

# THE ALABAMA MUNICIPAL JOURNAL

July 2005

Volume 63, Number 1

## Profiles of the League President and Vice President

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President: Mayor Bobby Hayes, Pelham



Vice President: Mayor Lew Watson, Lincoln

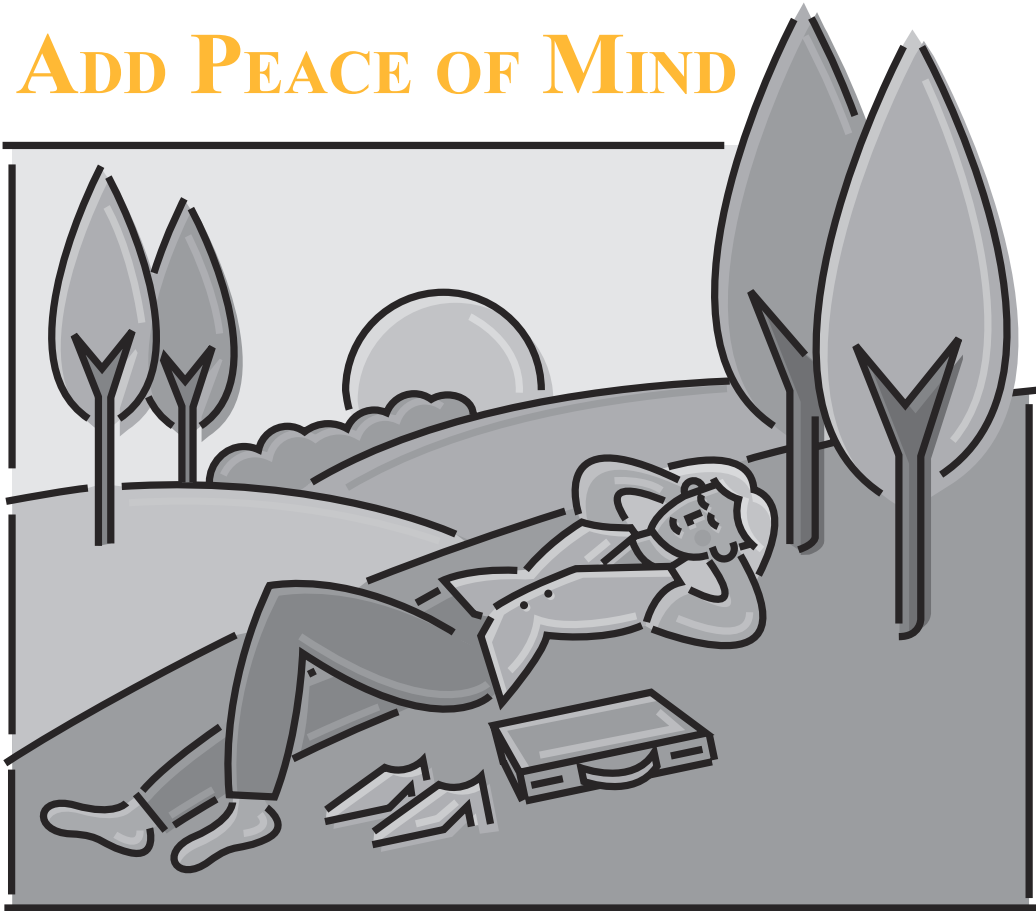
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- Dealing with Requests for Cable Franchise Transfers
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# THE ALABAMA MUNICIPAL JOURNAL

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## Profiles of the League President and Vice President

By: Niko Corley, Communications Coordinator, ALM



On May 24, 2005, city of Pelham **Mayor Bobby Hayes** was elected as the League's new president. Hayes, who served as vice president under President Jim Byard of Prattville from 2004-2005, has been mayor of Pelham since 1984.

In 1983, Hayes retired as field commander of the tactical operations unit of the Birmingham Police Department and felt called to

municipal government to improve the lives of his city's residents. Twenty-two years later, having proven his municipal government leadership skills and abilities, Hayes has been elected as the 60th president of the League. Mayoral work, he says, has been rewarding for him.

"[I've] tried to do what's right for the community, to do what's right for the majority of the citizens," Hayes said. "Being able to help people has been great."

Now in his sixth term as Pelham's mayor, Hayes has overseen a number of municipal improvement initiatives during his time in office, including the construction of a civic complex, tennis center, racquetball club and senior center. At the time of his retirement, Pelham's water was being rationed and Hayes didn't think the officials in office were doing much to remedy the situation, so he ran for mayor. An increase in the number of water supply and storage facilities built by his administration along with the completion of a new sewer plant and system and three new fire stations, have improved life for Pelham residents and kept Hayes in office.

Perhaps the greatest improvement to Pelham though, that has occurred under Hayes' leadership has been the explosion of the "119 corridor", an area between U.S. 31 and AL 119, which attracted few businesses and saw little economic improvement until Hayes' administration began development there.

"There wasn't anything out there except a goat farm," Hayes said.

By providing better water and sewer services for the city of Pelham, keeping it business friendly and controlling growth, Hayes helped turn the 119 corridor into Shelby

County's most prosperous retail and commercial center and one of Alabama's fastest growing business areas.

Perry Roquemore, League executive director, says Hayes has earned the presidency.

"It's amazing what has happened [to Pelham] under his administration and leadership," Roquemore said. "He'll certainly be a good president."

Hayes is active on a number of boards and committees in both Shelby and Jefferson Counties, including the Greater Shelby County Chamber of Commerce and the Alabama City/County Management Association. He is a board member of the National League of Cities Public Safety and Crime Prevention Policy Committee and an executive board member of the Alabama Housing Finance Authority.

Besides his past-vice presidency and current presidency, Hayes is an executive member of the League's board and also a member of its committee on state and federal legislation. He says serving as vice president for the past year gave him a more comprehensive view of how the League is run and of how he can be a strong president.

Hayes says he will look to past presidents for advice in the coming year, and urges municipal officials to stay abreast of what bills are being passed in the legislature.

"We need to kill those bills that are detrimental to municipalities and to the state, and we need to ask our members to help us [do that]," Hayes said.



As Mayor Bobby Hayes ascended to the position of League president, **Mayor Lew Watson** of Lincoln was simultaneously elected vice president of the organization. Watson is currently serving his eighth term as mayor of the east Alabama city.

Watson was a captain in the U.S. Army Corps of Engineers and began his first term as mayor in 1972 after returning from active duty in

Vietnam. Before becoming mayor of Lincoln, Watson was on a civic action committee that helped expose him to the workings of municipal government. It also placed in him

*continued page 22*



# The President's Report

Bobby Hayes  
Mayor of Pelham

## Youth Government Day Introduces Young People to Local Government

I would like to thank the League of Municipalities and each member for giving me the opportunity to serve as President. It is quite an honor for my city and myself. I will do my best to live up to your expectations for the president of the League and assure you that I will work hard to achieve the goals that the League sets forth during my term.

I would also like to thank the presidents who have come before me. You have made the League what it is today, and as I said in my comments following the transfer of the gavel from Jim Byard, I will continue to call on those past presidents for assistance and guidance. A special thank you goes to the League staff for the untold number of things they do to make our League the best in the country, and finally and very importantly to my city council for allowing me to be gone on occasion to perform the duties of the president of the League. (I think they have already called Perry to try to schedule some sort of meetings on the first and third Monday night of each month to keep me out of their hair at our regularly scheduled council meetings.) I absolutely could not take on this office without their support.

This spring, I attended the Southern Municipal Conference meeting in Point Clear where I had the opportunity to meet elected officials from across the southeast. It was a very informative session, and the state of Alabama was well represented at its initial hosting of this conference. I want to thank each elected official who took the time to participate and showcase Alabama's southern hospitality to our guests.

Many of you who know me well know that I love doing things for young people. This is something we do in our city that I would like to share with you. I'm not quite sure when we started Youth Government Day at city hall, but it seems like we've been doing it for as long as I've been yavor, and I'm currently serving my 21st year.

The fifth grade class at Valley Intermediate School studies government each year. They take a trip to Washington, D.C. as part of their program, and then come home and elect students to fill local government positions for Youth Government Day. Each class nominates someone to run, after which they campaign and hold elections. They elect a mayor, council members and department heads, a total of 22 positions.

In May, the entire fifth grade class tours city hall on Youth Government Day, and the elected youth officials spend their time planning their council meeting or working with their official department head. Our fire department cooks a great lunch and we enjoy that along with their teachers before they return to school. The day ends with a youth council meeting following our regularly scheduled meeting that evening.

Each year the students seem brighter. They always have great ideas about what they want to do in their meetings, much like a newly elected mayor or council member. They learn very quickly that local government can't grant every request. Each youth department head makes a report at the council meeting and some have requests for additional funding. Our youth mayor this year responded rather quickly with, "In your dreams" to some of the requests.

Youth Government Day in Pelham is a great day for our students and city officials. If you aren't doing something similar in your city, I strongly encourage you to think about starting a program like this. It's a wonderful way to introduce young people to local government and perhaps inspire them to serve when they reach adulthood. Many of their parents have never attended a council meeting, and Youth Government Day serves as an introduction to local government for them.

Following the event, I write each student a letter and enclose a few snapshots of them carrying out their duties during the day and at their council meeting. I hope they remember the day with fond memories as I do.

As president, I am here to help you and hope you will call on me at 205-620-6403 if I can be of assistance. Perry and the League staff are available to answer any questions you may have, so please utilize the services of the League of Municipalities. They are a wonderful resource for elected officials.

In closing I ask that you please remember the men and women who serve our country in the armed forces. Their efforts insure that we can continue to enjoy the freedoms we have today. ■



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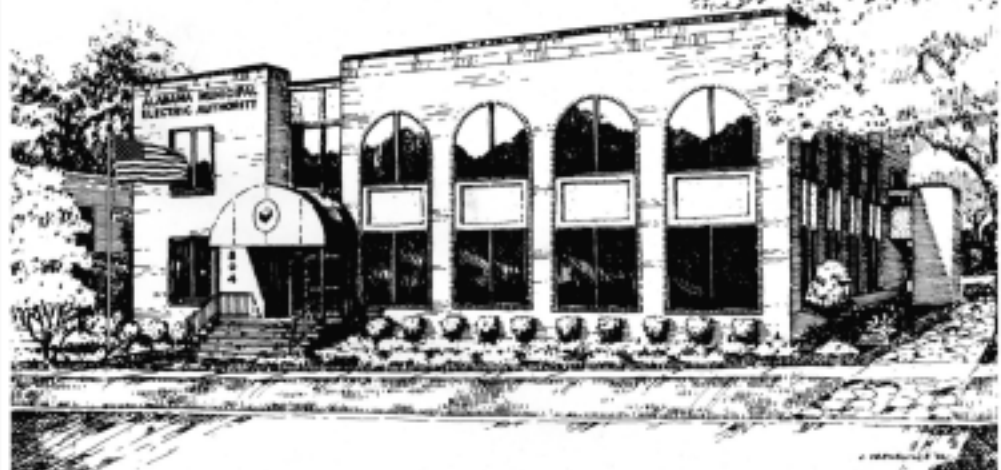
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# Municipal Overview

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

## Dealing With Requests for Cable Franchise Transfers

Alabama cities and towns served by Adelphia may soon receive Federal Communications Commission (FCC) Form 394 requesting transfer of the cable television franchise and system in their community. FCC Form 394 will include numerous attachments providing information regarding the proposed transferee's legal, technical and financial qualifications.

Due to the fact that other municipalities may receive similar requests in future years from additional providers, I wish to share an article written by Brian T. Grogan, a shareholder with the Minneapolis law firm of Moss & Barnett practicing in the areas of telecommunications and cable television law. Brian represents entities throughout the country on franchise renewals and ownership transfers.

The rules governing a transfer review are found in federal law at 47 U.S.C. § 537 and FCC regulations at 47 C.F.R. § 76.502. Franchising authorities must also carefully consider applicable state law and relevant provisions of the local franchise. Particular attention should be paid to the local franchise as it may contain additional transfer obligations and deadlines and may trigger rights for the franchising authority in the event of a change of ownership.

Under federal law, a franchising authority has 120 days from the date of submission of the completed FCC Form 394 to complete its review. The franchising authority must notify the cable operator within 30 days of the filing of FCC Form 394 if it questions the accuracy of the Form 394 information. If the franchising authority fails to act upon such transfer request within 120 days, such request is deemed granted unless the franchising authority and the requesting party otherwise agree to an extension of time.

### Legal Qualifications

When reviewing a proposed transfer of control, franchising authorities should document the ownership structure of the proposed transferee. Is the transferee a

corporation or partnership? Who are the principals? In addition, inquiries should be made into the following items:

- 1) Current cable franchises.
- 2) Criminal or civil proceedings involving the transferee.
- 3) Revocations, suspensions, non-renewals of any business license of the transferee.
- 4) Other cable systems sold by the transferee or any pending cable franchise applications.
- 5) Cable franchise violations.

### Technical Qualifications

With respect to the technical qualifications of the transferee, it is essential to identify any changes it may seek in the operation of the cable system or the franchise document. Inquiries should be made into the following items:

**1) Changes to the system.** Is the transferee proposing, or will the transferee undertake, any changes in the system including, but not limited to, programming, PEG access support, equipment, institutional network services, customer service, reporting, etc.?

**2) Changes in the operation of the system.** Is the transferee proposing or will the transferee undertake any changes in the operation of the system, including, but not limited to, billing practices, personnel, technical oversight, call center consolidation, etc.?

**3) Changes to the franchise.** Is the transferee requesting or will the transferee request any changes to the franchise document? In other words, will the transferee be seeking relief from any obligations which may require capital contributions or other burdensome requirements contained within the franchise. Is the proposed transferee willing to accept all of the franchise obligations or will it seek to challenge the enforceability of certain obligations?

### Financial Qualifications

A review of the financial qualifications of the proposed transferee is a critical element in the transfer review process. The financial capability of the transferee will impact directly on the quality of service and the ability of the transferee to live up to its commitments under the franchise. The franchising authority should be provided with the documentation necessary to enable it to evaluate the transferee's financial qualifications. At a minimum, the franchising authority should receive the following information:

- 1) Copy of a letter of intent and/or purchase agreement. These documents will assist the franchising authority in identifying the transferee and the content of the agreement to transfer the cable system.

*continued next page*

2) Corporate or business information documents, such as articles of incorporation, partnership and limited partnership agreements as well as management agreements.

3) Financing documents, such as a bank loan agreement or commitment letter; for limited partnerships, a proposed prospectus or offering circular, terms, and conditions of a limited partnership agreement; for a publication corporation, registration statements S-1 and all other forms filed with the Securities and Exchange Commission.

4) Current and historical financial statements of the transferee, including growth and revenue projections, income statements, sources and uses of funds, anticipated capital expenditures, justifications, depreciation schedules, charges for services, expenditures, other system new-build commitments, cash flow analysis, balance sheets and proposed penetration rate.

This financial information and other documentation will help the franchising authority assess the financial impact of the proposed transfer on the system and its subscribers. The following elements and assumptions are critical to the determination of whether the financial projections provided by the transferee are reasonable:

1) **Profitability.** There are several components to consider a) operating ratio, b) operating margin, c) operating expenses, and d) pre-tax profit margin.

2) **Market Factors.** Several factors should be addressed in the proforma financial statements, including basic service penetration, pay-to-basic penetration, revenue per subscriber and household density. These projections should be reviewed carefully against past performance in the market.

3) **Capital Expenditures.** There are many components to the category of capital expenditures, including plant distribution costs, pre-operating expense, headend costs, converter costs, connection costs, building costs or leasehold improvements. The capital costs projected in the proforma financials for such categories should be scrutinized for the reasonableness of the assumptions compared to the general industry standards.

4) **Debt-to-Equity Ratio.** The debt-to-equity ratio is a significant measurement in the context of a transfer transaction. This measurement shows long term debt as a percentage of overall capitalization. A low or conservative debt-to-equity ratio suggests the capacity to borrow additional funds. A high debt-to-equity ratio suggests a highly leveraged entity vulnerable to slight shifts in revenue or costs.

5) **Cash Flow-Debt Service.** The proforma financials should include a cash flow or source of funds schedule indicating projected annual income or depreciation which in turn would indicate projected cash flow, i.e., net income

plus depreciation. Each of the foregoing components should be examined and compared to industry standards to determine whether the projections demonstrate the proposed transfer and subsequent operation of the cable system is financially feasible.

### Conditions for Transfer

**Approval** - To the extent a franchising authority determines to approve a proposed transfer, careful consideration of the transfer resolution should be undertaken. Be particularly careful when utilizing a form resolution submitted as part of FCC Form 394. Often cable operators may include provisions within such a resolution which may result in a waiver of existing franchise violations resulting in a "clean slate" for the proposed transferee.

In other words, there may presently exist a latent franchise violation such as failure to pay the proper franchise fee to the franchising authority. If a transfer resolution is executed with language indicating that the transferee assumes the franchise free and clear, the franchising authority may be prevented from thereafter pursuing the collection of past due franchise fees. Other common conditions for approval may include an acceptance agreement, guaranty, performance bond/letter of credit/security fund, and a certificate of insurance. Settlement of existing franchise obligations is also a possibility as well as resolution of franchise violations.

**Denial of Transfer** - If a franchising authority chooses to deny the proposed transfer of control it may be based on a variety of reasons:

1) The transferee may lack the necessary legal, technical or financial qualifications;

2) The transferee may not agree to comply with valid franchise obligations; or

3) The transferee may eliminate or reduce competition in the community in violation of 47 U.S.C. § 533.

Moreover, in the event there is an existing franchise violation which has not yet been cured, a franchising authority may seek resolution of such a matter as part of a transfer proceeding.

Local Government Services, LLC will be working on behalf of a number of franchising authorities to review any proposed transfer of Adelphia served systems. Local Government Services, LLC will be conducting a review of the legal, technical and financial qualifications of proposed transferee and providing recommendations for consideration by franchising authorities. Issues specific to franchising authorities are being handled on a case by case basis. For additional information regarding this proceeding please feel free to contact Greg Fender at (770) 279-5030 or [gfenderh@comcast.net](mailto:gfenderh@comcast.net). ■



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# ENVIRONMENTAL OUTLOOK



By Gregory D. Cochran  
Director, Intergovernmental Relations

## Indoor Air Quality

Indoor pollution sources that release gases or particles into the air are the primary cause of indoor air quality problems in homes. Inadequate ventilation can increase indoor pollutant levels by not bringing in enough outdoor air to dilute emissions from indoor sources and by not carrying indoor air pollutants out of the home. High temperature and humidity levels can also increase concentrations of some pollutants.

**Pollutant Sources.** There are many sources of indoor air pollution in the home, including combustion sources such as oil, gas, kerosene, coal, wood and tobacco products; building materials and furnishings as diverse as deteriorated, asbestos-containing insulation, wet or damp carpet, and cabinetry or furniture made of certain pressed wood products; products for household cleaning and maintenance, personal care or hobbies; central heating and cooling systems and humidification devices; and outdoor sources such as radon, pesticides and outdoor air pollution.

The relative importance of any single source depends on how much of a given pollutant it emits and how hazardous those emissions are. In some cases, factors such as the age of the source and whether it is properly maintained are significant. For example, an improperly adjusted gas stove can emit significantly more carbon monoxide than one that is properly maintained.

Some sources, such as building materials, furnishings and household products like air fresheners, release pollutants more or less continuously. Sources related to activities carried out in the home release pollutants intermittently. These include: smoking, the use of unvented or malfunctioning stoves, furnaces or space heaters; the use of solvents in cleaning and hobby activities; the use of paint strippers in redecorating activities; and the use of cleaning products and pesticides in house keeping. High pollutant

concentrations can remain in the air for long periods after some of these activities.

**Amount of Ventilation.** If too little outdoor air enters a home, pollutants can accumulate to levels that may pose health and comfort problems. Unless they are built with special mechanical means of ventilation, homes that are designed and constructed to minimize the amount of outdoor air that can leak into and out of the home may have higher pollutant levels than other homes. However, because some weather conditions can drastically reduce the amount of outdoor air that enters a home, pollutants can build up even in homes that are normally considered leaky.

**Immediate Effects.** Immediate effects may show up after a single exposure or repeated exposures. These include irritation of the eyes, nose and throat, headaches, dizziness and fatigue. Such immediate effects are usually short-term and treatable. Sometimes the treatment is simply eliminating the person's exposure to the source of the pollution, if it can be identified. Symptoms of some diseases, including asthma, hypersensitivity pneumonitis and humidifier fever, may also show up soon after exposure to some indoor air pollutants.

The likelihood of immediate reactions to indoor air pollutants depends on several factors. Age and preexisting medical conditions are two important influences. In other cases, whether a person reacts to a pollutant depends on individual sensitivity, which varies tremendously from person to person. Some people can become sensitized to biological pollutants after repeated exposures, and it appears that some people can become sensitized to chemical pollutants as well.

Certain immediate effects are similar to those from colds or other viral diseases, so it is often difficult to determine if the symptoms are a result of exposure to indoor air pollution. For this reason, it is important to pay attention to

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# THE LEGAL VIEWPOINT

By Ken Smith  
Deputy Director/Chief Counsel

## THE FALSE CLAIMS ACT: What You Don't Know Could Be Costly

This article was presented at the 2005 Municipal Law Conference in Huntsville, by Randy Van Vleck, general counsel with the New Mexico Municipal League. The False Claims Act, while not widely known, creates a major source of potential municipal liability by opening recipients of federal funds (including municipalities) to suits by individuals alleging that false information was submitted to the federal government to verify the use or application of those funds. Van Vleck's overview of the act provides a guideline for municipal officials and employees to use in complying with the act. We appreciate Van Vleck's willingness to allow us to use his article in the Alabama Municipal Journal.

### WELCOME TO THE FALSE CLAIMS ACT: 31 USC §§3729-3733

#### 1. What is the False Claims Act?

- a) A Federal Statute enacted in 1863 to protect the Government and Union Army from profiteering during the Civil War.
- b) This is because the Government was purchasing faulty supplies, broken rifles, rancid food, useless ammunition and lame horses and mules.
- c) The False Claim Act provides:  
**ANY PERSON** who **knowingly** presents a false or fraudulent claim for payment or approval to the United States Government or who engages in related offenses, is liable to the U.S. Government for a civil penalty of not less than \$5K and not more than \$10K, **PLUS** 3 times the amount of damages sustained by the Government because of the actions of that person.
- d) **1986 Amendments to the Act**
  - i. Added incentives for private citizens with evidence of fraud to come forward and assist the federal government in prosecuting such cases.
  - ii. Modified the state of mind requirements under the Act.

#### 2. To Whom does the False Claims Act Apply?

- a) The FCA covers fraud involving any federally funded contract or program with the exception of tax fraud.
- b) In the late 1980s and early 1990s most cases involved Department of Defense contracts, but more recently have been used to fight Medicare fraud and fraud involving other federally funded health care programs.

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c) **EXAMPLES**

- i. A contractor falsifies test results or other information regarding the quality or cost of products it sells to the Government.
- ii. A health care provider bills Medicare for services that were not performed or were unnecessary.
- iii. A grant recipient charges the government for costs not related to the grant.

**3. Elements of a Claim under the FCA**

- a) Defendant presented or caused to be presented to an agent of the United States, a claim for payment;  
“**Claim**” means any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee or other recipient, if the U.S. Government provides any portion of the money or property that is requested or demanded **OR** if the U.S. Government will reimburse such contractor or other recipient for any portion of the money or property that is requested or demanded.
- b) The claim was false or fraudulent;
- c) The defendant knew it was false or fraudulent;
  - i. Actual knowledge.
  - ii. Acting in deliberate ignorance of the truth or falsity of the false claim.
  - iii. Acting with reckless disregard of the truth or falsity of the false claim.
- d) The United States suffered damages as a result.

**4. Potential Plaintiffs**

- a) Any person may sue as (Relator) in the name of the Federal Government
- b) Employees
- c) Former employees
- d) “Concerned” Citizens

**5. Incentives (bounty) Payable to Plaintiffs**

- a) If the Government takes the lead in the case and the plaintiff assists the Government – bounty to plaintiff can be between **15-25% of the recovery** (Avg.= 16%)
- b) If the plaintiff proceeds on their own – bounty to plaintiff can be between **25-30% of the recovery** (Avg. = 28%)

**4. Types of FCA Cases**

- a) Billing for goods or services that were never delivered or rendered.
- b) Billing for marketing, lobbying or other non-contract related activities.
- c) Submitting false records in order to show better than actual performance.
- d) Double billing.
- e) Charging for employees that were not actually on the job or billing for made-up or estimated hours in order to maximize reimbursements.
- f) Billing in order to increase revenue rather than billing to reflect actual work performed.

**5. Special Litigation Procedures**

- a) Complaint filed *in camera* and under seal must include supporting evidence and documents to support the claim.

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By Lorelei A. Lein  
Staff Attorney

# Legal Notes

## DECISIONS FROM THE UNITED STATES SUPREME COURT

**Regulatory Taking:** Regulatory taking formulation under which government regulation is deemed to effect a taking of private property requiring compensation under the Fifth Amendment’s taking clause, if regulation does not substantially advance a legitimate governmental interest, gives no insight as to the extent and type of burden that the regulation imposes on a property owner and therefore is an improper inquiry for the purpose of identifying a compensable regulatory taking. *Lingle v. Chevron USA, Inc.*, 125 S.Ct 2074 (2005). NOTE: This opinion overrules *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

## DECISIONS FROM OTHER JURISDICTIONS

**First Amendment:** Inscription of phrase “In God We Trust” on the façade of a county government center promotes a valid secular purpose of displaying the national motto, without endorsing religion or leading to excessive entanglement of government and religions, and therefore does not violate the First Amendment’s establishment clause. *Lambeth v. Board of Commissioners of Davidson County, N.C.*, 407 F.3d 266 (4<sup>th</sup> Cir. 2005).

**First Amendment:** A municipal ordinance barring the placement of a handbill or an advertisement on a car without the written consent of the owner is content and viewpoint neutral, is narrowly tailored to serve a significant governmental interest in barring litter and visual blight and citizens’ interest in having their private property left alone, leaves open ample alternative channels of communication, and therefore is a reasonable time, place and manner restriction on speech permitted by the First Amendment. *Jobe v. Catlettsburg, Ky.*, – F.3d –, 2005 WL 1048780 (6<sup>th</sup> Cir. 2005).

## ATTORNEY GENERAL OPINIONS

**Drug Forfeiture:** State forfeiture proceeds received by a municipal law enforcement agency pursuant to Section 20-2-93(e)(2) of the Code of Alabama 1975 must be deposited in the general fund and used as determined by the municipal law enforcement agency. The funds must be appropriated by the city council to the police department and may be used as determined by the police department. 2005-121.

**Drug Forfeiture:** Federal forfeiture proceeds received must be deposited in a separate account maintained by the city clerk and spent in accordance with federal guidelines. If the federal proceeds are appropriated by the city council to the police department, the police chief is authorized to expend the funds. If not, the city council may approve specific expenditures on the chief’s recommendation. In the case of a disagreement, the council has no authority other than to disapprove the request. 2005-121.

**Elections:** The board of registrars may provide only the names and precincts of registered voters to persons or entities requesting voter information, unless the entity requesting the information is a political party. However, political parties are not authorized to obtain the social security numbers of registered voters. This limitation on access to voter information does not apply to public officials in need of information to effectively carry out their duties. 2005-124.

**Elections:** A person who is 17 years of age on the date that registration closes, but who will turn 18 on or before election day, must be permitted to register to vote. 2005-124.

**Elections:** A voter identification card is an acceptable form of identification for purposes of Section 17-11A-1 of the Code of Alabama 1975, only if both the name and address of the

*continued next page*

voter are listed on the card. Further, the voter identification card must be the most recent card issued to the voter and the address listed on the card must match the address shown on the list of registered voters at the polling place. 2005-124.

**Utilities:** A member of a separately incorporated utility board may be employed by a town as a building inspector on an independent contractor basis. 2005-126.

**Firearms:** Generally, a municipality can regulate the discharge of firearms other than handguns, within its corporate limits. A city may adopt an ordinance making a violation of the state handgun law a violation of municipal ordinance. Further, a city may designate areas within the city limits where firearms may be discharged and may regulate the times and places a firearm can be discharged for hunting and non-hunting purposes, provided such ordinance is not inconsistent with state laws and regulations. 2005-127.

**Taxation:** Lodging at a hunting facility offered separately from a package that includes lodging, food and hunting or fishing, is subject to a lodging tax. 2005-131.

**Employees:** No elected official of Houston County, or any municipality in Houston County, may serve as a member of the Houston County Personnel Board. 2005-133. NOTE: This opinion only relates to those municipalities located within Houston County. See Act 84-578 and Act 93-696.

**Medical Clinic Boards:** A town may not sublease property to a private organization for less than adequate consideration. However, a town that is interested in creating a medical clinic may create a public corporation that subleases space to a private organization for the purpose of establishing a hospital or clinic as permitted by Section 11-58-1, et seq., of the Code of Alabama 1975 or Sections 22-21-310 through 359 of the Code of Alabama 1975. 2005-135.

### ETHICS COMMISSION OPINIONS

**AO-NO. 2005-20:** A city councilmember employed by the public school system, or who has a spouse employed by the public school system, may vote to authorize a Feasibility Study on whether or not to form a city school district, as there is no opportunity for personal gain. Further, they may vote on whether to create a city school district; provided, that the councilmember, or his or her spouse, is not affected nor will receive any benefit different than that received by all other employees of the newly formed city school district.

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# Federal Legislative and Regulatory Issues

Mary Ellen Wyatt Harrison  
Staff Attorney

## Is Your Drinking Water Safe?

Abiding by the new national arsenic standards set to take effect at the start of calendar year 2006 could prove costly to many public water systems. At present, the arsenic limit is 50 parts per billion. But on Jan. 1, 2006, the Environmental Protection Agency is planning to implement a new 10 parts per billion limit. Several lawmakers are worried about the economic impact the new standard will have on public water systems serving smaller, rural communities in particular.

A grant program has been proposed to assist small public water systems with the transition. The new program – titled the Small Public Water System Assistance Program – would be authorized under the Community Drinking Water Assistance Act, S. 689, which awaits markup by the Senate Environment and Public Works Committee. Identical legislation, H.R. 2417, has been introduced in the House.

The Small Public Water System Assistance Program would support projects and activities undertaken in certain areas to achieve or maintain compliance with national drinking water standards. Only small public water systems that serve a disadvantaged community are eligible for the grants. Funds could be used to obtain technical assistance and to train and certify operators of small public water systems.

For this program, a small system would be defined as one that serves a community with a population of no more than 200,000 individuals. Public systems in Bernalillo or Sandoval County, N.M.; Scottsdale, Ariz.; Mesquite or Washoe County, Nev.; and El Paso County, Texas would also be eligible. Communities with a population of less than 50,000 would share at least 20 percent of the funds available each year through the program.

The Health and Human Services Department would fund up to 90 percent of the cost of upgrading a water system; the remaining funds would need to be provided by Small Public Water System Assistance Program grantees. Up to \$1.9 billion would be authorized annually through FY 11 under S. 689.

In hopes of making the process easier on small communities, postponing for 10 years the date by which nonprofit public water systems serving communities of 10,000 or fewer residents would have to comply fully with the arsenic drinking water standard, as well as other regulations that address naturally occurring contaminants such as radon, radium and uranium has been proposed.

Under the Rural Community Arsenic Relief Act, S. 41, a public water system would qualify for an exemption if it could prove that complying with federal rules would not be economically feasible; would have a disproportionate and adverse impact on low-income families; would be substantially impeded by limited access of the nonprofit small public water system to innovative and affordable technology; or would not be necessary, based on the fact that drinking water provided by the nonprofit small public water system does not pose an unreasonable health risk. If S. 41 becomes law, water facilities serving small populations would have until Jan. 1, 2016, to reach full compliance (10 parts per billion).

## Public Housing

Public housing agencies that last year helped significant numbers of residents leave public housing to live independently may be eligible for a share of \$10 million in bonus payments available from the Department of Housing and Urban Development. Through the Graduation Incentive Bonus Program, small agencies with 100 to 249 dwelling units can obtain up to \$12,275; medium-sized PHAs with 250-1,249 units can secure up to \$26,198; and large agencies operating 1,250 or more public housing units are eligible for awards of up to \$207,209. The list of agencies currently eligible for a bonus payment includes 32 large-, 119 medium- and 163 small-sized PHAs. These awards may be used to continue promoting the economic self-sufficiency and management skills of public housing residents. Applicants should not plan to use their awards to initiate new activities or programs.

*continued page 21*

- b) Government has 60 days to determine whether or not it will act as lead plaintiff in the case. This time may be extended by court order.
  - a. If government elects to take the lead, it will have full authority to dismiss, settle or otherwise compromise the claim.
- c) If Government does not take the lead, the Relator may continue with the case on their own.
- d) 6 year statute of limitations
  - i. Can be tolled up to 10 years from the violation if the Government neither knew nor reasonably should have known of the violation.
- e) Damages
  - i. Civil penalty of 5K-10K per violation
  - ii. “Bounty” to plaintiff in the amount of up to 3 times the amount of damage or loss sustained by the Government.

## **THIS IS THE QUINTESSENTIAL WHISTLEBLOWER STATUTE**

### 1. Anti-retaliation provisions in the Act

- a) Any person who is discharged or otherwise retaliated against (demotion, suspension, threats, harassment or other adverse employment action or discrimination) for participating in a *qui tam* action is entitled to:
  - i. Reinstatement with same seniority status as prior to the retaliation.
  - ii. Double back pay with interest.
  - iii. Special damages as a result of the retaliation
  - iv. Litigation costs
  - v. Attorney fees.

## **SO, YOU’VE NEVER HEARD OF THE FALSE CLAIMS ACT, IS IT REALLY THAT BIG OF A DEAL?**

- 1. In 1988 there were 60 *qui tam* cases filed with a recovery amount of 355K.
- 2. In 1999 there were 483 cases filed with a total recovery of 458M.
- 3. Since 1986 2.5B has been recovered as a result of *qui tam* cases.

## **HOW ARE STATE AND LOCAL ENTITIES IMPLICATED?**

State and local entities routinely file claims within the meaning of the Act. They are the recipients of Federal grant money. State and local entities regularly report expenditures and claims for reimbursement to the Federal Government. If State and local entities are “persons” under the FCA, they may be subject to liability under the Act.

### **State Actors Under the False Claims Act**

In the year 2000 the U.S. Supreme Court decided *Vermont Agency of Natural Resources v. United States ex. rel. Stevens* 529 U.S. 765 (2000).

In this case, the plaintiff worked for a state agency and he alleged that the agency was submitting false claims to the U.S. Environmental Protection Agency. The state agency received EPA grants funds to pay employees’ salaries. Agency employees were instructed to submit time records based upon estimates of the work to be performed in the grant application instead of the actual number of hours worked. Even though several agency employees voiced concerns, they were nevertheless instructed to continue to report their time based upon the advanced estimates in the grant application. This was to insure that the agency could maintain or even increase current grant funding.



### **The Court ruled:**

1. From a historical perspective at the time the FCA was adopted, the term “person” did not presumptively include states (as opposed to private corporations).
2. The 1986 amendments imposed “damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities.
3. In comparing the FCA to a similar statute adopted in 1986 (Program Fraud Civil Remedies Act of 1986 31 USC §3801(a)(6), it found that the latter statute specifically excluded states from the definition of “persons.” It would be inconsistent for Congress to subject states to treble damages in one act while exempting states in another.
4. The final analysis is unmistakable. Neither states nor state agencies are “persons” within the FCA

### **Local Government Actors Under the False Claims Act**

Prior to the year 2000 and the *Stevens* decision, the issue of whether local government entities were “persons” under the FCA received little judicial attention. A Federal District Court in New York found that neither states nor municipalities were persons under the FCA. *Graber v. City of New York* 8 F.Supp. 2d 343 (S.D. N.Y. 1998).

After *Stevens*, Appellate courts in the **Third** and **Fifth** Circuits extended *Stevens* and held that local governmental entities also enjoyed immunity from suit under the FCA.

In *United States ex. rel. Garibaldi v. Orleans Parish School Board* 244 F.3d 486 (5<sup>th</sup> Cir. 2001), the Court of Appeals reversed a lower court decision, holding as a matter of first impression that a school board does not qualify as “any person” under the FCA. The Court relied extensively on *Stevens*, but took particular interest in the portion of the *Stevens* decision dealing with the assessment treble damages and their punitive nature.

The Third Circuit Court of Appeals followed *Garibaldi* in *United States, ex. rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002). In this case, the county used HUD funds to buy a piece of property in order to expand a park site. A few years later, the county allowed the state department of transportation to purchase portions of the acquisition parcel for highway expansion purposes. The money was escrowed by the county which intended to re-purchase the land from the state (if the highway was not built) or to return the money plus interest to HUD. Nevertheless, the county did occasionally dip into this fund for general county purposes. The county did not return the money to HUD once it realized that the highway was going to be built. *Dunleavy*, a consultant to the county concerning HUD grants sued as relator. Once again the Court found that the treble damages portion of the FCA was punitive in nature and therefore the county was immune from such suit.

Exactly one week earlier, the Seventh Circuit Court of Appeals rejected the *Stevens* analysis as applied to local governmental entities and drew heavily from the 1986 amendments to find that local governments were indeed “persons” under the FCA. *United States ex. rel. Chandler v. Cook County* 277 F.3d 969 (7<sup>th</sup> Cir. 2002). Because of the split in circuits, the United States Supreme Court accepted *certiorari* and unanimously decided the case *United States ex. rel. Chandler v. Cook County* 123 S.Ct. 1239 (2003).

In *Chandler*, the plaintiff brought a *qui tam* action against the Hekton Institute for Medical Research, Cook County and Cook County Hospital. Chandler alleged that defendants forged certain test data pertaining to non-existent subjects, submitted false progress reports and otherwise failed to comply with human research regulations. The research was undertaken by virtue of a grant from the National Institute of Drug Abuse, and the grant recipients agreed to comply with Department of Health and Human Services guidelines regarding human subject research.

Cook County moved to dismiss arguing that it was not a person under the Act.

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The Supreme Court noted that as early as 1826 the presumption is that the term “person” extends to cover corporations, including public corporations such as municipalities. It has been a long-standing interpretation that municipal corporations were viewed in the same vein as other corporations. The Court said that

while Congress may not have been aiming to reach local governments when it passed the Act, Congress nevertheless wrote “expansively” to reach all types of fraud, without qualification, that might result in financial loss to the Government. Today, local governments receive all sorts of federal funding and are no less able to exploit the federal spending power than other entities. Nothing in the Act or its history pointed to the exclusion of local governments from the meaning of person.

The punitive nature of treble damages does **NOT** lead to the conclusion that local governments should not be liable under the Act. The treble damages provision is compensatory as well as punitive. It serves more as an incentive to motivate would-be plaintiffs than to punish local governments. Rationalizing further, the court said: “although the treble damages remedy is still punitive ... the force of the punitive nature is not as robust as if it were a pure penalty.”

## **Applications of the False Claims Act**

### **Substitution of Goods**

The mere fact that the item supplied to the United States was as good as the one contracted for did not relieve suppliers of liability under former §231 of this title if it could be shown that the suppliers attempted to deceive the government agency. *U.S. v. Aerodex, Inc.* 469 F.2d 1003 (5<sup>th</sup> Cir. 1972)

### **Duty of Applicant for Grant Funds**

The applicant for public funds has a duty to read the regulations or be otherwise informed of the basic requirements of eligibility. One seeking public funds must bear great measure of responsibility in advising the government of the true and actual factual basis of the claim and eligibility for [payments must be established by the recipient. *U.S. v. Cooperative Grain & Supply Co.* 476 F.2d 47 (8<sup>th</sup> Cir. 1973)

### **Respondeat Superior**

The acts of a city employee in manipulating the Section 235 subsidized mortgage housing program operated by the municipality could form the basis for a claim under the FCA, even though the municipality denied awareness of the employee’s manipulation of the program, and asserted that the acts were unauthorized. *U.S. v. Incorporated Village of Island Park* 888 F. Supp. 419 (E.D. N.Y. 1995) ■

Funds will be disbursed to qualified applicants on a first-come, first-serve basis through July 18. Application instructions are available at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-10959.pdf>. Requests for Graduation Incentive Bonus grants should be submitted through [Grants.gov](http://Grants.gov). For more information on this opportunity, contact the Public and Indian Housing Information and Resource Center, (800) 955-2232.

## Grants and Funding

State and local governments, independent school districts and public and state-controlled institutions of higher education are eligible for grants to aid the arts on radio and television. The grant money must be used to support the development, production and national distribution of radio and television programs on the arts. For more information, call Media Arts staff, (202) 682-5738. More information may also be obtained at <http://www.fedgrants.gov/Applicants/NEA/NEA/NEA7344600/Grant>. The deadline is September 9, 2005.

State, local and tribal governments, institutions of higher education, Native American tribal organizations and nonprofit organizations are eligible for grant funds to determine methods and strategies to overcome obstacles to full, active participation of a state or county-based immunization registry by private practitioners. The letter of intent, which is optional, is due August 15, 2005; the application is due August 31, 2005. The contact for the grant is the Centers for Disease Control and Prevention Procurement and Grants Office, (770) 488-2700; [pgotim@cdc.gov](mailto:pgotim@cdc.gov). More information may also be obtained by visiting <http://www.fedgrants.gov/Applicants/HHS/CDC/PGO/CDC-RFA-IP05-096/Grant.html>.

State, local and tribal governments, institutions of higher education, Native American tribal organizations and nonprofit organizations are eligible for grant funds to increase the use of immunization recall office procedures among private practitioners who immunize children in a given community. The optional letter of intent is due August 15, 2005; the application is due August 31, 2005. For more information, contact Centers for Disease Control and Prevention Procurement and Grants Office, (770) 488-2700; [pgotim@cdc.gov](mailto:pgotim@cdc.gov) or visit <http://www.fedgrants.gov/Applicants/HHS/CDC/PGO/CDC-RFA-IP05-088/Modification1.html>.

State, local and tribal governments, institutions of higher education, Native American tribal organizations and nonprofit organizations are eligible for funds to conduct an incremental economic evaluation of the vaccination of healthy children aged 6-23 months, and the adults who

accompany them, in the mass vaccination clinic settings compared with vaccinations at routine health care visits. The deadline for letter of intent is August 15, 2005; and the application is due August 31, 2005. For more information, contact Centers for Disease Control and Prevention Procurement and Grants Office, (770) 488-2700; [pgotim@cdc.gov](mailto:pgotim@cdc.gov) or visit <http://www.fedgrants.gov/Applicants/HHS/CDC/PGO/CDC-RFA-IP05-094/Grant.html>.

The Veterans Administration is making funds available for its Homeless Providers Grant and Per Diem Program for eligible currently operational programs that have previously received a VA Per Diem Only grant in 2002, 2003 and 2004. The deadline is October 5, 2005, and the contact is Guy Liedke, (877) 332-0334. For more information, please visit *Fed. Reg.*, June 6, 2005, pages 32863-32865.

State, local and tribal governments, institutions of higher education, Native American tribal organizations, nonprofit and for-profit organizations and small businesses are eligible for grants to fund development or replicate and test a model of policies and procedures that can be used to implement the new provisions of the Child Abuse Prevention and Treatment Act regarding substance-exposed newborns. The deadline is August 5, 2005, and the contact is Irene Bocella, (202) 205-1723; [ibocella@acf.hhs.gov](mailto:ibocella@acf.hhs.gov). For more information, please visit *Fed. Reg.*, June 6, 2005, pages 32783-32794. Nonprofit organizations, state and local public agencies, and faith-based and community-based organizations are eligible for funds to support the Community Food and Nutrition Program's Nationwide Initiative: Youth Obesity, An American Crisis. For more information please contact Catherine Beck at (202) 401-9352 or [OCSGRANTS@acf.hhs.gov](mailto:OCSGRANTS@acf.hhs.gov) or visit *Fed. Reg.*, June 6, 2005, pages 32794-32805. ■

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the desire to one day take on a larger role in his city's government. His entry into the system was, he says, out of necessity.

"What first got me was that our town was starting to grow and the mayor had just moved," Watson said. "The town needed people who were interested in the growth of the community."

Census 2000 figures show Lincoln having just over 4,500 residents; not one of Alabama's biggest cities, but still in the top quarter. In a state where 47 percent of the municipalities have fewer than a thousand residents, Lincoln is positioned between the largest and smallest of Alabama's cities. Watson feels this provides him a unique opportunity as vice president that will prove advantageous when it comes to sharing information, especially success strategies for municipal improvement, between the state's cities.

One of the strengths of the League, Watson says, is that its leadership has not been limited to only Alabama's biggest cities. Past presidents are "from some of the largest and some of the tiniest" municipalities in the state Watson says, and the varying experiences and ideas these mayors bring enhance the services the League can offer its member cities.

Watson is a graduate of the University of Alabama and the Birmingham School of Law. He is former chairman of the East Alabama Regional Planning and Development Commission and a member of the Kiwanis Club and the Greater Talladega Area Chamber of Commerce. His League work includes service on a number of committees, including FAIR and the League's executive committee. Watson has also been chair and vice chair of the organization's state and federal legislation committee.

His service to Alabama municipalities extends beyond the borders of the state, as Watson currently serves on the NLC's Committee on Information Technology and Communications, Policy and Advocacy, a duty he shares with Alabama municipal officials Mayors Barry McCulley, Homewood; Jim Byard, Jr., Prattville; and Melvin Duran, Priceville. Also serving on the committee with Watson is Lee Loder, council president, Birmingham.

Besides his eight terms as Lincoln's mayor, Watson has worked in the grocery business and is also a certified real property appraiser. He and his wife Joyce have four children.

Under Watson's leadership, Lincoln was one of the first cities in Alabama to start its own cable system, and his involvement with his area's chamber of commerce and regional planning and development commission helped attract the Honda Motor Co. to Talladega County. Through his experiences as mayor of Lincoln, Watson understands the

development problems municipalities, especially smaller ones, can run into.

"We need to recognize that many communities are faced with not having growth," Watson said.

As the League's new vice president, Watson is committed to assisting Alabama's cities in achieving their municipal development goals. ■

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# Environmental Outlook continued from page 11

the time and place symptoms occur. If the symptoms fade or go away when a person is away from home, for example, an effort should be made to identify indoor air pollutant sources that may be possible causes. Some effects may be made worse by an inadequate supply of outdoor air or from the heating, cooling or humidity conditions prevalent in the home.

**Long-term Effects.** Other adverse health effects may show up either years after exposure has occurred or only after long or repeated periods of exposure. These conditions, which include some respiratory diseases, heart disease and cancer, can be severely debilitating or fatal. It is prudent to try to improve the indoor air quality in your home even if symptoms are not noticeable.

While pollutants commonly found in indoor air are responsible for many harmful effects, there is considerable uncertainty about what concentrations or periods of exposure are necessary to produce specific health problems. People also react very differently to exposure to indoor air pollutants. Further research is needed to better understand which health effects occur after exposure to the average

pollutant concentrations found in homes and which occurs from the higher concentrations that occur for short periods of time.

**How Does Outdoor Air Enter a House?** Outdoor air enters and leaves a house by infiltration and natural ventilation or mechanical ventilation. Through infiltration, outdoor air flows into the house through openings, joints and cracks in walls, floors and ceilings, and around windows and doors. With natural ventilation, air moves through opened windows and doors. Air movement associated with infiltration and natural ventilation is caused by air temperature differences between indoors and outdoors and by wind. Finally, there are a number of mechanical ventilation devices available from outdoor-vented fans that intermittently remove air from a single room, such as bathrooms and kitchen, to air handling systems that use fans and duct work to continuously remove indoor air and distribute filtered and conditioned outdoor air to strategic points throughout the house. The rate at which outdoor air replaces indoor air is called the air exchange rate. When there is little infiltration, natural ventilation or mechanical ventilation, the air exchange rate is low and pollutant levels can increase. ■



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## Terry Bassett

**Rev. Terry Bassett**, a Uniontown councilmember, died in a car accident on March 15, 2005. Bassett was entering his second term on the council at the time of his death. ■

## Gerald D. Kelley, Sr.

**Gerald D. Kelley, Sr.**, former councilmember of Geneva, died April 6, 2005. Kelley served on the council from 2002-2004. He served 32 years in the U.S. Air Force, retiring in 1986 at the rank of chief master sergeant. Kelley was a member of Geneva Pride and the Geneva Tree City committee. He was also active in the Maple Avenue Baptist Church. Kelley is survived by his wife, a son, a stepson, two sisters, a stepbrother, five grandchildren and two great-grandchildren. ■

## Huey Johnson

**Huey Johnson**, councilmember of East Brewton, died April 19, 2005. He was 63. Johnson was serving his fourth term on the city council, the first of which began in 1992. He was a retired truck driver and had lived in East Brewton for the past 30 years. Johnson is survived by his wife, three children and seven grandchildren. ■

## Bobby Wood

**Bobby Wood**, former mayor of Athens, died May 2, 2005, of a massive heart attack at South Baldwin Medical Center in Foley. He was 74. Wood served as Athens' mayor from 1980 to 1984. Before going into politics, he designed and built golf courses. ■

## Jim Isaac

**Jim Isaac**, former mayor of Forkland, died April 21, 2005. Isaac served as mayor from 1979 to 2000 and during his time in office made many municipal improvements to the city. He was instrumental in the incorporation of Forkland, organized the first police and fire departments, and secured a grant to build the town hall. ■

## John W. "Dub" Blackwell

**John W. Blackwell**, former mayor of Russellville, died May 13, 2005. He was 76. Blackwell served three consecutive terms as mayor, from 1988 to 2000. He was past president of the North Alabama Mayors Association, past president of the Russellville Rotary Club and vice president of the Franklin County Arts and Humanities Council. Blackwell was also named Franklin County Citizen of the Year in 1992. He is survived by his wife, daughter and two grandchildren. ■

## Ed Porter

**Ed Porter**, former mayor of Bessemer, died May 11, 2005. Porter was 77. During his 16-year tenure in office, the city of Bessemer built an airport, civic center and saw the construction of Interstate 459. Prior to becoming mayor in 1974, Porter had been elected public safety commissioner in 1966. In 1990, he retired to Wilsonville. He is survived by his wife, daughter, son, two sisters, four grandchildren and four great-grandchildren. ■

## Tommy Roden

**Tommy Roden**, former councilmember and mayor of Holly Pond, died May 23, 2005, at Brookwood Medical Center in Birmingham. He was 71. Before becoming mayor, Roden became Holly Pond's town clerk at the request of the mayor and city council. In the next election, he won a seat on the council and began a political career that spanned 40 years. Roden became mayor in 2001 when the sitting mayor died, a position he filled until 2004. He is survived by his wife, son, daughter and two grandchildren. ■

## Robert M. "Bob" Davis

**Robert M. "Bob" Davis**, former mayor of Cedar Bluff, was found dead June 8, 2005, at his home, apparently of natural causes. He was 62. Davis resigned from office on May 11, 2005, a position he had held since 1993. ■



*The best thing  
about the future is that  
it only comes one day at a time.*

*— Abraham Lincoln*

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