

The Alabama Municipal JOURNAL

December 2011

Volume 69, Number 6

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The Alabama League of Municipalities at 535 Adams Avenue in downtown Montgomery. Photo by Elmore DeMott, www.elmoredemott.com.

A Message from the Editor



Alabama is a great place to live for many reasons. Rock climbing is one of them!

The Christmas season is once again upon us and, as we prepare for surprises from Santa, festive holiday parties and quality time with family and friends, it's also a good opportunity to reflect on the past 12 months – the challenges and the accomplishments – as we bid farewell to 2011.

It was a milestone year for both the State of Alabama and the Alabama League of Municipalities. In January, state, county and municipal public officials and employees began the New Year under a reformed and extremely vigorous Ethics Law which passed in a Special Session last December. State, county, municipal and association employees, lobbyists, and elected officials spent most of 2011 maneuvering very carefully as the new Ethics Law began to thread its way into the fabric of the Legislative process. ALM's staff continues to work closely with the Alabama Ethics Commission and the Attorney General's Office to ensure that our membership has the most current information possible on the new Ethics Law.

When the Legislature met for its Regular Session on March 1st, it did so with its first Republican majority in 136 years. In every session of the Alabama Legislature since 1935, the League has served as the guardian and the voice of municipal interests. This year was no exception. The League supported an aggressive legislative agenda and had a number of significant successes during the Session, including bills relating to publication of municipal ordinances, competitive bid law, validation of municipal annexations and penalties relating to environmental laws. Also during the Session, the new Legislature passed a sweeping immigration law, Act No. 2011-535, which has since been touted as the toughest in the nation. There is still a great deal of uncertainty surrounding the law and how it is to be implemented and so the Alabama League of Municipalities has been studying Act No. 2011-535 and is working closely with several key constituency groups to help determine how to best enforce it.

On Wednesday, April 27, 2011, Alabama hosted an unusual yet perfect set of weather conditions that produced dozens of deadly tornadoes beginning before dawn until late that night. Within the span of a few hours, one of the most prolific and catastrophic natural disasters in Alabama's history unfurled. A record-breaking 62 monsters from the sky ravaged the northern two-thirds of the state, decimating over 1200 miles, scattering 10 million cubic yards of debris, claiming more than 240 lives and causing an estimated \$1.5 billion in property damage. This unprecedented tornado outbreak, which included seven EF-3, eight EF-4 and three EF-5 monsters, catapulted Alabama into the national spotlight and will eventually rank as one of FEMA's top 10 costliest disasters – and Alabama's municipalities will be recovering for many years to come.

This epic natural disaster struck the state just three days prior to the Alabama League's annual convention, which was scheduled to take place in Huntsville April 30-May 2. The damage resulting from the tornados left the League with no choice but to postpone the convention until late June. Even so, Mayor Tommy Battle and the City of Huntsville worked diligently with the League's staff to ensure that ALM's annual convention met the expectations of our membership.

In May, Perry C. Roquemore, Jr., the League's executive director and longest serving employee, retired after 37 years of service. During the rescheduled convention in June, the League's membership voted to make Ken Smith, a 25-year League employee, the fourth executive director in ALM's 76-year history.

Also this year, the League launched a completely redesigned website – an updated, streamlined, aesthetically superior version that makes it easier for municipal officials and employees to find relevant, timely information. We plan to add additional features in 2012 that will, hopefully, save money and time in the long run. The League has also begun distributing a weekly e-newsletter, "This Week from the League," which is sent to every municipal official and employee in our database. If you have not received the e-newsletter, but you are currently on our blast email list, please check your SPAM and/or Junk Mail folders and add us to your safe senders list. If you're not on our blast email list and would like to receive "This Week from the League," we're happy to add you! Please visit our website at www.alalm.org, click on the red link near the top of the page that says, "Sign up for our Newsletter" and complete the form.

From our family to yours, have a wonderful Christmas! We look forward to a very productive 2012 as we continue to work with you on behalf of our cities and towns!

Carrie

The President's Report

Councilmember Thomas O. Moore • Demopolis



Attorney General Announces Webpage for Information/Guidance Regarding Alabama's Immigration Law and Litigation

Last month, Attorney General Luther Strange announced that information and guidance regarding Alabama's new immigration law, Act No. 2011-535, and the legal challenges to the law will be posted on the Attorney General's website at www.ago.alabama.gov.

According to a press release from the AG's office, the Attorney General's primary role remains to represent the State defendants in ongoing litigation. Due to this litigation, under state law, the Attorney General may not issue formal opinions on specific questions. Although the role of the Attorney General's Office in the ongoing litigation limits the nature of communications and advice the Attorney General may provide about Act 2011-535, and state law prohibits the issuance of Attorney General Opinions while the

This general guidance may also be helpful to law enforcement and district attorneys, though the AG's Office encourages them to look specifically to the Alabama Department of Homeland Security and the Alabama Peace Officers Standards and Training Commission. Act No. 2011-535 provides for the Alabama Department of Homeland Security to coordinate with law enforcement agencies regarding practices and methods to enforce the law, and the Alabama Peace Officers Standards and Training Commission will offer training opportunities in the future.

The Alabama League of Municipalities has also been studying the new immigration law and is working closely with several key constituency groups to help determine how to best enforce Act No. 2011-535. Shortly after the fall meeting of the Alabama

Association of Municipal Attorneys (AAMA), the League's Legal Department invited a group of municipal attorneys to meet and discuss the many issues raised for our communities as a result of provisions of the new immigration law that were not stayed by the federal court pending the multiple lawsuits challenging Act No. 2011-535. This group, which included attorneys from the major metropolitan areas of the state as well as smaller municipalities, met at the League headquarters on November 2nd and began developing some consensus on how to best implement the provisions of the law. They also began compiling a list of "problem areas" that needs further clarification – either through the rule-making process or legislatively.

Following the November 2nd meeting at League headquarters, ALM General Counsel Lori Lein and Deputy General Counsel Tracy Roberts attended a meeting on November 8th set up by Homeland Security. (As I mentioned

earlier, the Alabama Department of Homeland Security and the Secretary of State are authorized under the law to disseminate rules for implementing the law.) There were many interested parties represented at the November 8th meeting, including the Governor's Office, the Department of Public Safety, the Sheriff's Association, the Police Chief's Association, the Department of Conservation, the Department of Revenue, the Association of County Commissions and the League of Municipalities. Although no substantive work took place during this meeting, a subcommittee was formed to research issues relating to Sections 7 and 30 of the Act dealing with business transactions and public benefits. The League will be actively involved in this process and will be attending future meetings on this critical topic. ■



Municipal attorneys from around the state met at League Headquarters on November 2nd to discuss Alabama's new immigration law.

litigation is underway, the Office of Attorney General is committed to assist governmental agencies and officers as possible so that they may properly carry out their own duties. The office will, therefore, develop guidance that will be based, in part, upon positions taken in legal filings and posted on the website periodically as it becomes available to assist state and local agencies in their interpretation and enforcement of the immigration law.

The Attorney General's webpage includes summaries on the lawsuits in federal and state courts, including links to numerous documents that have been filed. A searchable copy of Act 2011-535 is posted, as is information about which provisions of the law have yet to take effect, which provisions now are in effect, and which provisions have been enjoined from enforcement by court order.



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- 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

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- Danny B., Defendant
Marshall County, Alabama

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- Craig A., Defendant
Foley, Alabama

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Municipal Overview

Ken Smith • Executive Director



2012 League Legislative Package

The Alabama League of Municipalities Committee on State and Federal Legislation met at League Headquarters on Thursday, November 3, 2011. The committee, which is composed of elected municipal officials from throughout the state, considered a multitude of legislative recommendations from the League's five policy committees, member municipalities, and the League staff. At the conclusion of their meeting, the committee unanimously approved the package of bills listed below to be introduced during the 2012 Regular Session.

The contributions and input from the League's five policy committees is crucial to the development of the League's legislative package. Each year, municipal officials serving on these committees hear from state and federal resource advisors and create a set of proposed policies and goals that are adopted by the full membership at the League's annual convention. These policies and goals establish the course which the League will follow on vital issues at the state and federal levels of government. While many don't realize it, one of the most important roles the policy committees performed is the suggestion of legislation that will enable municipalities to better serve their citizens.

The realities of the legislative process prevent the submission of all legislative proposals. The Legislative Committee's role is to wade through the work of the policy committees and any other issues that have arisen and prioritize these proposals into 10 – 12 bills that the League will attempt to pass each session. This session, seven of the League's eleven proposed bills stem from policy recommendations from these committees. We want to thank the members of the League's policy committees for their hard work in developing these policy statements and legislative recommendations. The chairs and vice chairs for the League's policy committees are:

Community and Economic Development

Chair: Mayor Phil Segraves, Guin

Vice Chair: Councilmember Newton Cromer, Saraland

Energy, Environment and Natural Resources

Chair: Councilmember Dean Argo, Prattville

Vice Chair: Mayor Rusty Jessup, Riverside

Finance, Administration and Intergovernmental Relations

Chair: Councilmember David Hooks, Homewood

Vice Chair: Councilmember Adam Bourne, Chickasaw

Human Development

Chair: Councilmember Tayna Rains, Dutton

Vice Chair: Councilmember Lewis Washington, Wetumpka

Transportation, Public Safety and Communications

Chair: Councilmember Jeddo Bell, Greenville

Vice Chair: Mayor Gary Livingston, Eva

Without the input of these committees, the work of the Legislative Committee would be much more difficult. We encourage any municipal official who is interested to contact the League regarding service on next year's committees. We also want to thank the members of the Legislative Committee for their efforts in developing this legislative package. The Chair and Vice Chair of the Committee on State and Federal Legislation are:

Chair: Councilmember Debbie Quinn, Fairhope (32)

Vice Chair: Councilmember Sadie Britt, Lincoln (11)

The Committee on State and Federal Legislation has adopted an ambitious League Legislative Package for 2012. It is critical that all municipal officials get behind this package and push for its passage during the session. Please make a special effort to contact legislators while they are home before the session begins. The impact of these personal contacts cannot be overemphasized. **The Regular Session will begin on February 7, 2012.**

Just as we have in the past, the League will work hard to keep you informed during the session. Although the format may look different from previous sessions, we will continue to provide a weekly Legislative Bulletin summarizing any legislative developments that took place that week. As you

well know, however, Legislative developments often won't wait for notice in the Legislative Bulletin. Therefore, if you have provided us with an e-mail address, you will receive periodic e-mail Legislative Alerts as a benefit of your League membership. Please review these messages carefully. We may need you to contact your legislators and express your views to them as the session progresses. Your immediate response to League requests can often make a difference between whether legislation passes or fails. Working with you as a team, the League legislative staff stands the best chance of preventing the enactment of negative legislation while helping put our own bills in the most favorable position possible.

In addition to these notices we also plan to begin providing advance notice about upcoming committee meetings and other information that will help you prepare for action each week. The League will use these and other methods to keep you informed and up to date.

The need for municipal officials to speak with a unified voice has rarely been as critical as it is now. Due to economic instability and shortfalls in both State budgets, we can expect a very tough session, as we work both to protect the legislatively-granted authority to raise needed funds locally as well as to prevent the erosion of state distributed local revenues.

In recent sessions, we have seen numerous efforts to eliminate or reduce taxes on various businesses. We expect these attempts to continue. Passage of these bills would have a devastating effect on local governments. More than any other level of government, local governments depend on these revenues to provide services to their citizens.

Unfunded mandates are always a concern as the state places more responsibilities on local governments without providing adequate funding to meet these demands. Please continue to help us address these and other issues as they come before our state legislature. Together, we can keep our cities and towns strong.

The League's legislative package will consist of the following items (in no particular order of priority):

2012 League Legislative Goals

Mayoral Vacancies in Certain Class 7 or 8 Municipalities

Section 11-44G-2, Code of Ala. 1975, provides a procedure to be used in Class 7 or 8 municipalities for filling a vacancy in the office of mayor. Another statute provides that the Council President in cities of 12,000 or more inhabitants shall automatically become mayor under the death or resignation of the mayor. Over the years, the population of some Class 7 or 8 municipalities has increased to 12,000 or more inhabitants. These cities are faced with conflicting statutes and have no guidance as to the procedures

they should use to fill mayoral vacancies. This bill proposes to amend Section 11-44G-2 to allow the council president to fill the vacancy in Class 7 or 8 cities with populations of 12,000 or more inhabitants.

Engineer Approval of Subdivisions

The League will seek legislation to amend Section 11-52-30(b), Code of Alabama 1975, relating to subdivision regulations to allow the city engineer of any municipality, whether employed full-time or by contract, to approve subdivision proposals in lieu of a county engineer.

Competitive Bid Law – Data Management Exception

The competitive bid law requires bidding of services and goods that exceed \$15,000. Certain contracts are exempting from the bidding requirement. The League will seek an amendment to the bid law to exempt the purchase of data management services from bidding.

Competitive Bid Law – Local Preference

Current law allows municipalities to give a 3% preference for local bidders as defined by the bid law. The League will seek support legislation to increase the preference allowed local bidders under the provisions of the competitive bid law from 3 percent to 5 percent.

Law Enforcement Contracts

Municipalities may enter contracts to have other law enforcement agencies enforce state laws within the municipal corporate limits. Municipalities in a few counties have authority to contract for the enforcement of their municipal ordinances, but most municipalities do not have this authority. The League will seek authority for municipalities in all counties to enter into contracts that allow other law enforcement agencies to enforce municipal ordinances.

Meeting Cancellation

No current procedure exists that allow municipalities to cancel meetings in advance, even when no quorum will attend. This legislation will allow the presiding officer to cancel a meeting after receiving written notice from a sufficient number of members of the council to know that a quorum will not attend the meeting.

Federal Food Stamps

The League will seek legislation similar to that enacted in other states to authorize the Alabama Department of Human Services to opt out of the Federal law which restricts persons convicted of felony drug charges from being eligible to receive food stamps if the individual meets all other eligibility requirements for aid or benefits.

continued on page 24



The Legal Viewpoint

By Lori Lein
General Counsel



Conflicting Offices and Interests

As election season approaches, we receive many calls relating to problems with the legal incompatibility of elected or appointed offices and conflicts of interest. Even after elections are over, these issues continue to nag public officials and employees. Under the common law, offices were considered incompatible if their functions were inconsistent, one being subordinate to and interfering with the other so as to induce the presumption that they could not be executed impartially by the same officer. Also, at common law, the Biblical admonition that “no man can serve two masters” has been applied to prevent public officers from doing public business with themselves.

In addition to these heritages from the common law, there are definite provisions on the subject found in the Alabama Constitution of 1901 and the Code of Alabama. From a practical standpoint, these laws are the principal guides. Few cases construing these laws exist, but conscientious officials have requested numerous opinions of the Attorney General's office over the years relating to conflicting offices and conflicts of interest.

This article is a summary of constitutional and statutory provisions dealing with the compatibility of offices and conflicts of interest together with a collection of related opinions from the Attorney General and the courts.

Offices of Profit

State laws which prevent the holding of two offices of profit by the same person at one time have generated more opinions from the Attorney General than any other aspect of this subject.

Section 280 Alabama Constitution, 1901, states:

“No person holding an office of profit under the United States except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time

under this state, except justices of the peace, constables, notaries public and commissioners of deeds.”

In addition to this provision, an Alabama statute practically restates the prohibition found in Section 280. Section 36-2-1(b), Code of Alabama 1975, reads as follows:

“No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this state, nor shall any person hold two offices of profit at one and the same time under this state, except constables, notaries public and commissioners of deeds.”

What exactly does the term “office of profit” mean? The lack of a concise definition for the term has caused most of the trouble in construing these laws. The Alabama Supreme Court gave this guidance: “We are of the opinion and so hold, that any state, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the state, the term and salary or prerequisites of which are fixed by law, is an office of profit within the purview and meaning of Section 280, Alabama Constitution, 1901.”

In *Montgomery v. State*, 107 Ala. 372, 18 So. 157 (Ala. 1895), three tests were established by the court to determine if an office is one of profit:

- whether the sovereignty, either directly or indirectly, as through a municipal charter, is the source of authority;
- whether the duties pertaining to the position are of a public character; that is, due to the community in its political capacity; and
- whether the tenure is fixed and permanent for a definite period by law.

To this might be added that the office must carry with it a right to compensation for the performance of its duties.

These provisions of the law do not prevent a person who holds an office of profit from being a candidate in an election for another office of profit, nor from continuing to hold the first office after election to the second office up to the time

the duties of the second office are assumed. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57 (Ala. 1913). Acceptance of the second office of profit automatically vacates the first office. *State v. Herzberg*, 141 So. 553 (Ala. 1932). This, of course, is true whether the second office of profit is elective or appointive.

A person may serve as a postmaster and as a part-time councilmember. AGO 2005-019.

Ruled Offices of Profit

The following positions have been held to be offices of profit either by the courts or by the Attorney General: The following have been held to be offices of profit either by the courts or by the Attorney General: **Mayor**, 1 Q. Rep. Att. Gen. 85, 88 Q. Rep. Att. Gen. 8, and AGO to Hon. Bentley Hill, July 21, 1972; **members of county board of registrars**, AGO to Hon. W. H. Olvey, July 23, 1959 and AGO 2005-031; **municipal judge** (see exception above), AGO to Hon. Arnold Teks, July 13, 1960, and Hon. P. M. Johnston, September 11, 1964; **county solicitor**, 64 Q. Rep. Att. Gen. 108, and AGO to Hon. P. M. Johnston, September 11, 1964; **member of county board of education**, 77 Q. Rep. Att. Gen. 77 and AGO 1988-114; **chief deputy sheriff**, 64 Q. Rep. Att. Gen. 58; **deputy sheriff paid with public funds**, AGO to Hon. Buford L. Cryar, March 17, 1975; **supernumerary probate judge**, AGO 1980-518 (to

Hon. Don Siegelman, August 19, 1980); **register of circuit court**, 52 Q. Rep. Att. Gen. 238 and 103 Q. Rep. Att. Gen. 8; **circuit solicitor**, AGO to Hon. Glenn Manning, August 23, 1956; **state docks director**, 88 Q. Rep. Att. Gen. 8, and AGO to Hon. K. L. McRae, July 8, 1957; **member of board of equalization**, 82 Q. Rep. Att. Gen. 20; **member of state legislature**, *Smith v. State*, 162 So.2d 473 (Ala. 1964), and Biennial Reports of the Attorney General, 1928-30, page 636; **councilmembers where their salary has been established by ordinance or resolution**, 103 Q. Rep. Att. Gen. 8 and AGO 1988-114; **holder of any elective office of the county**, 77 Q. Rep. Att. Gen. 47 and AGO to Mayor of Cherokee, August 2, 1956; **police chief**, *Alexander v. State*, 150 So.2d 204 (1963) and AGO to Hon. Larry Moody, November 18, 1975; **county license inspector**, AGO to Mr. T. C. Almon, April 17, 1964; **coroner**, AGO to Hon. Moran Baxter, February 21, 1975; **county commissioner**, AGO to Hon. Charles R. Adair, Jr., January 27, 1975; **district attorney**, AGO to Hon. John Starnes, September 26, 1973; **deputy district attorney**, AGO to Hon. John T. Reid, April 9, 1974; **deputy coroner**, AGO 1979-221 (to Hon. William J. Murray, June 11, 1979); **member of water improvement commission**, AGO 1979-160 (to Hon. Robert Gullledge, April 26, 1979); **supernumerary probate judge**, AGO 1980-518 (to Hon. Don Siegelman, August 19, 1980); **fire chief**, AGO 1981-235 (to Hon. Charles A. Nix, February 10,

1981); **postmaster**, AGO to Hon. Berniece T. Clark, July 14, 1972; **city school superintendent**, AGO 1982-066 (to Hon. Bob M. English, November 6, 1981); **supernumerary district attorney**, AGO 1982-309 (to Hon. Joseph M. Carlton, April 29, 1982); **clerk of the State Supreme Court**, AGO 1984-136 (to Hon. John F. Tanner, January 27, 1984); **member of the board of Alabama Board of Funeral Services**, AGO 1993-212; **member of State Board of Education**, AGO 2003-065; **member of Macon County Racing Commission**, AGO 2004-199; **members of the State Oil and Gas Board**, AGO 1994-132.

Section 280, Alabama Constitution, 1901, does cover a municipal councilmember who is entitled to receive a salary. If the councilmember is not entitled to receive a salary, then he or she does not hold an office of profit. The Attorney General has ruled that a councilmember entitled to receive compensation cannot waive that compensation in order to make the position one that is not an office of profit. AGO to Hon. John A. Denton, March 8, 1974; AGO 2000-064. Neither Sections 145, 147, nor 280, Alabama Constitution, 1901, prohibit a municipal judge from also serving as a city council member. AGO 2006-060.

Ruled NOT Offices of Profit

On numerous occasions the courts or the Attorney General have ruled that certain public positions are not offices of profit. Caution must be used in this aspect of the discussion of offices of profit. Simply because a position is not an office of profit does not necessarily mean it may be held simultaneously with an office of profit. Conflicts of interest statutes might prevent an officer of a municipality from being employed in a position not deemed to be an office of profit. Any position with a governmental unit which is a matter of contract is not deemed an office of profit.

The following is a list of positions held **not** to be offices of profit: **Councilmembers whose salary or compensation has not been set by ordinance or resolution**, 103 Q. Rep. Att. Gen. 8 and AGO 1992-400; **school principal**, AGO to Hon. William Olvey, August 31, 1956; **delegate to political party convention**, 83 Q. Rep. Att. Gen. 32; **city attorney**, AGO to Hon. Donald Burtkiewicz, September 28, 1964; **vocational teacher**, AGO to Hon. W. W. Weatherford, August 16, 1960; **jury commission clerk**, AGO to Hon. H. F. Koonce, February 9, 1961; **Civil Defense director**, AGO to Hon. W. M. Griffin, October 7, 1964; **assistant city attorney**, *State v. Wilkinson*, 124 So. 211 (Ala. 1929); **assistant director of vocational trade and technical school**, AGO to Hon. Herman Thompson, June 25, 1966; **city clerk**, 15 Q. Rep. Att. Gen. 350; **city treasurer**, 15 Q. Rep. Att. Gen. 350; **member of State Planning Board**, 46 Q. Rep. Att. Gen. 82; **superintendent of school bus transportation**, 52 Q. Rep. Att. Gen. 268; **member of municipal water**

board, 81 Q. Rep. Att. Gen. 32; **school teacher**, AGO to W. H. Olvey, August 31, 1956 and AGO 1984-108 (to Hon. Fred M. Scoggins, January 4, 1984); **director of municipal utility board**, AGO to Hon. Robert S. Milner, June 5, 1967; **county attorney**, AGO to Hon. L. H. Boden, November 5, 1970; **president of a state university**, AGO to Hon. Robert Guillot, March 13, 1972; **rural mail carrier**, AGO to Ms. Martha Lawrence, June 29, 1972; **deputy sheriff who is paid by sheriff**, AGO to Hon. E. H. Graves, Jr., June 15, 1972; **bailiff**, AGO to Hon. Curtis Wright, February 6, 1976; **unpaid member of city board of education**, AGO to Mr. Clifford S. Smith, August 1, 1977; **special assistant attorney general**, AGO to Hon. James D. Evans, December 20, 1977, and February 2, 1978; **county RSVP director**, AGO 1982-166 (to Hon. William B. Duncan, February 5, 1982); **assistant district attorney**, AGO 1985-084 (to Hon. John C. Jay, Jr., November 20, 1984); **members of utility board, housing authority and industrial development board**, AGO 1985-137 to Hon. R. C. Hagood, December 27, 1984; **classified employees elected to county office**, AGO 1986-010 (to William G. Hause, October 8, 1985); **County Clerk**, AGO 1986-384; **employees of separately incorporated electric corporations**, AGO 1992-309; **members of the board of commissioners of an emergency management communications district**, AGO 1992-375; **retired probate judge receiving retirement pay**, AGO 1992-497; **distribution clerk with U. S. Postal Service**, AGO 1980-586 (to Hon. Thomas E. Manning, September 15, 1980); **Water Authority board member**, AGO 2004-193; **county legislative coordinator**, AGO 2004-224; **uncompensated member of local volunteer fire department**, AGO 2006-138; **uncompensated reserve police officer**, AGO 2004-174; and an **uncompensated volunteer fire chief**, AGO 1993-012.

Nepotism

The question often arises as to whether employees of cities and towns may be related to officers of the municipality by blood or marriage. In an opinion to Hon. L. C. Grigsby, dated December 21, 1959, the Attorney General ruled that his office could find no general laws which prohibit a relative of the municipal governing body from holding a position with the municipality. The state nepotism statute applies **only** to state officials and employees. AGO to Hon. Elizabeth O. Thomas, January 12, 1976; AGO 2002-168 and AGO 2004-149.

It should be pointed out, however, that several municipalities have local civil service statutes which prescribe conditions under which relatives may not be employed. The Attorney General's office has determined that absent local civil service prohibitions, a council member's spouse may be employed by the municipality as long as the

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council member does not participate in the employment decision or any other issue specifically concerning the spouse's employment. AGO 2000-181.

Membership on Boards

Alabama laws provide for the establishment of boards which act as agencies of municipalities. Notwithstanding any other provision of law, employees of any separately incorporated public corporation authorized to be created by a municipality pursuant to state law are employees of that separately incorporated entity and are not employees of the municipality authorizing the creation of the entity. Section 11-40-24, Code of Alabama 1975.

These statutes invariably prescribe restrictions upon the persons who may serve as directors. Care must be used by a municipal governing body or other appointing authority, to comply with these restrictions in each case. Examples of these restrictions are revealed in the following Attorney General and court opinions:

- A municipal councilmember may not be appointed to serve as a member of the municipal housing authority because Section 24-1-24, Code of Alabama 1975, provides that "None of the commissioners may be city officials." AGO to Hon. E. E. Wakefield, December 11, 1956.
- A councilmember may not be a member of a zoning board of adjustment. AGO to Hon. John B. Nisbet, Jr., February 24, 1970.

- A mayor cannot serve as a member of the State Ethics Commission. AGO 1979-344 (to Hon. Leslie S. Wright, January 25, 1979).

- A councilmember may be employed by a separately incorporated utility board if he or she does not hold a managerial position with the board. AGO 2004-213.

- Section 11-50-313, Code of Alabama 1975, has been amended to permit councilmembers serving on utility boards organized pursuant to said law to receive a fee for this service, provided the board of directors of the utility approves it first. However, a utility board cannot pass a resolution allowing a municipal officer to receive retroactive compensation for serving on the board. AGO 1986-268.

- A member of a city gas board may serve on the city medical clinic board, although Section 11-54-8, Code of Alabama 1975, prohibits a city officer from serving on a medical clinic board. However, the Alabama Supreme Court concluded in *Mobile v. Cochran*, 276 Ala. 530, 165 So.2d 81 (1964), that a member of a separately incorporated municipal utility board is not an officer or employee of the city. AGO to Hon. Louis P. Moore, November 3, 1978.

- A municipal officer or employee may serve as a director of a downtown redevelopment authority. Section 11-54A-7, Code of Alabama 1975.

- A councilmember may serve as a director of a county hospital association. AGO 1981-003 (to Hon. W. D. Scruggs, Jr., October 2, 1980).

At times questions are raised as to the legality of professionals serving on municipal boards. Section 36-25-9, Code of Alabama 1975, states that nothing in that section shall prohibit real estate brokers, agents, developers, appraisers, mortgage bankers or other persons in the real estate field or other state-licensed professionals from serving on any planning boards or commissions, housing authorities, zoning board, board of adjustment, code enforcement board, industrial board, utilities board, state board or commission. The statute further provides that all municipal regulatory boards, authorities or commissions currently comprised of any real estate brokers, agents, developers, appraisers, mortgage bankers or other persons in the real estate industry may allow these individuals to continue to serve out their current term if appointed before December 31, 1991, provided that, at the conclusion of such term, subsequent appointments shall ensure that membership of real estate brokers and agents shall not exceed one less of a majority of any municipal regulatory board or commission effective January 1, 1994.

The mayor, as a member of the city council and of the planning commission and who is also a realtor with a client affected by a vote, is prohibited from voting on any matter defined in Sections 11-43-53 and 36-25-9, Code of Alabama 1975. AGO 1993-193.

Public Utility Employees

Section 11-43-11, Code of Alabama 1975, states the following:

"No officer of any municipality shall, during his term of office, be an officer nor employed in a managerial capacity, professionally or otherwise, by any corporation holding or operating a franchise granted by the city or the state involving the use of the streets of the municipality. This section shall not apply to or affect any attorney or physician employed by the municipality, and any municipality incorporated or organized under any general, special or local law of the state of Alabama may employ an attorney or physician, or attorneys or physicians, employed by a public utility."

The Alabama Supreme Court in *State v. Morrow*, 162 So.2d 480 (1964), held that the legislative intent and purpose of the section is clear. The court stated that the section was enacted on the theory that employment by a public utility holding a franchise granted by the city involving the use of the city's streets could be incompatible with serving as an officer of the municipality at the same time. The real basis of such incompatibility is the possibility of a conflict of interest between the interest of the municipality and the interest of the public utility. The Attorney General has ruled that the law does not prevent a person covered by its provisions from running for municipal office and being elected thereto. But before assuming the duties of the office that person must

resign from employment with such utility, even though that employment is not within the municipality. AGO to Hon. Charles R. Cain, September 22, 1960. This section prohibits the treasurer of the Northwest Alabama Gas District from serving as mayor or councilmember where the district serves the municipality. AGO to Hon. M. C. Hollis, Jr., July 24, 1956. A cable television company which holds a franchise issued by the city is within the coverage of the section. AGO to Hon. W. K. Little, May 12, 1972.

This statute does not prohibit the mayor of a municipality from being appointed superintendent of utilities as such is expressly authorized by law. See, Section 11-43-161, Code of Alabama 1975. The manager of the local office of Alabama Power Company cannot be a member of the city's incorporated utility board. AGO 1981-403 (to Hon. J. D. Falkner, June 2, 1981). A person employed by a utility holding a city franchise may serve on the city governing body unless he serves in a managerial capacity for the utility. AGO 1986-211 (to Hon. W. A. Smith, April 15, 1986).

Conflicts of Interest

A number of statutes prohibit municipal officers and employees from having specific dealings with a municipality, but the one most widely referred to is found in Section 11-43-12, Code of Alabama 1975. It provides, in part, as follows:

"No alderman or officer or employee of the municipality shall be directly or indirectly interested in any work, business, or contract, the expense, price, or consideration of which is paid from the treasury, nor shall any member of the council, or officer of the municipality be surety for any person having a contract, work, or business with such municipality, for the performance of which a surety may be required."

This section not only prohibits officers and employees from having contracts with the municipality, it prohibits their being employed by the municipality. 53 Q. Rep. Att. Gen. 67. The following opinions indicate the wide scope of this section.

An officer of a municipality may not hold any other salaried position in the municipality even though he receives no pay for such office. AGO to Hon. Cecil White, February 7, 1966. An officer of a municipality may not also serve as a police officer even though the only compensation provided would be payment for gasoline, oil and automobile upkeep. AGO to Hon. H. B. Wilson, December 14, 1964. However, the law does not prohibit a municipal firefighter from serving as a county commissioner. AGO 1992-277. A municipal clerk is not prohibited from serving as a director of a separately incorporated utility board or from receiving compensation for such service. AO NO. 1993-1.

A municipal councilmember is prohibited from engaging in the bail bond business while serving on the council. A

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When the Public Works Department in Tuscaloosa County, Alabama, solicits bids for heavy equipment, purchase price is just one factor it considers, says Engineering Coordinator Michael Henderson. "If there's a disaster in our area, we need to know our equipment, and our dealer will come through for us. We must know, beyond a shadow of a doubt, that the equipment is ready to work because response time is critical."

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properly authorized professional bail company owned by the spouse of a councilmember may do business in the municipality. AGO 1997-084.

A mayor has an indirect interest in the contracts of his wife who does business in her individual capacity and the municipality is prohibited from contracting with her by law. AGO to Hon. Josh Mullins, May 4, 1965. The section prohibits a municipality from doing business with a corporation whose sole stockholder and owner is the spouse of a municipal employee. AGO 1988-275. These sections also prohibit a mayor from selling insurance to the municipality, if he or she is an agent for the insurance company. AGO to Mayor of Florence, March 14, 1952. A municipal officer may not subcontract to perform part of a contract between the city and its prime contractor without violating the section. AGO to Hon. Carlton Mayhall, October 6, 1964. An officer may not lease a water supply to the waterworks system since he would be directly interested in a contract the consideration for which would be paid from the municipal treasury. AGO to Hon. E. C. Morrison, September 2, 1964. When a municipality serves as a sponsor for a summer food service program and federal funds pass through the municipal treasury, councilmembers are prohibited by Section 11-43-12, Code of Alabama 1975, from serving as the compensated program administrator. AGO 1992-299.

A councilmember may not lawfully sell goods, wares or merchandise to a municipality which he serves as councilmember. However, the Attorney General has ruled that an exception exists when the only newspaper in the municipality is owned by a municipal official. In this case, the city may go ahead and advertise in that paper as required by law. It is reasoned that the publication requirement overrides the conflict prohibition; it is further noted that publication rates for legal advertisements are established by law. 56 Q. Rep. Att. Gen. 108.

A municipal employee may not use municipal facilities to conduct Tupperware or jewelry parties on a lunch break or after hours, when the party will result in a financial gain to the employee or a business with which he or she is associated. AO NO. 1996-59.

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

Members of a city council may vote on a rezoning issue affecting the neighborhood in which they or a family member resides, as there is no personal gain, nor will the members be affected any differently than the other residents of the neighborhood. AO NO. 2004-08 and AO NO. 2008-03.

A municipality may sell real property to a group of citizens, one of which is a councilmember, provided the

city receives the fair market value of the property and the councilmember does not take any part in the consideration of the sale and does not vote on the sale of the property. It is the best public policy to sell such property by competitive bidding. The councilmember should make a public disclosure of the potential conflict of interest. AGO 1993-194.

In *Mobile v. Cochran, supra*, the Alabama Supreme Court ruled that members of separately incorporated boards are not officers of the city and, therefore, are not governed by the restrictions of Section 11-43-12, Code of Alabama 1975. The chair of a municipal water and sewer board may accept employment with the city housing board as long as the individual does not use either position to financially benefit either the water works and sewer board or the housing authority. AO NO. 1993-126.

A councilmember may not hold the job of municipal clerk even though no pay is received for services as a councilmember. AGO to Hon. Lloyd Barnes, November 26, 1956. A municipal employee who is elected to the council may not continue to serve as an employee when he assumes office on the council. AGO to Hon. Charles Adams, July 31, 1956.

Although public officials and employees may accept free athletic tickets to sporting events or other social occasions, they may not solicit these tickets. AO NO. 1999-16.

Section 11-50-313, Code of Alabama 1975, allows councilmembers serving as directors of utility boards to receive compensation for their service. Also, Section 11-43-80, Code of Alabama 1975, specifically allows the mayor to be hired as superintendent of utilities for additional compensation. An individual may not serve on a utility board and also be employed as manager of the board. AGO 1993-052.

An employee of a separately incorporated municipal utility board, incorporated pursuant to the provisions of Act 175 of the 1951 Regular Session of the Alabama Legislature, may serve on the board of a municipal housing authority. AGO 2006-003.

The spouse of a city council member may serve on the board of a municipal housing authority. AGO 2006-003.

Section 11-43-12, Code of Alabama 1975, has also been interpreted to prohibit a city parks and recreation director from simultaneously serving as mayor. AGO to Hon. T. E. Whitmore, April 6, 1976. It also prohibits the same person from simultaneously serving as city judge and as city attorney. AGO to Hon. Bobby Claunch, November 21, 1972. However, different members of the same law firm may serve as municipal judge and as municipal attorney, provided the earnings of neither position become revenues of the firm and are not taken into account when firm profits are divided. AGO 1992-044.

This section prohibits a town from purchasing land from its mayor. AGO 1981-239 (to Hon. Charles Couch,

February 10, 1981). However, a municipality may condemn the property of a municipal officer or employee provided that the officer or employee refrains from the decision-making process regarding the condemnation. AGO 1996-231. A municipality may purchase property owned by the mayor's mother when the mother is not a member of the mayor's household, not financially dependent on the mayor and the mayor does not participate in either the discussion or the vote. AGO 1997-140. A city may enter into an agreement, which involves the mayor's son as a real estate broker, provided the mayor does not reside in the same household as his son, is not financially dependent on his son, and does not participate in the discussion or vote on whether or not to enter into the agreement. AGO 2005-181.

The section also prohibits a company in which a councilmember owns a majority of the stock from selling materials to an independent contractor who is working on a city project if such materials will be used in the city project. AGO 1981-258 (to Hon. William J. Trussell, February 19, 1981). A councilmember who is a landlord may not participate in a community block grant program in the municipality for which he or she serves. AGO 1996-323.

A councilmember may not be employed by an engineering firm as a resident inspector for a project where the engineering company is performing services under direct contract with the city. AGO 1982-077 (to Hon. Charles E. Bailey, November 16, 1981). A councilmember may participate in the appointment or election of a son-in-law or stepfather to a city board provided the relative is not financially dependent upon the councilmember and is not an employer or employee of the councilmember. AGO 1983-112 (to Hon. Fred W. Purdy, December 29, 1982). A police dispatcher cannot serve as an agent for a bail bonding business in the city. AGO 1993-116. A mayor and members of the council may receive water and cable television discounts only if granted as part of their salaries. AGO 1991-173.

Section 41-16-60, Code of Alabama 1975, states that no member of the municipal governing body or of a municipal board shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual services. This section is part of the competitive bid law applicable to municipal purchases of personal property or contractual services. The office of the Attorney General has determined that a member of a municipal utility board who is the sole owner of a business may not sell trucks to the utility board, with or without bids. AGO 1999-098. Section 41-16-60, Code of Alabama 1975, precludes a member of the Water Works and Sewer Board from having any personal or financial beneficial interest, directly or indirectly, in a contract for the provision of services to the Board. Whether a direct or indirect benefit actually exists is a

question of fact for the Board to determine. AGO 2007-078.

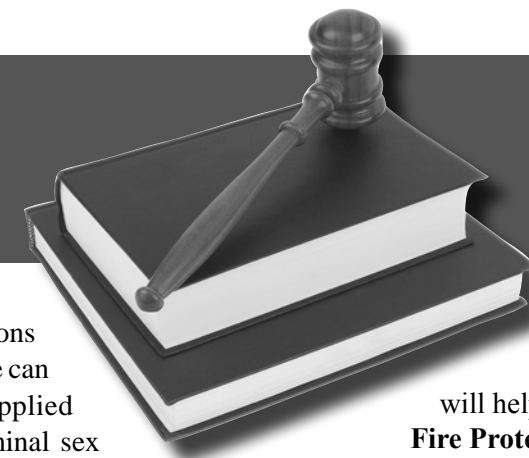
Violation of Section 11-43-12 is deemed a misdemeanor and constitutes grounds for impeachment. A violation of Section 41-16-60 also constitutes a misdemeanor punishable by fine not exceeding \$500 or imprisonment not exceeding 12 months. Removal from office is mandatory.

Exception for Class 7 and 8 Municipalities

Exceptions to Sections 11-43-12 and 41-16-60, Code of Alabama 1975, are provided by Section 11-43-12.1 for Class 7 and 8 municipalities (under 12,000 population according to the 1970 federal decennial census). Notwithstanding any statute or law to the contrary, any Class 7 or 8 municipality may legally purchase from any of its elected officials or employees any personal service or personal property, provided the elected official or employee is the only domiciled vendor of the personal service or personal property within the municipality. The cost or value of such personal property or service shall in no event exceed \$3,000. The elected official or employee, who proposes to sell to the municipality, shall not participate in the decision-making process determining the purchase but shall make any disclosure required by the state ethics commission. The governing body of such municipality shall determine and find that the elected official is the sole vendor domiciled in the municipality and that the selling price of such service or property is lower than could be obtained from a vendor domiciled outside the municipality. In making such determination, consideration may be given to the quality of service or property proposed to be supplied, conformity with specifications, purposes for which required, terms of delivery, transportation charges and the date of delivery. The office of the Attorney General has determined that a Class 8 municipality may contract, under the provisions of Section 11-43-12.1, with a wood-waste recycling business partially owned by a council member if the provisions set out in the statute are followed. AGO 2003-014.

This law also allows any Class 7 or 8 municipality to legally purchase from any of its elected officials any personal service or personal property under competitive bid law procedures. This authority is not restricted to situations where the elected official or employee is the sole vendor within the municipality. The elected official or employee, if he or she proposes to bid, shall not participate in the decision-making process determining the need for or the purchase of such personal property or personal service or in the determination of the successful bidder. The governing body shall affirmatively find that the elected official or employee is the lowest responsible bidder as required by the state law. It shall be the duty of the municipality to file a copy of any contract awarded to any of its elected officials or employees with the state ethics commission. All awards shall be as a result of original bid taking. In the event an

continued on page 21



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

Board of Education: City boards of education are local agencies of the state and, therefore, enjoy constitutional immunity from tort actions. *Ex parte Phenix City Bd. of Educ.*, 67 So.3d 56 (Ala.2011)

Competitive Bid Law: A pipe supply company's alleged contract to provide piping components to a city involved "materials" and "supplies," and moneys greater than \$15,000, and thus was subject to Alabama's competitive-bid law, and would be void, as having been entered without bidding. *Consolidated Pipe & Supply Co. v. City of Bessemer*, 69 So.3d 182 (Ala.Civ.App.2010)

Courts: Unsworn statements made by counsel in a trial brief was not evidence that could be considered in support of the trial court's decision to absolve a store from paying sales tax on the grounds that the store did not receive notice of its duty to collect tax prior to a certain date. *Town of Westover v. Bynum*, 68 So.3d 840 (Ala.Civ.App.2011)

Courts: An action seeking an injunction preventing application of the statute that provided for a DNA database fee brought by plaintiffs who had paid the \$12 fee as part of a fine for a traffic citation was an improper civil proceeding collaterally attacking the judgments in criminal cases. The relief was provided for by the rule of criminal procedure governing post-conviction relief proceedings. The general rule is that a court may not interfere with the enforcement of criminal laws through issuance of injunction in a civil action. *Citizenship Trust v. Keddie-Hill*, 68 So.3d 99 (Ala.2011)

Law Enforcement: A circuit court lacked subject-matter jurisdiction to enjoin law enforcement from seizing or charging criminally any individuals operating or possessing certain gaming machines. Such a declaration impermissibly interfered with the enforcement of criminal laws through a civil action. *Redtop Market, Inc. ex rel. Bolton v. State ex rel. Green*, 66 So.3d 204 (Ala.2010)

Law Enforcement: A city's declaratory judgment action against the county sheriff, seeking a declaration that an ordinance setting rules for licensing, permitting, and operating machine bingo games in a city complied with the state constitution and state laws, involved only an anticipated controversy, rather than a bona fide justifiable controversy, and, thus, the trial court lacked subject matter jurisdiction over the action. The city's complaint merely described anticipated conduct, in that it alleged that the sheriff had indicated he would arrest any future participant playing or in possession of bingo machines authorized by ordinance, and the complaint made request for an advisory opinion based on an assumption that the anticipated conduct would take place. *Surles v. City of Ashville*, 68 So.3d 89 (Ala.2011)

Tort Liability – Civil Rights: In failing to dispute his liability at the time he paid parking fines, a vehicle owner voluntarily paid the fines, and had no cause of action by which to recover such payment. He may not be said to have been under duress in electing to voluntarily pay the parking fines in order to avoid the threat of possible imprisonment for nonpayment of those fines. *Kruse v. City of Birmingham*, 67 So.3d 910 (Ala.Civ.App.2011)

Searches and Seizures: A judge's issuance of a warrant to search a defendant's residence, telephonically and based on a police officer's unsworn statements, did not evince abandonment of his judicial role as to preclude application of good faith exception to warrant requirement. The judge required the officer to set forth the specific evidence upon which he was basing the request for the search warrant, and only after hearing that evidence did the judge agree to issue the search warrant, and the judge's failure to swear in the officer before issuing the search warrant did not, in and of itself, evidence lack of neutrality. *Bailey v. State*, 67 So.3d 145 (Ala.Crim.App.2009)

Searches and Seizures: A police officer who smelled the odor of marijuana coming from a vehicle at a traffic stop carried out at a driver's license checkpoint had probable cause to search the driver's person and vehicle, regardless of any subjective belief held by the officer concerning whether he would arrest driver at that time. *State v. Perry*, 66 So.3d 291 (Ala.Crim.App.2010)

Sex Offenders: The sex offender registration requirement that an adult criminal sex offender provide "the actual address at which he or she will reside or live upon release"

to the Department of Corrections at least 180 days prior to release can violate equal protection as applied to indigent and homeless criminal sex offenders. *Reese v. Oliver*, 66 So.3d 289 (Ala.Crim.App.2010)

Sex Offenders: Collages or montages which included pictures or photographs of unclothed young children combined with adult sexual acts were obscene within the meaning of the Child Pornography Act. *McFadden v. State*, 67 So.3d 169 (Ala.Crim.App.2010)

Tort Liability: The Alabama Litigation Accountability Act does not require that the trial court conclude that the pro se litigant intended to file an action without substantial justification before an assessment of attorney fees can be made. A determination that the pro se litigant should have known of the lack of justification for his or her action will suffice to permit an assessment of attorney fees against that litigant. *Schweiger v. Town of Hurtsboro*, 68 So.3d 181 (Ala.Civ.App.2011)

UNITED STATES COURT DECISIONS AFFECTING ALABAMA

Immigration: Enforcement of Alabama law requiring every public elementary and secondary school in Alabama, at time of child's enrollment in school, to determine, based upon child's original birth certificate or certified copy thereof, whether child was born outside the United States or is child of unlawfully present alien, and also requiring school or district to compile and submit certain data to the State Board of Education, as well as the provision making it a criminal misdemeanor for alien unlawfully present in the United States to willfully fail to complete or carry an alien registration document, would be enjoined pending federal government's appeal from district court order denying its motion for preliminary injunction with respect to this statute as allegedly preempted by provisions of the Immigration and Nationality Act. *U.S. v. Alabama*, 2011 WL 4863957 (11th Cir. 2011)

ATTORNEY GENERAL'S OPINIONS

Appropriations: To determine whether a public purpose is served, the governing body must look to the statutes setting forth the powers of the governmental entity. If within such powers, there exists the authority to promote

the action at issue, then the governing body need only decide whether the appropriation will help accomplish that purpose. AGO 2012-002

Fire Protection: Funds from the two mill ad valorem tax levied for fire and rescue services in St. Clair County may be used for fire department uniforms and public education material. AGO 2011-001

Housing Authority: Actual damages include past-due rent and other charges, damages to the dwelling unit, and reasonable attorney's fees for the cost of collection. Because section 35-9A-426 of the Code of Alabama specifically authorizes reasonable attorney's fees, it is possible that such charges may be an independent claim and not combined with a claim for actual damages. AGO 2012-007

Housing Authority – Conflicts: A member of the board of commissioners of a housing authority, whose spouse is employed by the financial services company that provides investment advice to the housing authority, does not have a conflict of interest as prohibited by section 24-1-26 of the Code of Alabama. **Note:** This opinion does not address the Ethics Law. Questions relating to the Ethics Law should be submitted to the Ethics Commission. AGO 2012-003

Public Records: The city council, city manager, or a person authorized by the council or manager, including an authorized individual council member, may only obtain the front side of an Alabama Uniform Incident/Offense Report, even after the case is closed, under section 45-8A-23.262 of the Code of Alabama. The city manager may obtain a full report from the city's police department, if necessary, as part of the normal supervisory functions of the manager's office. The manager should not make the back side of the report available for inspection. AGO 2012-009

Utilities: A board member of a water authority established pursuant to sections 11-88-1 through 11-88-21 of the Code of Alabama vacates office when that person moves outside of the portion of the service area for the appointing authority and outside of the county of the appointing authority. AGO 2012-006

ETHICS COMMISSION ADVISORY OPINIONS

AO No. 2011-09: There is nothing in the revised Ethics Law which prohibits an individual from simultaneously serving as both a lobbyist and a principal.

AO No. 2011-09: There is no requirement that the individual signing on behalf of the principal be an officer of

continued next page

the association. The important consideration in determining who signs as the principal's representative is that the individual is easily identifiable as a person with the authority to speak on behalf of the association.

AO No. 2011-09: Lobbyists and/or principals may not "stack" their expenditures to increase the \$25/\$50 cap, regardless of whether or not they are lobbying on the same issue or employed by the same principal.

AO No. 2011-09: Public officials/public employees may receive promotional items, items created for presentation, or other items of de minimis value.

AO No. 2011-09: The Ethics Commission cannot arbitrarily assign a value to what is and what is not de minimis.

AO No. 2011-09: Public officials and public employees may accept door prizes; provided, acceptance of the door prize requires no affirmative action on their part; that it is not given in exchange for official action; and where the door prize is incidental to their attendance at the conference/ seminar.

AO No. 2011-09: An educational function is limited by definition to taking place in the State of Alabama, unless a majority of attendees are from elsewhere, and then it may occur anywhere within the continental United States.

AO No. 2011-09: An educational function, where more than 12 individuals are reasonably expected to be in attendance and will have a diversity of views and opinions, becomes a widely attended event.

AO No. 2011-09: There is no limitation as to where a widely attended event may take place.

AO No. 2011-09: A widely attended event is not a purely social or recreational event. Because of the requirement of a diversity of views or interests, there must be some educational or informational component to the widely attended event.

AO No. 2011-09: A work session is an event where a group of public officials/public employees are gathered together in their official capacity to further the public's interest.

AO No. 2011-09: The only hospitality that may be provided at a work session is food and beverages. Food and beverages may be provided to allow the work being conducted to continue, thereby furthering the public's interest.

AO No. 2011-09: Hospitality in the form of social or sporting events (golf, fishing, etc.) may not be provided at a work session, as these activities change the dynamic of the meeting from a work session to a purely social occasion.

AO No. 2011-09: While sponsors may provide food and beverages at work sessions, a lobbyist may not be solicited to do so.

AO No. 2011-09: Sponsors may not provide food and beverages at work sessions, if it is being offered in exchange for official action on the part of the public participants.

AO No. 2011-09: The revised Ethics Law excludes from the definition of a thing of value, anything given as part of a relationship that exists outside the public sector, i.e., a pre-existing friendship, or familial relationship.

AO No. 2011-09: The \$25/\$50 limit on food and beverages applies only to expenditures made by lobbyists and principals, and where the occasion does not fall under any of the other exceptions to the definition of a thing of value.

AO No. 2011-09: If a lobbyist/principal, or a public official/public employee knowingly and willfully disregards the \$25/\$50 spending limit, a violation of the Ethics Law has occurred.

AO No. 2011-09: Public officials and public employees may participate in charitable events, such as golf tournaments; provided, there is an educational or informational component to the event.

AO No. 2011-09: A primary sponsor of an event may pay entry fees and provide hospitality for a participant at events falling under the exceptions to the definition of a thing of value.

AO No. 2011-10: A City may enter into a lease with the Mayor to lease a vacant lot for a period of 10 years at a price of \$1 annually in exchange for the City paving the lot; provided, the paving cost is amortized over the term of the lease, and should the lot be sold during the time period, the Mayor must reimburse the City the unamortized remainder

of the paving cost. **Note: This opinion addresses only the Ethics Law and does not address other provisions of law such as Section 11-43-12, Code of Alabama 1975.**

AO No. 2011-11: Lobbyists and principals may contribute to any charitable or non-profit organization that they so desire, regardless of whether or not public officials/public employees volunteer for the organization or serve on its board. A public official/public employee may not solicit a lobbyist to contribute to a charitable or non-profit organization.

AO No. 2011-11: Public officials and public employees may, on behalf of a charitable organization, sign a solicitation letter; provided, the solicitation letter is generic and is done in such a manner that individuals or entities receiving the solicitation do not feel obligated to contribute.

AO No. 2011-11: Public officials and public employees may not, even on behalf of a charitable organization solicit anything other than a campaign contribution from a lobbyist.

AO No. 2011-11: Public officials and public employees may not exert undue influence over persons or principals to contribute to a charitable organization, when those individuals solicited have matters pending before the public body on which the public official serves or the public employee is employed.

AO No. 2011-11: Lobbyists/principals and vendors may provide financial support, underwriting or sponsorship of conferences held for public officials or public employees; provided, they are not attempting to corruptly influence official action by their sponsorship; and further, where the lobbyists have not been solicited for their financial support, underwriting or sponsorship.

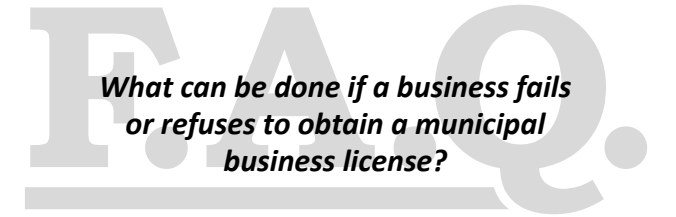
AO No. 2011-11: Lobbyists/principals and vendors may provide hospitality to public officials and public employees in relation to an educational function or a widely attended event; provided, it is an integral part of the overall event.

AO No. 2011-11: Lobbyists/principals and vendors may provide hospitality to participants in an educational function or a widely attended event, when the hospitality provided is not an integral part of the event, but is in conjunction with the event; provided, the hospitality has been sanctioned by the sponsors of the event.

AO No. 2011-11: The \$25/\$50 limit on expenditures per meal placed on lobbyists and principals does not apply if the event falls under one of the other exceptions contained in the new definition of a thing of value.

AO No. 2011-11: Sporting and recreational events that are not an integral part of an educational function or a widely attended event, but are stand-alone events, are no longer permissible under the Alabama Ethics Law.

AO No. 2011-11: Lobbyists and principals may not "stack" their expenditures to get around the \$25/\$50 limitation, regardless of whether or not they are lobbying on the same issues. ■



It is a criminal offense for any person, taxpayer, or agent of a person or taxpayer to engage in businesses or vocations in a municipality for which a license may be required without having procured a license. Each day a business operates without a required license constitutes a separate offense. Each offense may be punished by a fine not to exceed \$500, and if a willful violation, by imprisonment, up to six months. §11-51-93, Code of Alabama. Any person intentionally aiding in the commission of the offense may also be charged. §13A-2-23, Code of Alabama. A law enforcement officer may arrest any person without a warrant if the offense has been committed in the presence of the officer. §15-10-3, Code of Alabama. The council of any municipality may, by ordinance, authorize its law enforcement officers to issue a summons and complaint (citation) in lieu of placing persons under custodial arrest, for any violation not involving violence, threat of violence or alcohol or drugs. §11-45-9.1, Code of Alabama.

Civil remedies allow for liens on real and personal property used in an unlicensed business. These liens attach as of the date the license is due and are superior to all other liens, except the lien of the state, county, and municipal corporations for taxes and the lien of the state and county for licenses. Such liens may be enforced by attachment. §11-51-96, Code of Alabama. The governing body should have the municipal attorney prepare the necessary notice of lien and civil complaint for attachment for satisfaction of the past due licenses.

A good overall way of enforcing license ordinances is found in §§11-51-150 through 11-51-161, Code of Alabama. This allows a municipality to seek remedies in court (1) to enjoin the further operation of the business within its corporate limits or police jurisdiction, (2) procure an accounting for license payments and penalties due, and (3) secure any equitable attachment that will aid in the license collection (i.e., liens, garnishments and freezing of assets). Injunction is the most drastic civil enforcement method, but is probably the only procedure which will work in cases where an established business adamantly refuses to pay for the required license. ■

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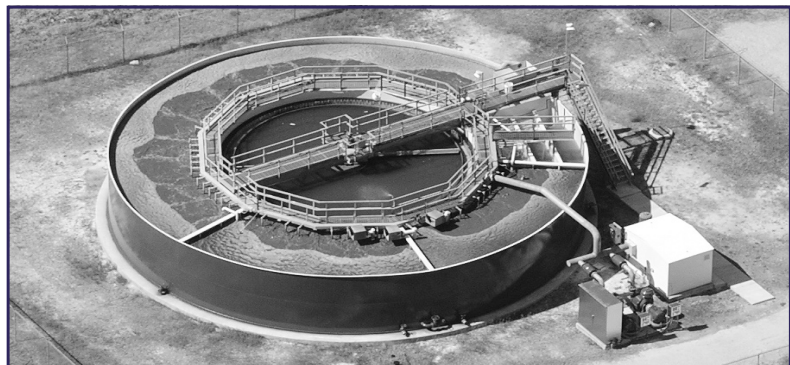
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Legal Viewpoint

ected official or employee offers to sell or submit a bid to the municipality, he or she shall make full disclosure of his or her ownership or the extent of ownership in the business organization with which he or she is associated, under oath, to the municipality.

Other Exceptions

Although Sections 11-43-12 and 41-16-60 have been used as authority for prohibiting numerous activities, the courts and the Attorney General have ruled that certain exceptions, other than Section 11-43-12.1, do exist. For instance, a municipal official's son is not prohibited from bidding on a municipal contract because of kinship as long as the father has no financial interest in the son's business. AGO to Hon. James C. Wood, September 10, 1975. A person whose spouse serves as a municipal judge may serve on the municipal council provided he recuses himself from voting on issues dealing with his wife's position as judge. AGO to Hon. James H. Sims, July 8, 1975. A councilmember may serve as a volunteer firefighter for the municipality provided he receives no compensation for his services other than reimbursement for expenses incurred in the performance of his municipal duties. AGO to Hon. Paul Shipes, February 8, 1974. An incorporated water board may purchase insurance from an insurance agency owned by the municipal attorney. *Mobile v. Cochran, supra*. A municipal official may rent TV sets to patients in a municipal hospital. AGO to Hon. Oscar Peden, June 11, 1971.

These sections prohibit a municipal official or employee from doing business with the municipality, even if the contract is made on a competitive bid basis. However, the Attorney General has ruled that these sections do not prohibit a municipality from doing business with incorporated firms which have municipal officers or employees as shareholders or corporate officers. 128 Q. Rep. Att. Gen. 30. However, a municipality may not do business with the incorporated firm if the firm is a **family-held** corporation or if the municipal official is a majority shareholder in the corporation. *See*, AGO to Hon. Frankie J. Kucera, April 6, 1976; AGO to Hon. Wayne Harrison, December 6, 1973; AGO to Hon. Herbert G. Hughes, August 9, 1968; and AGO to Hon. Andrew J. Gentry, Jr., March 8, 1974.

These sections do not prohibit a municipal official from bidding on real property being sold by the municipality, 129 Q. Rep. Att. Gen. 48, nor does it prohibit a corporation which employs a municipal official from selling automobiles to the municipality which the official serves. AGO to Hon. Robert S. Milner, April 4, 1975.

A municipality may do business with a bank where the mayor of the city serves on the bank's board of directors and is a minority stockholder, provided, however, that the mayor

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does not vote on matters relating to the bank that are brought before the city council. AGO 1993-168 and AGO 2005-047.

Political Activity of Public Employees

Section 17-1-4, Code of Alabama 1975, provides that no city employee, whether classified or unclassified, shall be denied the right to participate in county and state political activities to the same extent as any other citizen of the state, including the endorsing of candidates and contributing to campaigns of his or her choosing. The statute gives county employees the right to participate in city and state elections and gives state employees the right to participate in county and city elections.

Section 17-1-4, Code of Alabama 1975, allows municipal employees the right to participate in municipal elections. To be a candidate, the employee must take an unpaid leave of absence or use personal leave or compensatory time. Employees who violate this provision must be dismissed. Employees may not use public funds or property for political activity. AGO 1993-00108. Supervisors may not coerce employees to campaign. Employees who campaign must do so on their own time.

Unpaid reserve officers do not have to take a leave of absence to run for municipal office unless the council establishes a policy requiring this. AGO 1997-00034. A personnel policy that allows employees during an unpaid leave to continue their health insurance coverage, provided they pay the premiums, would permit an employee taking time off to run for office to do the same. AGO 1998-00090.

A local act that prohibits employees of a county commission from participating in political activities at the city, county and state levels is in conflict with Section 17-1-4 of the Code of Alabama, which sets forth the right of city, county and state employees to participate in political activities. AGO 2000-153.

The federal Hatch Act covers federal employees and officers and employees of a state or local agency if their principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States government or a federal agency. Generally, this law does not restrict activity in nonpartisan elections. Municipal elections are nonpartisan. The Hatch Act is enforced by the United States Civil Service Commission. Additional information may be obtained from that office.

Other Statutory Restrictions

No officer of a municipality may be surety for any person having a contract, work, or business with the municipality for the performance of which a surety may be required. Section 11-43-12, Code of Alabama 1975. Certain exceptions exist for public works bids. *See*, Section 39-1-4, Code of Alabama 1975.

No officer or employee of a municipality, personally or through any other person, shall deal or traffic in any manner whatsoever in any warrant, claim or liability against the municipality. Violation constitutes a misdemeanor and grounds for impeachment. Section 11-43-14, Code of Alabama 1975.

A councilmember or mayor is prohibited from voting on questions which come before the council in which he or she or his or her employer or employee has a special financial interest, either at the time of voting or at the time of his or her election. Section 11-43-54, Code of Alabama 1975. The Attorney General has ruled that this section requires a councilmember whose spouse is employed as a teacher in the city's school system to refrain from voting on all matters pertaining to compensation, tenure and benefits of his or her spouse. AGO 1989-084 and AO NO. 1992-87. However, the Attorney General has ruled that a mayor whose spouse is employed by the city school system may vote on school board appointments or on appropriations to the school system if the vote of the council ends in a tie. AO NO. 1992-83. Section 36-25-5(a), Code of Alabama 1975, permits a councilmember, whose spouse is employed in a private capacity by a person who is a current member of the city board of education, to vote on the appointment of a new board member. AO NO. 1991-51.

A county commissioner may not vote on a one-cent sales tax that would benefit a city board of education which employs him or her. AO NO. 1994-33. Councilmembers who are employed by a board of education cannot vote on a proposed sales tax increase for school system capital outlays. AGO 1991-041. A councilmember may not vote on a budget which would benefit his or her spouse, nor vote on a disciplinary matter, if the vote might affect his or her spouse financially. AO NO. 1992-98.

No member of a municipal council may be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he or she was elected. He or she may not be interested, directly or indirectly, in any contract, job, work, material or the proceeds thereof or services to be performed for the municipality, except as provided by law. Section 11-43-53, Code of Alabama 1975.

Chapter 10 of Title 13A, Code of Alabama 1975, as amended, sets out a number of offenses against public administration, such as obstructing governmental operations, refusal to permit inspection, failure to file a required report, tampering with governmental records, bribery of public officials, failure to disclose conflict of interests, trading in public office, misuse of confidential information and perjury. Municipal officials should become familiar with these statutes. ■



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Municipal Overview

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Appropriation for Wastewater Treatment SRF and the Alabama Drinking Water Finance Authority

Many years ago, the Alabama Legislature established a State Revolving Loan Fund for Wastewater Treatment (SRF) and the Alabama Drinking Water Finance Authority. The purpose of these programs was to take state funds and match them with federal dollars to create a loan fund to offer low interest loans to governmental entities for wastewater treatment and drinking water projects. Each year, the League seeks additional matching funds from the legislature to continue these nationally recognized programs.

Non-Returnable Containers

The League will seek enactment of legislation to regulate use of non-returnable beverage containers.

School System Consolidation

The League will support legislation that would allow contiguous municipalities with total populations of at least 5,000 to band together to form their own school systems.

Validation of Municipal Incorporations

Periodically, the League asks the legislature to enact a bill to validate municipal incorporations enacted prior to the effective date of the legislation. The bill proposes to validate the procedure used in the incorporation process even if errors occurred. The bill does not validate substantive errors. ■

Councilmember Jesse Matthews Elected to NLC Board of Directors

Councilmember Jesse Matthews of Bessemer was elected to serve a one-year unexpired term on the National League of Cities' (NLC) Board of Directors during the annual NLC business session on Saturday, November 12 at the Congress of Cities in Phoenix, Arizona. Matthews was first elected to the Bessemer City Council in 1998 and has also served as Council President. During his tenure, he has initiated and supported the creation of McNeil Park, worked closely on the Sanitary Sewer Project for the Pipe Shop Community, installed several new stop signs and lights and eliminated overgrown lots in District 6 communities. He has served on the Alabama League of Municipalities' Executive Board since 2004 and is an Advanced Certified Municipal Official. Matthews is a member of the Bessemer Chamber of Commerce, the Bessemer Fourth of July Committee, the Jesus Christian Daycare and School Board, the Israel Williams Scholarship Fund Board, the Jefferson Democratic Conference Committee and the Alabama Democratic Conference Committee. He is the Second Vice President of the Alabama Black Caucus of Local Elected Officials and serves on the Deacon Board Ministry and as a youth advisor for the New Bethlehem Baptist Church.



NLC is governed by a Board of Directors which is made up of the three officers -- president, first vice president, second vice president -- and 40 members. To serve as a member of the NLC Board of Directors, a candidate must be a local elected official from a member city, or a chief executive officer of a member league. An elected official serving as an Officer or Board member must remain a local elected official throughout his/her Board term. After completion of their terms, members of the Board of Directors still in government service become members of the Advisory Council. Former Board members continue to serve on the Advisory Council as long as they are in government service. The Alabama League currently has three representatives serving on the NLC Advisory Council: Mayor Leon Smith of Oxford, Mayor Ted Jennings of Brewton and Councilmember Debbie Quinn of Fairhope, who is the current chairperson of the Advisory Council.



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Tis the Season...

Be SAFE!



The holiday season has arrived and it's now time to begin decorating our cities and towns. Unfortunately, many municipalities often use whatever equipment they have on hand to perform this task. This usually means personnel will be in the front bucket of a back-hoe or on the platform of a forklift while installing lights and decorations. This, of course, is an extremely unsafe practice that can lead to serious injury or death.

Forklifts and front-end loaders are not designed to lift personnel or to be used as a work platform. OSHA states that forklifts, front-end loaders and "similar pieces of equipment" shall not be used to support scaffold platforms unless specifically designed by the manufacturer for such use. Keep in mind that while OSHA guidelines may not be *required*, OSHA is still a reliable source of information for developing your public entity's best practices.

The Alabama League of Municipalities' Loss Control Department recommends that municipalities discontinue using front-end loaders and similar equipment when installing holiday decorations, lights and other such items. We recommend using a lift that is designed for passenger use and has been tested for such use. Often times such equipment can be found locally for rent at a reasonable cost.

Choosing to use the proper equipment provides a safer work area for your employees and can possibly save someone's life.

Have a safe and happy holiday season!

Will Strength
Loss Control Representative
AMIC/MWCF

AMFund Congratulates the Town of Berry, its most recent borrower!



Pictured left to right: Greg Cochran, AMFund President; Mayor Wally Burns, Southside, AMFund Vice Chairman, Mayor Roy Dobbs, Berry, AMFund Chairman; Mayor Howard Shell, Atmore, AMFund Board; and Mayor George Evans, Selma, AMFund Board. (Not pictured: Councilmember Debbie Quinn, Fairhope, AMFund Board)



Learn how AMFund can help your community meet its infrastructure needs.

Contact Greg Cochran,
AMFund President,
at 334-386-8130 or
gregc@amfund.com

AMFund is administered by the Alabama League of Municipalities.

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Within 24 hours, AMIC representatives were surveying and photographing damage and consulting with experts to take the necessary steps to secure the affected areas within its member municipalities. Sixty-three AMIC members sustained damage totaling approximately \$45 million. AMIC issued its first claims check within 48 hours and distributed nearly \$12 million to its members within three weeks of this unprecedented tornado outbreak.



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