

Local Government Law News

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ORGANIZING AND DEPLOYING FIRE DEPARTMENTS: THE NEW NFPA STANDARDS

Despite strong opposition from local government interests, the National Fire Protection Association (NFPA) has issued two new standards that establish staffing and response time standards for career and volunteer fire departments. One is NFPA 1710, entitled *Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments*. The other is NFPA 1720, entitled *Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Volunteer Fire Departments*.¹

The NFPA describes itself as “as the world’s leading advocate of fire prevention” and “an authoritative source on public safety.” It claims a membership of over 75,000 individuals in 100 countries. It is the publisher of the widely known National Electrical Code, the Life Safety Code, and many other codes and standards. It develops the codes and standards in technical committees made up of volunteers representing areas such as governing agencies, fire services, educational institutions, businesses, insurance companies, industry, and consumers.²

Development of the Standards

The development of NFPA 1710 and NFPA 1720 began with a decision of the NFPA Standards Council in 1995 to establish a project on fire service organization and deployment. The technical committee working on that project (NFPA 1200) reached an impasse over whether the proposed standard would be adequate to meet the needs of both the career and volunteer fire services. In 1997 the Standards Council decided to appoint two technical committees, one to develop a standard (NFPA 1710) for substantially all career fire departments and one to develop a standard (NFPA 1720) for substantially all volunteer fire departments. After the technical committees developed their respective documents, the NFPA membership approved them at its meeting in May 2001. Opponents of the standards then took an appeal to the NFPA Standards Council.

Among the opponents were the National League of Cities and its affiliate Kentucky League of Cities, the International City/County Management Association, the U.S. Conference of Mayors, and the National Association of Counties. Part of the appeal concerned alleged violations of NFPA policies, rules, and regulations that

combined to make the development unfair and devoid of a true consensus. Another part concerned the charge that proponents of the standards improperly packed with supporters the meeting that adopted the standards.³ The Standards Council rejected these concerns.

Opponents also argued that there was a lack of scientific evidence supporting specific nationwide minimum service requirements as contained within the standards. The Standards Council took this to mean “that individual jurisdictions should be able to define their own level of acceptable risk and identify their own ways to minimize that risk taking into account a variety of variables including local physical, political, and fiscal conditions.”⁴ The Standards Council dismissed the argument saying that jurisdictions that think the standard is inappropriate can decline to adopt it. Further, said the Standards Council, the opponents’ objections to the underlying science “fails to recognize that standards development activities within the NFPA system rely, not just of [*sic*] empirical studies, but, on many other types of input, including anecdotal and historical evidence, incident reports and investigations, and the collective experience, expertise, and judgment of the Technical Committee members themselves.”⁵

Although the Standards Council rejected the procedural and technical objections raised by the opponents, it did modify both NFPA 1710 and NFPA 1720 by adding equivalency statements.⁶ The purpose of the equivalency statements is to stress the intention that the standards do not restrict alternative methods that demonstrably provide equivalent levels of protection. The Standards Council also put the standards on a three-year revision cycle, the shortest ordinarily available in NFPA.

As the Standards Council’s decision suggested, NFPA

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DIRECTOR'S DESK

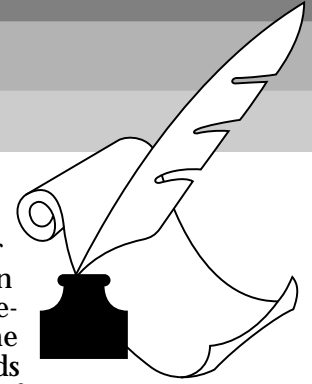
People often perceive fire protection as one of the most local of local government functions. Within the broad divisions of emergency services - fire, police, and emergency medical services - one could say that fire services are localized to an extent the others are not. With emergency medical services, for example, patient and hospital are frequently not in the same community. With police services, crime is an extended phenomenon, as the war on drugs readily shows. Further, the increasing federal role in law enforcement was the subject of a special task force put together by the American Bar Association not long ago.

Fire is different. In the common instance of the structure fire, the structure itself fixes the risk in place. Even where the risk is not fixed in place - a car fire, for example - the risk remains essentially local. The large-scale, mutual aid emergency also demonstrates the point. EMS, when engaged in mutual aid, typically disperses patients to multiple facilities beyond the community that is the scene of the emergency. The fire service, when engaged in mutual aid, typically concentrates its resources in the community that is the scene of the emergency.

Fire protection, while traditionally local, was not always traditionally governmental. For early settlers in sparsely populated communities, fire was essentially a personal risk. As settlements grew, fire became a community risk, but fire protection remained essentially a private function. Citizens organized themselves to protect against the risk of fire and responded as a community when fire broke out. Government's role was limited to a few simple regulations such as a requirement that citizens keep leather buckets and fire poles at the ready or a ban on thatched roofs. Gradually, however, factors such as the growth of cities and advances in fire fighting technology changed fire protection from a private function to a public one. By the middle of the nineteenth century, paid fire departments were emerging in many areas of the country.

With that trend came some early signals of a need for some standardization within the fire service. In 1872, a conflagration burned most of Boston to the ground, in part because couplings on fire hoses were of every imaginable size and thread. This created terrible problems when mutual aid responding fire apparatus were unable to connect to the Boston hydrants. The following year the International Association of Fire Engineers proposed the adoption of a standard for fire hose threads. However, nothing further happened until 1904. That year a massive fire destroyed 1500 buildings in Baltimore, again because of a lack of standard fire hose couplings. When firefighters from

Washington and as far away as New York arrived to help douse the fire, few of their hoses fit the hydrants. In an investigation conducted before the Baltimore fire, the National Bureau of Standards (now the National Institute of Standards and Technology) collected more than 600 sizes and variations in fire-hose couplings. After the Baltimore fire, the National Bureau of Standards and the still young National Fire Protection Association participated in the selection of a national standard.



The National Fire Protection is only one of many standards-setting organizations. Some are very large; some are very small. The work of some has relatively little to do with law or government; the work of some is specific to law and government. In this latter category, for example, is the International Code Council whose founders (BOCA, ICBO, and SBCCI) developed the three sets of building codes common throughout the country.

In a similar vein is the work of organizations like the National Conference of Commissioners on Uniform State Laws. The conference works for the uniformity of state laws and promotes that principle by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable. The Uniform Commercial Code, perhaps the best known example of that work, is not without its effects on local government. Its revised Article 9 no longer contains the exception for transfers by a government or governmental subdivision of old Article 9.

Local government then is no stranger to standardization, but that is not really the point of controversy. The controversy is about which level of government is to be responsible for which functions and activities. More than a question of allocation, it has implications for the relationships between levels of government and the relationships among governments on the same level. As de Tocqueville observed, "County and township are not constituted everywhere in the same way, but one can say that the organization of township and county in the United States everywhere depends on the same idea, viz., that each man is the best judge of his own interest and the best able to satisfy his private needs. So township and county are responsible for their special interest. The state rules but does not administer. One finds exceptions to that principle, but no contradictory principle."

1710 and NFPA 1720 are not automatically binding on local governments. “[J]urisdictions which believe that NFPA 1710 is not appropriate to its [*sic*] local circumstances are free to decline to adopt it.”⁷ This is perhaps too simple a response. As the opponents recognized, control over adoption is not exclusively in the hands of local government. It could apply through local action such as an ordinance or a fire department’s internal rule. However, in some instances it might apply through a collective bargaining agreement. In other instances it might apply to local governments through a provision of state law. In still other instances it might apply to them through the “general duty” standard of the Occupational Safety and Health Act, as sometimes happened with the industrial fire brigade standard.⁸ Perhaps a larger concern is that in still other instances the standards might apply to local governments in the context of a lawsuit alleging negligence. Assuming that a fire department is not immune from suit, a potential plaintiff could try to show that the NFPA standard represents the standard of care owed by a local government to an injured party.

Content of NFPA 1710

NFPA 1710 applies to fire departments that are “substantially all career.” An NFPA survey suggests that 3,300 to 3,600 of the more than 30,000 fire departments in the United States would fall within its scope. In contrast, NFPA 1720 applies to fire departments that are “substantially all volunteer.” Neither standard contains a specific definition of the term nor does either standard refer to combination departments. The International Association of Fire Chiefs (IAFC) suggests it is possible to fall under both NFPA 1710 and NFPA 1720 where, for example, emergency medical service is “substantially all career” and fire suppression is “substantially all volunteer,” or vice versa.⁹

The heart of NFPA 1710 is its fire suppression staffing and response times. Among the more controversial of these provisions is the requirement that fire companies have a minimum of four on-duty personnel (§ 5.2.2.1.1). Sometimes misperceived as a requirement that a department have four persons on every rig, the definition of “company” in the standard (§ 3.1.8) allows for the possibility that the four-person company results from multiple-vehicle responses or mutual aid. Beyond this requirement for the first four-person company at an incident, the standard goes into detail about how many persons are required for a full alarm assignment. A full alarm response could require fourteen or fifteen persons including firefighters, command personnel, equipment operators, and support personnel (§ 5.2.3).

Another of the more controversial provisions concerns response times. NFPA 1710 sets an objective of four minutes or less for the arrival of the first engine company and/or eight minutes or less for the deployment of a full first alarm assignment at a fire incident 90% of the time. These times begin after allowing for a one-minute turnout time. According to IAFC, a response that misses

the four-minute criterion (four-person team) but achieves the eight-minute criterion (fourteen-person team) still complies with NFPA 1710.¹⁰

NFPA 1710 applies to emergency medical services (EMS) as well as to fire suppression. The standard (§ 5.3.2) recognizes three basic treatment levels - first responder, basic life support (BLS), and advanced life support (ALS) - and provides that all firefighters who respond to emergencies must have first responder training. It further divides EMS into five basic functions - initial response, BLS response, ALS response, patient transport, and quality management. NFPA 1710 calls for a four-minute response time for first responder (or better) capability, followed by an eight-minute response time for an ALS unit.

Content of NFPA 1720

NFPA 1720 generated less heat compared to NFPA 1710. The following table compares the two.¹¹

	<u>1710</u>	<u>1720</u>
First-unit response time	4 minutes/90%	N/A
Initial Full Assignment response time	8 minutes/90%	N/A
First-unit staffing/arrival	14 minimum	N/A
Assignment staffing	14/15	5
Initial attack time	N/A	2 minutes/90%
Annual evaluation	yes	no
Quadrennial report	yes	no

As the table indicates, the standards for volunteer departments are different, but NFPA 1720 is more demanding of volunteer departments than historically has been the practice.

Examples of NFPA 1720’s requirements include written rules and regulations, standard operating procedures, and orders (§ 4.1.1) and a community risk management plan (§ 4.1.2). The department must be organized into company units on response teams (§ 4.1.4) and identify the minimum staffing required for safe and efficient operations (§ 4.1.5).

At the fire scene, an identified Incident Commander must be responsible for the direction of all activities (§ 4.2.1.2). Company officers must be aware of the identity, location, and activity of every person (§ 4.2.1.4), and each person must be aware of the identity of the company officer (§ 4.2.1.5). Upon assembling the necessary resources, the department must have the capability to safely initiate attack within two minutes 90% of the time (§ 4.2.2.1). Except in life-threatening situations, the ini-

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DECISIONS OF NOTE



KENTUCKY SUPREME COURT

Separation of Powers - Practice of Law

On a request for a certification of law from the United States Court of Appeals for the Sixth Circuit [see below], the Kentucky Supreme Court certifies that the General Assembly did not violate separation-of-powers principles by enacting KRS §§ 21A.300 and 21A.310(1). The statutes impose criminal sanctions on practicing attorneys who solicit accident or disaster victims by direct mail within 30 days of the event. The court sees a distinction between its power governing the admissions and ethical conduct of attorneys and the General Assembly's power to define and provide sanctions for criminal conduct. The majority finds a parallel in criminal sanctions for the unauthorized practice of law, a point that the dissent finds "perplexing." *Chambers v. Stengel*, 37 S.W.3d 741 (Ky. 2001).

Workers' Compensation - Attorneys Fees

An arbitrator awarded a benefit to an injured city worker, after which the city sought review by an administrative law judge. When the city did not prevail, the ALJ awarded attorney fees to the injured worker pursuant to KRS 432.320(2). The court holds that this statute is unconstitutional. Its "indiscriminate imposition of attorney fees . . . on an employer who loses in arbitration . . . violates the [city's] right to procedural due process." In the opinion of the court, the only purpose of the statute is to punish an employer who brings an appeal in good faith. That, the court holds, "is a pure act of arbitrary power that violates Section 2 of the Kentucky Constitution." *City of Louisville v. Slack*, 39 S.W.3d 809 (Ky. 2001).

Student Athletes - Eligibility

A student athlete declared ineligible by the NCAA sought an injunction in Circuit Court requiring the NCAA to reverse its decision. The trial court granted a temporary injunction and the Court of Appeals affirmed. Finding the decision of the trial court to be clearly erroneous both in its assessment of the athlete's likelihood of success on the merits and in its balancing of the equities, the Supreme Court reverses. Further, the court decides that a trial court cannot enjoin an athletic association from imposing agreed-upon restitutionary sanctions. In so deciding the court overrules *Kentucky High School Athletic Association v. Hopkins Co. Bd. Educ.*, 552 S.W.2d 685, (Ky. App. 1977). *National Collegiate Athletic Association v. Lasege*, 53 S.W.3d 77 (Ky. 2001).

Sovereign Immunity - Proceeds from Insurance Policy

A patient at a county-owned hospital sued for an in-

jury caused by a hospital employee. The Circuit Court dismissed the action as barred by sovereign immunity, and the Court of Appeals affirmed. At issue before the Supreme Court was whether KRS 67.186(3) "permits a suit to be brought against a county hospital for the sole purpose of measuring a negligence claimant's entitlement to proceeds from the hospital's policy of liability insurance." The court finds that it does. The court viewed the statute as a legislative codification with respect to county hospitals of the holding in *Taylor v. Knox County Bd. Educ.* [purchase of insurance by an otherwise immune governmental agency effects a partial waiver of sovereign immunity to the extent of the limits of the available insurance]. *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001).

Freedom of Speech - Public Employees

A county clerk drafted a letter on private stationery supporting the candidacy of a person running for state senator and directed his secretary to deliver it to the clerk's employees. Upon a complaint, the Kentucky Registry of Election Finance found that the letter violated KRS 121.310, which made it unlawful for an employer to circulate a statement asking employees to vote for any person. The Court of Appeals struck down the statute as overbroad, and a sharply divided Supreme Court affirms. For the majority the statute burdens core political speech without a compelling justification. It patronizes the public employee and assumes a lack of free will when casting a secret ballot. The dissenters would find that the statute furthers the government's interest in free elections and is an even-handed restriction on the partisan political activities of public employees. *Kentucky Registry of Election Finance v. Blevins*, 57 S.W.3d 289 (Ky. 2001).

School Teachers - Evaluation

A tenured high school teacher received a letter from the high school principle informing him that the principal would not recommend renewal of the teacher's coaching contract. The superintendent accepted the principal's recommendation. The teacher brought an action against the district board of education alleging that he was entitled to a formal evaluation before a decision not to renew his contract as coach. The Supreme Court held that the teacher was not entitled to a formal evaluation as coach prior to non-renewal of the contract because the evaluation requirement in KRS 156.101(6) is limited to the activities of teaching and administration. The Supreme Court noted that, in enacting the statutes, the General Assembly was interested in providing the public with information about the performance of certified school personnel, not with information about the performance of a school's sports teams. *Board of Education of Erlanger-Elsmere School District v. Code*, 57 S.W.3d 820 (Ky. 2001).

KENTUCKY COURT OF APPEALS



Land Use - Mobile Homes

A city zoning code required the placement of mobile homes only in mobile home parks. Property owners sought approval to place a double-wide manufactured home on a lot not in a mobile home park. The city denied them permission, and the owners then challenged the zoning code. The court treats the issue before it, whether mobile homes can be excluded from certain zoned areas within the municipality, as one of first impression. Because Kentucky cities have the power to enact zoning ordinances to protect the value of neighboring properties, a city can do so by limiting the placement of mobile homes to mobile home parks. The zoning ordinance was a proper exercise of the police power. *McCollum v. City of Berea*, 53 S.W.3d 106 (Ky. App. 2000).

Sex Discrimination - Unwed Mother

A mid-management employee at a community college attributed the college's refusal to move her to faculty status to her status as an unwed mother. She sued, alleging a violation of the Kentucky Civil Rights Act (KRS Chapter 344). The trial court found that status as an unwed mother was not protected by the act, but the Court of Appeals disagreed. However, although a member of a protected class, the employee could not meet her burden of proof in her action. The college had a nondiscriminatory reason for its refusal to reclassify her as faculty. The asserted claim of sovereign immunity fails since under the Civil Rights Act sovereign immunity is expressly waived. *Tiller v. University of Kentucky*, 55 S.W.3d 846 (Ky. App. 2001).

UNITED STATES SUPREME COURT



Americans with Disabilities Act - Disability Defined

Claiming to be disabled by carpal tunnel syndrome and related impairments, an assembly line worker sued her former employer for failing to provide her with a reasonable accommodation as required by the Americans with Disabilities Act of 1990 (ADA). The Court holds that the ADA's disability definition guides what an individual must prove to demonstrate a substantial limitation in the major life activity of performing manual tasks. The court holds that in order for performing manual tasks to meet this definition, the tasks in question must be central to daily life. It is insufficient for individuals attempting to prove disability status under this test merely to submit evidence of a medical diagnosis of impairment. The central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives,

not to occupation-specific tasks. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. ____ (January 8, 2002).

Free Speech - Park Permits

A group seeking to hold a rally in a park challenged the park's permit requirement as an unlawful prior restraint. The court found the requirement to be a valid time, place, and manner restriction on the use of a public forum. See *Be It Ordained . . .* elsewhere in this issue. *Thomas v. Chicago Park District*, 534 U.S. ____ (January 15, 2002)

Employment Discrimination - Binding Arbitration

A company's employees must each sign an agreement requiring employment disputes to be settled by binding arbitration. After the company fired him, one employee filed a timely discrimination charge with the Equal Employment Opportunity Commission (EEOC) alleging that his discharge violated the Americans with Disabilities Act of 1990. The EEOC subsequently filed an enforcement suit. The company petitioned under the Federal Arbitration Act (FAA) to stay the EEOC's suit and compel arbitration. However, the court rules that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an ADA enforcement action. *EEOC v. Waffle House, Inc.*, 534 U.S. ____ (January 15, 2002).

Educational Records - Right of Privacy

A parent of three children in public school claimed that peer grading embarrassed her children. She asked the school district to adopt a policy banning peer grading, but it declined to do so. She then filed a class action suit in the United States District Court alleging that the peer grading policy violated the Family Educational Rights and Privacy Act of 1974 and an appeals court agreed. The Supreme Court rejected that interpretation as one that "would effect a drastic alteration of the existing allocation of responsibility between States and the National Government in the operation of the Nation's schools." The student papers are not educational records because, at the point of grading, the student papers are not "maintained" within the meaning of the Act and because a student grader is not "a person acting for" the school district. *Owasso Independent School District v. Falvo*, 534 U.S. ____ (February 19, 2002).

Prisoners' Rights - Exhaustion of Remedies

The Prison Litigation Reform Act of 1995 provides that, with respect to prison conditions, a prisoner may not sue under Federal law until he has exhausted available administrative remedies. Without following available procedures, an inmate commenced a federal court action charging a violation of the Eighth Amendment's ban on "cruel and unusual punishments." The court holds that the statute's exhaustion requirement applies

to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. *Porter v. Nussle*, 534 U.S. ___ (February 26, 2002).

UNITED STATES COURT OF APPEALS



Practice of Law - Solicitation

A personal injury attorney who, before the enactment of KRS §§ 21A.300 and 21A.310, routinely engaged in direct-mail solicitation of accident victims challenged the constitutionality of those statutes. After the District Court enjoined enforcement of those portions the state agreed were improper, there remained the portions of the statute that imposed a thirty-day prohibition of attorney solicitation of victims following an accident, injury, or disaster. The Court of Appeals upholds the statutes against due process, equal protection, and First Amendment attack. The due process attack based on vagueness fails because the statute uses common terms that give fair notice of the conduct prohibited. The equal protection attack fails because the limitation to attorneys in the statutes is narrowly tailored to further substantial governmental interests. The First Amendment attack fails because the statutes' scope is proportional to the state's interest in protecting against an invasion of privacy that reflects poorly on the practice of law. *Chambers v. Stengel*, 256 F.3d 397 (6th Cir. 2001).

Sentencing Guidelines - Enhancements

Two employees of a county water district were convicted of making materially false statements regarding a matter within the jurisdiction of the federal government (18 U.S.C. § 1001). They submitted reports to the Kentucky Division of Water that contained falsified turbidity measurements. Both the government and the defendants appealed the sentences imposed. The Court of Appeals affirmed that the "Abuse of Trust" enhancement and the "Special Skill" enhancement in the U.S. Sentencing Guidelines applied to the actions of the district employees. *United States v. White*, 270 F.3d 356 (6th Cir. 2001).

Free Speech - Retaliation

An elementary school teacher presented to her fifth grade class information regarding industrial hemp. Following this event, the district fired her for insubordination, conduct unbecoming a teacher, inefficiency, incompetency, and neglect of duty. She mounted several challenges to the dismissal, including one in federal court. The District Court agreed to abstain from deciding her state law breach of contract claim and granted summary judgment in favor of defendants as to her First Amendment retaliation claim. The Court of Appeals reasoned that the teacher's selection of a speaker for an in-class presentation was protected speech touching on a matter of public concern. Hold-

ing that a genuine issue of material fact existed as to whether teacher would have been terminated had she not engaged in constitutionally protected activity, it remanded the matter to the district court. *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001)

UNITED STATES DISTRICT COURT



Civil Rights - Sexual Orientation

A physician whose practice is in Louisville challenged the Louisville city and Jefferson county ordinances prohibiting discrimination on the basis of sexual orientation. He contended that his religious beliefs were so in conflict with the ordinances that he would not comply with them, and thus he risked prosecution. The court rejected the claim because, as religion-neutral laws of general applicability, the ordinances were consistent with the Free Exercise Clause of the federal constitution and with § 5 of the Kentucky Constitution. The physician also challenged the ordinances as violations of the Free Speech, Equal Protection, and Due Process clauses and on grounds of state preemption. The court rejected these theories as well. *Hyman v. City of Louisville*, 132 F.Supp.2d 528 (W.D.Ky. 2001).

Government Employees - Immunity

During the course of divorce proceedings, the wife alleged that the husband had improper sexual contact with their daughter. A Family Services Worker substantiated the charges. The husband then sued various employees of the Cabinet for Families and Children alleging various acts of negligence and other improprieties on their parts. The defendant employees asserted that they were absolutely immune from suit, but the court rejected the argument because their actions were investigatory, not prosecutorial. However, the court finds that the defendants were entitled to qualified immunity. *Edwards v. Williams*, 170 F.Supp.2d 727 (E.D. Ky. 2001).

Fair Labor Standards Act - Wages and Hours

Retired city firefighters claimed that, by miscalculating their hourly rate of pay in determining overtime compensation, the city violated the federal Fair Labor Standards Act, the state wages and hours law (KRS Chapter 337), and their collective bargaining agreement. The city moved to dismiss. The court granted the city's motion with respect to KRS Chapter 337 because those claims first must be brought administratively. The court denied the rest of the motion, allowing the remaining claims to proceed, and declined to abstain in the matter under either the *Colorado River* or *Burford* doctrine. *Hasken v. City of Louisville*, 173 F.Supp.2d 654 (W.D. Ky. 2001).

STATES EYEING SIN TAXES

By Jason White*

Sin is in. Or at least the taxation of it is, if recent actions by state legislators and governors are any indication.

With almost every state running a budget deficit, lawmakers in at least thirty of them are looking to garner additional revenue by raising tobacco or alcohol taxes or expanding gaming — the so-called ‘sin taxes.’ In most cases, state lawmakers are doing so in lieu of increasing broader sales or income taxes, fearing the reprisal of voters in this major election year.

“Knowing that lawmakers are rather reluctant this year to raise general revenues, they are looking at alternatives. And sin taxes would fall in the sort of gray areas for states,” says Arturo Perez, fiscal analyst for the National Conference of State Legislatures. “These revenue enhancing measures are somewhat more palatable than income or sales tax increases.”

Twenty-three states are actively pursuing tobacco tax increases, according to NCSL. Thirteen are weighing proposals to increase alcohol taxes. And roughly 28 states have seen proposals to expand gaming operations and scope, according to a national anti-gambling group.

“It’s a feeding frenzy,” says Tom Grey, spokesman for the National Coalition Against Legalized Gambling. “Since Sept. 11, with the budget crisis, the gambling industry is back pushing its products.”

A Deutsche Bank report found that New York, Kentucky and Pennsylvania are highly likely to expand gambling in 2002, while Hawaii, Maryland and Ohio are all rated as having a “moderate” chance.

So far this year, Ohio has announced plans to join a multi-state lottery game — the Big Game — from which the state hopes to harvest \$41 million in new lottery profits next year. Pennsylvania recently decided to join the 23-state Powerball game.

“For those states that have made the decision to join multi-state games, it could mean more money,” says David Gale, executive director of the North American Association of State and Provincial Lotteries.

But despite the profits gambling promises, not every state is leaping at the chance to expand its games. New Hampshire lawmakers rejected a proposal to bring video slot machines into the state. Fearing an increase in crime associated with the machines, the New Hampshire Association of Chiefs of Police was among those leading the fight against the bill. And last month, a Hawaii House committee voted down bills authorizing casino gambling, while Senate lead-

ers said they don’t plan on hearing any gambling bills.

“My read is we’re going to win some and lose some,” says the NCALG’s Grey.

Analysts say many more states can be expected to raise their cigarette taxes.

New York lawmakers approved in mid-January a cigarette tax increase of 39 cents, which officials hope will generate \$150 million in fiscal year 2002. When the law takes effect in April, New York’s cigarette tax will be \$1.50 per pack, the highest in the nation.

In Hartford, Conn., Republican Governor John Rowland proposed a 61-cent per pack increase that would generate \$30.8 million in additional revenue in fiscal year 2002 and \$122.3 million in fiscal year 2003. At \$1.11, Connecticut’s tax would be third highest in the nation. The Hartford Courant reports the tax increase is proceeding on a fast track at the Capitol, with a single public hearing on the plan scheduled, and legislators aiming for a vote as early as Feb. 27.

Proponents of cigarette tax increases say they are good policy because they generate revenue and lead to a decrease in smoking.

“We are in a terrible budget deficit,” says Kentucky Rep. Mary Lou Marzian, in announcing her proposal to increase the state’s tobacco tax from 3 cents to 47 cents per pack [HB 677 - Ed.]. “It just seems like the right thing to do, with our tobacco tax being among the lowest in the nation and with our state being the highest in youth smoking.”

In addition, lawmakers can pass them off as voluntary taxes.

“If you don’t want to pay for it, don’t smoke,” said Minnesota Gov. Jesse Ventura, who proposed raising his state’s cigarette tax by 29 cents.

Cigarette manufacturers have been waging a state-by-state campaign against the proposed increases. “There’s a very good argument to be made that adult cigarette smokers are paying more than their fair share of taxes,” says Tom Ryan, spokesman for Philip Morris USA. “Cigarettes are among the highest taxed consumer goods available. The average cost of cigarettes is about \$3.35 per pack. Half of that is going to state and federal governments.”

In addition, some tax analysts fret about the regressivity of cigarette taxes.

“By and large this is a vice of the poor,” said Bill Ahern, spokesman for the Tax Foundation, a national clearinghouse for information on tax policy. “So when

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* Jason White is a Staff Writer for Stateline.org. This article is used with permission.

BE IT ORDAINED . . .

An Illinois statute gives the Chicago Park District the responsibility to operate public parks and other property in Chicago and the power to enact ordinances for their government and protection. One such ordinance requires an individual to obtain a permit before conducting large-scale events. In *Thomas v. Chicago Park District*, 534 U.S. (January 15, 2002), the United States Supreme Court upheld that ordinance against a First Amendment attack.

The petitioners in the case had applied to the park district on several occasions for permits to hold rallies advocating the legalization of marijuana. The park district had granted some permits and denied others. Unhappy with their treatment by the park district, petitioners filed suit claiming that the ordinance was facially unconstitutional as a form of prior restraint on speech. The Supreme Court rejected this contention.

The Supreme Court viewed the ordinance not as subject-matter censorship, but as a content-neutral time, place, and manner regulation of the use of a public forum. The object of the ordinance was to coordinate multiple uses of limited space, not to exclude communication of a particular content. This “traditional exercise of authority” did not raise censorship concerns for the court.

Content-neutral time, place, and manner regulations can be applied in a way that stifles free expression. For that reason, case law requires that the regulations contain adequate standards to guide an official’s decision and render it subject to effective judicial review. The court found that the ordinance at issue passed that test. Here is the ordinance.

Code of the Chicago Park District

SECTION C. PERMITS.

1. Designation of Park Facilities.

a. Proposed Designation.

The General Superintendent shall classify all park property under a uniform system of classification and designate for each such classification the use or uses which, in his/her judgment, should be permitted therein. Categories of classifications which the General Superintendent shall designate may include, but are not limited to, parks, playgrounds, playlots, fieldhouses, boat harbors, and leased facilities. The General Superintendent shall classify all park property under the following classification system:

- (1) public forums;
- (2) limited use areas;
- (3) areas or facilities not designated for public assembly; or
- (4) special facilities.

The General Superintendent shall then record the designations for each park and shall trans-

mit the same promptly to the Board, which shall then approve, amend or reject the designations. Thereafter, the General Superintendent may, from time to time, as he/she shall deem necessary and proper, amend or revise his/her designations and shall promptly transmit in writing the amendments or revisions to the Board, which shall approve, amend or reject the same. All such designations, and the General Superintendent’s amendments and revisions thereof, shall be in full force and effect from the time that the same are expressly approved as such or as amended by the Board.

b. Public Review of Proposed Designation.

Simultaneous with the transmission to the Board of the plats or maps required by this ordinance, or of any written amendments or revisions thereof, the General Superintendent shall file a duplicate copy of the same with the Secretary, which duplicate copy shall be available for public inspection and copying in the Office of the Secretary during normal business hours.

2. Rules and Regulations.

The General Superintendent may, from time to time, establish reasonable rules and regulations, for the use of each facility in the Park System and for obtaining permits pursuant to this chapter. Such rules and regulations shall be based on a due regard for the purpose for which the facility is established, the safety of those using the facility, of park Employees and of the public, the safety and maintenance of Park District property, the need for and the availability of supervisory personnel, and the maximum number of people who can safely use the facility at one time. Subject to the foregoing, and except as hereinafter provided, all Park District facilities may be used by members of the general public, without permit, for recreational and athletic purposes not inconsistent with the nature of the facility and the safety of the public and of Park District property.

3. Permit Requirement.

a. General.

No person shall, without a permit:

- (1) conduct a public assembly, parade, picnic, or other event involving more than fifty individuals;
- (2) circulate or distribute any leaflets, handbills, notices, pamphlets, books, documents or papers of any kind in any indoor facility, fieldhouse, garden, zoological garden or other special facility;
- (3) conduct any exhibit, music or dramatic performance, fair, circus, concert, play, radio or television broadcast, other than a news transmission;

- (4) exhibit or display any motion picture, television program, light or laser light display, or similar event;
- (5) operate a vehicle, except upon a publicly dedicated street, alley, watercourse or other thoroughfare which may abut or traverse a park;
- (6) create or emit any Amplified Sound, except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so as not to interfere with the use and enjoyment by another person;
- (7) station or erect any building, tent, canopy, stand, bandstand, stage, tower, scaffold, sound stage, platform, rostrum or other structure;
- (8) station or use any electrical or electronic device or equipment that would require outdoor auxiliary power;
- (9) sell or offer for sale any goods or services;
- (10) display, post or distribute any placard, handbill, pamphlet, circular, book or other writing containing commercial advertising matter within the Park System;
- (11) bring, land or cause to ascend or descend or alight within the Park District, any airplane, helicopter, flying machine, balloon, parachute or other apparatus for aviation;
- (12) conduct any sporting event;
- (13) ride any Horse on any driveway, roadway, path or trail; or
- (14) bring onto property a tame, non-domestic supervised and controlled or restrained animal for limited non-commercial or promotional purposes.

b. Permits for Activities Involving More Than 500 Individuals.

No activity involving more than five hundred individuals shall be held within two thousand five hundred feet nor within two hours of any other activity involving more than five hundred individuals.

4. Application for Permits.

a. Filing Written Application.

- (1) **Special Event Permit**
Any person seeking the issuance of a permit shall apply for a permit by filing a written application for permit on a form and within such time as shall be prescribed by the General Superintendent. Applications involving any of the following activities shall be filed with the Region Manager for the region in which the special event is to take place, or his/her designee:
 - (a) an event involving more than fifty individuals;
 - (b) the sale or offering for sale of any good or service;

- (c) the sale or service of alcohol on Park District property;
- (d) advertising or commercial activities;
- (e) activities involving more than one park;
- (f) a religious or partisan political event;
- (g) creation or emission of any Amplified Sound, except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so as not to interfere with the use and enjoyment by another person;
- (h) stationing or erecting any building, stand, bandstand, stage, tower, tent, canopy, scaffold, sound stage, platform, rostrum or other structure;
- (i) use of any electrical or electronic device or equipment requiring outdoor auxiliary power;
- (j) bring, land or cause to ascend or descend or alight within the Park District, any airplane, helicopter, flying machine, balloon, parachute or other apparatus for aviation;
- (k) riding of a Horse or Horses; or
- (l) use of mechanical rides (which may be permitted only on hard surfaces).

(2) **Media/Motion Picture/Commercial Photography**

Any person seeking the issuance of a permit for filming of a media broadcast (other than a news transmission), motion picture, or still commercial photography shall file a written application for permit with the General Superintendent or his/her designee on a form and within such time as shall be prescribed by the General Superintendent.

(3) **Recreational Permits**

Any person seeking to reserve Park District facilities for any event involving less than fifty people and not including the items covered in paragraph 4(a) (1), above, shall file a written application with the park/playground supervisor where the event is proposed to take place on a form and within such time as shall be prescribed by the General Superintendent.

(4) **Special Facilities**

Any person seeking the issuance of a permit for use of Park District property designated as a special facility shall file a written application for permit with the General Superintendent or his/her designee on a form and within such time as shall be prescribed by the General Superintendent.

b. Application Fee.

For any activity described in this chapter, Section C.4.a, no application for permit shall be considered unless the applicant shall have paid at the time for filing an application for permit the re-

quired application fee in an amount in accordance with the schedule of fees set by the General Superintendent and approved by the Board.

c. Indemnification and Reimbursement Agreement.

No application for permit shall be granted unless the applicant shall have executed an agreement with the Park District, on a form to be prescribed by the General Superintendent, in which the applicant shall promise and covenant to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park District for any such costs incurred by the Park District; and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organization, its Officers, Employees or agents or any person under their control insofar as permitted by law.

d. Security Deposit.

For any activity described in this chapter, Section C.4. (a) (1), Section C.4. (a) (2) or Section C.4. (a) (4), no application for permit shall be granted unless the applicant has paid, within the time prescribed by the General Superintendent, the security deposit in an amount in accordance with the schedule of fees set by the General Superintendent and approved by the Board. The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the park upon the conclusion of the use or activity. The security deposit shall be deposited by the Park District into an escrow account. Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee.

(1) If it is determined that there has been no damage to Park District Property or equipment beyond reasonable wear and tear, the security deposit shall be refunded in full within thirty (30) days of the conclusion of the permitted event.

(2) If it is determined by such inspection, that the permitted event proximately caused damage to Park District property in excess of normal wear and tear and which requires repairs in excess of routine maintenance or determined that fines should be assessed against the permittee pursuant to this chapter, Section C.7., below, the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost repair or any fines assessed against the permittee. The General Superintendent or his/her designee shall given written notice of the assessment of damages or fine and retention of the security deposit to the per-

mittee by personal delivery or by deposit in the United States mail, with proper postage prepaid to the name and address set forth in the application for permit. Any assessment of damages or fine in excess of the security deposit shall be paid to the Park District within ten (10) days after notice of such assessment of damages or fine is sent. Retention of all or a portion of a security deposit shall be subject to the appeal procedures contained in Section C.6., below. An assessment of damages or fine in excess of the security deposit shall be subject to the appeal procedures contained in Section B.18(b) and (c)., above.

e. Fees for Use of Park Facilities.

No application for permit shall be granted unless the applicant has paid, within the time prescribed by the General Superintendent, a user fee and any other required fee in an amount in accordance with the schedule of fees set by the General Superintendent and approved by the Board. No application for permit shall be granted unless all required fees are paid as specified in paragraph 5(b), below.

f. Insurance.

Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District and shall name Park District as an additional insured thereunder. The amounts and type of insurance required shall be determined by the Division of Risk Management, based upon the nature of the activity and the risk involved. The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District property, and within the time prescribed by the General Superintendent. The certificate shall also provide that the insurer shall give the Park District reasonable advance notice of insurers intent to cancel the insurance coverage provided.

g. Permits Not Transferable.

No permit or preliminarily approved permit application may be transferred.

5. Processing of Application for Permits.

a. Order.

Applications for permits shall be processed in order of receipt; and the use of a particular park or part thereof shall be allocated in order of receipt of fully executed applications accompanied by the application fee.

b. Conditional Approval.

Applications for permits for activities or events which require insurance, approval or permits from other governmental entities, or compliance

with other terms or conditions, will be reviewed and, if the application otherwise conforms to all other requirements, a conditional approval will be issued. If, within the time prescribed by the General Superintendent, any required fee or security deposit is not paid, or an insurance certificate evidencing the requisite insurance is not filed with the Division of Risk Management, or the approval or permit of other governmental entities has not been received, or the other terms and conditions have not been met, the conditional approval will automatically expire, the application for permit will be deemed denied and no written notice of denial will be required. For events or activities which involve the use of special facilities, or activities described in this chapter, Section C.4.a. (1) (c), (d), (g), (h), (i) or (j), above, all terms and conditions for issuance of the permit, including securing insurance and payment of all fees and security deposit, must be completed at least thirty days prior to the event unless a longer time period is prescribed by the General Superintendent.

No permit shall be issued unless all applicable fees and security deposit are paid within the times prescribed by the General Superintendent. Failure to pay fees or security deposit within that time shall cause the application to be deemed denied, without further notice to the applicant.

c. Written Denials.

If no written denial or conditional approval is issued within fourteen days of the date on which a permit application is fully completed, executed and filed with the appropriate Officer or Employee, as designated by the General Superintendent, the application shall be deemed to have been granted a conditional approval pursuant to Section 6.b., above. Provided, however, the Park District may extend the period of review for an additional fourteen days by issuance of a written notice of extension. If, prior to the expiration of the extended review period, no written denial is issued, the application for permit shall be deemed to have been granted a conditional approval pursuant to Section 6.b., above.

d. Notice of Extended Review or Denial or Issuance of Permit.

Written notice of denial or notice of extension shall be served on the applicant by personal delivery, or by deposit in United States mail, with proper postage prepaid, to the name and address set forth on the application for permit.

e. Contents of Notice; Grounds for Denial.

Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application or permit has been

denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District shall propose an alternative place, if available for the same time, or an alternative time, if available for the same place.

To the extent permitted by law, The Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:

- (1) the application for permit (including any required attachments and submissions) is not fully completed and executed;
- (2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;
- (3) the application for permit contains a material falsehood or misrepresentation;
- (4) the applicant is legally incompetent to contract or to sue and be sued;
- (5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;
- (6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part hereof;
- (7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;
- (8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;
- (9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

- (10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;
- (11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent; or [*sic*].

f. Amendment or Revision of Applications.

Any amendment or revision of an application or permit shall for purposes of determining the priority of the application for permit, relate back to the original filing thereof; but the time in which the Park District shall grant or deny the application for permit and serve notice of such granting or denial shall be computed from the date of the amendment or revision.

6. Procedures for Review; Waivers.

a. Review by General Superintendent.

- (1) Any applicant who is denied a permit or denied a request for a waiver of user fee, security deposit, or certificate of insurance, or a permittee who has had all or a portion of its security deposit retained because it was assessed damages or a fine pursuant to this ordinance may, within seven days of the service of notice of such determination, file a written appeal from such determination with the General Superintendent;
- (2) The General Superintendent shall have seven days from the date on which the appeal was received in which to serve upon the applicant a notice that lie/she has affirmed, modified or reversed the denial or retention of security deposit;
- (3) Such notice shall be deemed served upon the applicant or permittee when it is personally delivered or when it is sent by United States mail, with proper postage prepaid, to the name and address set forth on the application for permit;
- (4) If such notice is not served upon the applicant or permittee within seven (7) days of the date upon which the appeal was filed, then the denial or retention of security deposit shall be deemed reversed.

b. Form of Appeals.

Any appeals filed pursuant to this ordinance shall state succinctly the grounds upon which it is asserted that the determination should be modified or reversed and shall be accompanied by copies of the application for permit, the written notice of the determination of the Park District, and any other papers material to the determination.

c. Waiver of Requirements.

Any requirements for a user fee, security deposits, or certificate of insurance shall be waived by the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity. Fees for equipment and services shall not be waived pursuant to this subsection. Application for a waiver of a user fee, security deposit, or certificate of insurance shall be made on a form prescribed by the General Counsel and must include an affidavit by the applicant and sufficient financial information about the applicant to enable the General Counsel to determine whether the requirement(s) would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity. If it appears that the applicant does not have sufficient funds to satisfy the user fee requirement prior to the proposed event, but that the applicant intends to raise sufficient funds at the event, the General Counsel shall require the applicant to pay such user fee out of the proceeds of the proposed event. If no written denial is issued within fourteen (14) days of the date on which the application for such waiver is fully completed, executed and filed with the General Counsel, the waiver request shall be deemed approved, contingent upon the applicant complying with all other permit requirements. Denials of requests for such waivers shall be subject to the appeal procedures contained in Section 6.a, above.

7. Fines.

The violation by a permittee of the terms of his/her permit or the laws and regulations of the Park District shall subject the permittee to a civil fine of up to \$500. Each day that a violation continues shall be deemed a separate violation. Such fines may be assessed against any security deposit held by the Park District on behalf of the permittee, pursuant to this chapter, Section C.4.d., above. Any assessment of fines in excess of any security deposit shall be subject to the procedures contained in Section B.18., above.

8. Severability.

If any provision of this ordinance or the application thereof to any person or circumstance be held invalid, the remainder of this ordinance and the application of such provision to other persons or circumstances shall not be affected thereby. The Park District reserves the power to amend or repeal this ordinance at any time; and all rights, privileges and immunities conferred by this chapter or by acts done pursuant hereto shall exist subject to such power.

you raise these taxes, you're making a policy decision to plug the deficit, or whatever you're trying to do, with revenue from low-income citizens."

"Nonsense," says Pete Fisher, spokesman for the Campaign for Tobacco Free Kids, a group that advocates for raising tobacco taxes. "There is increasing evidence that lower-income people quit smoking at higher rates when the tax goes up than higher-income people do. The argument is just overwhelmed by the health benefits of the tax."

Many states are also considering alcohol tax increases. Nebraska lawmakers have introduced three bills to raise its alcohol tax, and Washington lawmakers are discussing an alcohol tax increase, hoping to dent the state's \$1.6 billion deficit.

But experts say that unlike tobacco, alcohol is a much more politically sensitive source to tap for money.

"In the past, it's always been very difficult to enact increases in alcohol taxes," says Lee Dixon, a spokesman for the National Conference of State Legislatures. "First, it touches on a lot more people than cigarettes. Second, people don't see it as the 'sin' that cigarettes are."



tial attack must be organized in a way that at least 4 members are assembled before making an interior attack (§ 4.2.2.2.). The fire department must have the capability for sustained operations and provide a dedicated rapid intervention crew (§ 4.2.2.4).

NFPA 1720 also requires written mutual aid agreements and fire protection agreements covering issues such as liability, injury, death, retirement, cost, and authorization for support services (§ 4.3.1). Procedures for training the personnel covered by those agreements must be in place (§ 4.3.2). Communications equipment for mutual aid companies must allow them to mesh with the companies with which they are responding (§ 4.3.3). Like its counterpart, NFPA 1720 covers emergency medical services and special operations such as hazardous materials response. It requires appropriate levels of training for these activities (such as to NFPA 472 for hazardous materials) and a health and safety program in accordance with NFPA 1500.

As noted earlier, NFPA 1710 and NFPA 1720 do not automatically apply to a fire department and might never apply. Applicable or not, however, fire departments and local governments could profit from familiarity with the standards as a means to assess the effectiveness of services provided and to identify gaps into which to insert community resources.

1. Both standards are available for a price from the National Fire Protection Association, Inc., 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101, (617) 770-3000. At the time of this writing, the list price was \$22.50 each.
2. See <http://www.nfpa.org>.
3. A similar tactic was involved in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).
4. Standards Council Decision (Long Form) D#01-11 (13 July 2001) at page 7.
5. *Id.* at page 8.
6. They read, "Nothing in this standard is intended to prohibit the use of systems, methods, or approaches of equivalent or superior performance to those prescribed in this standard. Technical documentation shall be submitted to the Authority Having Jurisdiction to demonstrate equivalency."
7. D#01-11 at page 7.
8. Under the Occupational Safety and Health Act, an employer has a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654 (a) (1). The fire brigade standard is at 29 C.F.R. 1910.156.
9. *NFPA 1710: A Decision Guide*, p.14, International Association of Fire Chiefs, 4025 Fair Ridge Drive, Fairfax, VA 22033, (703) 273-0911, available on-line at <http://www.iafc.org/downloads/index.shtml>.
- 10 *Id.* at 26.
- 11 *Id.* at 14.

OPINIONS OF THE ATTORNEY GENERAL

SUMMARIES OF SELECTED FORMAL OPINIONS OF THE ATTORNEY GENERAL

OAG 01-8

Subject: Authority of the Kentucky Community and Technical College System to prohibit an elected faculty of staff board member from voting on general employee salary and benefit issues.

Syllabus: The KTCTCS Board of Regents cannot prohibit the elected faculty or staff member from voting on general salary and benefit issues.

Synopsis: A narrow reading of the term “faculty compensation” is appropriate. Faculty and staff should not be permitted to act in their own personal interests by voting on individual salaries, but should be permitted to represent the interests of the faculty and staff at large in major decisions regarding compensation of these groups as a whole.

OAG 01-9

Subject: Authority of a school board or superintendent to grant an unpaid leave of absence.

Syllabus: A school board or superintendent may grant an unpaid leave of absence to a teacher or administrator for any reason that is specified in KRS 161.770.

Synopsis: KRS 161.770 permits the granting of a leave of absence only for education or professional purposes or where illness, maternity, adoption of a child or children or other disability is the reason for the request. A school board may not grant a “general leave.”

OAG 01-10

Subject: Authority of school superintendents to solicit or consider the comments and opinions of teachers in evaluating the job performance of school principals.

Syllabus: The Kentucky Board of Education may grant superintendents the authority to solicit or consider the comments and opinions of teachers in evaluating the job performance of school principals.

Synopsis: The process of conducting performance evaluations for school principals in Jefferson County schools is governed by 701 KAR 3:345. According to this process, comments and opinions of faculty may be considered by the superintendent if those comments and opinions relate specifically to the principal’s professional responsibilities.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

01-ORD-222

The Open Records Act allows an agency to withhold proprietary records confidentially disclosed to the agency within the scope of KRS 61.878(1) (c). In addition, an agency may withhold preliminary drafts, notes, and correspondence within the scope of KRS 61.878(1) (i). A city relied on these provisions when it denied a request for records related to the proposed construction of a cellular tower. After conducting his own review of the records at issue, the Attorney General upholds the city’s actions.

01-ORD-233

An agency cannot afford a requester access to a record the agency does not have. However, with respect to denials based on the non-existence of a requested record, an agency must at a minimum document what efforts were made to locate the requested records and offer some explanation for the non-existence of the records. The fiscal court’s failure to provide that explanation made its response procedurally deficient.

01-ORD-245

A researcher sought unrestricted access to the personnel files of former teachers now asserted to be deceased. The school denied unrestricted access because it had no information regarding whether the subjects were still alive. In earlier opinions the Attorney General took the position that it would be improper to deny access to the personnel file of a deceased teacher. That person’s right of privacy ended at the time of his or her death. Because the burden of proof in sustaining a denial to inspect records falls on the agency, the school here has the burden of determining whether the persons in question are still alive. In making a

determination whether a former employee is still living, the Attorney General would follow “an actuarial reasonableness standard.”

02-ORD-5

A county 911 center denied a request for a copy of the tapes of a call for assistance on the ground that release would constitute an unwarranted invasion of the caller’s personal privacy. Relying on *Zink v. Commonwealth*, 902 S.W.2d 825 (1994), the center asserted that release of the tape would have a chilling effect on those who would otherwise seek assistance of law enforcement. The Attorney General upholds the center’s action, finding that the agency provided specific justification to support a determination that the protection of the caller’s privacy interests outweighed the public’s right to know in this instance.

02-ORD-14

KRS 61.878(1) (l) authorizes public agencies to withhold public records made confidential by act of the General Assembly. This provision, together with Kentucky Rules of Evidence 503, excludes from public inspection those public records protected by attorney-client privilege. A board of education denied a request for records on the ground that they were protected by the privilege. Here the board properly relied on the privilege and on the exceptions for preliminary drafts and preliminary recommendations to the extent that the materials sought were not adopted as part of the board’s final action.

02-ORD-12

KRS 61.878(1) (k) authorizes public agencies to withhold public records made confidential by federal law. Following the events of September 11, 2001, the Federal Aviation Administration revised its regulations respecting information related to airport security. A regional airport authority properly relied on those regulations to deny a request for information about certain airport personnel and disciplinary actions involving them.

02-ORD-17

A public agency has no obligation to honor a request for information as opposed to a request for specifically described public records. Therefore, it does not subvert the intent of the Open Records Act when it produces the records in which the information is contained, even if that makes it expensive and cumbersome for the requester. An agency is not required to create a record or a limited number of records in response to a request.

02-ORD-19

A police agency provided redacted accident reports to two news organizations after reading KRS 189.635(5) and (6) together with KRS 61.878(1) (a). However, the Attorney General rules, the agency must make the entire report available. The limitation in KRS

189.635(6) on the news organization’s use of the information is not authority for the police department to withhold that information under KRS 61.878(1) (a). The rule of statutory construction is that a specific statute prevails over a general statute. Because KRS 61.878(1) (a) is a residual and general statute, it does not apply where a specific statute, here KRS 189.635(6), requires disclosure.

Under KRS 61.880 the Attorney General reviews complaints alleging violations of the Open Records Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision it has the force and effect of law. Copies of the decisions summarized here are available from the Local Government Law Center.

SUMMARIES OF SELECTED OPEN MEETINGS DECISIONS

02-0MD-6

A city council went into closed session to discuss the possible discipline of specific police officers and the possible dismissal of recently hired architects. In the course of those discussions, collateral issues arose concerning an increase in the insurance premium tax and the city’s comprehensive plan. The press objected to the discussion of these collateral issues in the closed session. The Attorney General agreed that the discussion was improper. Only discussion that was directly related to the possible discipline and dismissal was proper. KRS 61.810(1) (f) is a limited exception to the requirement of open meetings. It does not allow a general discussion of personnel matters to occur in secret.

02-0MD-11

Public agencies frequently hold work sessions in advance of their regular meetings. Unless the work session, too, is a regularly scheduled meeting, work sessions must be treated as special meetings subject to all the notice and procedural requirements for special meetings. For example, a special meeting requires an agenda where a regular meeting does not. Here the work session was a special meeting and failure to include an agenda with the notice was an error on the part of the agency.

Under KRS 61.846 the Attorney General reviews complaints alleging violations of the Open Meetings Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available from the Local Government Law Center.

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