THE ALABAMA MUNICIPAL
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April 2003 Volume 60, Number 10

Preclearance of Election Changes Under the Voting Rights Act

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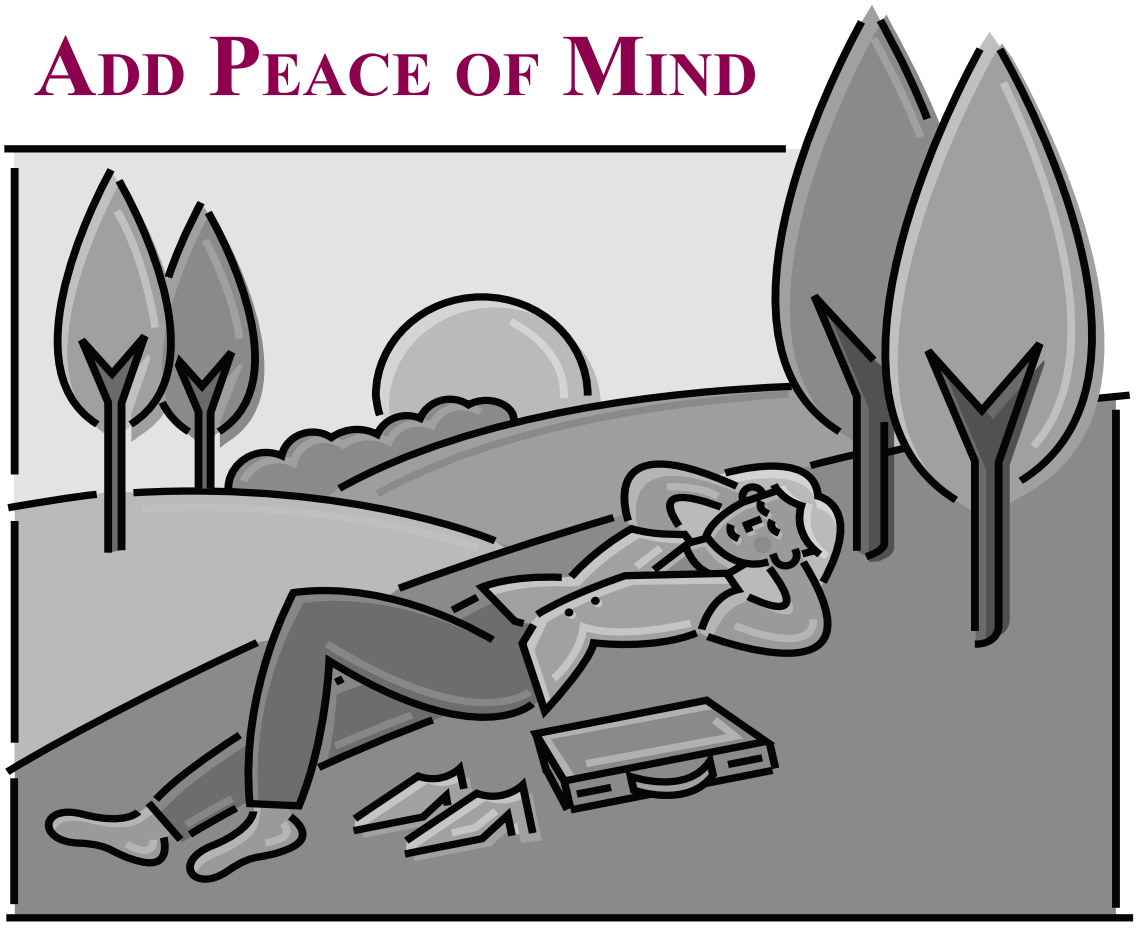

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2003 Annual Directory & Vendor Yellow Pages Available

The *Annual Directory & Vendor Yellow Pages* is a 132 page, 8˚ 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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The President's Report

George W. Roy
Mayor of Calera

Experts Discuss Emergency Response Planning

A panel of experts led by former White House Press Secretary Mike McCurry discussed the importance of keeping communities informed about homeland security and war preparations during the National League of Cities annual Congressional City Conference in Washington, D.C.

McCurry was joined by Alex Padilla, Los Angeles city council president and a member of NLC's board of directors; David Schonfeld, a developmental and behavioral pediatrician and associate professor at Yale University; and Margaret Nedelkoff Kellems, Washington, D.C., deputy mayor for public safety.

During the presentation, the panel noted the importance of developing emergency plans, training, using the media to deliver accurate messages and the importance of regional cooperation.

Kellems said Washington, D.C., has mutual aid agreements with neighboring counties in Maryland and Virginia. Washington is also the only city to have its own federal liaison to the U.S. Department of Homeland Security.

"All of our planning for law enforcement, firefighting, mass care, health and medical services, are done as a regional effort," said Kellems. "We have a group composed of myself and the emergency management directors from D.C., Maryland and Virginia, and we meet weekly to discuss these things."

In terms of using the media to get accurate information to the public, Kellems said Washington officials have held numerous briefings with the major media in the city about what would happen in the event of an emergency.

She said the most important thing to remember when dealing with the media is to provide the most accurate information available.

"If we have a major emergency here, we're going to rely on the major media more than anything else to get correct and accurate information out to the public," said Kellems.

To prepare for an emergency, Padilla said city officials must become familiar with their city's and region's plans.

"Because in times of crisis, you have to be able to trust your system. When a crisis occurs is not the time to decide to make or refine your system," said Padilla.

Kellems and Padilla indicated that like many cities, Los Angeles and Washington had emergency plans in place prior to the Sept. 11, 2001, terrorist attacks. Those plans, they said, were based on responses to natural disasters.

They have since updated those plans to include responding to an attack."We have now restructured our emergency response plan. It's a functional all hazards plan. The city now uses the same architecture as the federal government, as do our contiguous jurisdictions. We all talk the same language, we know how we're going to interact and we know who is going to work with whom," said Kellems.

Padilla said his city has run numerous exercises at Los Angeles International Airport and the Port of Los Angeles. "We've gone through the drills at the port and at LAX. We've tested those procedures … And that is why there has been so much frustration at this conference with the federal government. Because part and parcel with that preparation is knowing that you have the best equipped personnel at the local level," said Padilla, referring to the NLC's efforts to get Congress to fully fund the $3.5 billion First Responder Initiative.

To keep the public informed of a city's emergency plans, and what to do in case of an emergency, Schonfeld advised city officials to keep their messages short and succinct.

"What officials really need to do is distill the information, put it in simple and comprehensible terms and deliver only what is relevant at the time," said Schonfeld. "If we want the public to understand, we have to simplify what we say."

Schonfeld also said that cities should enlist schools to assist in providing services to children who may be worried or scared by the possibility of terrorist attacks. He also encouraged city officials to be human, be present and be leaders when discussing how a war in Iraq or the threat of attacks in the United States could affect their communities.

"People elect officials to serve and to lead, and they expect that in times of need. As leaders, you need to convey to your constituents what services are in place to help them," said Schonfeld.

Note: *This article was written by Lance Davis and appeared in the March 17, 2003 issue of* Nation's Cities Weekly.

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Municipal Overview

By
PERRY C. ROQUEMORE, JR.
Executive Director

Highlights of NLC Congressional City Conference

Nearly 200 municipal officials from Alabama attended the NLC Congressional City Conference in Washington, DC, in early March. Delegates met with their U.S. House members at district dinners on Monday night, March 10. On Tuesday morning, March 11, delegates had breakfast with Senators Richard Shelby and Jeff Sessions. Among the issues discussed at the meeting were the President's economic stimulus package and Homeland Security.

Economic Stimulus Legislation

House Ways and Means Committee Chairman Bill Thomas (R-Calif.) recently introduced the President's $723 billion economic stimulus package, the "Jobs and Growth Tax Act of 2003" (H.R. 2). The legislation calls for acceleration of the 10 percent individual income tax rate bracket expansion, acceleration of the reduction in individual income tax rates, acceleration of marriage penalty relief, acceleration of the child tax credit, elimination of the double taxation on corporate dividends and an increase in expensing for small businesses.

Municipal priorities for investment in critical infrastructure, homeland security and an overall balanced policy of fiscal responsibility at local, state and federal levels of government are not in the forefront of the current debate on an economic stimulus for the country.

Thomas laid out an aggressive timeline for House action where the Ways and Means Committee will hold hearings on H.R. 2 in early March. A full committee mark-up is anticipated the third week of March, and a vote on the floor of the House could come by end of the month.

Since Congress returned to work in late January, several economic stimulus proposals have been introduced including the "State and Local Aid and Economic Stimulus Act of 2003" (S. 201), a state and local government fiscal relief proposal sponsored by Sens. Olympia Snowe (R-Maine) and Charles Schumer (D-N.Y.). This bipartisan bill would "direct $20 billion to states and $20 billion to local governments to help them continue needed services and stop further tax increases as they work to close their budget gaps."

Senate Minority Leader Tom Daschle has also introduced a Senate Democratic alternative that would provide $15 billion for states and localities. Twenty percent of this funding would be passed through to local governments, including $5 billion for "hometown" security, $6 billion to fund major programs in the No Child Left Behind Act and $4 billion for infrastructure. It would also provide $2.9 billion in additional funding for highways, $700 million for mass transit and $400 million for airport construction. State matching requirements would be waived.

Approximately half of the cost of the President's proposed economic growth package (H.R. 2) would be attributed to the elimination of taxes on dividends. This proposal has created significant concern in the municipal bond market, where investment in tax-exempt municipal bonds could become less attractive if the tax-free dividend proposal passes. This, in turn, could affect the cost of local and state bonds used for infrastructure financing, general obligation debt, low-income housing and other purposes. At a minimum, municipal borrowing could become more expensive.

The elimination of revenue from taxes paid on dividends could also affect many state and local tax revenue structures that mirror the federal tax code. With states facing a collective 2003 budget shortfall of approximately $67 billion, this change in federal tax law could hinder changes in state and local tax administration to help buffer additional budget deficits. The long-term effects of the Administration's economic growth plan would not be seen until fiscal year 2007, according to the Congressional Budget Office.

The National League of Cities is working with other local and state government organizations and the staff of leading members of the Senate Finance Committee and Ways and Means Committee to communicate support for state and local fiscal relief in any final stimulus agreement — including full funding of federal mandates (i.e. Title I education programs such as the Individuals with Disabilities Education Act and homeland security) and changes in the federal tax code that would improve bond financing of projects and services. These include arbitrage relief and support for advance refunding legislation (S. 271) sponsored by Sens. Gordon Smith (R-Ore.) and John Corzine (D-N.J.).

continued next page

A recent survey conducted by the National League of Cities shows that 73 percent of city officials say their local economies are weaker this fiscal year than last year due to higher costs for public safety, health care and infrastructure and lower revenues from sales taxes, income taxes, tourist-related taxes (i.e. restaurant and hotels) and cuts in state revenue sharing. City and state budgets are being squeezed by the weak economy, close to $3 billion in unfunded homeland security spending, and sharply rising Medicaid costs. There is an unparalleled state financial crisis with a total 2003 budget shortfall of $67 billion and an anticipated $60 billion to $85 billion shortfall in 2004.

NLC is asking municipal officials to meet with their members of Congress, urging them to support a sensible and balanced economic stimulus package that will provide immediate, targeted investments in cities and towns.

NLC's policy supports an anti-recession fiscal assistance program to offset the revenue losses of municipal governments during periods of national economic decline as well as expansion of cities' ability to issue municipal bonds to help fund public-private partnerships or other appropriate ventures in those areas needing economic stimulus or development.

Ridge Speaks to Delegates at Congressional City Conference

Homeland Security Director Tom Ridge announced $750 million in grants Monday to help fire departments train and prepare and equip themselves as the first line of defense in the war on terrorism during a general session of the Congressional City Conference in Washington, D.C.

The announcement more than doubled last year's Assistance to Firefighters grants, when the Federal Emergency Management Agency distributed more than $334 million through 5,316 grants to help America's firefighters prepare to respond to fires and other disasters. FEMA is part of the new Homeland Security Department.

"Here I'm going to need to ask your help. There's a lot of money here – three-quarters of a billion dollars," Ridge said. "But we didn't quite get the flexibility that I thought we needed for local communities to use these dollars, not just for fire equipment, but for equipment that can be used to respond to a terrorist incident."

Ridge asked local officials to take a regional approach to the firefighters' grants. "So maybe, as you take a look around the region, you can develop mutual aid arrangements, so that one fire department picks up one kind of equipment; another picks up another kind of equipment; somebody else pays for some training and exercises with their money," he said. "So you can really add value by putting together and pooling some of these resources and taking a regional approach toward securing these dollars."

The $750 million in grants is part of $1.3 billion the Homeland Security Department will be making available in 2003 funding to help better equip and train first responders, Ridge told the delegates.

The department recently made available nearly $600 million in grants for first responders through the Office of Domestic Preparedness. The money is used by state and local governments to purchase equipment and training, planning and exercises.

"As we go to combat terrorism, I'm hopeful that in the years ahead, we can get even more money where there's flexibility for the state and locals to purchase what they decide they need, rather than what somebody thinks they want," Ridge said. "I figure you guys are in the better position … So we'll work with you as we work with Congress. They ultimately appropriate the dollars; we respect that. But I'd sure like to see you get some more flexibility."

Ridge said the department looks forward to working with city officials to get improved and expanded flexibility in 2004, including money for urban search and rescue teams and interoperable communications.

Ridge thanked NLC for its support in creating the Department of Homeland Security.

"Your advocacy was a huge help, and I thank you for that. I want to thank you for your support of the state and local unit that is becoming a formal part of the new Department of Homeland Security," he said.

Ridge said he felt that one of the reasons that the President was so keen in getting state and local people involved in the Homeland Security Advisory Council, and in having a state and local unit within the new department, was he understood as a former governor himself the partnership needed to build a national capacity to prevent terrorist attacks and to respond to an attack as partners.

"Now, many of you have heard me say this, and I believe it, we cannot secure the homeland, ultimately, from Washington, D.C.," Ridge said. "We have to have partners at the state and local level. And at the end of the day, the homeland is secure when the hometown is secure."

Ridge said the 2003 budget does not include a lot of money for new programs, bur rather for security

enhancements, new equipment and resources for cities, states and borders

"So the dollars that I'm talking about are for prevention, for reducing our vulnerability to attack, as well as preparing ourselves to respond to an event if it occurs.," he said.

The new investment and new programs for homeland security include: Money to hire 1,700 new inspectors at ports of entry of land and sea and air, and an additional 600 border patrol agents; $400 million toward the continued development of an entry-exit visa system; and Infrastructure improvements at the border to facilitate the development of 21st century border agreements such as the NEXUS program with Canada to reduce border delays for people known to both sides as non-terrorists.

Ridge also spoke about the work the Customs Department and Coast Guard have done to increase homeland security.

The Department of Homeland Security is also taking steps to assess threats through the Information Analysis and Infrastructure Protection Directorate, the department's own little intelligence unit.

"We're going to get information from Customs and from Transportation and from the Coast Guard and from a lot of other people. But we're also going to have access to information from every other intelligence-gathering agency in the government," Ridge said. "And we're going to take that information and we're going to map it against different vulnerabilities that we might have, so that we can harden America; so that we can protect our infrastructure."

Ridge closed his speech by talking about the success of the department's readiness website – ready.gov. The site has had more than 100 million hits, with more than 5 million people staying on the website for an average of 15 minutes.

"This is the kind of approach that we need to take. Working together. If you have a website up for your city or community, maybe you can make that connection, pull them into the ready.gov.," he said. ■

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ENVIRONMENTAL OUTLOOK

By Gregory D. Cochran
Director, State and Federal Relations

Waterways in Gulf States Named Critical Habitat for Sturgeon

Waterways from Florida to Louisiana have been named critical habitat for the threatened Gulf sturgeon, giving additional protection to one branch of the oldest living line of fish. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service announced the designation.

The New Orleans Audubon Society originally sued the U.S. Army Corps of Engineers and the Interior Department in 1991, demanding critical habitat for the fish. A federal district judge rejected its claims in 1998, but the 5th U.S. Circuit Court of Appeals overturned that decision in March 2001.

The new designation covers about 1,730 river miles and 2,333 square miles of estuaries and the Gulf of Mexico, from the Pearl River in Louisiana to the Suwannee River in Florida and may put a crimp into a proposal to dam Florida's Yellow River. Supporters say the dam would create a needed reservoir for western Florida. Opponents say that, by drastically decreasing water levels on the lower part of the river, it could endanger some species there.

Gulf sturgeon can live up to 70 years, grow longer than 9 feet and weigh more than 300 pounds. They are a cold-water fish, having adapted during the Ice Age. When the area became warmer, they adapted by swimming upriver to coldwater springs for the summer, returning to the Gulf in the winter. The Gulf sturgeon's fossil family tree goes back 200 million years

Before 1900, they thrived in the northern Gulf of Mexico, down to west-central Florida. But over fishing, the sturgeon was taken both for its flesh and for caviar, as well as dams and pollution almost wiped them out. The Endangered Species Act has protected sturgeon since 1991.

Parts of these Alabama, Florida, Louisiana and Mississippi rivers, estuaries and other waterways are now considered critical habitat for the Gulf sturgeon: Escambia, Conecuh, Sepulga, Yellow, Blackwater, Shoal Rivers, Choctawhatchee, Pea Rivers, Apalachicola, Brothers, Suwannee, Withlacoochee, Lake Pontchartrain (east of the Lake Pontchartrain Causeway), Lake Catherine, Little Lake, The Rigolets, Lake Borgne, Pascagoula Bay, Mississippi Sound, Pensacola Bay, Santa Rosa Sound, Choctawhatchee Bay, Apalachicola Bay, Suwannee Sound, Pearl, Bogue Chitto, Pascagoula, Leaf , Bouie (also referred to as Bowie), Big Black Creek, and Chickasawhay.

Regulations Website offers improved access

The Office of Management and Budget (OMB) and the U.S. Environmental Protection Agency (EPA) have created an online, one-stop federal rulemaking clearinghouse designed to make it easier for the public to find, review and submit comments on hundreds of federal documents that are open for comment and published in the Federal Register. "E-rulemaking will allow citizens to participate actively by enabling them to be involved in federal rulemaking on their own terms at a location and time of their choice," EPA Deputy Administrator Linda Fisher said of the new Website at www.regulations.gov. "This initiative will help assure the public that they have a role in making regulatory decisions and that it can be done in a more timely and efficient manner." The initiative is part of the Bush administration's E-government agenda aimed at cutting costs and streamlining interactions between the public, businesses and government. To find Federal Register documents currently open for comment, users can click on the "go" buttons

continued next page

heading every page. They then can access the "Submit a Comment on this Regulation" link to express their opinion on a specific document. Alternatively, they may submit a comment directly to the agency through the PDF or HTML version.

EPA Enforcement Data Available Online

EPA's Office of Enforcement and Compliance Assurance has published a notice of availability and request for comments (FR Doc. 02-29471) on its new Web site, Enforcement and Compliance History Online (ECHO), which contains searchable facility-level enforcement and compliance information. Comments must be submitted to the agency by Jan. 21.

ECHO provides inspection, violation, enforcement and penalty information for the past two years for about 800,000 facilities regulated nationwide under the Clean Air Act Stationary Source Program, Clean Water Act National Pollutant Discharge Elimination System, and Resource Conservation and Recovery Act. It also contains demographic information from the National Census. EPA encourages stakeholders to determine if their facility report is accurate and, if not, whether the error reporting process is user-friendly.

The ECHO Web site is available at www.epa.gov/echo. Comments can be submitted to echo@epa.gov, or contact Rebecca Kane at kane.rebecca@epa.gov or (202) 564-5960.

Flurry of Environmental Legislation Introduced

More than 500 legislative bills have been filed since the opening of the Alabama Legislature last week. This year's initial crop of environmental legislation tackle Alabama's growing scrap tire dump crisis, the need for a statewide Clean Indoor Air Act, a brownfields incentive program and new quarry laws.

The following is a listing of environmental bills introduced in first week of new session.

SB 30 by Senator Penn, Granite and limestone surface mining operations, local approval required.

SB 97 by Senator Barron, Land Recycling (Brownfield) Finance Authority Loan Program administered by the Alabama Department of Environmental Management.

SB 98 by Senator Little, Brownfield recovery tax abatement for voluntary cleanup.

SB 126 & HB 287 by Senator Figures/Rep Grantland, Clean Indoor Air Act

SB 164 & HB 144 by Sen. Means/Rep. Layson, Amend Environmental Management Commission membership. Replace certified well driller position with geologist or hydro-geologist and replace at large position with qualified agriculture or forestry representative.

SB 132 & HB 186 by Sen. Means/Rep. Ford, Scrap Tire Environmental Quality Act

SB 158 & HB 302 by Sen. Mitchem/Rep. Knight, Waste Reduction and Technology Transfer Foundation appropriation.

HB 115 by Rep. Payne, Grease and animal byproduct disposal methods approved by appropriate agency, transportation requirement and penalties.

HB 176 by Rep. Perdue, Motor vehicle registration or license fee levied by state and county authorities to levy additional fee for mass transit. ■

THE LEGAL VIEWPOINT

By Ken Smith
Deputy Director / Chief Counsel

Preclearance of Election Changes Under the Voting Rights Act

Municipal elections in Alabama will be held in August of 2004. While this may seem far in the future to some, it is not too early to begin planning for the elections.

Alabama law requires that certain actions (establishing salaries for elected officials, determining whether to vote by districts, etc.) be made in advance of the election date. Other changes will be necessary simply to effectively conduct the election itself. A vital element in conducting your election is that any change in municipal operations and procedures that has an impact on elections must be precleared by the United States Attorney General's Justice Department Voting Rights Division in Washington, D.C. Changes that are not precleared cannot be enforced.

For instance, in *Singer v. City of Alabaster*, 821 So.2d 954 (Ala. 2001), the City of Alabaster followed a procedure of incorporating newly annexed territory into its existing voting districts. The City sought preclearance of the annexations and district assignments. The Justice Department precleared the annexations, but not the district assignments. Thus, the City refused to include the votes of residents of these newly annexed territories in a subsequent election. The residents sued, arguing that their votes must be counted. The Alabama Supreme Court held that Section 5 prohibited it from forcing the City to include these votes until preclearance was obtained.

Annexation is one type of election change that is often overlooked until the last moment. The League strongly urges municipalities to examine annexations that they have made to be certain that they have been precleared and make every effort to complete the annexation process in time to obtain preclearance well in advance of the election date.

As you can see, the coverage of the Voting Rights Act is extremely broad. Alabama has been a covered jurisdiction since 1965. The law provides that a "change affecting voting" shall mean "any voting qualification, prerequisite to voting, standard, practice or procedure different from that in force on November 1, 1964," and shall include, but not be limited to, the following examples:

• Any change in qualifications or eligibility for voting.

• Any change concerning registration, balloting and the counting of votes and any change concerning publicity for or assistance in registration or voting.

• Any change with respect to the use of a language other than English in any aspect of the electoral process.

• Any change in the boundaries of voting precincts or in the location of polling places.

• Any change in the constituency of an official, or the boundaries of a voting unit, e.g., through redistricting, annexation, de-annexation, incorporation, reapportionment, changing to at-large elections from district elections or changing to district elections from at-large elections.

• Any change in the method of determining the outcome of an election, e.g., by requiring a majority vote for election or the use of a designated post or place system.

• Any change affecting the eligibility of persons to become or remain candidates; to obtain a position on the ballot in primary or general elections; or to become or remain holders of elective offices.

• Any change in the eligibility and qualification procedures for independent candidates.

• Any change in the term of an elective office or an elected official or in the offices that are elective, e.g., by shortening the term of an office; changing from election to appointment; or staggering the terms of offices.

• Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

continued next page

• Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

In addition to the above, Alabama cities and towns have been required to obtain approval of all annexations, incorporations, ward line changes, election law changes and ordinances requiring candidates to pay a qualification fee. These changes must be precleared prior to enforcing the change.

This article is a guide for municipal officials to use in complying with the provisions of this law. Information in this article was taken largely from the Justice Department web site, which is available at **www.usdoj.gov/crt/voting/sec_5/about.htm**, and from League staff reports.

Introduction to Section 5 Preclearance

Section 5, one of the original provisions of the Voting Rights Act of 1965, is codified at 42 U.S.C. Under Section 5, any change with respect to voting in a covered jurisdiction – or any political subunit within it – cannot legally be enforced unless and until the jurisdiction first obtains preclearance. Section 5 provides that preclearance may be obtained only from the United States District Court for the District of Columbia, or from the United States Attorney General. Preclearance requires proof that the proposed voting change does not deny or abridge the right to vote on account of race, color or membership in a language minority group. If the jurisdiction is unable to prove the absence of such discrimination, the District Court denies preclearance, or in the case of administrative submissions, the Attorney General objects to the change, and the change is legally unenforceable.

The Voting Rights Section is responsible for reviewing voting changes submitted to the Attorney General and for defending Section 5 litigation in court. The Voting Rights Section receives requests for approval of between 15,000 to 24,000 changes each year. The Voting Section also brings lawsuits to enjoin the enforcement of voting changes that have not received the required Section 5 preclearance.

The Attorney General may deny Section 5 preclearance (by interposing an objection) no later than 60 days after a voting change has been submitted. Most voting changes submitted to the Attorney General are precleared; since Section 5 was enacted the Attorney General has objected to about one percent of the voting changes that have been submitted.

The Attorney General has published detailed Guidelines that explain how to make Section 5 submissions and the process of how the Attorney General decides whether proposed voting changes are nondiscriminatory. You can access these Guidelines at **www.usdoj.gov/crt/voting/sec_5/guidelines.htm.** Notices of Section 5 submissions are regularly posted to the Internet and can be mailed upon request to interested individuals, organizations and jurisdictions.

The discussion on these linked pages is directed primarily at the Section 5 preclearance requirement as it affects the adoption of new redistricting plans. However, redistricting plans typically are associated with numerous other voting changes, such as precinct and polling place changes and special elections. The tight timetables under which many redistricting submissions are made make it important to understand how to make a complete submission of all voting changes, and how to adopt plans and associated changes that comply with the substantive requirements of Section 5.

Only Voting Changes Require Section 5 Preclearance

It is important to understand that Section 5 applies only to *changes* in practices or procedures affecting voting. Continuous use of a voting practice in effect since the jurisdiction's coverage date does not implicate Section 5, nor does continued use of a practice already precleared under Section 5.

In *Allen v. State Board of Elections*, 393 U.S. 544, 565 (1969), the Supreme Court stated that the coverage of Section 5 was to be given a broad interpretation:

> "We must reject the narrow construction that appellees would give to Section 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes "all action to make a vote effective."

The legislative history on the whole supports the view that Congress intended to require preclearance of any enactment which altered the election law of a covered State in even a minor way.

Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

While reaffirming Allen in *Presley v. Etowah County Com'n*, 502 U.S. 491, 492 (1992), the Supreme Court emphasized that changes covered under Section 5 must have a direct relation to voting. The Court provided a nonexclusive list of four categories in which voting changes covered under Section 5 would normally fall:

- changes in the manner of voting;
- changes in candidacy requirements and qualifications;
- changes in the composition of the electorate that may

vote for candidates for a given office; and
- changes affecting the creation or abolition of an elective office.

In the cases consolidated before the Court in Presley, the changes involved the transfer of authority over road maintenance and construction between elected officials and from elected officials to an appointed official. The Court found that these types of transfers did not directly relate to voting and, therefore, not were subject to Section 5. Some transfers of authority between government officials, though, do have a direct relation to voting if they concern authority over voting procedures, such as a change in who has authority to adopt a redistricting plan, conduct voter registration or select polling place officials. See, e.g., *Foreman v. Dallas County*, 521 U.S. 979 (1997).

Voting Changes Enacted or Administered by Any State Official Require Section 5 Preclearance

There is a broad range of officials who enact or administer voting changes that are subject to Section 5 review, including legislative bodies (i.e., state legislatures, county commissions, city councils); executive officials (i.e., governors and mayors); and other officials (i.e., secretaries of state, county clerks, registrars). All voting changes adopted by a state court of a fully covered state require preclearance, as do voting changes adopted by a state court in a partially covered state if the change is to be implemented in a covered political subdivision of that state. See, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 265-66 n.16, 270 (1982); *LULAC of Texas v. Texas*, 995 F. Supp. 719, 724 (W.D. Tex. 1998).

Some Federal Court Orders Require Section 5 Preclearance

The Supreme Court has held that a voting change developed and imposed on a jurisdiction by a federal court is not subject to Section 5 review. These are generally referred to as "court-drawn" or "court-fashioned" voting changes. However, if a voting change ordered by a federal court reflects the policy choices of the jurisdiction – for example, if it was presented to the court as a consent decree agreed to by the jurisdiction – Section 5 review is required. *McDaniel v. Sanchez*, 452 U.S. 130 (1981). These are generally referred to as "court ordered" changes.

Obtaining Section 5 Preclearance By Court Order

Section 5 provides two methods for a covered jurisdiction to seek preclearance of voting changes. The first method mentioned in the statute is through a Section 5 declaratory judgment action filed by the covered jurisdiction in the United States District Court for the District of Columbia. A three-judge panel is convened in such cases. The defendant in these cases is the United States or the Attorney General, represented in court by attorneys from the Voting Section of the Civil Rights Division. Appeals from decisions of the three-judge district court go directly to the United States Supreme Court.

The jurisdiction seeking preclearance must establish that the proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group]." Judicial preclearance is obtained in the form of a declaratory judgment from the court that this standard has been met. The status of an unprecleared voting change which is the subject of a declaratory judgment preclearance action is the same as if preclearance had not been sought at all – legally unenforceable. This means that until the declaratory judgment action is obtained, the jurisdiction may not implement or use the voting change.

Obtaining Section 5 Preclearance Through Submission to the United States Attorney General

The second method of obtaining preclearance is known as administrative preclearance. A jurisdiction can avoid the potentially lengthy and expensive litigation route and obtain preclearance by submitting the voting change to the Civil Rights Division of the Department of Justice, to which the Attorney General of the United States has delegated the authority to administer the Section 5 review process. Preclearance is obtained if the Attorney General affirmatively indicates that he/she has no objection to the change or if, at the expiration of 60 days, no objection to the submitted change has been interposed by the Attorney General. It is the practice of the Department of Justice to respond in writing to each submission, specifically stating the determination made regarding each submitted voting change.

Well over 99 percent of preclearance requests follow the administrative preclearance route, no doubt because of the relative simplicity of the process; the significant cost savings over litigation; and the presence of specific deadlines governing the Attorney General's issuance of a determination letter.

In administrative preclearance proceedings the Attorney General attempts to apply the same standards that would be applied by the court. The burden of establishing that a proposed voting change is nondiscriminatory falls on the jurisdiction, just as it would on the jurisdiction as plaintiff in a Section 5 declaratory judgment action. See 28 C.F.R. 51.52; *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 335 (1966).

There are occasions when a jurisdiction may need to obtain Section 5 preclearance on an accelerated basis due to anticipated implementation before the end of the 60-day

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review period. In such cases, the jurisdiction should formally request "Expedited Consideration" in its submission letter, explicitly describing the basis for the request in light of conditions in the jurisdiction and specifying the date by which the determination must be received. Although the Attorney General attempts to accommodate all reasonable requests, the nature of the review required for particular submissions will necessarily vary and an expedited determination may not be possible in certain cases.

A preclearance determination removes the prohibition against enforcement that Section 5 imposes on unprecleared voting changes. The Attorney General's decision to preclear a submitted change cannot be challenged in court. *Morris v. Gressette*, 432 U.S. 491 (1977). A preclearance determination, however, does not protect any voting practice from challenge on any other grounds.

The declaratory judgment route to preclearance remains available to jurisdictions which have failed to obtain preclearance from the Attorney General. The proceeding before the three-judge federal court is de novo and does not constitute an appeal of the Attorney General's determination, although the Voting Section represents the defendant United States in these cases.

Lawsuits to Prevent the Use of Unprecleared Voting Changes

Voting changes for which Section 5 preclearance is required are legally unenforceable if preclearance has not been obtained. Section 12(d) of the Voting Rights Act, 42 U.S.C. 1973j(d), specifically authorizes the Attorney General to file suit to enjoin violations of Section 5. A private right of action to seek injunctive relief against a Section 5 violation was recognized by the Supreme Court in *Allen v. State Board of Elections*, 393 U.S. 544, 554-57 (1969). Any person or organization with standing to sue can challenge a Section 5 violation in the United States District Court in the judicial district where the violation is alleged to have occurred. Whether brought by the Attorney General or by private parties, these cases are commonly known as Section 5 enforcement actions.

Upon finding a Section 5 violation, the court in an enforcement action will consider an appropriate equitable remedy. The general objective of such remedies is to restore the situation that existed before the implementation of the unprecleared change. Thus, the typical remedy imposed by courts in such cases includes issuance of an injunction against further use of the unprecleared change. In certain circumstances, other remedies have included voiding illegally-conducted elections; enjoining upcoming elections unless and until preclearance is obtained; or ordering a special election; in some cases courts have also issued orders directing the jurisdiction to seek preclearance of the change from the Attorney General or the District of Columbia District Court.

Making Section 5 Submissions: SENDING MAIL TO THE VOTING SECTION

New procedures for the delivery of mail and overnight express parcels to the Civil Rights Division have been instituted. The Voting Section's postal address (P.O. Box 66128, Washington DC 20035) is no longer in effect.

The Department has established a single address for the receipt of all United States Postal Service mail. All mail to the Voting Section must have the full address listed below:

Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Deliveries by overnight express services such as Airborne, DHL, Federal Express or UPS should be addressed to:

Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

If you are sending a Section 5 submission, please make sure that the front of the envelope identifies it as a submission under Section 5 and your return address is clearly indicated.

How Section 5 Submissions are Reviewed

Upon receipt of a submission, one or more staff members in the Voting Section are assigned to investigate the proposed change. The nature and extent of that investigation will vary, depending upon the change itself and the surrounding circumstances. Investigations often involve telephone interviews with persons representing or associated with the submitting authority, and with private citizens, particularly members of racial or language minority groups. The Department encourages communications from the public regarding pending submissions, and considers all information or comments received. Prior submissions in Justice Department files may also be examined, as well as information available from the United States Census, the Internet or other sources.

While every effort is made to complete an investigation so that a determination is made before the end of the 60-day review period, the factual and legal issues presented by a particular submission may mean that the information originally provided by the submitting authority, considered together with the information obtained during the investigation, is still insufficient to enable the Attorney General to make a

determination. While Section 5 authorizes the Attorney General to object to the submitted change on that basis, it is the Voting Section's general practice to request additional information, in writing, from the jurisdiction. Upon receipt of a complete response to the request for additional information, a new 60-day period begins for the Attorney General to make a determination.

Particular Issues Regarding Making Section 5 Submissions

Some specific issues deserve mention here. The Attorney General will make no determination regarding a voting change which has not been finally adopted.

The Attorney General will make no determination regarding a voting change which is directly related to another known covered voting change which has neither been precleared nor submitted for preclearance. For example, the Attorney General will not review a districting plan if it is prompted by an unsubmitted change in the method of electing the jurisdiction's governing body, change in the number of elected officials or annexations.

By the same token, new redistricting plans themselves often require that other voting changes be made, such as changes affecting voting precincts, polling places and absentee voting locations. If these changes have been finalized, the jurisdiction should submit them for Section 5 review with its redistricting submission. The related voting change need not have been adopted by the jurisdiction making the original submission.

For example, state legislation authorizing political subdivisions to adopt voting changes ("enabling legislation") requires preclearance under Section 5. A political subdivision's implementation of the enabled change will not be reviewed under Section 5 if the enabling legislation has not been precleared or submitted for preclearance.

Clearly, it is in the covered jurisdiction's interest to submit a voting change *as soon as possible* after it has been finally adopted, even if its implementation may be many months away (for example, in the next general election). To the extent procedural or substantive issues prevent a determination on the merits occurring within the initial 60-day review period, a prompt submission may allow a sufficient opportunity to resolve issues in time for the practice (or a revised one) to be implemented as originally anticipated.

Contents of Submission

A voting change must be submitted in written form to receive Section 5 preclearance, although submissions in certain electronic formats are acceptable. While no specific format is required for a Section 5 submission, the submission ordinarily should include the following required contents:

(a) A copy of any ordinance, enactment, order or regulation embodying a change affecting voting.

(b) A copy of any ordinance, enactment, order or regulation embodying the voting practice that is proposed to be repealed, amended or otherwise changed.

(c) If the change affecting voting either is not readily apparent on the face of the documents, provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

(d) The name, title, address and telephone number of the person making the submission.

(e) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

(f) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

(g) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

(h) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(i) The date of adoption of the change affecting voting.

(j) The date on which the change is to take effect.

(k) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(l) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(m) A statement of the reasons for the change.

(n) A statement of the anticipated effect of the change on members of racial or language minority groups.

(o) A statement identifying any past or pending litigation concerning the change or related voting practices.

(p) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(q) For redistrictings and annexations: the items listed under Sections 51.28 (a)(1) and (b)(1); for annexations only: the items listed under Sections 51.28(c)(3). (**Note:** these cited provisions and others are available in the Guidelines posted on the Justice Department web site; the link is above.)

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(r) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change.

Additionally, it may prove helpful if the submitting jurisdiction includes the supplemental information listed in the Guidelines. This supplemental information includes:

(a) Specified demographic information

(b) Maps broken down to show how the proposed changes will affect the voting population, such as old and new boundaries of the voting unit or units, old and new boundaries of voting precincts, the location of racial and language minority groups, etc.

(c) Annexations. For annexations, in addition to information specified elsewhere, the following information:

1. The present and expected future use of the annexed land (e.g., garden apartments, industrial park).
2. An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.
3. A statement that all prior annexations subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations subject to the preclearance requirement that have not been submitted for review. see S 51.61(b).

(d) Where a change may affect the electoral influence of a racial or language minority group, returns of primary and general elections conducted by or in the jurisdiction, containing the following information, showing information such as candidate's names, race, votes received, etc.

(e) Where a change is made affecting the use of the language of a language minority group in the electoral process, information that will enable the Attorney General to determine whether the change is consistent with the minority language requirements of the Voting Rights Act.

(f) Any information relating to public notice and participation in the proposed change.

(g) Information showing the availability of the submission for public review and comment.

(h) For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers and organizational affiliation (if any) of racial or language minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process. ■

Legal Notes

By Mary Ellen Harrison
Staff Attorney

COURT DECISIONS

Sunshine Law: The Sunshine Law does not apply to a water board incorporated as a public corporation under Section 11-50-310, Code of Alabama, 1975. The court reasoned that the money received from municipal residents does not convert the funds into municipal funds and grants received or disbursed by the board were not funds belonging to the state, county or municipality. Section 11-50-310 does not authorize the board to disburse state, county or municipal funds. *Water Works and Sewer Board of the City of Selma v. Randolph*, 833 So.2d 604 (Ala. 2002).

Employees: The Court of Civil Appeals held that there was substantial evidence to support the Mobile Personnel Board's decision to reduce an employee's punishment, and it is not within the power of the lower court reviewing the record to substitute the judgment of the Board with its own. The Personnel Board sits in judgment like a jury, and therefore, the Personnel Board's decision should be given the same weight as a jury. *Mobile County Personnel Board v. Mobile*, 833 So.2d 641 (Ala.Civ.App. 2002).

Condemnation: In a condemnation case, the trial court's judgment is to be affirmed unless the verdict is not supported by competent evidence, is palpably wrong, manifestly unjust, or is against the preponderance of the evidence. *Oates v. State Dept. of Transp.*, 833 So.2d 654 (Ala.Civ.App. 2002).

Ad Valorem Taxes: To warrant a change in next year's ad valorem taxation of a parcel of land that has been granted a current-use treatment during the particular year under Sections 40-7-25.1 and 40-8-1, Code of Alabama, 1975, the use being made of that property must be different from use for which current-use treatment has been granted with respect to proceeding year. Whether use has changed from commercial use to forest property is a factual question for a jury to resolve on owner's challenge. Constitutional Amendment 373(b,j) gives the right to have forest property assessed on a current-use basis. When there is a challenge to the revocation of the current-use treatment of property, the state can present evidence to show the use of property before and at the time that the benefit of the current-use assessment was granted, but the state cannot use it to show a change in the surrounding property. *Delany's Inc. v. State*, 834 So.2d 97 (Ala.Civ.App. 1999).

Tort Liability: When an officer has probable cause to make an arrest, he is performing a discretionary function when he decides to make a warrantless arrest; thus, the city has discretionary-function immunity under Section 6-5-338, Code of Alabama, 1975. *City of Birmingham v. Sutherland*, 834 So.2d 735 (Ala. 2002).

Citations to Cases from Other Jurisdictions

Employees: The 90-day period for filing suit after the EEOC dismisses an employment discrimination charge can be triggered by oral notice to the employee explaining that the period has commenced. *Ebbert v. Daimler-Chrysler Corp.*, 319 F.3d 103 (3rd Cir. 2003).

Prisoners: The U.S. District Court of the Western District of Virginia held that the 2000 Religious Land Use and Institutionalized Persons Act violates the First Amendment establishment clause. In this case the prisoner invoked RLUIPA to challenge the prison board's refusal to approve his request for a kosher diet. *Madison v. Riter*, 240 F.Supp.2d 566 (W.D.Va. 2003).

First Amendment: A public school district did not violate a student's freedom of speech and religion when the district ordered the student to remove proselytizing passages in his graduation speech. *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003).

First Amendment: If retaliation against a public employee for engaging in protected speech is reasonably likely to deter the employee from engaging in a protected activity, it is an

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adverse employment action that violates the First Amendment. This is true regardless of whether it involves the loss of a valuable governmental benefit or privilege. *Coszalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003).

Public Records: Financial documents submitted by a federal criminal defendant when applying for Criminal Justice Act assistance in paying his or her attorney's fees and legal expenses are not subject to a First Amendment or common law right of access. In re Boston Herald Inc., 2003 WL 474403 (1th Cir. 2003).

Environment: A Safe Water Drinking Act rule limiting the permissible level of radionuclides in drinking water was upheld in City of Waukesha v. E PA, 320 F.3d 228 (D.C.Cir. 2003). The court rejected the claims that the EPA failed to conduct a cost-benefit analysis, failed to use the best available science to determine the appropriate standards for contaminants, and failed to respond adequately to comments submitted during the rulemaking process.

Sex Offenders: A person who is required to register as a sex offender under state law due to a prior conviction has no 14th Amendment procedural due process right to a hearing on likelihood that person is currently dangerous. *Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160 (2003).

Sex Offenders: The Alaska Sex Offender Registration Act that requires all sex offenders to register and provides for internet posting of all of registrant's information does not impose punishment upon the sex offender; therefore, the Act is not an unconstitutional ex post facto law as applied to those convicted of sex crimes before its enactment. *Smith v. Doe*, 123 S.Ct. 1140 (2003).

Family Medical Leave Act: An employer's FMLA leave form requiring a health care provider to certify that a serious health condition exists by explaining the nature of the illness constitutes an inquiry into the employees medical condition that triggers the confidentiality protections of the Americans with Disabilities Act, even if the employee voluntarily submits the form. *Doe v. U.S. Postal Serv*., 71 LW 1511 (DC Cir. 2003).

ATTORNEY GENERAL'S OPINIONS

Ad Valorem Taxes: Residency for registering and paying ad valorem taxes on motor vehicles under Section 40-12-253, Code of Alabama, 1975, is a question of fact that may be determined by looking at the following factors: homestead exemptions, voter registration, ownership of property, and the address listed on the driver's license. 2003-077.

Prisoners: Under Section 14-6-1, Code of Alabama, 1975, the sheriff has legal custody and charge of the jail in his county and all prisoners committed thereto. Additionally, Section 14-6-2, requires that the sheriff feed the prisoners in the county jails unless otherwise provided by law. The sheriff should seek funds from all applicable sources as provided by law for feeding prisoners in county jails. The county, state, municipal and federal governments should cooperate with the sheriff in meeting their responsibilities in obtaining and providing funding for feeding of inmates. 2003-079.

Prisoners: Alabama law does not preclude contracting to use out-of-state prison facilities to incarcerate part of the State's prison population. The Supreme Court of the United States has held that interstate prison transfers do not deprive inmates of any liberty interest protected by the Due Process Clause. 2003-080.

Industrial Development: The City of Troy may contract with a foreign corporation if the municipality determines that a public purpose is served. The contract between the two entities should specify the consideration and the public benefit to be received. The city may require an accounting of how the money is spent in the contract with the corporation. Additionally, a city may enter into a no-cost lease with a foreign corporation for nominal consideration if the city determines that a public purpose is served. 2003-081.

Appropriations: A city may lease municipal property at no charge if a public purpose is served. The city council must determine if a public purpose is to be served by the corporation in leasing the municipal property. 2003-083.

Zoning and Planning: Once a planning commission has properly exercised its authority in adopts regulations that regulate subdivision development, it is bound by its regulations. 2003-089.

Licenses: A municipality that is not a member of a gas district may not collect a business license tax from a gas district incorporated under Article 12 of Title 11 of the Code of Alabama, 1975. 2003-091.

Nuisances: A Class 6 municipality may use the provisions found in Section 11-67-20 et seq. and Section 11-67-60 et seq., Code of Alabama, 1975, to require abutting landowners of an unopened street in a subdivision to either cut or maintain weeds up to the centerline of the unopened street. This may be done at the owner's expense, or the city may assess the owner for the costs of the removal as provided in the statute. The city may also use the statutes to require abutting landowners of opened and paved streets in a subdivision to cut or maintain weeds in the street right-of-way between the lot line and the paved surface of the street or to pay an assessment for the costs of the city doing the work as prescribed in the statute. 2003-093. ■

Speaking of Retirement

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

Join RSA-1 Today and Secure a Better Tomorrow

The majority of people working today should expect their retirement income to come from three sources: their pension plan, Social Security, and personal savings. With experts estimating that a person will require between 70 and 80 percent of his or her preretirement income, increasing your personal savings is a good retirement strategy to help supplement your retirement income.

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Start securing a better future with the RSA-1 Deferred Compensation Plan today.

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

J.O. Chaffin

J.O. Chaffin, former mayor of Piedmont, died February 2, 2003. He was 95.

Chaffin served as mayor from 1956 to 1960. He operated a general mercantile business from 1947 to 1965. He served as a Randolph County Commissioner for eight years and worked at the Calhoun County Department of Licenses until he retired in 1973.

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

Jack E. Bowling

Jack E. Bowling, councilmember for Rainbow City, died March 18, 2003. He was 68.

Bowling was elected to the Council in 2000 and served until July 2001 when he declared himself inactive without pay due to health problems. He was a retired building inspector with Rainbow City. He also served in the U.S. Army.

His election to the Council marked the first time he had held public office. ■

Rev. E. M. White

Rev. E.M. White, former councilmember for Eufaula, died March 21, 2003.

White served three terms on the Council, where he also served as president pro tem. He received his bachelor's degree from Morehouse College in Atlanta and his master's in education from Atlanta University. He later studied at Union Theological Seminary in New York. He retired as an elementary school principal in 1982 and served as pastor for numerous churches from 1944 to 1978. ■

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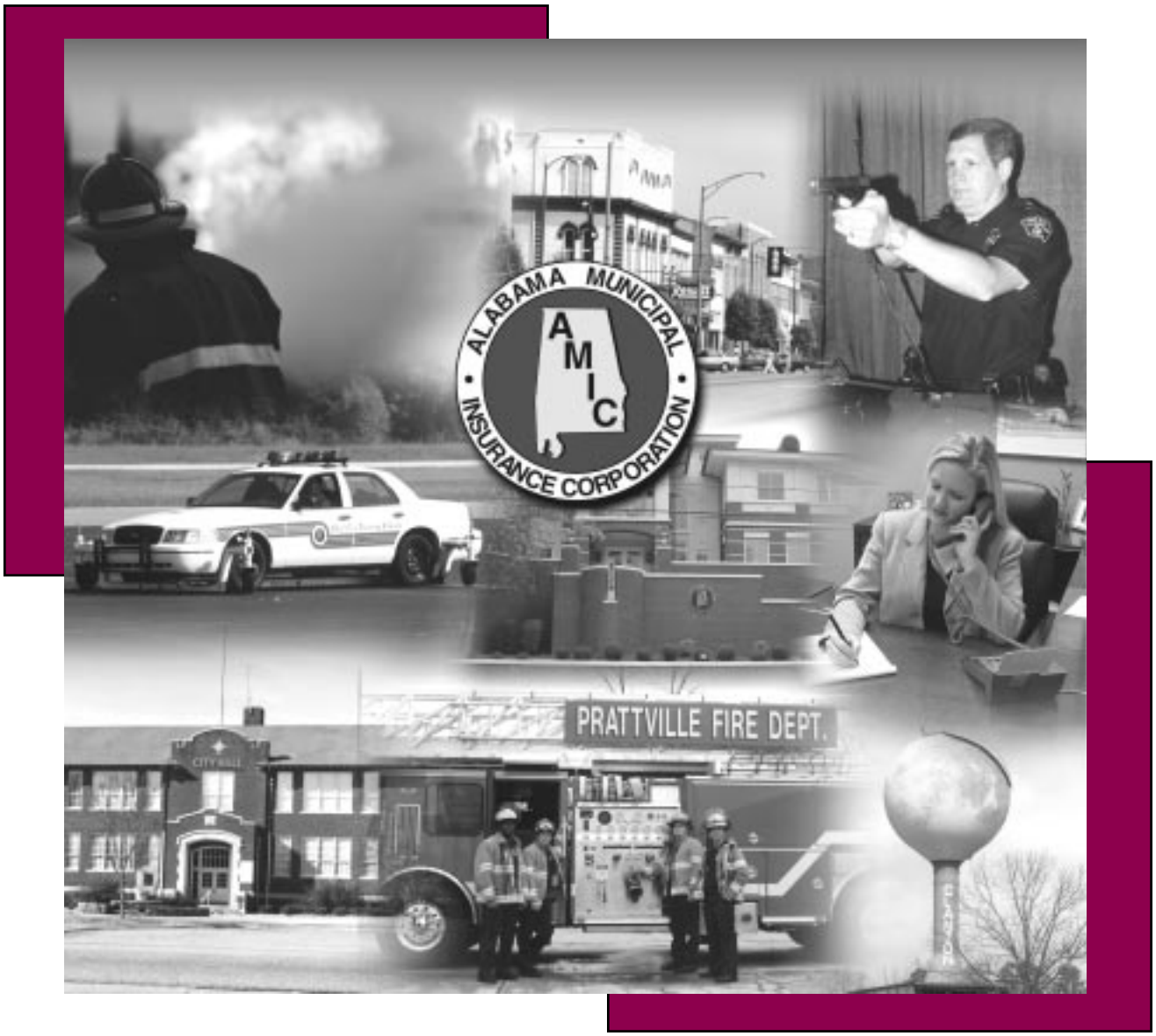

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