

Local Government Law News

Salmon P. Chase College of Law ♦ Kentucky Department for Local Government ♦ Northern Kentucky University

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JAILS AND THE AMERICANS WITH DISABILITIES ACT¹

by
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The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, embodies a national policy of nondiscrimination against, and reasonable accommodation of, persons with disabilities. It covers discrimination in employment (Title I), public services and transportation (Title II), public accommodations (Title III), and telecommunications (Title IV). Recently, the United States Supreme Court ruled that Title II of the ADA covers inmates in state prisons and local jails. The case was *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998).

Ronald Yeskey was a prison inmate sentenced to 18 to 36 months in a Pennsylvania correctional facility. The sentencing court recommended his placement in Pennsylvania's Motivational Boot Camp for first-time offenders. Successful completion would have led to release on parole in just six months. Because he had a medical history of high blood pressure, authorities denied him admission to the program. He sued, alleging that his exclusion violated the ADA.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." In *Yeskey* the Supreme Court held that this includes state prisons and prisoners. As defined, "public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." State prisons and local jails fall squarely within the definition.

The Supreme Court rejected the contention that prisons do not provide prisoners with "benefits" of "services, programs, or activities." Modern prisons, said the court, provide inmates with many recreational activities, medical services, and educational and vocational programs

that benefit prisoners and from which disabled prisoners could be excluded. In the court's view, the ADA provides no basis for distinguishing programs, services, and activities provided by prisons from those provided by other public entities.

The Supreme Court also rejected the contention that the term "qualified individual with a disability" is ambiguous with respect to prisoners. The statute defines the term to include anyone with a disability "who, with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Rejecting arguments that this implied voluntariness on the part of the qualified individual, the court noted that prisoners are eligible to participate in a variety of programs and activities provided by prisons— some voluntary, some not. The court said that the involuntary nature of a prisoner's confinement does not lead to the conclusion that a prisoner cannot be a qualified individual with a disability.

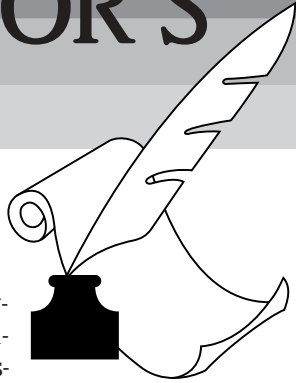
Finding responses to the difficulties associated with the disabled will severely challenge state and local governments.² The current trend in the growth of prison populations only worsens the problems that disabled

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DIRECTOR'S DESK



One of the joys I find in the practice of local government law is that it is as varied as local government itself. Local governments provide so many of the essential services on which we rely every day – transit systems and airports, schools and hospitals, courts and jails, emergency services and more. As this brief list reveals, local government law is important to lawyers both inside and outside government. It is appropriate then that Chase College of Law, with its reputation as “the lawyers’ school,” should be home to the Local Government Law Center.

The traditions of the Local Government Law Center I think reflect this in three ways. It serves municipal attorneys and local government officials, providing advice and technical assistance on local government law. It serves law students, providing clinical legal education to future government and non-government attorneys. It serves the larger public, supporting the development of local government law. It is my privilege as the new Director to be a part of those traditions and to build upon them together with our new dean, Gerard St. Amand.

I come to the center after twenty years at the New York State Department of State, New York’s local government agency. Assisting municipal attorneys and local government officials was an important part of my work there, as it will be here. While at the department I served as managing attorney of its legal office, as counsel to its divisions and statutory offices, and as an administrative law judge. I was also an advisor to the Governor’s Special Fire Safety Task Force and the Governor’s Blue Ribbon Commission on Local Government Consolidation.

My undergraduate degree is from Rensselaer Polytechnic Institute, where I majored in chemistry. Before taking up the study of law, I was an analytical chemist in the fields of environmental protection and occupational safety and health. That would prove to be my doorway into local government law when after law school my first assignment involved local responses to hazardous materials incidents. My law degrees are from DePaul University College of Law and Notre Dame Law School, where I attended the Program of International and Comparative Law in London, England.

I welcome your comments and suggestions about the Local Government Law Center and its programs. We are here to serve and support you.

RECENT DEVELOPMENTS

Chase College of Law

The Salmon P. Chase College of Law welcomed a new dean. Gerard A. St. Amand was commandant (dean) of the Judge Advocate General’s School in Charlottesville, VA, and also formerly served as an academic director (1966-97) in the General’s School. He was assistant and associate professor there from 1983-86.

St. Amand served as commandant of the Judge Advocate General’s (JAG) School since 1997. His other practice in the military includes postings as staff judge advocate at headquarters, V Corps, in Germany and Hungary; deputy chief for personnel plans, and training at Headquarters, Department of the Army, Washington, D.C.; staff judge advocate, 10th Mountain Division, Ft. Drum, New York; special assistant to legislative counsel to the Secretary of Defense, Headquarters, Department of Defense, Washington D.C.; and various postings as a trial and labor attorney and legal advisor for the Department of the Army in Missouri, New York, and Germany.

St. Amand earned his bachelor’s degree in mathematics and economics and his juris doctor from Boston College. He is an honor graduate of the Judge Advocate General’s School and is a distinguished graduate of the National War College. He is a native of Holyoke, MA.

The dean will oversee the College of Law, which has an enrollment of 400 students, 37 full-time faculty, 24 full-time staff, and the law library.

Department for Local Government

Timothy A. Sturgill was appointed general counsel to the Department for Local Government in September. Prior to joining the Department, Sturgill was a staff attorney with the Cabinet for Human Resources (1991-95) and the Cabinet for Workforce Development (1995-1999) where his practice was focused in the area of administrative and employment law. Sturgill received his undergraduate degree in business administration with a concentration in accounting and a minor in economics from the University of Virginia’s Clinch Valley College in 1987 and his law degree from the University of Louisville School of Law in 1991.

As a general counsel to the Department, Sturgill is responsible for all legal services to the Department. As time permits, he also provides assistance to local governments by researching legal issues and answering technical legal questions relating to the operation of local government entities. Many such requests for legal opinions are referred by the Office of the Attorney General. Sturgill also coordinates with and acts as the Department’s liaison to the Local Government Law Center.

Sturgill may be contacted in the Office of the Commissioner of the Department for Local Government at (502 573-2382 or (800) 346-5606.

KENTUCKY DECISIONS OF NOTE

KENTUCKY SUPREME COURT



Public Employees - Independent Duty to Report Child Abuse

A teacher and a counselor in a school system each received reports from students that another teacher had engaged in sexual contact with students. Each followed school protocol and told the school principal what the students reported. Later each was indicted on a misdemeanor charge of failure to report the suspected abuse to the proper authorities in accordance with KRS 620.030. A sharply divided court holds that the reports to their supervisor, who then also had a duty to report, did not relieve the teacher and the counselor of their independent duty to make a proper report. Neither did the reports to their supervisor afford them immunity from prosecution under KRS 620.050. *Commonwealth v. Allen*, 980 S.W.2d 278.

Condemnation - Right of Redemption

As amended in 1980, KRS 416.670 gave condemnees and their successors the right, under certain statutory conditions, to repurchase property taken by the state. A unanimous court holds that the right applies to property whether condemned before or after the amendment. Here the original property owners may repurchase property at the price the state originally paid, not at its significantly higher appraisal price nor the still higher price offered by a third party. *Kelly v. Thompson*, 983 S.W.2d 457.

Schools - Transporting Non-public Elementary School Children

In an earlier decision the court held unconstitutional the manner in which the Jefferson County Fiscal Court allocated funds for the transportation of non-public elementary school children. The court now finds the replacement plan to be a lawful method of allocating transportation subsidies. The subsidies pass directly to contract carriers, and no funds pass into the hands of private or parochial schools. *Neal v. Fiscal Court of Jefferson County*, 986 S.W.2d 907.

Cities – Incorporation

Where a petition for incorporation recited insufficient services as a reason for incorporation, it created a presumption that incorporation is a reasonable way to provide the services. To rebut the presumption opponents must offer evidence that actually refutes the claim. Here they did not. Also, where only a narrow corridor linked two territories proposed for incorporation, the presumption was that the territories are not contiguous. The proponents of inclusion must show that the corridor has some municipal value or purpose beyond merely connecting the territories. They also did not. *Griffin v. City of Robards*, 990 S.W.2d 634.

KENTUCKY COURT OF APPEALS



Recreational Use Statute - Parking Fee at City Park not a Charge

A visitor entered a city park at an entrance where a sign stated “Entrance Fee 2.00 Per Car.” Persons not in cars and cars entering at other entrances paid no charge. While swimming in the park, he sustained a severe injury to his heel and foot. He later filed suit to recover damages for his injury. In its defense the city asserted that it was immune under the Kentucky Recreational Use Statute, KRS 411.190. Under that law if the owner makes the land available for recreational use without charge, he will not incur liability for ordinary negligence. The court holds that a fee to park a car was not a fee to enter upon the land and use the park for recreational purposes. Therefore, the statute applied and the city was immune. *City of Louisville v. Silcox*, 977 S.W.2d 254.

Alcoholic Beverages - City Ordinance Preempted

The city of Ashland passed a comprehensive ordinance for the control and licensing of alcohol sales in limited sale precincts. The ordinance prohibited the sale of alcohol at grocery stores and gasoline stations. On the basis of the ordinance, the city denied an application to sell beer at two locations within the limited sale precincts. The applicant appealed to the Kentucky Alcoholic Bev-

erage Control Board, which determined that the city could not so prohibit the sale of beer. Agreeing with the board, the court holds that the specific terms of KRS 243.280(2), which allows beer sales at grocery stores, prevail over the general terms of KRS 242.1292(5) and (6), which grants the city power to regulate sales within the limited sale precincts. The court also rules that the city could not impose quotas on retail malt beverage licenses. *Ashland v. Kentucky Alcoholic Beverage Control Board*, 982 S.W.2d 210.

Home Rule Powers - Purchase of Vehicles for Magistrates

A citizens' group challenged a fiscal court's vote to appropriate and expend monies to purchase vehicles for use by county magistrates. The group contended that the fiscal court had no authority to make the purchase. Citing KRS 67.083, the "home rule statute," the court concludes that the fiscal court has the necessary authority. Fiscal courts have broad powers related to governmental functions, so long as the power at issue is not restricted by other legislation. Here there is no such restriction. *Concerned Citizens for Pike County v. County of Pike*, 984 S.W.2d 102.

Fire Protection - Inadequate Water Supply

After fire completely destroyed their building, the owners sued the city and the water district. They alleged that the loss was due to water pressure insufficient to assist fire fighters' efforts to save the building. They further alleged that the low rate of flow was the result of the failure to enforce local fire protection standards during the process of plat approval. However, the situation where a local government causes an injury is different from the situation in which it fails to prevent an injury. The court finds this case to be an example of the latter, for which the city and water district are statutorily exempt from liability under the Claims Against Local Governments Act, KRS 65.2003(3). The owners' also claimed a "taking" of their property as a result of a delay in issuing an occupancy permit. That claim fails, too. *Siding Sales, Inc. v. Warren County Water District*, 984 S.W.2d 490.

Zoning - Compliance with Comprehensive Plan

Applicants sought to rezone approximately ten acres of land from single family residential district to planned shopping center district. The planning commission and the urban county government council separately denied the application after public hearings. Applicants alleged

it was arbitrary to have done so in reliance on an out of date comprehensive plan. Affirming the council's decision, the court finds substantial evidence to support the denial. The local government's failure to timely update its comprehensive plan does not render arbitrary decisions that rely on it. Applicants here were unable to show a compelling need for their request or that changes in the area had overridden the comprehensive plan. *Fritz v. Lexington-Fayette Urban County Government*, 986 S.W.2d 456.

Zoning - Overriding Planning Commission

The planning commission recommended disapproval of a zone change application. At the subsequent hearing of the urban county council, the developer asked for and received permission to amend the proposed ordinance. Citing the Kentucky Supreme Court's decision in *Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Company, Inc.*, the court holds that the ensuing delay results in adoption of the planning commission's recommendation by operation of law. The ninety-day period of KRS 100.211(7), within which the council must act to override the commission, cannot be waived. *Nicholasville Road Neighborhood Consortium, Inc. v. Lexington-Fayette Urban County Government*, 994 S.W.2d 521.

Zoning - Required Conceptual Development Plan

The planning commission voted to deny requested zoning change, and the city commission voted to overturn that recommendation and grant the request. When the city acted on the request, it was not accompanied by a proposed development plan as defined in KRS 100.111(8). Therefore, says the court, the city lacked authority to approve the change. *Davis v. Board of Commissioners*, 995 S.W.2d 404.

UNITED STATES COURT OF APPEALS



Public Employees - First Amendment Rights

A school employee was reassigned from her administrative position to a classroom teacher position after her husband resigned as superintendent of schools. She alleged that the demotion was in retaliation for her association with her husband. The school board responded

that she lacked the necessary credentials for the administrative position and had refused to take additional classes to obtain the proper certification. To prevail on her First Amendment claim, the employee has to show that the legitimate, non-discriminatory explanation offered by the board was a pretext for its action. She did not. *Whitaker v. Wallace*, 179 F.3d 541.

Government Offices – Good Friday Closings

An isolated instance of a sign bearing an image of the Crucifixion and announcing that county offices were closed for observance of Good Friday prompted a challenge to the closing. So long as a finding can be made that there is a significant secular reason for closing government offices on a particular date, the fact that the closing is also convenient for persons of a particular faith does not render the closing unconstitutional. The sign violates the Establishment Clause, but the closing itself does not where evidence supports the government's assertion of a secular purpose. *Granizeier v. Middleton*, ___ F.3d ___, (4/19/99, 97-5409).

Police – Crowd Control Measures

With the advice and approval of key local officials, and after consultation with coordinate law enforcement agencies, the police adopted a plan to maintain order at a potentially violent rally and counter-rally. Citizens claimed that plan denied them protected free speech and association and interfered with their pursuit of interstate commerce. The court finds no support for the claim. The plan accorded due weight to the preservation of community peace and safety while remaining conducive to individual and collective exercises of constitutional rights and had a minimal effect on interstate commerce, if any. *Grider v. Abramson*, ___ F.3d ___, (6/18/99 98-5282).

Public Bidding – Rejecting All Bids

A county solicited bids for towing service, rejected them all, and solicited new bids on different terms. After it opened the new bids, the county met with the bidders to negotiate a uniform price throughout the county. The unsuccessful bidders sued, claiming that the process was an abuse of the county's discretion. The court disagrees. Plaintiffs have no protected property interest in towing contract. Their claim of a deprivation of that property interest fails. So, too, does their claim of predatory pricing under Robinson-Patman Act. *Charlie's Towing Recovery, Inc. v. Jefferson County*, ___ F.3d ___ (7/15/99 98-5628).

U.S. DISTRICT COURT



Schools – Discrimination in Educational Programs

A local chapter of the National Honor Society offered membership to all but two students whose grade point averages were at or above the level considered for admission. Each excluded student had a grade point average substantially above the cutoff, but each also bore a child out of wedlock. Finding a likelihood of success on the merits of their Title IX claim under both disparate impact and disparate treatment theories, the court grants the students a preliminary injunction against the school district to admit them to the NHS chapter. *Chipman v. Grant County School District*, 30 F.Supp.2d 975.

Zoning - Selective Enforcement - Takings

After expending substantial sums to comply with city Storm Water Management and Control ordinance, developers claim to have discovered that other developers had received necessary construction permits despite the others' noncompliance. The first developers sued, alleging a violation of their rights to equal protection and due process. They also alleged that the utilization of a significant portion of the property for retention basins and flowage easements constituted a taking of their property by the government. To prevail on their selective enforcement claim, plaintiffs must show (1) the exercise of a protected right, (2) the prosecutor's stake in that right, (3) the reasonableness of the prosecutor's conduct, and (4) that the prosecution was initiated with the intent to punish the exercise of a protected right. Here, plaintiffs fail to establish the fourth element. Because plaintiffs had not attempted an inverse condemnation suit in state court, the takings claim is also dismissed. *Heaton v. City of Princeton*, 47 F.Supp.2d 841.



OPINIONS OF THE ATTORNEY GENERAL

OAG 99-5
AUGUST 13, 1999

Subject: Appropriation of funds from local governmental units to nonprofit organizations

Written for: Department for Local Government

Written by: Vanessa L. Armstrong
Assistant Attorney General

Syllabus: Appropriations made to nonprofit entities, which are earmarked and used for a public purpose, are a lawful use of public funds and are consistent with Section 179 of the Kentucky Constitution.

Statutes construed: Ky. Const. Section 179

OAGs cited: 68-534, 78-205, 78-516, 79-67, and 83-366

OPINION OF THE ATTORNEY GENERAL

I. Introduction

A number of requests for an Attorney General Opinion have been submitted concerning appropriations by local governments to nonprofit organizations. Such appropriations would come from both city and county governments alike. This opinion does not address those requests specifically. Rather, this opinion should serve as guidance to those governmental entities when they consider appropriating funds earmarked for such organizations.

In rendering this opinion, the Attorney General generally discusses the constitutionality of such expenditures. It must be kept in mind that in addressing the constitutionality of the proposed governmental appropriations only the courts are authorized to make a final, authoritative determination of this precise issue. However, pursuant to KRS 15.020 and 40 KAR 1:020, Section 3, the Office of the Attorney General may render an opinion in this matter.

II. Analysis

A. Section 179 of the Kentucky Constitution

When examining the issue of whether a city or county governmental entity may appropriate monies earmarked for nonprofit organizations, Section 179 of the Kentucky Constitution must be considered. Ky. Const. Section 179 provides, in part:

§ 179. Political subdivision not to become stockholder in corporation, or appropriate money or lend credit to any person, except for roads or state capital.— The General assembly shall not authorize any county, or subdivision thereof, city, town or incorporated district, to . . . appropriate money for . . . any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads; . . .

The primary purpose for this provision is to prohibit public funds from being diverted for private use. *Louisville Municipal Housing Commission v. Public Housing Administration*, Ky., 261 S.W.2d 286 (1953). As Justice Bert T. Combs noted:

“There was a time when the state was allowed to suscribe, and did subscribe, to the capital stock of various quasi public improvement companies and loaned or gave its credits to such. It was to prevent a repetition of that practice by the state that [section 177] was enacted.” It is apparent that section 179 was enacted in order to place upon local governmental units the same general restrictions imposed upon the Commonwealth itself by section 177. The purpose behind both sections was to prevent local and state tax revenues from being diverted from normal governmental channels.

Id., 261 S.W.2d at 288. See also *Louisville Bd. of Ins. Agents v. Jefferson County Bd. of Ed.*, Ky. App., 309 S.W.2d 40, 41 (1957) (“These constitutional provisions were added to the fundamental law of the state to prevent the investment of public funds in private enterprises. . .”). Thus, the question becomes whether public monies are being diverted for private use when local governments appropriate funds to nonprofit organizations.

B. Public Purpose

The Office of the Attorney General has consistently taken the position that governmental appropriations must be for a “public purpose.” This axiom derives from the Constitutional mandate that “[t]axes shall be levied and collected for public purposes only. . .” Ky. Const. § 171; See also *Industrial Develop. Auth. v. Eastern Ky. Reg. Pl. Com’n*, Ky. 332 S.W.2d 274, 276 (1960) (“Obviously if money is appropriated out of the treasury it must be measured by the same test as that by which it is raised by taxation and put into the treasury”). This is also consistent with an early pronouncement by Kentucky courts that Section 179 requires appropriations to be for a public purpose. See *Board of Trustees of House of Reform v. City of Lexington*, Ky., 65 S.W. 350, 352 (1901); *Carman v. Hickman County*, Ky., 215 S.W. 408 (1919).

When examining whether or not a purpose is a “public purpose” the “test [is] not who receives the money, but the character of the use for which it is expended.” *Kentucky Bldg. Commission v. Effron*, Ky., 220 S.W.2d 836, 837 (1949); see also *Hager v Kentucky Children’s Home Soci-*

ety, Ky., 83 S.W. 605, 608 (1904) (“it does not matter whether the agency through which it is dispensed is public or not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means”).

The *Carman* Court opined that it is “extremely difficult to define with accuracy what is a public purpose for which money collected by taxation may be appropriated, although there is, of course, no difficulty in ruling that taxes cannot be appropriated for other than public purposes.” *Carman*, 215 S.W. at 411. The Court further stated:

It is also true that many objects for which money may be appropriated are so clearly public in nature as that there could not well be any difference of opinion on the subject, such, for example, as public schools, public health, and public charities. On the other hand, there are many other enterprises helpful to the public in the community in which they are located, and that contribute very largely to the development and progress of the state, that are so purely private in their nature as not to admit of any doubt about the matter.

It is not, however, necessary that the whole body of the contributing public shall be directly the recipients of the benefits or advantages accruing from the establishment of the object in aid of which public funds may be set apart. It will be sufficient if it should be of such a character as that it promotes the general welfare and prosperity of the people who are taxed to sustain it.

Id. Additionally, in addressing the “public purpose” concept, the Attorney General has previously relied on *McQuillian, Municipal Corporations* (3rd ed. 1995). This treatise addresses the issue of “public purpose” as follows:

All appropriations or expenditures of public money by municipalities and indebtedness created by them, must be for a public and corporate purpose, as distinguished from private purpose, at least, unless the powers of the particular municipality in regard thereto have been enlarged by the legislature, which is itself limited

in its power to authorize expenditures or indebtedness for other than public purposes. . . .

Furthermore, the fact that a municipality is expressly authorized to expend a certain sum without specification as to the purpose of the expenditure does not authorize it to expend funds for other than a public purpose. . . . Moreover the public purposes for which cities may incur liabilities are not restricted to those for which precedent can be found, but the test is whether the work is required for the general good of all the inhabitants of the city. Further, it is not essential that the entire community, or even a considerable portion of it, should directly enjoy or participate in an improvement in order to make it a public one. Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all, or at least a substantial part of, the inhabitants or residents. Otherwise stated, the test of a public purpose should be whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit. . . .

What is a public municipal purpose cannot be precisely defined since it changes to meet new developments and conditions of the times. Indeed, it has been recognized that “public purpose” should be broadly construed to comport with the changing conditions of modern life.

McQuillin Municipal Corporations (3rd ed. 1995), Vol. 15, § 39.19, pp. 38-39.

In light of the foregoing, when deciding whether the appropriation will be for a public purpose, the governmental units should examine whether the receiving organizations provide services that will be for the general good and welfare of their citizens. “It is well settled that a private agency may be utilized as the pipe-line through which a public expenditure is made, the test being not who receives the money, but the character of the use for which it is expended.” *Effron*, 220 S.W.2d at 837.

C. Connection and Control

The Office of the Attorney General has taken the position that public funding must also meet the “connection and control” test. OAG 78-205, 78-516, 79-67, 83-366. The Attorney General has opined:

In *McQuillin Municipal Corp.* (3d Ed.), Vol 15, Section 39.19, the author further states that municipality has no power, unless expressly conferred by constitutional provision, charter or statute, to donate municipal funds for private purposes to any individual or company not under the *control* of the city and having no *connection* with it.

OAG 79-67 (emphasis added). The Office has construed this provision to require that appropriations made to such organizations be earmarked and used for a public purpose and subjected to proper budgeting documentation and approval. However, this latter requirement is not expressly mandated by the case law. In fact, one court stated that no such control is necessary, “if [the fiscal court] was satisfied that the management would be as faithful and beneficent without its control as with it, and would contribute as much to the welfare [of the public].” *Jefferson County v. Jefferson County Fiscal Court*, Ky.App., 299 S.W. 209, 210 (1927).

Accountability for such appropriations while not necessarily mandated by the case law is certainly a sensible requirement. In addressing similar appropriations in light of Ky. Const. Section 179, the Kentucky courts have found such appropriations constitutional in part because governmental units have exercised some control and accountability over the expenditures. *See, e.g., Hager v Kentucky Children’s Home Society*, Ky., 83 S. W. 605 (1904); *O’Bryan v. City of Louisville*, Ky., 382 S.W. 2d 386, 189 (1964) (funding was “subject always to the advice, approval, and direction of the city”). Thus, accountability appears to be a criterion considered when determining whether an appropriation is for a public purpose. Further, accountability is a safeguard that insures public funds are being used for the intended public purpose. As the *Hager* Court cautioned, when abuses of such appropriations occur, the people can rectify and control this problem for “[t]hey have reserved to themselves that power over their representatives in matters of legislation.” 83 S.W. at 610.

III. Home Rule

The General Assembly enacted statutes which have been commonly referred to as Home Rule acts. *See, e.g.,* KRS 67.083 *et seq.*¹ In KRS Chapter 67, the General Assembly defined the duties of the fiscal court. It also identified certain expenditures to be included in its annual budget. KRS 68.240. It has been suggested that the fiscal court is authorized to appropriate funds for those organizations, which provide services of a public nature, so long as the services rendered are consistent with those duties set forth in the Home Rule act.

While the Home Rule act empowers counties to appropriate funds for specific governmental functions, it is the constitution of this state which is supreme. *Fiscal Court of Jefferson County v. City of Louisville, Ky.*, 559 S.W.2d 478 (1977). There, the Supreme Court of Kentucky examined the constitutionality of the Home Rule act, which had given county fiscal courts essentially *carte blanche* authority to administer county government to the same extent as if the General Assembly had expressly granted and delegated to the fiscal courts all the authority that is within the power of the General Assembly. The Court found that the grant of authority was overly broad. In reaching its decision, the Court observed that:

[The constitution] is ordained and established by the people . . .

All legislation must conform to the principles established by the constitution. When an act of the legislature is appropriately challenged in the courts as not conforming to the constitutional mandate, this court has only one duty 'to lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.' . . . [The Court's] function is to 'ascertain and declare whether the legislation is in accordance with or in cotravention of the provisions of the constitution.'

Id. 559 S.W.2d at 481; *see also* OAG 68-534 ("unless the power to [appropriate public funds for private use] has been expressly designated by the Legislature *within constitutional authorization*, the municipality has no power to donate money . . . or otherwise aid a private corporation.") (emphasis added). Thus, the appropriations outlined in the Home Rule act may be perfectly lawful as long as they are consistent with Section 179 of the Kentucky Constitution. *See, Section II (A), (B), and (C), infra.* Yet, when defining a "public purpose," Kentucky courts show great deference to the Legislature's definition. *See*

Industrial Develop. Auth., 332 S.W.2d at 276. There, the Court observed:

Who is to determine what is a 'public purpose'? The legislature is given this primary duty 'This determination of what constitutes a public purpose is primarily a matter for legislative discretion *** which is not disturbed by the courts so long as it has a reasonable basis.'

Id. (citation omitted). Thus, the Home Rule act provides guidance to the governmental units, when they determine whether a specific appropriation is for a "public purpose." But in the end, Section 179 of the Kentucky Constitution and cases interpreting this provision govern.

IV. Conclusion

Section 179 of the Kentucky Constitution is designed to protect the public funds from being diverted for private use. Nevertheless, as Justice Ed C. O'Rear eloquently reasoned:

[W]hatever doubts may be existing concerning the constitutionality of the acts[s] in question must, under familiar and wise rules of construction, be resolved in favor of its constitutionality. And especially should this be so when such construction tends to support a highly beneficent object, well worthy of the care and attention that government has given it.

Board of Trustees of House of Reform, 65 S.W. at 353. It is for the local governmental units to determine if the appropriation is for a public purpose. This Office is, therefore, of the opinion that appropriations, which are earmarked and used for a public purpose, are a lawful use of public funds and are consistent with Section 179 of the Kentucky Constitution.

1. A similar home rule provision exists with reference to First Class cities. *See* KRS 83.410 *et seq.* And cities are given the right to exercise "any power and perform any function within [their] boundaries, . . . that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute." KRS 82.082.

SUMMARIES OF OTHER SELECTED FORMAL OPINIONS OF THE ATTORNEY GENERAL:

OAG 99-2

Subject: Conferring of degrees and granting diplomas by the University of Kentucky to community college students

Syllabus: The delegation of powers in KRS 164.580 is valid and does not violate Kentucky Constitution sections 2, 27, 28, 29, 60 and 69.

Synopsis: A memorandum of understanding between the University of Kentucky Board of Trustees and the Board of Regents of the Kentucky Community and Technical College System is a valid exercise of delegated power. The opinion's lengthy discussion of the Delegation Doctrine is useful beyond the context of the opinion. That doctrine limits the ability of the legislative branch of government to assign duties to the executive branch.

OAG 99-3

Subject: Plumbers and Plumbing

Syllabus: Apprentices and licensed journeyman plumbers cannot repair plumbing except under the supervision of licensed master plumbers.

Synopsis: A person who repairs his own plumbing or hires a "maintenance man" to repair it knows the work is not being done by a qualified plumber. A person who hires a plumber to repair his plumbing is entitled to have the work done by, or under the supervision of, a qualified plumber. The only persons qualified to call themselves plumbers and work on plumbing without supervision are licensed master plumbers.

OAG 99-4

Subject: Whether a member of a fiscal court may also serve as an appointed member of a county tourism commission as established in KRS 91A.360

Syllabus: A member of a fiscal court may also serve as an appointed member of a county tourism commission. The offices are not incompatible and no statutory or common law conflict of interest exists, although a common law conflict could arise.

Synopsis: Counties and cities may establish tourist and convention commissions and joint tourist and convention commissions. The chief executive officers of counties and cities, separately or jointly as the case may be, appoint the members of the commissions. Statute does not prohibit the appointment of a member of the fiscal court to a local tourist commission. Common law would allow the appointment of a member of the fiscal court other than the county judge/executive in whom rests the power to appoint. There is no inherent conflict of interest when a member of a fiscal court serves on a local tourist commission, but conflicts could arise in some circumstances.

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prisoners encounter. Already particularly susceptible to discrimination and oppression within the penal system, they must cope with problems common to being a prisoner and with the disadvantages inherent in their disabilities.

Disabled prisoners pose special problems compared to the general prison population. Then within the set of disabled prisoners, certain subsets present even greater problems. These include the elderly, the mentally disabled, the HIV-infected, and the hearing impaired. Also, the juvenile inmate who has an educational disability has rights to special education until he is twenty-one under the Individuals with Disabilities Education Act (20 U.S.C. §§ 1401 *et seq.*). The tension between the ADA's individualized approach to accommodating disabilities and the needs of prison security and administration makes the prison administrator's job that much harder.

The criminal justice system today confronts an increasingly older prison population, partially as a result of harsher mandatory sentences and "three strikes and you're out." Older prisoners are not necessarily disabled, but they are more likely to become disabled or to develop special conditions that require accommodation. Incarcerating older prisoners costs much more than incarcerating younger prisoners. Contributing to this are the costs of medical care and the costs of physical changes required in prisons designed and built for a younger, abler population.

The mentally disabled inmate population presents complex challenges. Assessing the extent to which mental disabilities impair daily activities is far more difficult than are physical disabilities. Also, a distinction must be drawn between the mentally ill and the mentally retarded. Mental retardation is a constant condition, not readily treatable. Prisons hold a significant population of mentally retarded inmates who are easy targets for violence and abuse. Corrections facilities have tremendous difficulty providing appropriate placement and treatment for mentally disabled inmates.

Inmates with HIV present one of the more severe challenges. Those inmates may have AIDS, AIDS Related Complex, or asymptomatic HIV infection. Overall, they are sick and getting sicker. Their presence among uninfected inmates is controversial and has resulted in

violence. Uninfected inmates want infected inmates segregated. Infected inmates claim both a right to freedom from segregation and a right to protection against violence. The needs of infected inmates regularly clash with the threat that HIV presents in the prison setting.

Hearing-impaired inmates experience an uncommon type and degree of disadvantage in prison due to their disability. For example, their disability is not immediately observable. Guards do not see the disability; they see the failure to respond to commands. Other inmates may interpret lack of understanding as a lack of intelligence. Deaf inmates may not hear announcements or the footsteps of an impending attacker. Their language skills, or lack of them, may leave them without the ability to manage their situation.

Local governments need to be mindful that the ADA's provisions also affect pretrial detainees. Case law suggests there is little practical difference between pretrial detention and post-conviction incarceration. This means that ADA claims of pretrial detainees are likely to result no differently than those of prison inmates.

In response to the decision in *Yeskey*, U. S. Senator Strom Thurmond introduced the State and Local Prison Relief Act, S.33. The legislation would amend the Americans with Disabilities Act and its companion law, the Rehabilitation Act, to make clear that those laws do not apply to prisoners in state and local prisons. A similar bill died in the last Congress, and the current bill remains in the Committee on Health, Education, Labor and Pensions. Even if the bill were to pass, however, it would not completely exempt prisons. They would still have to accommodate disabled counsel, visitors, and others who are not inmates. Also, their hiring practices for non-inmate employees would have to conform to the ADA. Local governments must be alert to these responsibilities.

1. This article is adapted from a presentation to the Municipal Law Section of the New York State Bar Association.
2. The discussion that follows draws heavily from Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 *Yale Law and Policy Review* 49 (1996). See also Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 *St. Louis University Public Law Review* 175 (1994).

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