

THE ALABAMA MUNICIPAL **JOURNAL**

September 2005

Volume 63, Number 3

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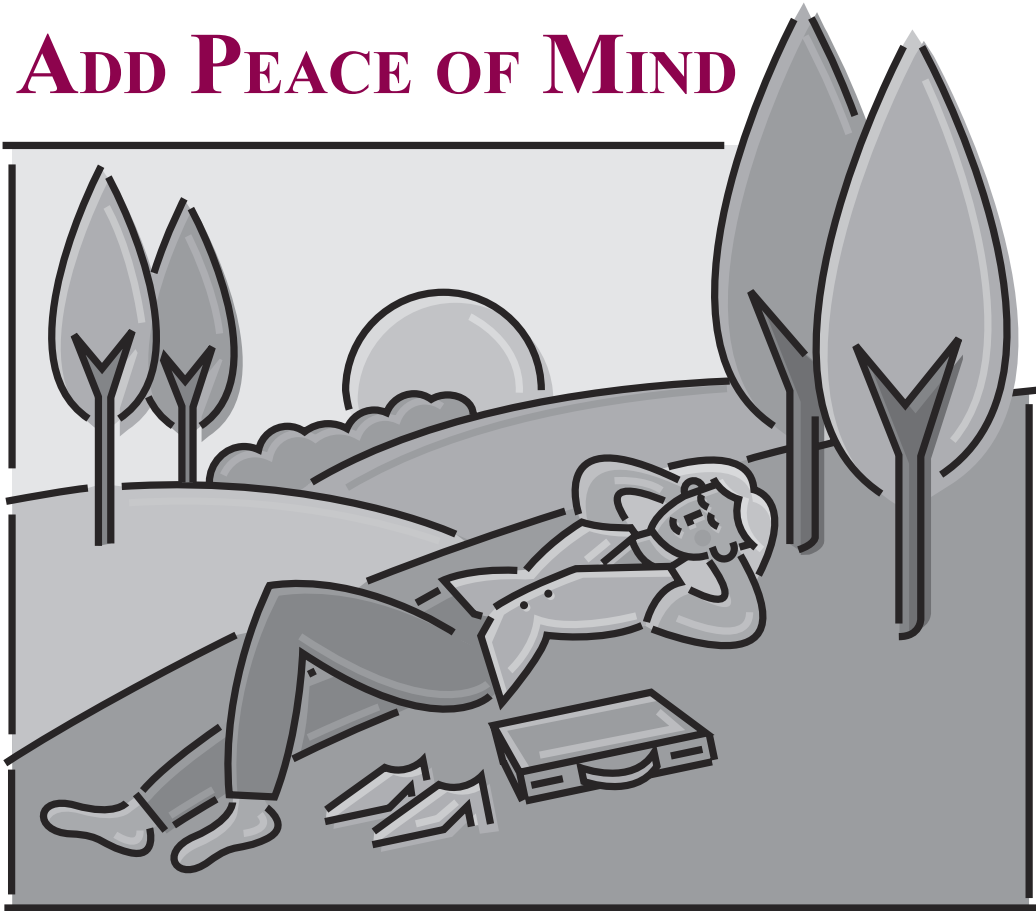
Inside:

- **The Power to Condemn**
- **Final Report on the 2005 First Special Session**
- **Tourism and Travel Grants Programs**

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J. KENNETH SMITH, Deputy Director/Chief Counsel, kens@alalm.org
STEPHEN S. MARTIN, Finance Director, stevem@alalm.org
ROBERT C. BLACK, General Counsel
CARRIE A. BANKS, Communications Director, carrieb@alalm.org
NIKO CORLEY, Communications Coordinator, nikoc@alalm.org
LAURA ANNE WHATLEY, Communications Assistant, lauraw@alalm.org
GREGORY D. COCHRAN, Director, Intergovernmental Relations, gregc@alalm.org
EDYE GOERTZ, Member Services Director, edyeg@alalm.org
LORELEI A. LEIN, Staff Attorney, loril@alalm.org
MARY ELLEN WYATT HARRISON, Staff Attorney, marye@alalm.org
SHARON CARR, Administrative/Legal Assistant, sharonc@alalm.org
FAITH ANN GUNN, Accounting Manager, faitha@alalm.org
THERESA LLOYD, CMO Program Administrator, theresal@alalm.org
RACHEL WAGNER, Librarian, rachelw@alalm.org
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Tourism and Travel Grants Programs Help Cities Promote Festivals, Attractions

By: Niko Corley, Communications Coordinator, ALM

“It’s really been great for us,” Winfield Mayor Bill West said regarding grant monies procured by the city through Alabama Bureau of Tourism and Travel to publicize its Mule Day Festival this month. “The funds have been used really constructively and [helped us] to advertise in *Southern Living*.”

The bureau provides funding to nonprofit organizations in Alabama promoting travel and vacation business in the state. Its matching grants program, which funds brochure printing and website development on a 50/50 matching basis, provides selected organizations up to \$2000 for festivals and/or events and up to \$4000 for attractions.

Nonprofits and municipalities such as Winfield can greatly expand the reach of their advertising efforts for events and attractions and likely draw larger crowds by utilizing the matching grants program or applying for special grants, as Winfield did, with the bureau director.

West says Winfield’s Mule Day draws a crowd of around thirty thousand over four days, and people come “from all over the southeast” for the music, activities, Civil War battle reenactment and arts and crafts. With the advertising boost Mule Day received through the Tourism and Travel grant, West hopes even more people will turn out for the festival this year.

Peggy Armstrong, city clerk of Slocomb, which holds an annual week-long tomato festival in June, says without the matching grants program her city would have been much more limited as to what they could have done to promote the event.

“The funds helped us more extensively advertise, cover a larger area and bring in more people,” Armstrong said, adding that Slocomb “will absolutely use it [the program] again.”

Last year alone, 20.6 million travelers visited Alabama, spending over \$7.3 billion in the state, an eight percent increase over 2003. With traffic volume through the state increasing each year, organizations utilizing effective advertising should be able to increase the number of people who visit or attend their events and attractions.

Promoting a festival or attraction is both an undertaking and an investment. In order to maximize returns, sufficient advertising must be done to reach the largest audience possible. Placing ads with local newspapers, magazines and radio and television stations are where most organizations start, but these forms of promotion – which can quickly exhaust advertisement funding – often only draw local crowds and sometimes return visitors.

The bureau’s matching grants program, however, goes a step further by reaching out to the growing number of travelers

visiting Alabama each year and by drawing people at the national level, all in a way that saves nonprofits valuable resources. By first determining the funding needed to effectively promote an individual event or attraction via brochures distributed to the state’s numerous welcome centers and at national travel shows, and then by matching the funds a nonprofit can afford, the bureau provides an easily accessible and widespread information source for travelers at half the cost to the organization.

Brian S. Jones, regional director of the bureau, says Alabama is a state diverse in attractions, and with its varied terrain and places of interest it’s a natural destination for all types of vacationers. Grant programs, the bureau’s annual vacation guide and its calendar of events (where all grant-receiving organizations’ events or attractions are listed), he says, are great ways to help showcase everything that awaits travelers to the state.

“From Talladega [races] to quilt and art festivals in small towns,” Jones said, “... the vacation guide lists attractions, hotels and bed and breakfasts, and is a way to highlight aspects of the state, like food, outdoors and gardens.”

Jones says more and more municipalities are finding out about the different grant programs available and cashing in on them. It is especially meaningful, he notes, for smaller cities to take advantage of this because all events in the calendar of events and vacation guide are listed equally.

“The same publicity is given to Birmingham...and Hartselle...the Peach Festival has the same listing as the Talladega race,” Jones said.

Lee Sentell, bureau director, says the popularity of the calendar of events and vacation guide keeps many tourists requesting copies year after year.

“It’s a great way to invite people back to our home state,” Sentell said.

Sentell mentioned it is not only the beaches, golf courses and food festivals that Alabama is so well known for that draw increasing numbers of people to the state each year, noting specifically that Alabama’s civil rights museums continue to get more and more exposure. With better promotions made possible by Tourism and Travel grant programs, nonprofits across the state can make their festival, event or attraction much more visible to residents and tourists alike.

Municipalities and organizations wishing to apply for grant funds should contact Kerry Teague, matching grants coordinator, at the Alabama Bureau of Tourism and Travel at **(334) 242-4359** for more information. ■



The President's Report

Bobby Hayes
Mayor of Pelham

Statewide Tutorial Program Aides Elementary and Middle School Students

On July 27 at the Pelham Public Library, Gov. Bob Riley announced the launch of a new statewide student tutorial program nicknamed Homework Alabama. The program will connect fourth grade through college-level students with live, online tutors for help in English, social studies, science and math. Elementary and middle school students can get assistance in the four basic subject areas listed above, but for college underclassmen and high school students, Homework Alabama offers an expanded list of subjects that includes chemistry, physics, algebra, geometry, biology and calculus.

Tutors for the program are subject specialists – college professors, graduate students and certified elementary and secondary school teachers – all of whom are proficient in their respective areas. Because they work closely with students, all tutors also undergo a seven-year criminal background check, administered by Kroll Background America, to help settle any cautious parent's concerns.

As of August 1, the Alabama Public Library Service made Homework Alabama a FREE service available to all students in Alabama. The site operates between the hours of 3 p.m. and midnight, seven days a week. Students may visit any Alabama public library to use this service or log on from home to www.homeworkalabama.org. Once online, students enter their zip code and are instantly connected to an online classroom. It's that easy.

Pelham was chosen for the site of the statewide announcement because Shelby County public libraries were the first in the state to offer this service three years ago. Funds from the Shelby County Commission and grants from the Library Services and Technology Act made the project possible there. It has seen much success, as around 1,000

students a month in the Shelby County area have taken advantage of this service since it began.

Homework Alabama will benefit all school-age children in the state, regardless of scholastic ability or family income. It will truly level the playing field by offering the same services to each and every child in Alabama independent of how gifted a student is or how much money his or her parents make. Alabama public schools do a tremendous job in educating our children, and this project will help further students' individual learning goals and give them the necessary tools for success in the future.

I encourage each mayor to contact their librarian or the APLS for additional information about this program so you can promote it in your community.

In closing, I ask that you please remember the men and women who serve our country in the armed forces. Their service ensures our continued enjoyment of freedom. ■



Pelham students gather with Gov. Riley to announce the launch of Homework Alabama, a free service provided through the Alabama Public Library Service.



Gov. Riley announces the launch of Homework Alabama.

Red Water Blues Erosion and Sediment Control Field Days 2005

<u>Date</u>	<u>Location</u>
September 15	Decatur
September 22	Prattville
September 29	Enterprise
October 13	Mobile

Field days will provide training to individuals who are involved in land-disturbing construction activities. Best management practices (BMPs) and new technology will be demonstrated. Participants can learn about BMPs by viewing the demonstrations and interacting with resource persons who will be available on site. In addition, individuals with current Qualified Credential Inspector (QCI) certification can complete the annual mandatory four-hour continuing education requirement.*

The training will be beneficial to the array of individuals who plan, install, maintain and inspect BMPs. Erosion

control/stormwater planners, designers, contractors and inspectors of BMPs from across the state are encouraged to attend. Other individuals with a vested interest in erosion and sediment control, such as city, county and state officials are also welcome.

Pre-registration is encouraged to help the sponsors plan for transportation and meals. The registration fee (\$30 in advance or \$40 on site) includes lunch. The fee for QCI continuing education recertification is \$125 (in advance) and \$135 on site.*

*An early-morning QCI training and field day activities session completes the mandatory four-hour continuing education requirement for individuals with existing QCI certification with the Home Builders Association of Alabama. For more information on the QCI program, contact **Kory Boling** at 800-745-4222 or koryboling@hbaa.org.



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— Abraham Lincoln

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Municipal Overview

By
PERRY C. ROQUEMORE, JR.
Executive Director

Final Report of the 2005 First Special Session

The House and Senate adjourned sine die on July 26, 2005, ending the special session called by Gov. Bob Riley for the purpose of passing a general fund budget, eminent domain legislation and other bills. All of the business of the session was completed in five meeting days – the minimum time required by the State Constitution to pass a bill.

Bills passed during the session included: a \$1.55 billion General Fund budget, a six percent pay raise for state employees, a four percent cost-of-living increase for retirees and eminent domain legislation.

General Bills Passed

Commercial Drivers License (HB7, Act 2005-325). Relating to motor vehicles; to amend Section 32-6-49.10 of the Code of Alabama 1975, relating to commercial driver licenses, to delete the requirement that the Social Security number of the licensee be included on the license and to provide for an endorsement for a driver authorized to drive a school bus; and to amend Section 32-10-8 of the Code of Alabama 1975, relating to motor vehicle accident report forms, to delete the requirement that the Social Security number of the operator be listed on the form.

DUI – Blood Alcohol Level Lowered for Commercial Motor Vehicle Drivers (HB8, Act 2005-326). To amend Section 32-5A-191 of the Code of Alabama 1975, relating to driving under the influence of alcohol or drugs, to provide that the driver of a commercial motor vehicle would be guilty of driving under the influence of alcohol if the person had greater than a certain percentage of alcohol in his or her blood.

Sales, Use & Lodgings Tax Exemption for Film Companies Extended (HB10, Act 2005-305). Relating to certain tax incentives and exemptions and other related exemptions; to amend Section 7 of Act 2001-975, 2001 Third Special Session (Acts 2001, p. 908), relating to certain sales, use and lodging tax exemptions for certain film production companies working in the state, to extend those exemptions until September 30, 2006; and to provide for legislative findings regarding the biotechnology industry and its value to the state and its workforce; a tax exemption for the Hudson-Alpha Institute for Biotechnology and its property; a certification of a particular level of investment, employment, and property improvements in exchange for the tax exemptions; and provisions for repayment of incentives if certain levels of investment are not achieved by September 30, 2008.

Municipal Solid Waste Landfills – Financial Assurances (HB11, Act 2005-302). To amend Section 22-27-2, Code of Alabama 1975, to add definitions, and to add Section 22-27-8 to the Code of Alabama 1975, relating to the establishment of financial assurance requirements for closure, post-closure care and corrective action for any municipal solid waste landfill in Alabama.

General Fund Budget (SB1, Act 2005-315). To make appropriations for the ordinary expenses of the executive, legislative and judicial agencies of the state, for other functions of government, for debt service and for capital outlay for the fiscal year ending September 30, 2006.

Gas Districts Authorized to Own LP Gas Systems (SB7, Act 2005-307). To amend Sections 11-50-396 and 11-50-397, Code of Alabama 1975, pertaining to gas districts, to provide that gas districts may own and operate liquefied petroleum gas systems and may distribute and sell liquefied petroleum gas within and without the state and to provide further that gas districts may not exercise the power of eminent domain in order to acquire any properties which are to be used in the distribution of liquefied petroleum gas.

State Employees – Pay Periods & Retirement Cost-of-Living Increase (SB9, Act 2005-316). To amend Sections 36-6-1 and 36-26-35, Code of Alabama 1975, relating to payment of salaries and annual leave of state employees; to provide that state employees shall be paid and shall accrue leave semi-monthly rather than biweekly; to provide for a six percent cost-of-living salary increase for certain state employees in the fiscal year beginning October 1, 2005; and to provide a cost-of-living increase to

continued next page

certain retirees and beneficiaries under the Employees' Retirement System.

CA – Minimum Ad Valorem Tax for Schools (SB12, Act 2005-215). Proposing an amendment to the Constitution of Alabama of 1901 to provide for a statewide minimum levy and collection, commencing with the tax year beginning October 1, 2006, and without limit as to time, of 10 mills of ad valorem property tax in each school district in the state, by authorizing and directing the County Commission or other local governing body of each county in the State to levy and collect in respect of property in each school district in the county an additional ad valorem tax at such rate as may be required to result in the levy therein of at least 10 mills of ad valorem tax, without restriction as to use other than for general public school purposes, and to provide for an election to be held on the proposed amendment.

Criminal Sex Offenders – Electronic Monitoring (SB53, Act 2005-301). To amend Sections 13A-5-2, 13A-5-6, 13A-6-69, 13A-11-200, 13A-11-201, 13A-11-202, 14-9-41, 15-18-8, 15-20-20.1, 15-20-21, 15-20-22, 15-20-23, 15-20-24, 15-20-25.1, 15-20-25.2, 15-20-25.3, 15-20-26, 15-20-29, 15-20-31, and 15-20-35 of the Code of Alabama 1975, relating to adult and juvenile criminal sex offenders; to provide for further regulation of adult and juvenile criminal sex offenders and to provide for increased or additional criminal penalties; to add new Sections 15-20-23.1, 15-20-26.1 and 15-20-26.2 to the Code of Alabama 1975, regulating adult criminal sex offenders and juvenile sex offenders and to provide penalties; and to repeal Section 13A-11-203, Code of Alabama 1975.

Eminent Domain (SB68, Act 2005-313). Relating to the powers of the state, a municipality, county or other governmental entity to acquire private property by condemnation so as to specify that such entities may not, except as otherwise provided, condemn property for nongovernmental retail, office, commercial, residential or industrial development or use, and to amend Sections 11-47-170 and 11-80-1, Code of Alabama 1975, in relation thereto.

Alabama Tourism Development Finance Authority Established (SB71, Act 2005-). To provide economic incentives for the development and promotion of tourism in Alabama; and to establish the Alabama Tourism Development Finance Authority to implement this act.

Motor Vehicles – Certificate of Title (SB75, Act 2005-322). To amend Sections 32-8-6 and 32-8-35, Code of Alabama 1975, relating to the method of payment by

designated agents for applications for certificate of title, to allow the Department of Revenue to prescribe the method of payment.

Railroads – Intent to Abandon Procedures (SB86, Act 2005-318). To amend Sections 37-13-1 and 37-13-2 of the Code of Alabama 1975, relating to railroad authorities; to remove the requirement in the application to the governing body that the operator has notified the Interstate Commerce Commission on an intent to abandon and to further define the term “authorizing subdivision.”

Motor Vehicles – Width Limits (SB95, Act 2005-323). Relating to motor vehicles; to add Section 32-9-20.1 to the Code of Alabama 1975, to specifically provide that certain appurtenances attached to a motor home, travel trailer, self-propelled camper or house car, truck camper or recreational vehicle (commonly known as an R.V.) may exceed the maximum width of motor vehicles if the appurtenance does not extend six inches beyond the sidewall of the vehicle.

ERS and TRS – Retirees Serving in Elected Office (SB97, Act 2005-299). To amend Sections 16-25-26 and 36-27-8.2, Code of Alabama 1975, to provide further for the conditions under which a retiree elected to public office may receive a pension from the Teachers' Retirement System or the Employees' Retirement System.

Proposed Constitutional Amendments

In addition to **SB12**, the Legislature approved the following proposed amendments to the Alabama Constitution of 1901 and these amendments will be submitted to the state's voters at a later date for ratification.

HB93, Act 2005-209 – relates to Lee County litter laws.

SB57, Act 2005-210 – relates to Lee County litter laws.

Local Bills Passed

HB19, Act 2005-306 – Lee County sales and use tax.

HB25, Act 2005-277– Lee County fire protection fees

HB26, Act 2005-278 – Shelby County Corrections Commission

HB27, Act 2005-279 – Shelby County traffic laws

HB55, Act 2005-280 – Northport Civil Service System

HB65, Act 2005-281 – Montgomery County retirement system ■

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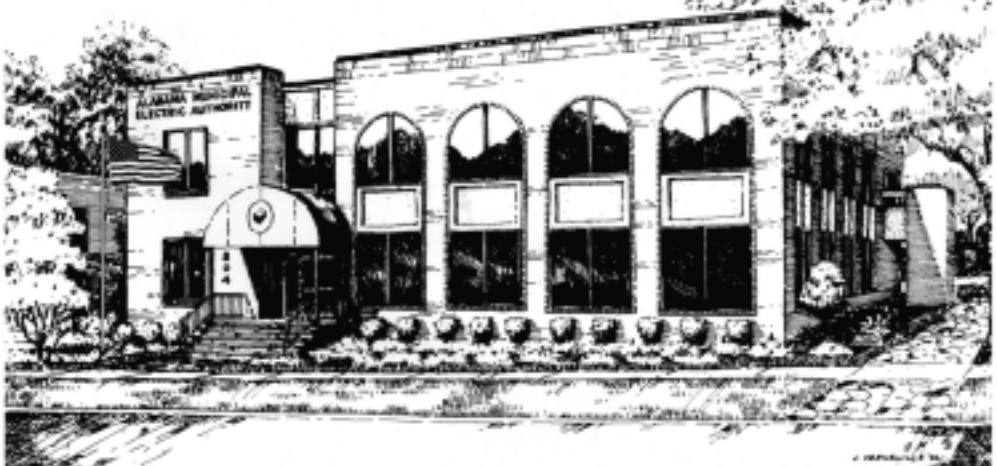


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By Gregory D. Cochran
Director, Intergovernmental Relations

State Appeals Court Rules in Favor of ADEM

The Alabama Court of Civil Appeals, in its order last month, reversed an earlier ruling by a Montgomery circuit court and found that the Alabama Department of Environmental Management's water quality "anti-degradation policy" fits federal regulations. The State Appeals Court ruling allows Alabama's environmental agency to keep its current water quality rules for businesses seeking permits, which an environmental advocacy group says are too lenient and arbitrary. Water quality standards under the federal Clean Water Act require states to avoid water pollution or at least hold it to an absolute minimum when some level of it is necessary for economic development.

The 2002 lawsuit was filed by Members of the Legal Environmental Assistance Foundation (LEAF), against ADEM, claiming the agency's permit process easily allows too many businesses to pollute Alabama's waterways. LEAF claims, in Alabama, the exception has become the rule, so much so that any time a permit applicant makes a case to ADEM about social or economic benefits, ADEM is allowing degradation.

ADEM is required to check every applicant thoroughly to ensure wastewater management's responsible handling. Since the lawsuit's filing in 2002, more than 200 wastewater permits have been issued under the agency's anti-degradation policy. ADEM cannot arbitrarily deny a permit once a permittee has demonstrated, to the department's satisfaction that it can do everything it is supposed to as far as protecting Alabama's water assets.

Some 75,000 miles of Alabama's rivers and streams are protected by these standards. LEAF also challenged ADEM's cost-based rule for determining whether alternative wastewater methods are required, a standard the group called arbitrary and unconstitutional. The rule states that if the cost of a nonpolluting alternative is 10 percent

or more than the cost of the current method, the alternative is not required.

The appeals court, in its ruling, said the U.S. Environmental Protection Agency (EPA) had approved ADEM's cost threshold and that the trial court "erred in invalidating the '110 percent rule.'" ADEM adopted its current rules after the Alabama Supreme Court declared the old ones invalid in an earlier LEAF lawsuit.

Industry Cites Bush Order In Hopes Of Bypassing Environmental Regulations

A group representing business interests is using a presidential order on promoting conservation partnerships issued last year to highlight industry environmental stewardship efforts that some sources believe could head off future regulatory mandates. The administration's effort, known as "cooperative conservation," asks EPA and the departments of Interior, Agriculture, Commerce and Defense to work with local communities to implement environmental and natural resource laws in a way that includes local participation in federal decision making, according to an executive order President Bush issued in August 2004.

While some environmental and conservation group sources say they are unfamiliar with the initiative, industry groups are embracing it to showcase environmental stewardship practices already under way. "The idea is not to take away government regulations, but to allow industry to have a little flexibility in some areas," one industry source says. The Western Business Roundtable hosted a conservation workshop July 7 in Denver, where groups from the oil and gas, timber, mining and other industry sectors showcased environmental initiatives they say could help

continued next page

convince lawmakers they are adequately protecting natural resources and should not be subject to further restriction in certain areas.

The group is compiled a list of “success stories” it planned to send to policymakers and elected officials ahead of a White House conference on cooperative conservation that was held last month in St. Louis. The stories include a proposal by the Questar Market Research Group for the Bureau of Land Management to relax wildlife restrictions and allow year-round oil drilling in exchange for additional environmental safeguards during the drilling process, such as fewer drilling pads and safer equipment.

Additional examples of cooperative conservation include efforts by the Colorado Four-Wheel Drive Association to help with reforestation efforts to offset the effects of off-road vehicle use and a proposal by the Colorado Farm Bureau to keep a bird, the Mountain Plover, off the endangered species list by working with landowners to ensure they do not disrupt nests while farming. Industry sources say these cases — most of which are specific to Colorado — could provide examples other states could use in developing cooperative conservation efforts of their own.

The Colorado workshop comes as the White House is planning a conference on cooperative conservation to coincide with the one-year anniversary of Bush’s executive order. The conference will feature similar case studies highlighting conservation efforts in four specific areas: metropolitan areas and towns, rural areas, wildlife habitats and coastal and marine habitats.

A White House official involved in organizing the conference says it is not designed to further any immediate policy changes, but attendees would develop a “to do list” of action items to work on in the next year. The official says the long-term vision for cooperative conservation is to back “locally-driven voluntary efforts” and make federal policy decisions more sensitive to such efforts. “Which laws will change – we don’t know that yet,” the source said. “But we will be players in the regulatory context.”

Environmentalists and conservation group sources have said in the past they are uncertain as to the direction of the administration’s cooperative conservation initiative, but would oppose any effort to weaken environmental regulations. ■

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THE LEGAL VIEWPOINT

By Ken Smith
Deputy Director/Chief Counsel

The Power to Condemn

In *Kelo v. New London, Conn.*, 125 S.Ct. 2655 (2005), the United States Supreme Court held that a Connecticut ruling authorizing the use of eminent domain for economic development purposes did not violate the United States Constitution. Specifically, the Court held that economic development can constitute a public purpose for the use of eminent domain by a public entity.

Following this decision, the Alabama Legislature enacted Act No. 2005-313, to provide that public entities in Alabama “may not ... use the power to take the private property of any person for the private use of another, as opposed to the use thereof by the public generally ...”

Eminent domain is the power of the state to take private property for public use. In Alabama, this practice and procedure is known as the right of condemnation. This power is nothing more than an inherent political right, founded on common necessity and interest, of taking an individual’s property for use by the whole community. The consent of the individual is not necessary since the state has a superior right to appropriate for public use private lands within its borders, subject, of course, to payment for the land.

The exercise of condemnation authority has often proven necessary for numerous functions related to the public health, safety and welfare. The exercise of this power of the sovereign, an ancient right, became increasingly important as the nation developed its factories, utilities, highways and railroads. The vast expansion of the armed forces and federal installations was possible because of the existence of the right to condemn. It is a necessary and useful tool of government.

Like all other rights in a democracy, the power to condemn is limited by the constitutional prohibitions that private property shall not be taken for public use without just compensation and that no person shall be deprived of property without due process of law. These prohibitions have given rise to limitations in which the courts have defined

“public use,” “taking” and “just compensation.”

Municipalities in Alabama have been specifically authorized by the Legislature to condemn private property for public or municipal uses. Act 2005-313, which is “declaratory of existing law,” to use the language from the act itself, indicates that in Alabama, the Legislature disapproves of using condemnation for certain economic development purposes. This article examines this legislation, and how it affects future condemnation in Alabama, then provides an overview of the existing law of eminent domain in Alabama. Practical pointers and procedures are discussed so municipal officials may be better informed about the methods of employing this right.

What hath *Kelo* Wrought?

Last month, we explored the *Kelo* decision in detail. Briefly, that article explained that many of the reports on the impact of this case were overblown. In fact, the holding in *Kelo* can be read very narrowly as merely a victory for federalism. Essentially, the Court ruled that economic development provided a benefit to the public and therefore the U.S. Constitution did not restrict the state of Connecticut from passing its own law allowing condemnation to be used to further the state’s economic development. The Court made it clear that other states could also decide this issue for themselves.

It is questionable whether *Kelo* even applied in Alabama. Because the Court recognize the authority of each state to determine for itself whether economic development served a public purpose, we have to look at the law in Alabama as it existed. For example, Section 23, Alabama Constitution, 1901, provides that “private property (may not) be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner ...” Thus, even before *Kelo*, Alabama had an existing constitutional provision

continued next page

restricting the use of condemnation for any private use.

A few cases though, had upheld the use of condemnation even though a private entity ultimately benefited from the condemnation. In these instances, however, the underlying reason behind the condemnation was to serve a public purpose. The private benefit resulted the public entity's contracting with a private person to use the property to benefit the public.

For instance, in *Parrish v. City of Bayou La Batre*, 581 So.2d 1099 (Ala. Civ. App. 1989), aff'd sub. nom. *Ex parte Parrish*, 581 So.2d 1100 (Ala. 1990), property was condemned for a disposal facility, a use that benefited the public. Rather than operate the facility itself, though, the city contracted with a private entity to perform that duty. The Court ruled that the benefit accrued by the private person was merely incidental to the underlying purpose for the condemnation. As the Court stated in *Gober v. Stubbs*, 682 So.2d 430 (Ala. 1996), "the determination of whether a use is public or private is dependent upon the nature of the use, not the manner in which the use is accomplished."

Despite these cases, though, it remained questionable at best whether any public entity in Alabama could condemn property solely for the benefit of a private party. Of course, it is also important to remember that in all condemnation cases, the owner of the property must receive just compensation when his or her property is condemned. This right is guaranteed by both the federal and state constitutions.

In any event, the Legislature felt that some clarification of Alabama law was necessary in light of *Kelo*. Just how broad is this new act?

The act amends Section 11-47-170 and 11-80-1 to restrict the authority of counties and municipalities in the exercise of eminent domain. While Section 11-47-170(a) authorizes the municipal governing body to condemn property for any lawful purpose, subsection (b) provides that property cannot be condemned for "private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity." This same restriction was added to Section 11-80-1(b). Similar language was placed in Section 3 (a) of the act, which restricts the state its agencies and departments as well as entities controlled or organized by municipalities or counties.

Thus, the act prevents condemnation of property for private development or for any purpose that is primarily aimed at the enhancement of tax revenue. Further, property cannot be condemned if the purpose for the condemnation is to transfer the property to a private (or public-private) entity.

Despite these restrictions, certain purposes for condemnation are specifically protected in the new act.

Public entities can still exercise eminent domain power "based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24, Code of Alabama 1975." Further, property can still be condemned for public utilities, streets and roads, governmental buildings and park and recreation facilities.

New language was also added to each of the above mentioned statutes concerning the sale of condemned property. If the property was never used for the purpose for which it was condemned or for some other public purpose, it must first be offered for sale to the person who owned the property at the time it was condemned, or to "his or her known or ascertainable heirs or assigns." The price of the property is the same as what was paid for the property when it was condemned less any amounts for income and transaction taxes that were paid, if any. If these persons do not accept the offer within 90 days, the property may be sold to someone else at a public sale following legal notice.

It is important to remember that Section 4 of Act 2005-313 states that this new law is merely "declaratory of existing law and shall apply to any pending action for condemnation." This factor seems to indicate that all previous condemnations are also subject to these provisions, as well as any subsequent condemnations.

Let's look now at the Alabama laws concerning condemnation.

The Authority to Condemn

The statutory authority for condemnation actions is found in Sections 18-1A-1 through 18-1A-311, Code of Alabama 1975. These sections allow municipalities to apply to the probate court in the county in which the lands are situated for an order of condemnation. Other sections deal principally with the procedures, both at the municipal level and in court, and will be discussed more at length later in this article.

Limitations on the power to condemn are found in the Fifth and Fourteenth Amendments to the Constitution of the United States. These amendments state that no person shall be deprived of life, liberty or property without due process of law. The Fifth Amendment provides further that no private property shall be taken for public use without just compensation. The latter limitation is a prohibition on the federal government, but the Supreme Court has, in recent years, under authority of the Fourteenth Amendment, applied many principles of the Bill of Rights (first ten amendments) to state procedures.

Section 23 of the Alabama Constitution of 1901 deals with the right of eminent domain and provides that just compensation must first be made before the taking of private property. Further, Section 235 of the Alabama Constitution

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By Lorelei A. Lein
Staff Attorney

Legal Notes

COURT DECISIONS

Tort Liability: A commanding officer's discretionary authority to order officers into "swinging baton" mode was not eliminated by a written directive of the police department requiring a crowd to be hostile, to refuse to disperse, and to continue to physically assault officers before taking action. As such, the written directive does not bar the officer's defense of discretionary-function immunity from striking workers' assault actions against the officer. *Thurmond v. City of Huntsville*, 904 So.2d 314 (Ala. Civ. App. 2004).

DECISIONS FROM OTHER JURISDICTIONS

First Amendment: A local parade ordinance requiring small groups of people to obtain a written permit before assembling or parading is not narrowly tailored to further a city's interest in maintaining the safety, order, and accessibility of its streets and sidewalks, and thus facially violates the First Amendment's free speech clause. *Cox v. Charleston, S.C.* 2005 WL 1745592 (4th Cir. 2005).

ATTORNEY GENERAL OPINIONS

Retirement Systems: A city or county cannot grant a cost-of-living raise to its retired employees in the Retirement Systems of Alabama without legislative authorization. 2005-157.

Competitive Bid Law: A written proposal on the outside of a sealed bid made prior to the bid opening can be considered part of the bid proposal. 2005-160.

Firearms: A retired law enforcement officer who obtains a permanent concealed firearms license pursuant to Section 36-21-9 of the Code of Alabama 1975, is not required to be tested annually for firearms re-qualification. This license, however, only permits the officer to carry a concealed firearm in Alabama and in those states that extend reciprocity to Alabama's concealed firearms licenses. In order to carry a concealed firearm in every state in the United States pursuant to the Law Enforcement Officers Safety Act of 2004, a retired Alabama law enforcement officer must be tested annually for firearms re-qualification. 2005-165.

Contracts: A county commission may enter into a long-term lease of real estate with a city to establish a senior citizens center. 2005-166.

Contracts: Under Section 11-96A-3 of the Code of Alabama 1975, a municipality may enter into a contract to purchase, manage and maintain housing for persons of moderate and low income within the municipality's corporate limits. 2005-167.

Ad Valorem Taxes: Under Section 40-2A-6 of the Code of Alabama 1975, a city, county, or state agency in Alabama may engage a private firm on a contingency-fee basis to collect delinquent property taxes by verifying from the tax assessor's records that property taxes are due, but any determination concerning the proper amount of taxes due must be made by the tax assessor. 2005-168.

Animals: A municipality with a population of less than 5000 is not required to maintain an animal control service. A municipality with a population of greater than 5000, however, is required to contribute a pro rata share for the maintenance

continued next page

of the county pound or establish and maintain its own pound. A municipality may, by ordinance, establish regulations regarding animal control services and contract with an independent contractor to perform animal control services. 2005-172.

Courts: The Attorney General does not issue opinions as to whether a certain action constitutes a violation of the criminal law as this may only be determined by a judge and jury. Each District Attorney in the various judicial circuits in the state must review each factual situation on a case-by-case basis and make the decision whether he or she should present the matter to a grand jury. 2005-173.

Gambling: Credits, free or purchased, provided to play gambling devices are "something of value" as defined by Section 13A-12-20(11) of the Code of Alabama 1975. When a patron wagers these credits on a gambling device, consideration flows from the patron to the facility. This provides the needed consideration to constitute these schemes as lotteries under Section 65 of the Recompiled Constitution of Alabama, as amended. 2005-173.

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Federal Legislative and Regulatory Issues

Mary Ellen Wyatt Harrison
Staff Attorney

Threatening Franchise Authority

Three bills are currently before Congress, as part of the rewrite of the Communications Act. The bills as they are written will significantly alter the ability of municipalities to enter into local cable franchise agreements and to manage and collect fees for the use of local rights of way.

Senate Bill 1504, the Broadband Investment and Consumer Choice Act, a wholesale rewrite of the Communications Act introduced on July 27, 2005 by Sen. John Ensign (R-Nev.), completely eliminates cable franchising.

House Bill 3146, sponsored by Reps. Marsha Blackburn (R-Tenn.) and Albert Wynn (D-Md.), and Senate Bill 1349, sponsored by Senators Gordon Smith (R-Ore.) and Jay Rockefeller (D-W.Va.) creates a national cable/video franchise that allows all new entrants into the video market to offer video programming in communities without obtaining a local franchise agreement.

Eminent Domain

The Supreme Court's opinion in *Kelo v. City of New London* has generated nationwide interest in the issue eminent domain. To date, there are nine bills that Congress will consider. The bills limit the use of eminent domain for economic development purposes. The two principal bills, House Bill 3135 and Senate Bill 1313, prohibit states and cities from using federal funds to exercise eminent domain for economic development. The bills fail to adequately define economic development.

Some members of Congress have also attached legislation to the appropriations process designed to limit local use of eminent domain. On June 30, without a hearing, the House

adopted an amendment to its housing appropriations bill, House Bill 3058, that would prohibit the use of federal funds to "enforce the judgment" in the *Kelo* case. The Senate Appropriations Committee did not attach a similar amendment to its housing appropriations bill, but the threat of an amendment is likely to resurface when the bill is considered by the full Senate in September.

SAMHSA Conference Grants

State, local and tribal governments, institutions of higher education and nonprofit organizations are eligible to receive grant funds to disseminate knowledge about practices within the mental health services and substance abuse prevention and treatment fields and to integrate that knowledge into real-world practice as effectively and efficiently as possible. The grant application deadline is October 31, 2005. For more information, contact Shelly Burgess at (240) 276-2134 or by email at sburgess@samhsa.gov. Please visit www.fedgrants.gov/Applicants/HHS/SAMHSA/OC/PA-06-001/Grant.html for more information on the grant. ■

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provides specifically that municipal corporations shall make just compensation for private property taken, injured or destroyed, and beyond, that such compensation must be paid before the taking, injury or destruction. Section 235 also provides that entry may be obtained, notwithstanding an appeal from the probate court, after the judgment of condemnation, provided the damages assessed are paid into court and a bond in double the amount of damages is filed to secure payment of the amount of damages determined upon appeal. It also provides that on appeal either party may demand the right of trial by jury.

Additional Authority

Sections 11-47-170 through 11-47-173, Code of Alabama 1975, provide additional authority for municipalities to condemn. These statutes prescribe the procedure. It is recommended, however, that the procedures set out in Title 18 be used by municipalities in condemnation cases because the Title 18 procedures are more fully developed than the procedures found at Sections 11-47-170 through 11-47-173.

Authorized Uses

The Code of Alabama authorizes municipalities to acquire property by condemnation for any city or town purpose. Section 11-47-171, Code of Alabama 1975. Municipalities commonly acquire property for street and sidewalk improvements, water supplies and sources, drainage and sewer projects. Cities and towns may acquire sites for public museums and public art galleries. Section 11-47-16, Code of Alabama 1975. City boards of education may acquire lands for school purposes under Section 16-11-13 of the Code. Lands for development of municipal airports may be acquired under the provisions of Section 4-4-5. Section 4-4-10 authorizes the abatement of obstructions within one-quarter mile of municipal airports. Public corporations, organized under the provisions of Sections 11-59-1, et seq., Code of Alabama 1975, may acquire sites for athletic fields and facilities. Gas districts, organized under Sections 11-50-391, et seq., Code of Alabama 1975, are granted the power of eminent domain, subject to the same limitations as in the case of municipal corporations. The Supreme Court held that use of property for off-street public parking in urban areas is a "public use" for which property may be condemned. *Florence v. Williams*, 439 So. 2d 83 (Ala. 1983).

These citations are sufficient to point out the many and varied purposes for which lands, easements and privileges and property may be acquired by cities and towns, and these uses are still valid following the adoption of Act 2005-313. The city attorney, in drafting the petition or bill of complaint

seeking the right to condemn, should be encouraged to specifically name the statutory authority under which the petition is brought. Likewise, if doubts or questions arise concerning the right of a municipality to acquire property for specific reasons, a conference with the legal department is recommended.

Statutes delegating the power of eminent domain must be strictly construed in favor of the owner of the property to be condemned. In other words, the public use, which would be alleged in the petition, must be based on sound legal authority.

Why Condemn?

The reasons for condemnation are numerous, the most common being because of a disagreement over its value. If a city needs an entire tract of land, an agreement must exist between the municipality and the landowner as to the value of it before a contract of sale may be executed. If the city needs only a portion of a tract, then the question arises as to the value of the part required. The problem is further complicated by arriving at the damage, if any, to the part not needed. This situation makes bargaining more difficult since a second problem is introduced.

Section 18-1A-171, Code of Alabama 1975, states that the amount of compensation shall not be reduced because of any incidental benefits the owner may accrue as a result of use of the land to be taken. An exception to this rule is made in cases where land is taken for public highways or for water and sewer lines or through proceedings instituted by water conservancy districts and water management districts. Further, in *Mobile County v. Brantley*, 507 So. 2d 483 (1987), the Alabama Supreme Court held that where a second condemnation of a person's property occurs, the owner is not entitled to the enhanced value created by the first taking, if subsequent condemnations were contemplated at the time of the first condemnation.

Another common reason for condemnation arises because of title defects which can take many forms – uncertainty as to the actual owner; the unsound mental condition or youth of the owner; or in cases where the property has been held in one family for a number of years, the record title holder has died and no administration has been had on the estate.

Absentee ownership can make negotiations more difficult and uncertain. Normally, with condemnations, time is of the essence since a city is usually anxious to proceed with a proposed project. Oftentimes it is quicker to condemn than to chance a breakdown of negotiations with an absentee owner. If negotiations are begun and then break

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down, the time devoted to negotiations is lost and the project further delayed. Absentee ownership normally means the owner is not conversant with the affairs of the city, has little or no interest therein and may be suspicious of any offer made by the city. Usually such an owner has no concept of the market value of the property, especially if the owner has been away from the city for a number of years. All of these factors make bargaining more difficult.

Occasionally, active disputes between adverse claimants of property arise. The city, not wanting to act as a referee between the claimants, merely condemns against both and lets the court determine the validity of the claims.

A city should not be reluctant to file actions for condemnation since the progress of the general public often requires such actions by the governing body. Criticisms directed to the governing body because of the exercise of this right should be met with a forthright statement that the city is merely resorting to the courts to settle bona fide disputes.

Procedures

The legal procedures for condemnations are set out in Title 18, Code of Alabama 1975. These statutes are strictly construed and, therefore, every effort to comply with them should be employed by the governing body, city employees and the city attorney.

Before commencing a condemnation action, a municipality must have the property appraised to determine the just compensation and offer to pay the owner the full amount established by the appraisal. The property owner must be given a written statement and a summary of the appraisal, showing the basis for the amount established. No increase or decrease in the fair market value caused by the project for which the property is acquired can be considered when arriving at the appraisal price, nor can any incidental benefits the property owners accrue because of the project be considered.

If a property owner agrees to the appraisal price, they he or she is not required to move until payment is received or the amount awarded by the condemnation order is deposited as required. Except in an emergency, a property owner has 90 days after receiving written notice from the condemnor to move from the property. A party cannot appeal from a condemnation order to which he or she has consented. *State v. Coheley*, 549 So. 2d 483 (1989).

If a property owner does not agree with the appraisal price, Section 18-1A-32, Code of Alabama 1975 requires the municipality to commence a condemnation action to acquire the property. However, Section 18-1A-4 of the Code permits a municipality to reach a settlement with a property owner either before or during the condemnation proceedings. No condemnation action can be maintained unless the

municipality has offered to acquire the property on the basis of its approved offer by purchase before commencing the action.

The condemnation action is commenced by filing a complaint with the probate court in the county in which the property or any portion thereof is located. The complaint must:

- Designate, as plaintiffs, the parties on whose behalf the condemnation is sought;
- Include the names of all persons holding any right, title or interest in the land, specifying each person's interest;
- Contain a legal description of the property and the interest sought to be obtained;
- Allege the plaintiff's right to condemn the property; and
- List all items the condemnor (the municipality) seeks to obtain from the property.

A map or diagram depicting the property sought to be condemned and any remainder must be attached to the complaint.

The probate judge must set a date for the condemnation hearing and issue a copy of the complaint to the defendants along with notice of the hearing date. Notice can be waived. The municipality must file a notice of the pendency of the action in the office of the probate court in each county where the described property is located.

A defendant may file an answer to the municipality's complaint objecting to the condemnation. All preliminary objections must be heard prior to the final determination of just compensation but the probate judge may join all preliminary objections into a single hearing. The burden of proof of all issues – except bad faith, fraud, corruption or gross abuse of discretion on the part of the plaintiff – is on the plaintiff. If the probate court finds a preliminary objection meritorious, the court shall make whatever disposition it deems appropriate under the circumstances, including an award of defendant's litigation expenses.

The Alabama Rules of Civil Procedure and the rules of evidence apply to condemnation actions in circuit court. The circuit court may require severable issues to be tried separately before the trial on the issue of the amount of compensation. Either party may demand a trial by jury. After the determination of the just amount of compensation, the plaintiff may withdraw from further participation in the trial as all that remains is the apportionment of the award among the interested defendants.

Consistent with prior Alabama law, Section 18-1A-270, Code of Alabama 1975, provides that the state of Alabama or any county, municipality, person or association proposing to acquire land or an interest in land, may apply to the probate

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Lynnette Ogden of Millport Named Clerk of the Year

Lynnette Ogden, MMC, town clerk of the town of Millport, received the 2005 Municipal Clerk of the Year Award during the Alabama Association of Municipal Clerks' and Administrators (AAMCA) summer conference, held July 22nd and 23rd in Mobile. Nominees were voted on in their respective districts in the AAMCA, and eight sent nominees this year.

The purpose Clerk of the Year Award recognizes a member of AAMCA whose accomplishments during the year have made the an outstanding contribution to the objectives of the municipal clerks' profession: the improvements of municipal government in Alabama and/or the clerk's own community and municipal



government. To be considered for selection as Municipal Clerk of the Year, a nominee must be a duly appointed city/town clerk of a municipality in Alabama and a member in good standing of AAMCA, with dues paid for the current year. Nominees are judged on a point system with several categories: years of service; contributions to their community; participation in the AAMCA and the International Institute of Municipal Clerks; and any significant contribution or sacrifice that was made during the past year. Ogden's exemplary service was formally recognized at the AAMCA Summer Conference Banquet where she received a plaque and a bouquet of flowers. The League congratulates her on her achievements. ■

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court for an order of condemnation. Within 30 days after the filing of the complaint, the probate judge must conduct a hearing on the condemnation request among all interested parties. Within 10 days after the hearing, the probate judge must issue an order granting or refusing the complaint.

If the complaint is granted either in whole or in part, the probate court must, within 10 days, appoint three citizens of the county in which the property is located to determine the amount of damages and compensation for the condemnation. The commission must make a written report to the probate judge within 20 days of their appointment, setting out the damages and compensation owed. Within seven days, the probate judge must issue an order that the report be recorded and the property condemned upon payment or the deposit into the court of the damages and compensation assessed. Either party may appeal to the circuit court, and if the municipality wishes to enter the property pending the appeal, it may pay the sum awarded into the court and post a bond in double the amount of the damages. If the condemnor fails to pay the damages and compensation assessed within 90 days after the assessment or within 60 days after the determination of an appeal, the condemnation will cease to be binding.

Duties of Officials

When the governing body decides to condemn property, a resolution to that effect, directed to the owners and property, should be adopted. This resolution should state that it is necessary and expedient to acquire a right of way (or easement, as the case may be); that in the judgment of the governing body it is necessary and expedient for carrying out the full powers granted to the city that such right of way be acquired; and further, that the city attorney be authorized to acquire such right of way by purchase or condemnation. The city clerk should furnish the attorney with certified copies of this resolution for attachment to the petition.

The city engineer should prepare an accurate description of the land to be taken for use in the resolution and in the petition. The city engineer should also furnish the attorney with as much information on the title as is available. The city engineer should be prepared to testify at the original hearing as to the accuracy of the description. The city clerk should be prepared to testify that the resolution was duly adopted and properly recorded in the minutes of the governing body. All other responsibility for the success of the action then shifts to the shoulders of the city attorney.

The Role of the City Attorney

The city attorney must steer the entire proceeding through the courts. The attorney should, as a first step, draft

the resolution for adoption by the governing body. This resolution is the authority to proceed in court on behalf of the municipality. The title should be examined to ascertain the names of all persons interested in the property and the names of all defendants in the case. The defendants include the record owners and all persons having a lien on the property in question, such as mortgages, judgment holders and the county tax collector. Any omission in naming the proper defendants is at the peril of the condemnor. The attorney will probably decide to file a *lis pendens* at the same time the petition is filed, although this step is not mandatory. The *lis pendens* is merely notice that a lawsuit has been filed that affects the title or an interest in the property. The *lis pendens* lets the property owner know that there is a claim on the property, and the recording informs the general public (and particularly anyone interested in buying or financing the property) that there is potential claim against it.

It is of the utmost importance that the attorney ensure notice and service be properly given to all defendants. The probate judge will appoint a guardian ad litem to represent infants, unknown owners or incompetents, if the allegations of the petition indicate a need. At the initial hearing of the cause, the attorney will prove the averments of the petition and help the judge draft the order granting condemnation. The right of the condemnor to condemn the particular property is a question of law for the court and practice in Alabama has made this part of the condemnation proceedings fairly routine.

After the right to condemn has been established, the court appoints the commissioners and the attorney will seek an opportunity to present evidence to the commissioners on the question of value or damages. In this hearing, the attorney is normally assisted by a qualified appraiser who testifies as to the value or damages. The attorney should, in each case, ensure that the commissioners are cognizant of all of the facts surrounding the city's requirements.

The attorney usually prepares and assists in the preparation of all orders, reports, notices and so forth, needed during the entire course of the proceeding. Upon receiving the commissioners' report, the attorney assists the judge in preparing the judgment of condemnation, which formally gives the city the green light to take the property.

Appeals

The governing body and the attorney should discuss the desirability of an appeal on the part of the city. Appeals are filed based on the results obtained in the probate court

continued next page

proceedings. If the award is considerably out of line with the evidence gathered by the city, normally an appeal is justified. The statutes authorize an appeal by either of the parties, so the attorney must be prepared to represent the city in circuit court, either in prosecution of the city's appeal or in defense of the landowner's appeal.

Time Elements

Frequently, the question arises as to how long condemnation takes. While it is difficult to give an exact time frame, a minimum schedule can be deduced by studying the statutes. Measuring from the date the decision to condemn is made, the resolution can be drafted and adopted at the next meeting of the governing body. Next, preparation and filing of the petition should not require, under ordinary circumstances, more than 15 days. The court, upon receipt of the petition, must issue notice to each named defendant and hold a hearing within 30 days. In addition, the municipality must be able to show that reasonable diligence was used to find all defendants, which may require extra time.

The court's appointment of commissioners will take up to 10 days, and the sheriff must serve the notice. The statute requires the commissioners, within 20 days from their appointment, to make their report to the court. Occasionally, commissioners act immediately but they can legally take up to 20 days. The court, upon receipt of the commissioners' report, issues an order (judgment) of condemnation and the city may immediately pay the award, which gives them the right of entry. Either party has 30 days to appeal to the circuit court.

Actions in condemnation cannot be concluded nearly as fast as many people believe. Sometimes the city may elect to pay slightly more than is justified to save time and avoid delays inherent to condemnation proceedings.

Condemnation Expenses

It is virtually impossible to predict the exact expenses of any lawsuit. An estimate of costs, however, should be helpful to city officials deciding whether or not to condemn, especially if there is not a wide difference of opinion as to the estimate of value between the city and the owner.

The first factor to consider is the value of expediting the initiation of the proposed project. Often, a delay in the beginning of a project, caused by the time taken to condemn, will result in additional construction costs.

Second, the value of the time of the clerk, engineer and attorney must be considered. This evaluation and analysis must take into consideration other work these persons may put aside in order to handle the case.

The actual costs of court are fairly standard from county to county, except for the allowance of commissioners' fees. Section 18-1A-293, Code of Alabama 1975, authorizes the

probate judge to set the compensation of the commissioners for their services. The commissioners selected by the court are usually persons trained in property evaluation and are entitled to a good rate of pay for their time and service. If notices are required to be published, the printing charges are an additional cost determined by multiplying the publication rate by the number of words.

The probate court charges fees for filings, reproducing copies and other court costs. The sheriff is entitled to regular service fees plus mileage expenses. The probate judge makes an additional charge for services by registered or certified mail.

Considering all of these expenses and costs, it is sometimes cheaper to pay a bit more for the land to be taken than to pay the costs and slightly less money through court for the same land.

Random Practical Tips

As pointed out above, sometimes it is cheaper to settle than to condemn. In addition, a settlement often saves time. Generally, constituents (voters) are usually better satisfied if no suit is brought.

The city attorney should be encouraged to combine as many tracts or parcels as possible into one complaint to reduce court costs.

City officials should realize that land appraisers are using their judgment and experience and that their estimates are mere opinions. In other words, the appraiser may actually be too low and a little give and take in bargaining with the landowner may avoid a lawsuit and may save the city money in the long run. The old adage that land values go up when a condemnation suit is filed generally holds true. Further, people have a tendency to revolt against the power to condemn, a feeling sometimes reflected in a verdict.

The best qualified appraisers available should be employed so their opinions and the methods used in preparing the appraisal will stand up under vigorous cross-examination. It is fatal in a lawsuit for a witness to be uncertain of the facts about which he or she is testifying.

Give the attorney a perfect description of the land to be taken and authorize the expenditure of funds necessary to secure accurate information as to actual ownership. A false start is usually costly in time and in money.

In cases where some owners along a right of way are willing to donate their property and others are not, all lands of the former should be acquired before suits are filed against the latter. Many owners will reverse their decisions and accept payment after learning that neighbors are being paid. This is a ticklish situation which should be recognized by city officials.

The city attorney's job is finished when the case is closed and the money is paid into court. Often times, the attorney

can gain good will for the city by assisting the owners in securing their money from the court. (Section 18-1A-291, Code of Alabama 1975, requires that property owners file a petition in court to collect their share of the award of damages and, if an owner is not represented by counsel, this requirement poses a problem.)

Negotiators for the city should be encouraged to deal openly and frankly with landowners. They should be thoroughly familiar with the entire proposed project, its estimated cost, the city's need for it and all the other "whys and wherefores" so that landowners will be sympathetic instead of antagonistic.

All land should be acquired before the construction contract is awarded. Litigation often bogs down because of unanticipated delays. Contractors will be justified in complaining if required to perform on a piecemeal basis.

Additional Court Decisions and Attorney General's Opinions Related to Condemnation

- The Alabama Supreme Court held the method for valuing property in a partial taking case is the fair market value of the property before the taking and the fair market value of the remainder of the property after the taking. *City of Cullman v. Moyer*, 594 So. 2d 70 (AL 1992).

- The Court of Civil Appeals held that a city did not have authority to condemn land for a roadway outside its corporate limits. *City of Huntsville v. Brown*, 611 So. 2d 372 (Ala. Civ. App. 1992).

- In *Doughty v. Birmingham Airport Authority*, 675 So. 2d 431 (Ala. Civ. App. 1995), the Court of Civil Appeals held that the condemning authority was responsible for the costs of a lienholder's claim for distribution of the condemnation award.

- In *Jefferson County v. Flanagan*, 722 So.2d 763 (Ala. Civ. App. 1998), the Court of Civil Appeals held that a probate court's condemnation award did not preclude filing of claims for trespass, conversion, negligence, private nuisance and Section 1983 violations.

- A municipality may condemn the property of a municipal officer or employee provided the officer or employee refrains from the decision-making process regarding the condemnation. Attorney General's Opinion 96-00231.

- The condemnation notice published initially pursuant to Section 18-1A-74, Code of Alabama 1975, may also include the preliminary notice of a possible commissioner's meeting. Attorney General's Opinion 97-00120.

- In *Southtrust Bank v. Fairhope Tax Corp.*, 698 So.2d 777 (Ala. Civ. Ap. 1997), the Court of Civil Appeals held that it was reversible error for a circuit court to apportion condemnation proceeds without calculating the

fair market value of a lease as required by the Alabama Supreme Court.

- A municipality may not purchase land from a councilmember. The councilmember may, however, donate the land, or the municipality may condemn the property. 98-00133.

- In *Jefferson County v. Flanagan*, 722 So.2d 763 (Ala. Civ. App. 1998), the Court of Civil Appeals held that a probate court's condemnation award did not preclude filing of claims for trespass, conversion, negligence, private nuisance and Section 1983 violations.

- The Alabama Court of Civil Appeals held that the landowners' failure to perfect their appeal pursuant to Section 18-1A-283 left the circuit court without jurisdiction to entertain an appeal from the probate court's judgment of condemnation, therefore the court dismissed their appeal. *Pace v. Utilities Board of City of Foley*, 752 So.2d 510 (Ala. Civ. App. 1999).

- 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).

- When the scope of an easement burdening a portion of a landowner's property is so sweeping as to be the equivalent of the taking of fee simple title to the property, it is a question of law for the trial court to decide, from the four corners of the deed granting the easement and the condemnation order, whether the condemnation constitutes a complete taking or not. In light of the sweeping, pervasive taking of a landowner's property as authorized by a condemnation order, particularly its broad reservation of future rights, the trial court properly deemed the easement at issue to be the equivalent of a taking of fee simple title to the entire property. *City of Huntsville v. Rowe*, 889 So.2d 553 (Ala. 2004).

- Section 18-1A-270 of the Code of Alabama does not grant a Downtown Redevelopment Authority created pursuant to Sections 11-54A-1, et seq., of the Code of Alabama 1975, the power to condemn property for economic development. 2005-150. ■



Speaking of Retirement

Choosing Your Monthly Benefit

When a member submits a retirement application to the ERS, the staff calculates the monthly benefit under the Maximum monthly benefit and the Optional monthly benefits. This information is mailed to the retiring member along with a form (RETIREMENT OPTION SELECTION) for the member to elect the option corresponding to the monthly benefit the retiring member wishes to receive. **If no election of an option is made prior to the effective date of retirement, the law specifies that the member will receive the Maximum retirement benefit. Once the member retires, the monthly benefit cannot be changed.**

Maximum Monthly Benefit

The Maximum monthly benefit is the highest monthly benefit available to a retiring member of the ERS. This benefit is a lifetime benefit paid to the retiree on a monthly basis. This benefit is calculated based on the member's average final salary *times* service credit *times* the retirement factor (.020125 or .02875 for State Police). At the death of the retiree, all monthly benefits cease. The designated beneficiary(s) will receive a one-time prorated monthly benefit covering the days of the month that the retiree was still living.

Optional Monthly Benefits

A member may provide a benefit for a beneficiary by selecting one of the following options.

Option 1. The monthly benefit under Option 1 is slightly less than the Maximum. This benefit is a lifetime benefit paid to the retiree on a monthly basis; however, if the retiree dies prior to receiving payments exceeding his or her account balance, the remaining balance will be paid to the designated beneficiary(s).

Option 2 (100% Survivor Benefit). Option 2 allows the retiree to receive a reduced benefit over the life of the retiree in return for allowing the designated beneficiary (only one beneficiary may be designated) to receive the same lifetime benefit after the retiree's death. The benefits are based on the ages of the retiree and the beneficiary. Therefore, once the member retires, he or she cannot change their beneficiary unless the beneficiary predeceases the retiree or if the retiree and the beneficiary become divorced. See **Replacement Beneficiary**.

Option 3 (50% Survivor Benefit). Option 3 allows the retiree to receive a reduced benefit over the life of the retiree in return for allowing the designated beneficiary (only one beneficiary may be designated) to receive one-half of the retiree benefit over the beneficiary's lifetime after the retiree's death. The benefits are based on the ages of the retiree and the beneficiary. Therefore, once the member retires, he or she cannot change their beneficiary unless the beneficiary predeceases the retiree or if the retiree and the beneficiary become divorced. See **Replacement Beneficiary**.

Option 4. Members may elect to receive a monthly benefit actuarially equivalent to the regular retirement benefit. The ERS Board of Control must approve this option. The monthly benefit paid to the beneficiary cannot exceed the limits determined by federal taxation laws.

Replacement Beneficiary

Retirees who elected joint survivor options (Option 2, 3 or 4) at the time of retirement may name a new beneficiary under either of the two following conditions: If the named beneficiary dies before the retired member **or** there is a divorce between the retired member and the beneficiary.

The retired member should contact the ERS for information and forms. Generally, there will be a recalculation of the benefit amount for the retired member and beneficiary. The replacement beneficiary must be in place for at least two years to become effective. However, if the retired member dies within this two year period, no monthly survivor benefit is payable.

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 Street, P. O. Box 302150, Montgomery, Alabama 36130-2150

2005 CMO Graduation Ceremony Held August 16th

On August 16th, the League held commencement ceremonies in Montgomery for its Elected Officials Training Program. These graduation exercises marked the tenth group of officials to receive their basic CMO (Certified Municipal Official) certification and the seventh group to receive their advanced CMO certification.

The Elected Officials Training Program consists of a series of one-day continuing education programs designed for elected municipal officials – mayors and councilmembers – who voluntarily wish to receive formal training in municipal government.

Officials who complete 40 credit hours of training are awarded the professional designation of Certified Municipal Official. Training sessions are conducted twice each year at four regional sites throughout the state. Additional hours may be earned by attending designated sessions during the annual League Convention and other approved events sponsored by the League and the National League of Cities. A limited amount of credit may be obtained by attending other approved courses. The training program can be completed in as few as two calendar years.

The Elected Officials Training Program is an ongoing project of the Alabama League of Municipalities to fulfill the education mandate contained in its constitution.

The first session of the Elected Officials Training Program was held at the Adams Mark Hotel in Mobile on September 22, 1994. The same program was offered in Birmingham, Montgomery and Huntsville. Nearly 200 officials enrolled in the program during the first sessions. Currently more than 2,000 municipal officials are enrolled and have attended one or more courses.

Session topics include council meeting procedure, rules of parliamentary procedure, the Alabama Sunshine Law, public records, ordinance drafting, powers of municipalities, ethics laws, conflicts of interests, duties of mayors and councilmembers, tort liability, annexation, zoning, subdivision regulation, municipal revenues and expenditures, the competitive bid law, personnel issues, insurance issues and regulatory powers of municipalities.

In 1998, the League added an Advanced CMO Program for those officials who had received the CMO designation and desired additional training.

During its January 2000 meeting, the League's Executive Committee approved the addition of a continuing education requirement to the Elected Officials Training Program. The Committee members felt the new requirement would

strengthen the CMO Program.

As of January 1, 2000, each Advanced CMO Graduate is required to earn ten (10) credit hours of approved training within two (2) calendar years to maintain their Advanced CMO active status. Any CMO Advanced Graduate who does not earn at least ten (10) approved credit hours of training within two (2) calendar years will have their Advanced CMO status designated as "inactive" until such time as the required ten (10) hours of approved credit is earned. The continuing education credits started at the 2000 Convention in Birmingham.

This year a total of 40 municipal officials successfully completed the requirements to receive their CMO certification. Twenty-seven officials received their Advanced CMO certification.

Representative Bill Dukes of Decatur addressed the 2005 graduates of the Elected Officials Training Program during the ceremony.

Dukes was a key player in municipal government for 28 years – 18 of them as Mayor of Decatur. A past president of the League, Representative Dukes was elected to the Alabama Legislature in 1994 and currently serves as chair of the House Local Government Committee. Following his comments, Dukes handed out plaques to those graduates who were able to attend the commencement ceremonies. The 2005 graduating class of Certified Municipal Officials and Advanced Certified Municipal Officials is listed on the next page. ■



Rep. Bill Dukes addresses graduates at the CMO ceremony.

2005 Advanced and Basic CMO Graduates

ADVANCED CERTIFIED MUNICIPAL OFFICIALS

- Councilmember Webb Nall, Atmore
- Councilmember Bobby J. Phillips, Calera
- Councilmember Ethel J. Sprouse, Cedar Bluff
- Councilmember Fred M. Waltman, Citronelle
- Councilmember Charles Henderson, Dadeville
- Mayor Ray Nelson, Fayette
- Councilmember Clemente R. Brooks, Flomaton
- Council President Robert W. Echols, Gadsden
- Councilmember Carolyn M. Doughty, Gulf Shores
- Councilmember Gary Gray, Guntersville
- Councilmember Barbara B. Austin, Killen
- Councilmember Willie Lee Jackson, Marion
- Councilmember Victor M. Long, Millbrook
- Mayor Joseph K. Roberson, Ohatchee
- Councilmember Celesia S. Kilgore, Ohatchee
- Councilmember Mike C. Henderson, Oxford
- Councilmember Arthur L. Sumbry, Phenix City
- Councilmember John Lawrence, Piedmont
- Council President Dean Argo, Prattville
- Councilmember Sam Heflin, Priceville
- Mayor Ron K. Davis, Prichard
- Mayor Gary W. Daffron, Ragland
- Councilmember Mack A. Bell, Roanoke
- Councilmember Charles Allen, Thomasville
- Councilmember Wayne Taylor, Trussville
- Councilmember Max C. Brasher, Winfield
- Councilmember Scot Nelson, Winfield



For more information on the League's CMO program, contact Theresa Lloyd, CMO Program Administrator, at 334-262-2566 or via e-mail at theresal@alalm.org.

BASIC CERTIFIED MUNICIPAL OFFICIALS CONT.

- Mayor David M. Frings, Alabaster
- Councilmember Jimmy A. Madison, Berry
- Councilmember LaBrenda J. Marshall, Bessemer
- Councilmember Isabell L. Boyd, Brundidge
- Councilmember John H. Turner, Colony
- Mayor Joe L. Smith, Dadeville
- Mayor R. Timothy Russell, Foley
- Councilmember Irish L. Simmons, Fort Deposit
- Councilmember Jim L. Armstrong, Gadsden
- Councilmember J. R. Countryman, Gadsden
- Councilmember Walt J. Higgins, Gadsden
- Mayor Phil Seagraves, Guin
- Mayor Charles W. Penhale, Helena
- Councilmember Bill Kling, Huntsville
- Councilmember Jannie Jordan, Hurtsboro
- Councilmember Sandra Fox Sudduth, Jacksonville
- Mayor Austin McArdle, Kinsey
- Councilmember Jerry W. Byram, Leesburg
- Councilmember DiAnne Tillery, Leesburg
- Mayor Richard S. Pate, Lowndesboro
- Councilmember James P. Hollis, Marion
- Councilmember Willie C. Goldsmith, Montevallo
- Councilmember Teresa Lott, Ohatchee
- Councilmember Davy J. Lindsey, Opp
- Councilmember Rosemary L. Metcalf, Pelham
- Councilmember Willard C. Payne, Pelham
- Councilmember Jim Phillips, Pelham
- Councilmember Charles T. Weed, Pinckard
- Councilmember Earline R. Martin-Harris, Prichard
- Mayor Pat R. Wheat, Reform
- Councilmember Nancy E. Keasler, Reform
- Councilmember Aubrey E. Grant, Robertsdale
- Councilmember Waylon W. Huguley, Sheffield
- Councilmember Glenn E. Baker, Springville
- Councilmember Laura Horton, Tarrant
- Councilmember Joe A. Matthews, Tarrant
- Councilmember Richie A. Sparkman, Trinity
- Councilmember Louise Fields, Tuskegee
- Councilmember Jim L. Jones, Valley
- Councilmember Elizabeth Lyons, Valley

Johnnie Daugherty

Johnnie Daugherty, McIntosh town councilman, died June 15. He was 78. Daugherty had been battling cancer for some time and was in his third term on the McIntosh Town Council at the time of his death. His brother, Edward D. Daugherty, was chosen to finish the unexpired term.

Gerald Ash

Gerald Ash, former mayor of Springville, died July 5. Ash served three terms as the city's mayor from 1984 until 1996. His death came only 16 days after his wife, Evelyn, died. Ash is survived by his six children, two brothers, 14 grandchildren and four great-grandchildren.

Robert B. Doyle

Robert B. Doyle, former mayor of Mobile, died July 9, 2005. He was 80. Doyle was first elected to place two on the commission form of government Mobile was under in 1969. During his three terms in office,

Doyle braved police and firefighter strikes, economic problems and a restructuring of the city's government. As mayor, he traveled to Europe and Asia to spark international interest and investment in Mobile. Doyle also served as League president in 1979. He and his late wife, Ramona, were active with Providence Hospital, where they took Christmas gifts to patients each year. He is survived by his four children, one sister, nine grandchildren and one great-grandchild.

Pat C. Reynolds

Pat C. Reynolds, former mayor of Vestavia Hills, died August 9, 2005. He was 65. Reynolds served three terms as mayor of Vestavia Hills, from 1988 to 2000. Prior to his political career, Reynolds owned restaurants and was a partner in Universal Travel. He was involved with the Vestavia Hills Planning and Zoning Commission, the American Cancer Society and the Boy Scouts of America. He is survived by his wife, two sons, two daughters, mother, sister, six grandchildren and two great-grandchildren.



Rachel was 4 when she learned to tie a shoe.

Rachel is just a child, but there are days when she has to act like a grown-up. Her mom has multiple sclerosis, a chronic, disabling disease of the central nervous system, which means that sometimes even the simplest tasks are virtually impossible to do.

Rachel is not alone. She is one of more than a million children in families living with the devastating impact of multiple sclerosis.

But there is help. We are the National MS Society, and we fund more MS research, offer more services for people with MS, and provide more professional education programs than any other MS organization in the world.

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