

THE ALABAMA MUNICIPAL **JOURNAL**

September 2002

Volume 60, Number 3

Keeping Your City's Bank Deposits **SAFE**



Inside:

- **NLC Releases Annual City Fiscal Conditions Survey**
- **Municipal Franchises**
- **Project R.O.S.E. Collects Used Motor Oil**

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Official Publication, Alabama League of Municipalities

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Published monthly by The Alabama League of Municipalities, 535 Adams Avenue, Montgomery, Alabama 36104, telephone (334) 262-2566. Web address: www.alalm.org. Single copies, \$2.00. By subscription, \$24.00 per year. Advertising rates and circulation statement available at www.alalm.org or by calling the above number. Statements or expressions of opinions appearing within this publication are those of the authors and not necessarily those of the Alabama League of Municipalities. Publication of any advertisement should not be considered an endorsement of the product or service involved. Material from this publication may not be reprinted without permission.

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Congratulations, Barbara!



Barbara McCord with granddaughter, Paige.

The League congratulates **Barbara McCord**, Member Services Director, who retired in August after 25 years of service with our organization. Barbara began working with the League as a staff secretary in April 1977. "I've thoroughly enjoyed my time with the League," said Barbara. "It's a wonderful place to work and my co-workers are wonderful people."

Barbara, who has three children and one granddaughter, plans to enjoy her retirement with her family. "I'm looking forward to being at home when my youngest son gets in from school," she said. Of course, she will also relish the role of being a full-time grandmother to Paige, who was born this past April during League convention (which is why Barbara was not able to attend her last convention). "I'm just really excited about having more time to spend with my family," said Barbara.

Perry Roquemore, the League's Executive Director, said he remembers the day Barbara came to work at the League. "She's been a fantastic employee for more than 25 years," he said. "We sure hate to see her go, but we wish her all the best during her retirement. She will indeed be missed." ■

League's Public Safety Consultant Honored

Roger Owens, Public Safety Consultant for the League's Loss Control Division, was honored with an Outstanding Service Award by the Alabama Association of Chiefs of Police (AACOP) on August 16, 2002, during their annual conference in Huntsville.

Roger – who retired as Deputy Chief of Police from the Montgomery Police Department after more than 24 years of service – joined the Loss Control Division in August 1993. As a Public Safety Consultant, Roger is responsible for traveling to 327 member police departments with liability or workers compensation insurance in an effort to reduce municipal liability and employee injuries. Through his position with the Loss Control Division, he works with



every police chief in the state to help them control losses through work comp injuries and liability claims and law suits.

Two years ago, the Police Chief Advisory/AACOP Education Committee instituted a police chief's certification program in which each chief is required to take 80 hours of training as well as pass a test on each eight-hour course. Roger has worked closely with the committee to help them professionalize the certification program. The Outstanding Service Award presented to Roger by the AACOP recognizes Roger's efforts on

behalf of all Alabama's police officers and was given in appreciation for his dedicated service to the Alabama Association of Chiefs of Police. ■

Keeping Your City's Bank Deposits SAFE

By: Andrea Jackson

City of Auburn Finance Director and Member of the SAFE Board of Directors

Most city treasurers are already aware of the SAFE Program of the State Treasurer's Office, which provides security for city funds that are on deposit in Alabama banks. This program was established by an Act of the 2000 Legislature and is codified in the *Code of Alabama*, Section 41-14A. This law requires all Alabama financial institutions that wish to accept deposits from cities and their boards and agencies to qualify with the Treasurer's Office and to pledge specific types of securities in specific amounts to secure the deposits of city and county public entities.

The SAFE Program has been in operation for one year now, and has been successful in achieving the goals of the original legislation. In recognition of this anniversary, the League felt it would be helpful to remind its members of their responsibilities within the SAFE Program and to provide some suggestions for actions that could strengthen the protection provided to the cities under this Program.

The primary responsibility of cities under the SAFE Program is to identify the city as a "public depositor" to each Alabama financial institution in which the city has funds on deposit and to provide the bank with a complete listing of all city accounts in that bank. Each time a city opens a new bank account, the city should document in writing to the bank that the new account is a public deposit as defined under the SAFE law, so that the bank will be responsible for collateralizing that bank account through the SAFE Program.

Each bank that has qualified with the State Treasurer's Office to participate in the SAFE Program will have received a certificate from the Treasurer's Office, designating the financial institution as a Qualified Public Depository (QPD) under the SAFE law. City treasurers should ask for a copy of this QPD certificate from each bank in which the city has funds on deposit and the city treasurer should maintain a copy of these QPD certificates on file. The city's auditors will likely ask to see evidence that each of the city's depositories has qualified with the State Treasurer's Office to participate in the SAFE Program.

Of course, it is possible for banks to voluntarily withdraw from the SAFE Program or for banks to be suspended from the SAFE Program by the Treasurer's Office. To determine whether the city's banks are currently qualified, city staff can review the list of currently eligible QPDs by visiting the State Treasurer's website at www.treasury.state.al.us. (click on "Services" to find information about the SAFE

Program). City treasurers should periodically check the Treasurer's website to verify that all of their banks are still qualified depositories with the SAFE Program. City auditors also might find it useful to access this website to verify the status of their clients' banks.

After the close of business each September, each QPD is required by the SAFE Program rules to provide to each of its public depositories (cities, counties, their boards and agencies) a written listing of all of the public depositor's accounts in the bank. City treasurers should establish a reminder system so that this listing will be expected from each depository and reviewed each year. If the city has not received these listings from each bank by November 1st, the city should notify the bank(s) from which a listing has not been received. If any listings are incorrect, the city treasurer should write to the bank and clearly outline the corrections that are needed. Copies of the annual bank account listing and any related correspondence should be retained in the city treasurer's files for the city's auditors.

In addition to monitoring the annual report due by November 1, from each bank in which the city has funds deposited, there are other actions that city treasurers can take to ensure that all public funds are protected under the SAFE Program. One very important measure is to advise the city's depositories in advance when significantly large deposits to city accounts are anticipated. Examples of this type of event would include notification in advance of receiving debt proceeds when bonds are issued or loans are to be closed or when large amounts of property tax revenues are due to be received from the county. Since the QPDs are responsible for maintaining a specified level of collateral based on the monthly average balance of the public deposits they hold, a very large deposit to a city's bank account imposes an expanded responsibility on the bank. By letting the bank know in advance about these large deposits, the city is helping the bank to ensure that adequate collateral levels are maintained.

One other way that cities can assist in the protection of public funds is to be sure that all city boards and agencies understand their responsibilities under the SAFE Program. The Code of Alabama, Section 41-14A-2 (4) defines public entities covered by the SAFE Program as, "the state and its political subdivisions, including ... municipalities, and any of

See SAFE Program, page 16

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The President's Report

George W. Roy
Mayor of Calera

NLC Releases Annual City Fiscal Conditions Survey

Cities predict a bleak future for their budgets, which have been hurt by the economic downturn and the surge in local homeland security spending, according to the annual survey of city finance officers conducted by the National League of Cities (NLC).

"Cities have been hit by lower sales and tourism tax revenues as well as higher security spending, and that means tight budgets," said Karen Anderson, NLC president and mayor of Minnetonka, Minn. "In some cities, residents won't get the services they deserve because city budgets have been squeezed too tight."

For the first time since 1993, a majority (55 percent) of the surveyed finance officers said that their cities are less able to meet their city's financial needs compared to the previous year (2001). The increased pessimism is based on slower-than-expected growth in revenue from sales, income, and tourist-related taxes combined with new responsibilities on homeland security, rising healthcare costs, and increased spending on infrastructure. Also, state budget woes have exacerbated cities' fiscal plight as states withhold funds from municipalities.

Finance officers reported that sales, tourist and income tax collections fell below budgeted levels in the two quarters following September 11, 2001 (October-December 2001 and January-March 2002). Sales tax collections were 8 percent lower than expected. Tourist-related tax receipts were hardest hit, falling 18 percent below projections. Income tax revenues fell 11 percent below projections in October-December 2001.

The finance officers were also asked about the factors making it most difficult for them to balance city budgets. Rising health care costs were cited by 88 percent of city officials. Increased spending on public safety and security needs was reported by two-thirds (69 percent), as was much-needed infrastructure investment (67 percent).

Two-thirds (67 percent) of the surveyed city officials think the problem will only worsen, saying they will be less able to meet city financial needs in 2003.

"The survey raises a caution light," said Anderson. "It reinforces the need for a strong federal-local partnership as we respond to the economic downturn and take on new responsibilities. Cities and towns need a strong federal commitment to essential programs, such as the Community Oriented Policing Services (COPS). We also need prompt funding to help pay for the major local investments in homeland security over the past 11 months."

Despite the bleak forecast, cities' ending balances (reserves) remained steady at the close of fiscal year 2001 – a testament to their responsible financial management. The ending balances in 2001 were 19 percent of expenditures, compared to 18.3 percent in 2000. One bright spot was property tax revenue, which rose by more than 5 percent over the previous year. However, the close of fiscal year 2001, for many cities, occurred prior to or just after the terrorist attacks of September 11, 2001. The economic and fiscal impacts of those attacks, in combination with the declining economy will challenge ending balances in 2002 and 2003.

The *City Fiscal Conditions Survey* is a national mail survey of finance officers in U.S. cities conducted from March to May 2002. Survey data are taken from 308 responding cities. This is the eighteenth edition of the survey, which began in 1985. A summary of the survey findings is available on the National League of Cities website at www.nlc.org.

The National League of Cities is the oldest and largest national organization representing municipal governments throughout the United States. With a membership of 1,800 cities and towns, as well as 49 state associations, NLC serves as a resource and advocate for 18,000 U.S. cities that serve 225 million people. ■

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2002 Annual Directory & Vendor Yellow Pages Available

The *Annual Directory & Vendor Yellow Pages* is a 130 page, 8½ x 11 publication with a coil binding that also offers information about the League and our staff and provides contact information for the Alabama House of Representatives, the Alabama Senate, Constitutional officers and important state agencies. Municipal listings for Alabama's more than 400 incorporated cities and towns include the following information:

- | | | | |
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Municipal Overview

By
PERRY C. ROQUEMORE, JR.
Executive Director

League Policy Committees Composed of Municipal Officials Throughout the State

The League has five policy committees: Finance, Administration and Intergovernmental Relations; Energy, Environment and Natural Resources; Community and Economic Development; Transportation, Public Safety and Communications; and Human Development. These five committees have been in existence for many years and are composed of members from all regions of the state.

On September 5 – Committee Day – members of the five committees met at the Montgomery Civic Center with numerous state and federal resource advisors to study the League's Policies and Goals and to recommend new or amended policy statements. After lunch – and once the resource advisors completed their presentations – the committees reconvened to amend and adopt their policy statements. The revised policy statement developed by the committees on Committee Day are then sent to the Committee on State and Federal Legislation for use in adopting the League Legislative Package for the Regular Session.

Five credit hours for the League's CMO Program (which could be applied to the Basic, Advanced or Continuing Education requirement) were awarded to attendees who stayed for the entire meeting on Committee Day. The Proposed Policies and Goals for 2003 – which are used by the League's staff to lobby issues affecting municipalities in Congress and the State Legislature – will appear in the October issue of the *Journal*.

The League wishes to thank the following persons who were appointed to the League's five policy committees for 2002-2003:

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continued next page

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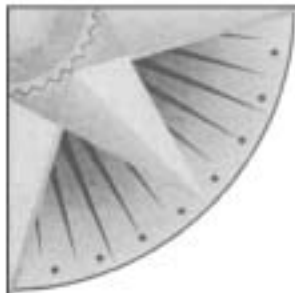
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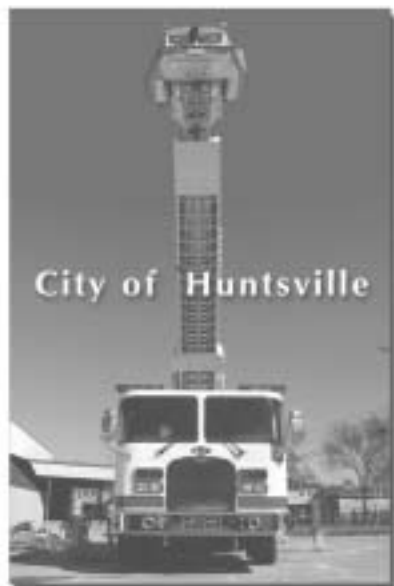
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SAFE Program

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their agencies, departments, boards, school districts, commissions, and courts; public corporations, including any public board, authority or district ... created by ... any municipality." So, each city treasurer should contact appropriate parties at the city's school board, separate city utility boards, industrial development boards, etc. to determine that their financial staffs are aware of the SAFE Program and that their banks have been notified in writing that the board or agency is a public depositor as defined by the SAFE law.

Questions about the SAFE Program can be directed to the SAFE Program Manager, Mickey Daughtry, in the State Treasurer's Office (phone: 334-353-3927 or e-mail: safe@treasury.state.al.us). Mickey and the rest of the Treasurer's Office staff are ready to assist cities and their boards and agencies with information about the SAFE Program. ■

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ENVIRONMENTAL OUTLOOK



By Gregory D. Cochran
Director, State and Federal Relations

Economic Incentives for Controlling Pollution

Over the last 20 years, and particularly during the past decade, economic incentives are being increasingly used to control pollution and improve environmental and health protection. A new EPA report, *The United States Experience with Economic Incentives for Protecting the Environment*, assesses the role of economic incentives for controlling environmental pollution. The report documents hundreds of uses of economic incentives for controlling pollution at all levels of government to both supplement and substitute traditional regulatory approaches.

What are economic incentives?

The Report defines economic incentives as instruments that use financial means to motivate polluters to reduce the health and environmental risks posed by their facilities, processes, or products. These incentives provide monetary and near-monetary awards for polluting less and impose costs of various types for polluting more, thus supplying motivation for polluters to change their behavior. The report distinguishes seven basic types of incentives:

1. Pollution charges, fees, and taxes
2. Deposit-refund systems
3. Trading programs
4. Subsidies for pollution control
5. Liability approaches
6. Information disclosure
7. Voluntary programs

Why are economic incentives important for environmental pollution control?

Economic incentives offer several advantages that make them attractive environmental management tools. First, economic incentives, in some circumstances, can be structured to achieve larger reductions in pollution than would result from traditional regulations. Second, economic incentives often can control pollution at lower costs than

can traditional regulations. Third, the use of economic incentives, in contrast to that of traditional regulations, can more easily control pollution generated by a multitude of small and dispersed sources. Fourth, economic incentives can stimulate technological improvements and innovations in pollution control in situations where traditional regulatory mechanisms may not.

What are the key topics and features of the report?

The report finds two general trends concerning the use of incentives: Increasing diversity of economic incentives used by EPA. Although historically EPA has relied on regulations to reduce pollution and improve the environment, it has begun to use a wide variety of economic incentive mechanisms in recent years, increasing application at other levels of government. Dozens of such applications are discussed in the report but there are hundreds more. Both the number of applications and their diversity is growing rapidly at the state and local level. Incentives are particularly useful in controlling pollution that has not already been subjected to traditional forms of regulation.

The Report concludes that economic incentives for environmental pollution control: 1. Provide a unique contribution to environmental management – in many cases incentives generate benefits beyond what is possible with traditional regulations; sometimes they are applied where traditional regulations might not be possible. They are particularly useful for small and geographically dispersed sources. They can also provide impetus for technological change. 2. Provide cost savings relative to traditional regulatory approaches. One study estimates potential savings of widespread use of economic incentives could reach \$45 billion annually. On a practical level, acid rain trading savings are at least \$700 million annually. 3. Have wide applicability to specific environmental problems – although a wide variety

continued next page

of incentives are available, any particular one may be effective in managing only a fairly narrow range of problems. The report suggests which incentives are most useful for particular problems.

Who is the report for?

The main audiences for the report are those designing environmental pollution control programs, including policy makers, EPA program and regional offices, state and local environmental pollution control agencies, and academic and non-profit organizations interested in managing environmental pollution control. It has been written with as little economic jargon as possible so as to be understandable to a general audience as well as economists.

Who prepared the report?

The report was prepared by the EPA National Center for Environmental Economics in the Office of Policy, Economics, and Innovation, part of the Office of the Administrator. Program offices throughout the Agency contributed to the report.

What are some examples of economic incentives discussed in the report?

Trading of sulfur dioxide allowances in the Acid Rain program, which encourages utilities to find least cost compliance strategies:

- Subsidizing farmers and others to conserve habitat and control pollution.
- Basing air emission permit fees on the quantity of emissions and charging for the disposal of industrial effluents in water treatment plants.
- Requiring a deposit on beverage containers to encourage recycling, which now occurs in ten states; many states have a similar system for lead acid batteries.
- Charging for natural resource damage caused by oil and hazardous material spills, a liability approach to encouraging pollution prevention
- Encouraging reductions in toxic emissions by broadly disseminating information about emissions through hazard warning labeling and in communities through the annual Toxics Release Inventory.
- Promoting voluntary programs such as Energy Star, Waste Wise, XL and other programs that reduce pollution by assisting and rewarding voluntary actions to reduce energy use and limit pollution.

Read a copy of the report by:

You may read the entire report on-line. This report and many other on-line reports contains links to related materials, whether on NCEE's web site or other sites, is full-text searchable, and can be viewed in a variety of ways of your

choosing. The report is available for downloading as a report cover and 12 individual sections as well as an entire report. All files are in Adobe Acrobat PDF format.

Obtaining a printed copy:

For a limited time you can obtain a printed copy of the report by sending an e-mail to carlin.alan@epa.gov or by writing Alan Carlin at USEPA (Mailcode 1809T), Washington, DC 20460.

Alabama Urban Forestry Association's 18th Annual Convention "Wildland Urban Interface"

As populations and urbanization expand in the South, human influences on our forests are increasing. Over the past few years, the topic of "Wildland Urban Interface" has become one of the most important emerging resource issues facing Alabama's communities. Critical interface issues include fire prevention, watershed management, wildlife conservation, biodiversity and land use planning and policy.

Mark your calendars and attend the Alabama Urban Forestry Association's 18th Annual Convention to be held November 6-8, 2002 at The Lodge and Conference Center at Grand National in Opelika. The convention will heighten awareness and provide information about wildland-urban interface issues for professional arborists, natural resource managers, policy makers, developers and communities. Participants will be introduced to cutting edge technology and other resources available to make science-based resource decisions.

To learn more about this emerging topic and how to register for this exciting convention, visit AUFA's website at www.aufa.com. To receive additional information about the convention call AUFA at 205-226-7760 or e-mail at aufa@bsc.edu. ■

Revenue Officers Association Launches Website

The Alabama Municipal Revenue Officers Association (AMROA) has recently launched its own website: www.amroa.com. Improving communication among the state's 275+ municipal revenue officers was a primary purpose for development of the site. In addition to current information related to training and certification programs and direct contact information, the site contains a message board allowing members to post a message or question with virtually immediate access to all members for a response. In addition, AMROA will experience dramatic improvements in its ability to network among municipal officials regarding the administration of revenue collection.



By Ken Smith
Director, Legal Services & Computer Programs

THE LEGAL VIEWPOINT

Municipal Franchises

A franchise is a form of a contract or agreement. As used in this article, a franchise is a special privilege, which does not belong to the citizens by common right, conferred by a government (municipality, in this case) upon an individual or corporation. It is essential to the character of a franchise that it should be a grant from the sovereign authority. In this country, no franchise can be held which is not derived from a law of the state. It is a privilege of a public nature which cannot be exercised without a legislative grant.

The Alabama Supreme Court has held that cities derive their authority to grant franchises from the legislature and it may or may not require them to be revocable. The Court has also ruled that a franchise grant is the creation of a property right and is more than mere legislation. Such property rights are subject to the terms and limitations of the grant.

Constitutional Provisions

Section 220 of the Alabama Constitution of 1901 reads:

"No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys or public places of any city, town or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town or village."

Construction of Section 220

Section 220 is a constitutional guaranty that no corporation can use municipal streets for private enterprise without consent from the city or town. It is in the nature of a Bill of Rights for municipalities, and its purpose is to control the use of the streets. It gives municipalities the right to veto the use of its streets for business purposes. *City of Montgomery v. Montgomery City Lines*, 254 Ala. 652, 49 So. 2d 199 (1949). Thus a municipality may withhold its consent to use the streets and public ways. *Montgomery v. Orpheum Taxi Co.*, 203 Ala. 103, 82 So. 2d 117 (1919).

In construing this section, the Alabama Supreme Court

has held that the power of a city to grant a franchise is by virtue of legislative authority, and Section 220 is not a grant of such power but the reservation of a restriction on legislative authority. *Phenix City v. Alabama Power Co.*, 239 Ala. 547, 195 So. 894 (1940). However, in *Dixie Electric Cooperative v. Citizens of the State of Alabama*, 527 So. 2d 678 (Ala. 1988.), the Alabama Supreme Court upheld the power of the legislature to require a municipality to either grant a franchise to a particular operator or not offer that service within the municipal limits. The Court stated that this did not violate a municipality's veto power under Section 220, because a municipality maintains its authority to veto the legislature's choice of operator. The result of this denial, however, would result in certain services being withheld from the citizens of the municipality.

The Court has also held that in granting a franchise, as authorized under this section, a city is not lending its credit within the meaning of Section 94 of the Constitution. In other words, Section 94 does not prevent a city from granting a franchise. *Andalusia v. Southeast Alabama Gas District*, 261 Ala. 297, 74 So. 2d 479 (1954). See Section 10-5-6, Code of Alabama, 1975.

The Court, in the *Orpheum* case, stated that consent of the local authorities is necessary "for the conduct of any public utility or private enterprise." Thus, cities and towns may regulate private taxi companies, cable television operations and other businesses that depend on the public ways or rights of way. In *City of Birmingham v. Holt*, 239 Ala. 248, 194 So. 538 (1940), the Court enjoined the use of sidewalks for advertising purposes. Similarly, in *McCraney v. City of Leeds*, 239 Ala. 143, 194 So. 151 (1940), the Court prevented the maintenance of gasoline pumps on a sidewalk of the city.

Time Limitations

"No city or town having a population of more than six thousand shall have authority to grant to any person, firm,

continued next page

corporation, or association the rights to use its streets, avenues, alleys, or public places for the construction or operation of water works, gas works, telephone or telegraph line, electric light or power plants, steam or other heating plants, street railroads, or any other public utility, except railroads other than street railroads, for a longer period than thirty years.” Section 228, Alabama Constitution of 1901.

Construction of Section 228

Section 228 limits the duration of franchises granted by cities with populations of more than 6,000 to 30 years. It has no application to cities with populations of less than 6,000. In *City of Montgomery v. Montgomery City Lines*, *supra*, the Court stated:

“Section 228, Constitution, is a limitation on the duration of franchises granted by cities of a certain population.”

In *Andalusia v. Southeast Alabama Gas District*, *supra*, the Court declared that franchises executed by cities of over 6,000 in population shall not have operation longer than 30 years from the date when granted.

The Court, in *City of Bessemer v. Birmingham Electric Co.*, 252 Ala. 171, 40 So. 2d 193 (1949), found that a franchise granted before the effective date of the Constitution of 1901 was not subject to the imposed limitation of this section. It thus appears that the population of the municipality on the date of the grant is one controlling factor and, further, that the constitutional provisions in effect on that date must be considered.

Section 22

Section 22 of the Constitution must also be remembered in connection with franchises. This section states:

“That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.”

Construction of Section 22 Exclusive Grants

The limitations embodied in Section 22 are not for the protection of individuals but for the protection of municipalities and the public generally. *City of Decatur v. Meadors*, 235 Ala. 544, 180 So. 551 (1938). An exclusive grant was struck down as early as 1885 in *Birmingham & Pratt M. St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465 (1885), where the Court held that the forerunner of this Section prevented a city from making any irrevocable grants of special privileges or immunities.

In *Alabama Power Co. v. City of Guntersville*, 235 Ala. 136, 177 So. 332 (1937), the Court stated that “the City, under constitutional limitations, is denied the right to grant to any person or corporation any exclusive franchise.”

And, in *Franklin Solid Waste Services, Inc. v. Jones*, 354 So. 2d 4 (Ala. 1977), the Alabama Supreme Court held that a five-year contract renewable for five years upon fulfillment of contractual obligations does not violate Section 22.

The Alabama Supreme Court provides additional guidance on exclusive franchises in *Beavers v. County of Walker*, 645 So. 2d 1365 (1994).

Other cases on this issue include:

• *Kennedy v. Prichard*, 484 So. 2d 432, the State Supreme Court held an exclusive contract for wrecker service which failed to comply with the bid law was void as an unconstitutional grant of a special privilege.

• *Franklin Solid Waste, Inc. v. Jones*, 354 So. 2d 4 (Ala. 1977), the State Supreme Court considered an appeal from a declaratory judgment holding that a contract entered into between Franklin and Montgomery County for solid waste collection violated Section 22 of the State Constitution which prohibits the State or its political subdivisions from awarding exclusive franchises. The Court reversed and remanded the case to the Montgomery County Circuit Court. The Supreme Court held that the contract in question was not a warrant of an exclusive franchise in violation of Section 22.

Impairing Obligations of Contracts

A valid contract (franchise) entered into by a municipality cannot be repudiated at the whim of the governing body of the municipality. In *Weller v. City of Gadsden*, 141 Ala. 642, 37 So. 682 (1940), the city had entered a 30-year contract with the plaintiff to permit construction of a water works system. A subsequent council, before construction on the system began, passed an ordinance repealing the franchise ordinance. The Court upheld the franchise under authority of this section of the Constitution. A later decision, in *City of Gadsden v. Mitchell*, 145 Ala. 137, 40 So. 557 (1906), approved the first finding of the Court but condemned the attempted effort to write an exclusive franchise.

In *Sweet v. Wilkerson*, 252 Ala. 343, 40 So. 2d 427 (1949), the Court stated that Section 22 “does not simply inhibit the State from impairing the obligations of contract between individuals, but with like force and effect the provision applies to contracts made by the State or one of its agencies when authorized by law.”

And, in *Southern Bell Tel. & Tel. Co. v. City of Mobile*, 162 F. 523 (C.C. Ala. 1907), the Court noted that a franchise is an easement and thus is a property right entitled to all the constitutional protection afforded other property. Therefore, the city cannot revoke a franchise except by due process of law.

Statutory Provisions

Franchises are normally granted by the execution of an ordinance of the governing body. Section 11-40-1, Code of Alabama, 1975, confers powers on municipalities of this state

to "contract and be contracted with." Section 11-45-8, Code of Alabama, 1975, requires publication of ordinances of a general or permanent nature and states that "all ordinances granting a franchise shall be published at the expense of the party or parties to whom the franchise is granted." Many municipalities, which are organized under special acts of the legislature, are bound, in granting franchises, to comply with specific sections of the act establishing their government.

Section 11-43-62, Code of Alabama, 1975, authorizes the regulation of the use of streets for erection of telegraph, telephone, electric and other systems of wires, and conduits, and, "generally to control and regulate the use of streets for any and all purposes." This section continues: "The council may sell or lease in such manner as it has power to grant, and the moneys received therefor shall be paid into the city treasury."

Taxing Authority

Cities and towns have authority, under Section 11-51-90, Code of Alabama, 1975, to fix and collect licenses for any business, trade or profession. This general authority has been sustained many times by the courts.

Section 11-51-129 of the Code limits the maximum amount of privilege or license taxes to three percent of annual gross receipts which municipalities may annually assess, and collect from persons operating a street railroad, electric light and power company, gas company, water works company, and pipe line company. Licenses on telephone companies are limited by Section 11-51-128 and on telegraph companies by Section 11-51-127. See Section 11-51-124 for license rates on railroads; Section 11-51-126 for express companies; and Section 11-51-125 for sleeping car companies. In the police jurisdiction, the license must be no greater than one-half of the basic rate. Section 11-51-91, Code of Alabama, 1975.

It should be noted that the authority to assess a license is separate from the power to require a franchise, and that both a license and a franchise may be assessed against the same business entity. In *City of Montgomery v. Montgomery City Lines*, *supra*, the Court dealt with the effect of Title 62, Section 563, Alabama Code of 1940, a section affecting franchises in the City of Montgomery. This section required that the city obtain adequate compensation for granting a franchise. The Court observed that the consideration paid for the privilege had no relationship to the right and power of the city conferred by Section 11-51-129. The Court stated:

"The amount of the compensation for the franchise as provided in Section 563, *supra*, is over and above and has no connection with or relation to the license tax authorized by Sections 745 and 733 (now Sections 11-51-129 and 11-51-91), *supra*."

General Comments

As noted above, cities with populations in excess of 6,000

are limited in granting franchises of longer duration than 30 years. The character of the use is an important factor, and some franchises are granted for considerably less periods of time. Original franchises are normally of lengthy duration so utilities can realize a return on investments. But on renewals, if the original investment has probably been recovered, a municipality might be wise to reduce the length of time of the franchise grant.

In cities under 6,000 population, no constitutional limitations exist, but the comments above are applicable.

It is strongly recommended that all franchises specify a definite termination date.

Termination

Franchises, being contracts, can only be terminated according to the law of contracts. A contract expires, on its own terms, at the end of the period of duration stipulated. Or it may be terminated by mutual consent of the parties. Many franchises have incorporated in them conditions of purchase and the exercise of such right ends the grant of the selling party. If the company holding the franchise fails to abide by the terms, the franchise may be revoked in a proper judicial proceeding.

Forfeiture

Section 10-2-210, Code of Alabama, provides for the forfeiture of franchise of quasi-public corporations. This section states that if a person, firm or corporation operating a public utility and holding a franchise from a municipality, shall fail to perform, after notice of default, the city or town may petition the circuit court to enforce the agreement. The court, after a hearing, may require compliance, grant time in which to do so, and upon failure to comply with the order, declare the franchise forfeited.

Section 10-2-210 was repealed by Act No. 80-633. Therefore, the terms of franchises, after the effective date of this Act, will govern the proceedings controlling forfeiture.

Assignments and Sales

Sections 37-4-40 through 37-4-44, Code of Alabama, 1975, cover sales and leases of property of a utility and the sale of the capital stock of a corporation owning and operating a utility. If the corporation operates in a single municipality, the transfer must be consistent with the public interest, as determined by the governing body of the municipality and the Public Service Commission.

A franchise, like any other contract, is subject to assignment or sale unless the terms of the grant restrict such assignment or sale. Thus, a municipal governing body should consider this fact when terms of the franchise are being considered and should include a provision giving the council power to approve a transfer of a franchise before making the initial grant. ■



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Legal Notes

By Lori Lein
League Counsel

COURT DECISIONS

Taxation: Local law providing for county occupational tax is unconstitutional because it failed to comply with the notice requirements for local legislation found in Section 106 of the Constitution of Alabama of 1901. *Richardson v. Izzi*, 819 So.2d 25 (Ala. 2001).

Court Decisions from Other Jurisdictions

Public Buildings: City's refusal to display on the lawn of a municipal building a monument funded by private contributions and listing the seven principles of religion of a church formed in 1975 near a Ten Commandments monument previously donated by a private group violates the First Amendment free speech rights of the new church. *Sumnum v. Ogden, Utah*, – F.3d – (10th Cir., No. 01-4022); 71 L.W. 5 (Aug. 6, 2002).

Telecommunications: A municipal ordinance that authorizes a municipality to grant an exclusive franchise for pay phones on public rights of way to one or two providers on the basis of an auction process that uses a bid amount as the primary selection criterion is preempted by Section 253(a) of the 1996 Telecommunications Act. *New Jersey Payphone Assoc. v. West New York, N.J.*, – F.3d – (3rd Cir., No. 01-1917); 71 L.W. 6 (Aug. 13, 2002).

Civil Rights: The state has no obligation under the 14th Amendment's due process clause to provide rescue services, competent or otherwise, to persons imperiled by private conduct, and city emergency medical technicians' alleged negligence in responding to a 911 call to rescue a child who was choking on a grape is not a "state-created danger" that

would impose an affirmative constitutional obligation on the state to perform a competent rescue. *Brown v. Pennsylvania Dep't of Health Emerg. Services Training Inst.*, – F.3d – (3rd Cir., No. 01-3234); 71 L.W. 7 (Aug. 20, 2002).

Education: A municipality's issuance of tax-exempt industrial revenue bonds to finance a pervasively sectarian institution's building program confers indirect, generally available government benefit whose primary purpose and effect is economic and educational development, rather than an endorsement of religion, and thus does not violate the First Amendment's establishment clause. *Steele v. Industrial Dev. Bd. Of Nashville*, – F.3d – (6th Cir., No. 00-6646); 71 L.W. 7 (Aug. 20, 2002).

ATTORNEY GENERAL OPINIONS

Industrial Development: The use of city and/or county notes or warrants by an industrial development board to pay the cost of purchasing certain real property and performing the site preparation and improvements to property will not constitute the "issuance of bonds" as that phrase is used in the definition of "maximum exemption period" in Section 40-9B-3(8)a.1 of the Code of Alabama. 2002-290.

Competitive Bid Law: If a governing body determines that drug-testing lab services are professional services that require a high degree of skill where the personality of the individual plays a decisive part in a decision, these services would be exempt from the Competitive Bid Law. 2002-297.

Councils and Councilmembers: The term "majority," as applied in Section 11-44C-28 and 11-44C-51 of the Code of

continued next page

Alabama, describes the five vote supermajority as established in Section 11-44C-28 of the Code of Alabama. 2002-301. **NOTE:** This opinion only applies to Class 2 municipalities (i.e. the City of Mobile).

Appropriations: If a city council determines that a public purpose is served, the city may enter into a contract with a local girl scout council to provide funds to the girl scout council in exchange for programs for girls in the local public schools and public housing communities. 2002-304.

Boards: Under the authority of Section 38-2-7 of the Code of Alabama, a city of 60,000 or more in population must be located wholly within one county to share the authority with the county commission in the appointment of the county board of human resources. In a county that contains a city of 60,000 or more in population, the city and the county have an equal number of votes in selecting the members of the county board of human resources. 2002-307.

Zoning: A planning commission has the duty to adopt a "master plan" to be used to advise the governing body in the determination of developmental decisions for a city and Section 11-52-10 of the Code of Alabama governs the procedure for adopting a master plan. 2002-309.

Ordinances: A municipal or county ordinance that purports to regulate fishing in a manner that is inconsistent with the general laws of the state is invalid. 2002-313.

Zoning: Day care homes must comply with local zoning ordinances. A day care home located in an R-1 zone where no exception is provided in the local zoning ordinance, must obtain a special exception under any procedures provided for in the local zoning ordinance. 2002-314.

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Project R.O.S.E. Collects Used Motor Oil

University of Alabama sponsored Project R.O.S.E., one of the oldest volunteer used motor oil outreach and education programs in the United States, is celebrating its 25th anniversary this year.

Founded in 1977 by Gary C. April, professor and head of UA's chemical engineering department, Project R.O.S.E., which stands for Recycled Oil Saves Energy, began with two 55-gallon drums placed at a pair of service stations in Tuscaloosa and Mobile, giving customers the opportunity to dispose of their used motor oil. Today, Project R.O.S.E. provides more than 500 volunteer used motor oil collection sites across the state and collects more than 8 million gallons of used motor oil for recycling annually.

The program has gained national attention from the U.S. Environmental Protection Agency and the Department of Energy, which have recognized it as a model volunteer used oil program for do-it-yourself oil changers.

Project R.O.S.E. is a grass-roots effort, April said. It enables communities to implement a recycling program that aids that specific community's needs.

Project R.O.S.E. has been contacted by every state in the nation, along with 12 foreign countries, for assistance in implementing their own oil recycling programs, April said.

Sheri Powell, project coordinator for Project R.O.S.E. for more than 10 years, says the longevity of the program can be attributed to its ability to reinvent itself. There have been scientific changes and environmental concerns regarding other automotive solvents and materials since Project R.O.S.E. began, Powell said. It has evolved in order to enable people to do their part in preserving the environment and we look forward to another 25 years of exciting challenges.

Powell said that at least 4 million gallons of used motor oil are still discharged in back yards, storm drains, landfills and streams in Alabama each year, something Project R.O.S.E. is trying to change by informing the public about the importance of disposing motor oil properly. Used motor oil contains dangerous toxins, such as lead chromium and cadmium.

When not recycled or disposed of correctly, it contaminates surface water and soil; kills plants and animals; and is hazardous to the health of humans. Some toxins found in used motor oil can cause cancer.

The oil from a single oil change can contaminate one million gallons of fresh water, a year's supply for 50 people, she said.

Project R.O.S.E. is headquartered in the chemical engineering department in UA's College of Engineering and is funded by the Alabama Department of Economic and Community Affairs Science, Technology and Energy Division.

For more information, or to locate used oil collection sites throughout Alabama, visit the Project R.O.S.E. website at www.eng.ua.edu/~prose, or call 1-800-452-5901. ■

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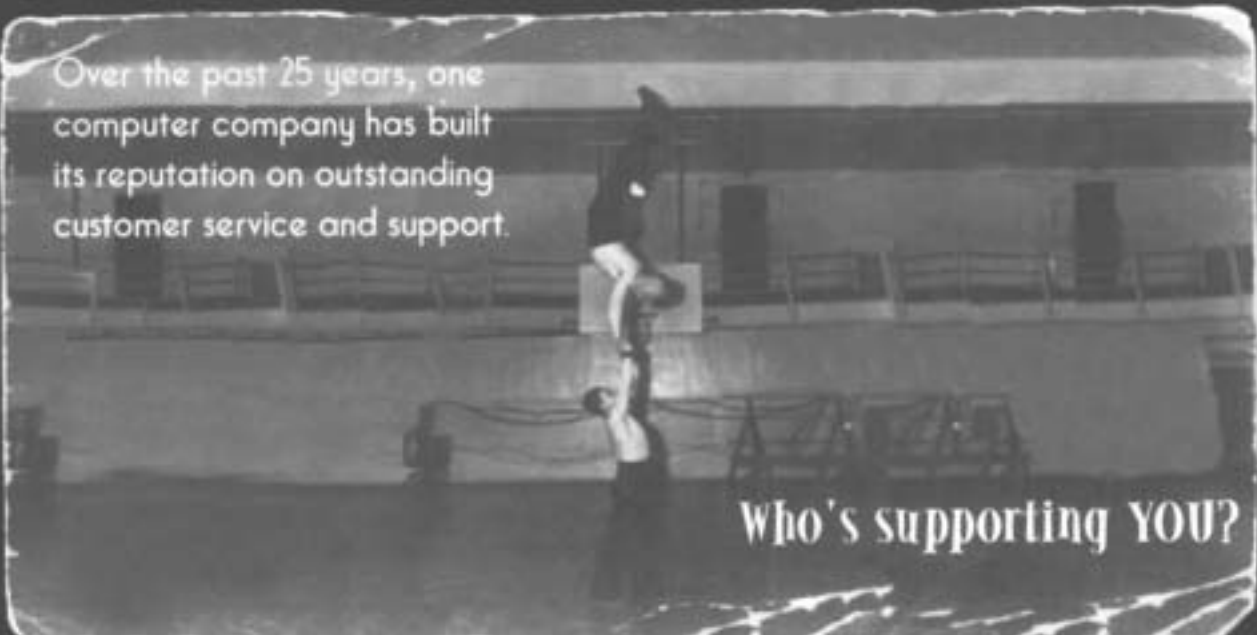
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Speaking of Retirement

*Prepared by the staff of the Retirement Systems of Alabama and edited by
Mike Pegues, Director of Communications.*

What Your Beneficiary Should Know

When a loved one dies, beneficiaries often find that they are overwhelmed and unprepared to deal with the death benefit process. Therefore, it is very important for the ERS member to communicate with his or her beneficiary and provide them with as much advance information as possible. The RSA hopes the following information will help beneficiaries through this process.

Designating a Beneficiary

New members designate a primary and contingent beneficiary when they begin employment. If the active member wishes to change the beneficiary designation, the member must complete a change of beneficiary form. If a member wishes to designate more than one primary and/or contingent beneficiary, he or she must complete a multiple beneficiary form. Keeping your beneficiary current will help avoid legal difficulties and not delay payment of the death benefit to your beneficiary.

Death of the Member

The death benefit process begins when the ERS is notified of the member's death. It is important for the death to be reported as soon as possible to avoid any delays or problems. Contact the ERS at 1-800-214-2158, extension 399, and the ERS will send the necessary forms to be completed with a list of documents (for example, Certified Death Certificate) the ERS requires to complete the process. The ERS will also require any outstanding payments be remitted back to the ERS at this time.

Beneficiary Benefits of an Active Member

If a member dies prior to retirement, death benefits are calculated and paid to the beneficiary based on the member's age, service credit, employment status and eligibility for retirement. Consult your ERS Member Handbook for preretirement death benefits.

Beneficiary Benefits of a Retired Member

Once the ERS receives the documents from the beneficiary, the ERS will calculate the benefits due to the beneficiary.

- If the member selected the Maximum retirement

benefit, the beneficiary will receive a pro rata payment for the number of days the member was living in the month of death.

- If the member selected the Option 1 retirement benefit, the beneficiary will receive a pro rata payment for the number of days the member was living in the month of death and any balance in the member's account at the time of death.

- If the member selected the Option 2 retirement benefit, the beneficiary will continue to receive the same monthly benefit as the member, except when legislation did not pass on Cost-of-Living Adjustments to the beneficiary.

- If the member selected the Option 3 retirement benefit, the beneficiary will begin to receive 50 percent of the monthly benefit of the member, except when legislation did not pass on Cost-of-Living Adjustments to the beneficiary.

Helpful Hints

- Have a copy of your will accessible to the executor of the estate.
- Death benefits may be subject to federal income tax, but not state and local taxes. If the beneficiary lives outside Alabama, consult that state's tax agency about tax consequences.
- Keep your beneficiary updated at all times.
- Beneficiaries should also use direct deposit for benefit payments.
- Consult an attorney or tax advisor.

Do you know who your beneficiary is? Any request for information on your beneficiary must be in writing.

Prepared by the Communications staff of the Retirement Systems of Alabama. To have your questions answered in "Speaking of Retirement", please address them to Mike Pegues, Communications, Retirement Systems of Alabama, 135 South Union St., P. O. Box 302150, Montgomery, Alabama 36130-2150.

Obituaries

Eugene C. Stallworth

Eugene C. Stallworth, former councilmember of Brewton, died July 17, 2002.

Stallworth served on the council from 1986 to 1992. He was Mayor Pro Tempore from 1988 to 1992. ■

A.A. Chandler

A.A. Chandler, former mayor of Vernon, died July 31, 2002. He was 85.

Chandler held various offices in Lamar County, including probate judge, superintendent of education for two terms, board of education for two terms and two terms as mayor of Vernon. He was a member of First Baptist Church of Vernon where he was a deacon and Sunday School teacher.

He is survived by his wife, daughter, son, four grandchildren and three great-grandchildren. ■

Rachell Waters-Smith

Rachell Waters-Smith, town councilmember of Level Plains, died August 16, 2002. She was 61.

Water-Smith served as longtime city clerk for former Enterprise Mayor M.N. Jug Brown before moving to Spanish Fort, where she lived before moving to Level Plains. ■

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ADEM Begins Regulatory Process for Adoption of Phase II Stormwater Regulations

The Alabama Department of Environmental Management is currently developing Phase II stormwater regulations to further address environmental problems associated with stormwater run-off. Adoption of these regulations is mandated by the Environmental Protection Agency (EPA), which adopted federal Phase II stormwater regulations in December, 2000. The Phase II stormwater regulations are a continuation of the Phase I stormwater regulations called for in the Clean Water Act Amendments of 1987.

While Phase I stormwater regulations affected larger municipalities, the federal Phase II stormwater regulations expand coverage to small municipal storm sewer systems (MS4s), i.e., populations under 100,000 people. Similarly, Phase II regulations also expand coverage to any individual or business responsible for a construction activity greater than or equal to one acre but less than five acres. Phase I requirements were applicable to construction activities of five acres or greater.

To maintain primacy for the National Pollutant Discharge Elimination System (NPDES) Program, the Department must adopt Phase II stormwater regulations that are equivalent to the federal regulations. The regulations the Department is drafting

will be presented for public comment in the Fall and will be the subject of a public hearing, probably in November.

The Phase II stormwater requirements substantially increase the number of facilities the Department will be required to regulate. Current estimates indicate that over 50 MS4s and as many as 10-15,000 construction sites could be affected by these regulations.

The federal Phase II stormwater regulations require each state to develop and adopt Phase II stormwater regulations but do not require local municipalities or local governments to take a similar action. Local municipalities and local governments can ensure compliance with the requirements of the federal regulations through coverage under the state program.

If you would like further information on the Phase II stormwater regulations that are currently being developed by the Department you may contact **Truman Green** at 334-271-7800 for municipal MS4 requirements or **Richard Hulcher** at 334-394-4311 for construction activity requirements. In addition, you may access the Department's web-site at www.adem.state.al.us to stay informed of the public comment period and the public hearing date. ■

Revenue Officers Mark Your Calendars!

The Revenue Officers Certification Training Institute will be conducted October 2-4, 2002, in Tuscaloosa, Alabama. The University of Alabama College of Continuing Studies administers the training under a course outline established by AMROA. Successful completion of the required number of hours leads to a designation of Certified Municipal Revenue Officer (CMRO). Visit online at www.amroa.com for an agenda and online registration.

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