides that if the municipality does provide additional compensation for this, they may compensate the clerk in any amount or manner the council deems appropriate.

Election Officials

A codification error had resulted in some confusion regarding who was prohibited from serving as an election official. The Act corrects this technical error and makes it clear that the municipal election officials serving at the polling place on election day cannot be municipal elected officials or related to the second degree of kinship to any candidate who is running for municipal office. These provisions are codified in Section 11-46-27.

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The Legal Viewpoint

By Ken Smith
Deputy Director/ General Counsel



Vox Populi - Referenda and Citizen Petitions

Referenda

The League is often asked if a municipality can submit non-binding, or even binding, questions to the voters. The Attorney General has consistently ruled that a municipality may only call for an election if it authorized to do so by legislative authority. In numerous opinions, the Attorney General has said a municipality may not hold an advisory election in the absence of statutory or charter authority. The cost of holding these elections is not a proper expenditure of city funds. The Attorney General has also disapproved submitting questions to the voters at the general election so that the cost is negligible.

Essentially, these rulings mean that the council cannot agree to be bound by the vote of the people unless the election is allowed by statute, the constitution, or charter power. This would be in improper delegation of the council's legislative power. A summary of the Opinions on this issue addresses most of the questions that arise in this area:

- A city may not allocate and spend funds in order to hold non-binding city-wide referendum on the question of a 1% sales tax increase. AGO 1982-198 (to Hon. George A. Monk, February 16, 1982).
- A city may not sponsor and hold a non-binding referendum using city employees and officials to work on the election, even if the cost of the referendum is paid for with private funds. AGO 94-00001.
- A private group may conduct a non-binding referendum for a municipality. The municipality may not participate other than as private citizens. The council cannot agree to be bound by the referendum. AGO 97-00257.
- A city may not sponsor and hold a non-binding referendum using city employees and officials to work on the election, even if the cost of the referendum is paid for with private funds. AGO 94-00001.
- A private group may conduct a non-binding referendum for a municipality. The municipality may not participate other than as private citizens. The council cannot agree to be bound by the referendum. AGO 97-00257.
- The probate judge has no authority to include a municipal advisory referendum on a primary election ballot. AGO 2006-075.

• A city council may not make zoning in a particular district subject to a referendum of the residents. AGO 91-00262.

Similarly, Section 212 of the Alabama Constitution, 1901 provides that, "The power to levy taxes shall not be delegated to individuals or private corporations or associations." This prohibits the council from making the levy of a tax subject to a referendum without specific authority from the legislature.

In Opinion of the Justices, 251 So.2d 739 (Ala. 1971), the Alabama Supreme Court interpreted this provision to mean that the public has created a legislative department for the exercise of the legislative power, including the power of taxation. The Court held that the legislature can't relieve itself of the responsibility. In Opinion of the Justices, 251 So.2d 744 (Ala. 1971), the Court further held that this Section prevents holding public elections on tax issues, unless authorized by the Constitution.

Citizen Petitions

The First Amendment to the U.S. Constitution guarantees citizens the right to petition the government for a redress of grievances. But, what is the legal effect of a petition brought by a citizen or citizens? While petitions certainly have a political effect and may at least lead to discussion of the issues, most do not require a city council to take any action or even debate the petition. A petition has legal effect only if a statute gives it some significance.

There are only a few instances where a petition will require the city to take legal action. Quite often the petition only brings the issue before the governing body, and the council may deny the petitioner's request, or even refused to consider the petition at all.

If a statute allows citizen petitions, however, it is important to know how many signatures are required to compel the body to act and what action is required. It is also vitally important that the signatures are properly verified.

In some cases, such as requesting a variance from a zoning ordinance, courts indicate that a petition by a single property owner is sufficient to require the board of adjustment to act. See, *Fulmer v. Board of Zoning Adjustment of Hueytown*, 286 Ala. 667, 244 So.2d 797 (1971). Other situations, such as requesting a wet/dry referendum, require the filing

of a petition signed by a specific number of individuals before the governing body can act. See, Section 28-2A-1, Code of Alabama, 1975.

The action the governing body must take can vary from merely considering the petition to calling for a referendum. In some cases, the body must specifically act or the petition is granted. For example, Section 11-52-32(a) provides that upon the filing of a subdivision "plat," essentially a petition for approval of a subdivision, "The planning commission shall approve or disapprove a plat within 30 days after the submission thereof to it; otherwise, such plat shall be deemed to have been approved. . . ." Thus, when a petition is filed, it is imperative that the entity that is required to act determine whether the petition legally requires it to act, and what form that action should take.

The verification process is crucial. Improper signatures should be rejected. Improper signatures may cause the petition to fail because there were not a sufficient number of signers to force (or allow) the governing body to act. If these signatures are not rejected, the petition is subject to legal challenge in court.

The goal, of course, is to meet statutory requirements. For example, if the Code requires signatures of a certain percentage of citizens, the citizenship of those signing must be verified. Unfortunately, there is very little guidance in Alabama on the verification process. Some guidance is available from court decisions and Attorney General's Opinions:

General Rulings:

- When a petition must be filed within a fixed time, signatures to the petition cannot be withdrawn after the expiration of such time. AGO to Hon. Sam E. Loftin, January 8, 1985.

- Where a petition was submitted to a local body, but was not certified by that body, and where the original petition is over a year and a half old, it cannot be withdrawn and recirculated for additional signatures. The petition, though, is a public record. AGO 98-00036.

- A municipality is not required to hold an election to determine whether an Improvement Authority may proceed to acquire, establish, purchase, construct, maintain, lease, or operate a cable system if no petition is timely filed or if the petition filed is insufficient. However, when an election is required to be held, and there is no previously scheduled general or special municipal election, a municipality must designate a special election date in accordance with sections 11-50B-8 and 11-46-21 of the Code of Alabama 1975. AGO 2003-006.

Annexation Petitions:

- The probate judge in *Lett v. State*, 526 So. 2d 6 (Ala. 1988), improperly struck names from the annexation petition because they were not dated. The court held that there is no requirement that names on the petition be dated because annexation proceedings may continue for years. In addition, there is no requirement that all names listed on the petition own property that is contiguous, provided that

the entire tract which is subject to the election is contiguous to the municipal limits.

- Where the annexation petition presented to the Probate Judge does not meet the statutory requirements, the city must start over with the adoption of a new resolution and must meet all of the Code requirements. AGO to Hon. O.D. Alsbrook, May 1, 1978.

- The State of Alabama is an owner of property within the meaning of the annexation statutes, and may consent to the annexation of property it owns, even though the State is exempt from ad valorem taxation. The petition for annexation should be signed by the Governor. AGO 98-00009.

- In the case of separate and independent petitions for annexation, each parcel of land seeking to be annexed must be independently contiguous to the then existing city limits to permit the independent annexation of the parcel pursuant to Section 11-42-21 of the Code of Alabama 1975. However, separate parcels may join and file a single petition for annexation. Further, a city cannot annex separate parcels of property by adopting one ordinance if separate petitions for annexation have been filed unless the parcels are joined together by a single petition. AGO 2003-147. NOTE: The League disagrees with this opinion and knows of one circuit court that also disagrees with the conclusion in this opinion. See *City of Clay v. City of Trussville*, In the Circuit Court of Jefferson County, CV 02-0718ER.

Incorporation Petitions:

- A person may remove his name from an incorporation petition at any time prior to it being submitted to the Probate Judge. AGO to Hon. William B. Duncan, August 14, 1981.

- For incorporation purposes, a qualified elector is a person who is registered to vote in the county and precinct in which the area to be incorporated is located. AGO 97-00219.

- A person may not remove his name from an incorporation petition after the petition has been submitted to the probate judge. After the probate judge determines that the petitioners to incorporate an area are qualified electors, that the petition meets the statutory requirements, and sets an election, the petition is not invalidated by the presentation of new information alleging that a petitioner no longer resides on the property to be incorporated. AGO 2000-038

- An incorporation petition should be treated as a judicial case. An original petition that has been withdrawn may be returned to the parties if the probate court finds that the motion is timely filed. Copies of the original documents should be preserved in a manner consistent with closed judicial cases. 2002-034.

- Because the statute is silent on the time a petition for the incorporation of a community must be filed or re-filed after the signatures have been obtained, a probate judge, in determining the validity of the petition, decides on a case-by-case basis regarding the passage of time between the execution of the petition and the submission of the petition to the probate court for the requested election.

continued on page 12



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Georgia Municipality

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- Former Director of Corrections
Large Florida State Court

"We have saved on jail expenses and issued fewer warrants."

- Court Clerk
Large Municipal Court

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- Judge
Alabama Court

Benefiting the Defendants...

"JCS has helped me understand the bad decisions I have made in my life. Through their guidance I have been given a chance to start over."

- Emma G., Defendant
Florida State Court

"...thank you for getting me into a treatment program. I'm loving my sobriety. It's a wonderful life. It does work One Day At A Time."

- Danny B., Defendant
Marshall County, Alabama

"Thank you for everything. Even though you did not have to do it, you did it anyway and it was much appreciated. You kept me out of jail."

- Craig A., Defendant
Foley, Alabama

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A probate judge, in his or her judicial capacity, may conduct a hearing to determine the validity of a petition for the incorporation of a community. The election for incorporation must be held within thirty days after the filing of a valid petition. 2002-278.

- A person may remove his or her name from an incorporation petition at any time prior to submission of the petition to the probate judge. It is incumbent on any person who agrees to sign a petition for incorporation to initially contact the petition committee and not the probate judge when the person seeks to have his or her name removed from the petition. Whether a person's name should be removed from an incorporation petition in instances where the incorporation committee has not been notified is a decision best suited for a determination by the probate judge. AGO 2010-071

Wet/Dry Petitions:

- In verifying signatures on a wet-dry petition, the probate judge may include in the total all who are registered voters at the time of verification. AGO to Hon. John L. Beard, November 25, 1981.

- All valid names of voters in the county calling for a wet/dry referendum are to be counted regardless of when and where the heading is stamped on the petition. AGO 86-00279.

- A wet-dry petition which does not contain the proper number of names may be withdrawn and recirculated for additional names to be added. AGOs 87-00037 and Hon. Hal Kirby, January 27, 1984.

- Act 2228, 1971 Regular Session, allows annexation by unanimous consent of the property owners. If two small parcels of land included in the petition did not join in the petition, the first petition is null and void. However, the council may adopt an ordinance accepting the petition as amended. AGO to Hon. James W. Grant, III, June 1, 1978.

- A wet-dry petition may be withdrawn and resubmitted again and again.

Zoning Petitions:

- Whether a petition presented to the planning commission in 1985 requesting that an area be rezoned may be resubmitted, must be decided by the planning commission. AGO 91-00340.

Dormant Municipal Reinstatement Petitions:

- The boundaries of a dormant municipality must be established by a court of competent jurisdiction before a probate court proceeds with the matter of a reinstatement petition for the dormant municipality. AGO 2001-125.

- Section 11-41-7 of the Code of Alabama 1975 does not authorize a probate judge to clear up errors or omissions in the legal description of the boundaries of a dormant municipality. A probate judge may not accept a plat and legal description from an original petition for incorporation of a dormant municipality, even if he or she also received a signed affidavit of a licensed land surveyor purporting to clear up scrivener's errors in the legal description. 2001-282.

- Towns or cities that have permitted their organization to become dormant and inefficient may petition the probate court for an order to reinstate the municipality pursuant to section 11-41-7 of the Code of Alabama. Once a municipality has been dissolved the town or city may not be reinstated under section 11-41-7, but may be able to incorporate pursuant to sections 11-41-1 through 11-41-6 of the Code of Alabama if the population requirements are satisfied. A community with a population of less than 300 may not be incorporated pursuant to section 11-41-1 of the Code of Alabama. AGO 2008-039.

Form of Government Petitions:

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

- The authority to adopt the mayor-council form of government under section 11-43C-2 of the Code of Alabama existed only in the year 1987 and expired before January 1, 1988, with the election of new officials under such a government first taking place in 1988. Thus, after receiving a petition, as set out in section 11-44E-201 of the Code of Alabama, from at least 25% of qualified voters to change its form of government, the City of Dothan was not required to call for the election to abandon the current form of government. 2007-051.

The Dillon Rule

The discussion of citizen petitions and referenda both point out the importance of complying with the Dillon Rule. The Dillon Rule provides that:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." *New Decatur v. Berry*, 7 So. 838 (Ala. 1890), and others.

Thus, in these areas, as in others, it is vital that the municipality look to legislative authority that it has been granted. These grants of power can be found in the Code of Alabama, the Alabama Constitution and local laws that the legislature has enacted. When deciding whether to call for an election, or to act on a citizen petition, the governing body must look to these grants of power to determine the extent of its rights and responsibility. ■



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Use of Electronic Devices

Prior to 2006, the use of electronic election devices was governed almost solely by administrative rules adopted by the Secretary of State. In 2006, statutes were created to control the use of these devices. The statutes did not specifically allow municipalities to use these devices. This meant that if the rules were ever repealed, municipal authority to continue using these devices was in danger.

The Act solves this problem by amending Section 17-7-25 to provide that to the extent practicable, the statutes, rules and regulations on electronic devices apply in all municipalities that decide to use electronic vote counting systems. In order to provide some flexibility, the Act provides that the duties assigned in the statutes and rules to a state or county official are to be performed by the corresponding municipal official. If there is no corresponding official, the clerk or, if the clerk is ineligible, another official appointed by the governing body shall perform those duties. The Act also states that “Where the rules or statutes refer to a statutory provision or act that conflicts with a statutory provision or act specifically applicable in municipal elections, the provision governing municipal elections shall prevail.”

Voter ID

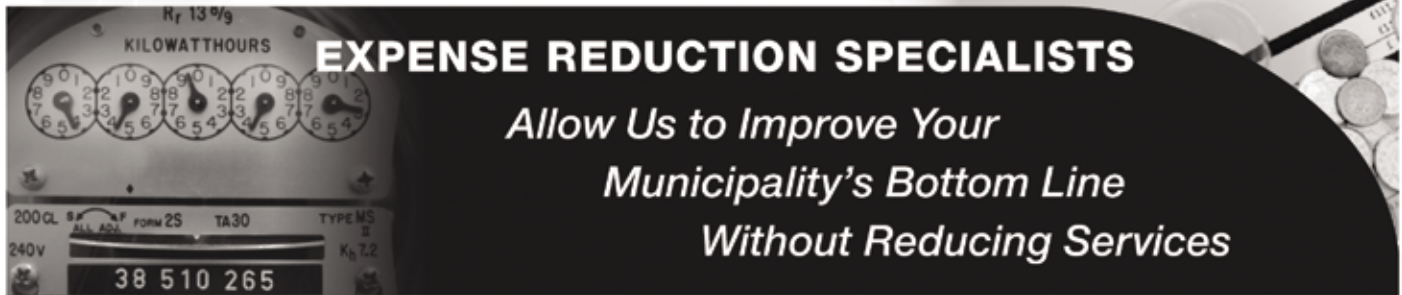
A legislative amendment to the Act changes the voter identification process in municipal elections. Section 17-9-30(f) of the Code of Alabama, 1975, states that if a voter does not have identification at the polls, two of the polling officials may certify that the individual is eligible to vote and allow that person to vote. The Act states that this process may not be used in municipal elections. Therefore, the election officials in municipal elections may not certify at the polls that the person is entitled to vote and allow that person to cast a regular ballot. Instead, unless the voter can provide identification by some other mechanism allowed by the statutes, he or she would be required to vote a provisional ballot.

Be aware that this will require instructing your polling officials that the procedure in municipal elections is different from that followed in state, county and federal elections. Many of the officials used in municipal elections also serve in these other elections, so they will have to be trained regarding this distinction.

Conclusion

Act 2010-687 addresses issues that arose during the 2008 municipal elections, clarifying questions and providing new methods to help simplify the election municipal election process. ■

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RDS Smart Government Awards

**2010
Small Municipality Award Winner
Presented to
City of Bayou La Batre**



From left to right: Yolanda Watkins (RDS), George Ramires (Councilmember), Mayor Stan Wright, Edgar Burt (Councilmember), Ida Mae Coleman (Councilmember), Stephen Morris (RDS), Rep. Spencer Collier (not pictured)

**2010
Mid-Size Municipality Award Winner
Presented to
City of Vestavia Hills**



From left to right: Randy Godeke (RDS), David Carrington (Councilmember), Mary Lee Rice (Council President), George Pierce (Councilmember), Christy Cato (RDS), Kennon Walthall (RDS), Mayor Butch Zaragoza, Jim Sharp (Councilmember), Steve Ammons (Councilmember)

Revenue Discovery Systems (RDS) presented its 2010 Smart Government Awards in two categories. The City of Bayou La Batre received the honor in the small municipality (population less than 15,000) category and the City of Vestavia Hills was the recipient in the mid-size municipality (population 15,000 to 50,000) category. The awards were developed to recognize municipalities, counties, and state agencies that are taking innovative steps to enhance growth, create cost savings and provide environmental benefits.

Bayou La Batre took steps to create financial stability while

reducing the total energy demand for the city. They created a city-managed, efficient, solid waste collection and disposal program and instituted a four-day work week.

Vestavia Hills has built the state's first Leadership in Energy and Environmental Design (LEED)-certified public library. The 36,000-square-foot-Library in the Forest is an environmental showcase as it provides an example of environmental stewardship including nature trails, an arboretum, and science education stations for the Vestavia Hills school system.

RDS

revenue discovery systems

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LEGAL CLEARINGHOUSE

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.

ALABAMA COURT DECISIONS

Courts: Following conviction in municipal court a defendant's failure to timely demand a jury trial in the circuit court constitutes an effective waiver of his right to trial by jury and will perfect his appeal directly to the Court of Criminal Appeals. The notice of appeal must be filed with the municipal court clerk within 42 days from the date of pronouncement of sentence or the date of denial of a timely filed post-trial motion, whichever is later. *Ex parte Cowley*, 43 So.3d 1197 (Ala.2009)

Courts: Where the prosecution presented an informant's hearsay statements as substantive evidence of guilt and the statements were the only evidence that connected the defendant to drugs found in the defendant's house, the confidential informant's testimony was relevant to the issue of the defendant's guilt, and, therefore, the trial court should have either excluded the evidence regarding the confidential informant's hearsay statements to law enforcement officers or required the prosecution to disclose the informant's identity to the defendant. *Marshall v. State*, 43 So.3d 1 (Ala.Crim.App.2009)

Elections: The failure to timely file a financial-disclosure report within the 10 and 5 day time period prior to election did not render the candidate ineligible to be on the ballot, since the signed reports were filed by the candidate prior to the election and did in fact disclose all information required by the Fair Campaign Practices Act. Although failure of a successful mayoral candidate to timely file the required report may have subjected him to criminal penalties, those penalties could not be sought or imposed in a civil action brought by a private citizen such as an unsuccessful candidate. *Sears v. McCrory*, 43 So.3d 1211 (Ala.2009)

Gambling: Constitutional amendments allowing bingo are exceptions to the constitutional prohibition against lotteries, and the exception should be narrowly construed. "Bingo" permitted by exception to the constitutional prohibition against lotteries is a game commonly or traditionally known by that name in which a caller randomly draws and announces alphanumeric or similar designations one by one, and players mark where any announced values appear on cards with spaces arranged in five columns and five rows with an alphanumeric or similar designation assigned to each space, can fail to pay proper attention or to properly mark cards, and, thus, miss

opportunity to be declared a winner, and are participating in group competition to recognize and announce "bingo" before other players. *Barber v. Cornerstone Community Outreach, Inc.*, 42 So.3d 65 (Ala.2009)

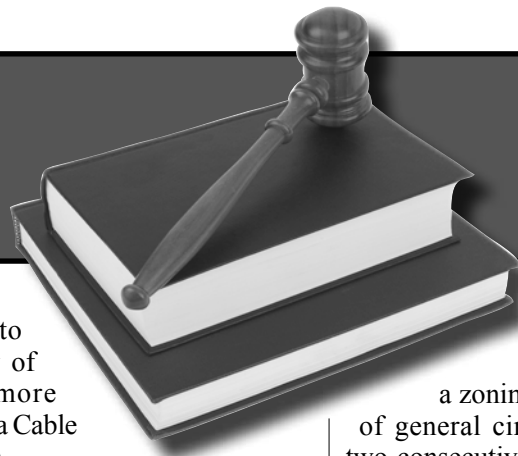
Law Enforcement: A Circuit Court may not interfere with the enforcement of criminal laws through issuance of an injunction in a civil action. The party aggrieved by such enforcement shall make his case in the prosecution of the criminal action. The Circuit Court lacks subject-matter jurisdiction to interfere with a criminal investigation by civil action unless the plaintiff seeks to avoid irreparable injury resulting from criminal prosecution where the plaintiff contends that the statute at issue is void. A Court may enjoin enforcement of a void law because enforcing a void law, exceeds the discretion of the executive in administering the laws. *Tyson v. Macon County Greyhound Park, Inc.*, 43 So.3d 587 (Ala.2010)

Miranda: A defendant's Sixth Amendment right to counsel attaches at the initial appearance, overruling *Ex parte Stewart*, 853 So.2d 901 (Ala.2002). However, a court must no longer presume a waiver of a right to counsel executed after the right to counsel has attached is invalid. A defendant must invoke his or her right to counsel, even if the right to counsel has attached and counsel has been appointed, and law-enforcement officers must have ignored that invocation to warrant consideration of the issue whether the defendant's waiver of his or her right to counsel is invalid. *Ex parte Cooper*, 43 So.3d 547 (Ala.2009)

Schools: A city board of education employee was not permitted to credit the time she spent as an employee of the county board of education toward her time spent working for the city board in order to attain "non-probationary" status under the Fair Dismissal Act, and therefore, the city board was not required to have a good and just cause to dismiss the employee before she had worked for the city board for three years. The city board of education had not been formed out of, or divided from, the county board, but was created independently by resolution adopted by the city. *Murphy v. Madison City Bd. of Educ.*, 42 So.3d 124 (Ala.Civ.App.2010)

Sex Offenders: Section 13A-6-111 of the Code of Alabama, setting forth the offense of transmitting obscene material to a child, does not require that the perpetrator communicate with an actual child, only that the perpetrator thinks that he or she is communicating with a child. *Baney v. State*, 42 So.3d 170 (Ala.Crim.App.2009)

Telecommunications: A cable television provider operated under a city franchise ordinance which allowed it to use the city's rights-of-way for its cable equipment, but the ordinance did not grant the provider the right to occupy private property. The cable provider did not have a statutory,



contractual or easement right to enter or remain on the property of an apartment complex. *Sycamore Management Group, LLC v. Coosa Cable Co., Inc.*, 42 So.3d 90 (Ala.2010)

DECISIONS FROM OTHER JURISDICTIONS

Elections: Arizona's requirement that prospective voters provide documentary proof of citizenship was superseded by the National Voter Registration Act. *Gonzalez v. Arizona*, --- F.3d ---, 2010 WL 4192623 (9th Cir. 2010)

First Amendment: A conversation between the owner of a buggy company and a city councilman, during which they discussed the company's troubles with parking and picking up customers constituted protected petitioning activity under the petition clause of the First Amendment. Retaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment. *Holzemer v. City of Memphis*, --- F.3d ---, 2010 WL 3565501 (6th Cir. 2010)

ATTORNEY GENERAL'S OPINIONS

Alcoholic Beverages: The levy and collection of tax on the sale of malt beverages authorized by Section 28-2-23 of the Code of Alabama does not apply to dry counties that have wet municipalities or to wet municipalities located in dry counties. AGO 2011-004

Appointments – Termination: Appointments and terminations made under an improper delegation of authority are void. Such acts are not subject to ratification. The Alabama Firefighter's Personnel Standards and Education Commission may not delegate, by way of adoption of policies and procedures, the authority to hire, promote, discipline and terminate employees to the executive director. The Commission may not ratify the appointments and terminations made under an improper delegation of authority. AGO 2011-001

Boards: A vacancy on the Board of Directors of the Birmingham-Jefferson Civic Center Authority should be filled by the members of the Senate from Jefferson County and by the members of the House of Representatives from Jefferson County on an alternating basis. AGO 2011-002

Ordinances: A municipality has the option of publishing notice of the approval of an ordinance in any newspaper that has a general circulation within the municipality and is published within the county. Section 11-45-8(b) of the Code of Alabama, also gives a municipality, whose population was less than 2,000 inhabitants as shown by the 1950 federal census, the option to choose whether to notify the public of the passage of an ordinance by either publication in a local newspaper or by posting the relevant information in three public places within the municipality. AGO 2011-005

Zoning: Section 11-52-77 of the Code of Alabama requires a municipality to publish a zoning ordinance prior to approval in a newspaper of general circulation published in the municipality for two consecutive weeks. If the municipality does not have a newspaper published within the municipality that is capable of complying with these requirements, section 11-52-77 permits the city to post the proposed zoning ordinance in four conspicuous places within the municipality. AGO 2011-005

ETHICS COMMISSION ADVISORY OPINIONS

AO No. 2010-09: A member of the County Commission may not vote, attempt to influence or otherwise participate in issues relating to the business dealings between an LLC and the County Commission when the LLC is owned in large part by a Corporation which is the 100% owner of a management company which employs the member of the County Commission, as the corporation's part ownership of the LLC makes it a business with which the Commission member is associated.

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2011 Statement of Commitment

The Statement of Commitment is a two-page document comprised of safety standards that each member endeavors to follow. It is updated annually and mailed to every MWCF member during November. If it is signed and returned by December 1, 2010, a 3% discount will be reflected on the 2011-2012 billing. This two-page document must be renewed each year.

Post Accident Drug and Alcohol Testing Program

The MWCF provides an additional 3% discount for those members that commit to a Post Accident Drug and Alcohol Testing program. In order to qualify a member must sign a "Participating Commitment" (which will be enclosed with the above mentioned document) and have such program certified by their attorney that the member's drug and alcohol policy is Fourth Amendment compliant. Unlike the Statement of Commitment, this document does not have to be renewed each year.

Medical Protocol

Another 3% discount is available to those members who establish and implement a Medical Protocol. This program is a great benefit to both the member and the claims management team. A sample protocol will be included in the November mail out for those members that do not yet have one on file. For further information regarding this discount, call Matt Graham at Millennium Risk Managers at 1-888-736-0210.

MWCF members who participate in all three programs will receive a bonus 1% discount – earning those members a full 10% discount on their annual premium for 2011! All members are encouraged to watch for the Statement of Commitment information packet coming to you in November and return it promptly to take advantage of these benefits. It will also be available for downloading on our website by going to the MWCF page at www.alalm.org.

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Meet the League's Finance Department

The League's Finance Department is composed of three full-time staff members who are responsible for implementing, maintaining and monitoring the League's accounting and financial reporting system including budget, payroll, accounts receivable, accounts payable, investments, reserves and personnel records. This department is also responsible for planning, developing and overseeing all accounting functions related to the Municipal Workers Compensation Fund, Inc. (MWCF), the Municipal Revenue Service and the Alabama Municipal Funding Corporation (AMFund).



Steve Martin
Finance Director

Born in Waxahachie, Texas, Steve grew up in Montgomery, received his BS degree in Business Administration from Auburn University and is a Certified Public Accountant. Since 1991, Steve has served as the League's Finance Director and is responsible for all accounting and investment operations as well as the day-to-day operations of the Municipal Workers Compensation Fund, Inc. Prior to joining the League's staff in 1991, he was a partner in a Montgomery accounting firm. Steve is a United Way volunteer, has served as a Foster Parent with AGAPE and is a former board member for the Family Sunshine Center. His professional affiliations include the Montgomery Chapter of the Society of Certified Public Accounts, where he has served as Vice President; and the Alabama Society of Certified Public Accountants,

where he has served as Treasurer, Vice President and Chair of Council. Steve and his wife, Loretta, live in Montgomery and attend Vaughn Park Church of Christ where he is a Deacon and church treasurer.

Faith Ann Gunn
Accounting Manager

A native of Nashville, Tennessee and a graduate of Freed-Hardeman University in Tennessee, Faith Ann has been the Accounting Manager for the League, as well as the Municipal Workers Compensation Fund, Inc. (MWCF) and the Municipal Revenue Service, since 1999. In addition, she manages employee benefits for all League employees and accounting functions for the Alabama Municipal Funding Corporation (AMFund). She and her husband, Allen, are parents of four grown children and have nine grandchildren. They are active members of Landmark Church of Christ in Montgomery and enjoy spending their leisure time aboard their boat on Lake Martin.



Rachel Wagner
Assistant/Librarian

Born and raised in Montgomery, Rachel received a B.S. degree in Elementary and Special Education from Auburn University in Montgomery in 1995. She joined the League staff in 1993 where she presently serves as the League's Finance Department Assistant and Librarian. She assists the Accounting Manager and manages the MWCF/AMIC safety video library. Rachel and her husband, Torrey, live in Millbrook and are active members of Vaughn Park Church of Christ. They enjoy going to football and basketball games to watch their two teenage daughters, Avery and Abbey, cheer.



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