Basic Principles of Annexation

by

William Elkins

Annexation

Through the passage of time, with population growths and decline in agricultural activity, cities have experienced the need to expand into new unincorporated territories to create larger urban areas. The Kentucky General Assembly has recognized this need to promote social- and economic growth and has provided a vehicle for cities to acquire new land to be included in their boundaries. This vehicle is annexation.

Chapter 81A of the Kentucky Revised Statutes provides for the annexation of unincorporated territories by all cities.

Chapter 81A begins by recognizing that cities are categorized into six classes. Chapter 81A designates these classifications based on population and other demographic factors. KRS 81.010 lists every city in its respective class.

Although annexation of unincorporated territory is similar for all classes and cities, there are some specific differences. Examination of the process of annexation should begin with the following common requirements of valid annexation, which run through each annexing statute:

1. The boundaries of every city shall remain unchanged unless enlarged by ordinance. Enlarging the boundaries of a city is done by annexation and every annexation begins with a “proposing ordinance” describing the area to be annexed and the desirability that it be annexed by the city.

2. Enacting an ordinance that proposes annexation requires: two public hearings prior to adoption of the ordinance; describing the territory to be annexed in the “proposed ordinance”; and developing and presenting a comprehensive plan for including the territory and providing services to the territory;

3. Property owners in the unincorporated territory must be sent notice of the annexation by first class mail. The notice must give the time and date of the next hearing on the matter and include a copy of the ordinance. The ordinance also must be published by newspaper at least once pursuant to notice requirements in KRS Ch. 424. The notice must provide an accurate description of the territory sought to be annexed. Publication also must include the time, place, and manner to protest the ordinance;

4. Following publication of the ordinance a waiting period must be allowed for property owners and resident voters in the affected area to demonstrate their opposition to the annexation; and

5. Following the waiting period, if the required opposition is not made, a city may enact an ordinance annexing the unincorporated territory. The ordinance must be filed, along with a map and demographic information of the territory, with the clerk of the county, Secretary of State, and the Department for the Department for Local Government.

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Recent Developments

Chase Local Government Law Center

During the past months, the Law Center was involved in some exciting projects, developed new projects, and underwent some changes. This August, the Law Center concluded its Summer Clinical Program and made a presentation to the Northern Kentucky City Clerk’s Association on the Model Procurement Code and public notice requirements.

Currently, we are developing a Model County Administrative Code for county governments and Model Hazardous Material Ordinances for the Kentucky Disaster & Emergency Services. These materials should be available this Fall. We are also constructing a web site, which should be operating by September. Also in September, the Law Center will be participating in the Kentucky League of Cities Annual Convention.

Finally, we are sorry to announce that effective June 30, 1998 Linda Taylor resigned as Director of the Law Center to return to Minneapolis, Minnesota. Professor Taylor also taught State and Local Government Law. We wish her success and happiness in her new endeavors.

Kathleen Gormley Hughes
Interim Director

Chase College of Law

Chase College of Law provided free tax preparation help again this year through the VITA (Volunteer Income Tax Assistance) program, administered under the direction of Professor Ljubomir Nacev. The program operated out of Brighton Center in Newport on Saturdays from February 7, 1998 through April 11, 1998.

Chase students Linda Averbeck, Laura Goodridge, Rick Hasebrock, Ken Kinder II, Dan Kruse, Kimberly Krzesowski, Mary Lepper, Mary Rauen, and Patia Tabar served as volunteers for the program. Also volunteering were Chase graduates Tomoyuki Otsuki, Glenn Rudolph and John Winkler.

This year the program assisted 148 taxpayers, who filed for $100,239 in tax refunds.

Kelly Beers, Associate Dean

Department for Local Government

The Department for Local Government, the Kentucky Local Issues Conference, Inc., and the Office of the Governor held the Governor’s Local Issues Conference in Louisville on August 18-20. Local officials, and local government delegates from across the Commonwealth attended this annual event.

The conference addressed the impact of recent legislation from the 1998 General Assembly, Regular Session, and new technical applications for state & local governments. Governor Patton once again hosted the Governor’s Round Table. Participants attended a reception honoring Senator Wendell H. Ford, and a reception hosted by Commissioner Arnold.

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Unincorporated Territories That May Be Annexed

While these five requirements could properly be regarded as steps in the process, there is one more requirement, which is the primary requirement: the territory to be annexed must be of a variety allowable by statute.

Annexation begins with a consideration of what type of territory may be annexed. Generally, territory not already incorporated by other municipalities or located in another county may be annexed. However, the territory to be annexed be contiguous to the existing city boundaries and possess characteristics such as population density, commercial use, institutional use, government use or subdivision of the land, that makes it urban in character or suitable for urban development. If the purpose of annexation is for urban development, the territory must be capable of being developed without unreasonable delay.

At times a city has sought to annex unincorporated territory not specifically within these limits. This usually occurs when a city proposes to annex a strip of land to cause a remote territory to be contiguous. The strip of land, usually a roadway, is commonly referred to as a “corridor.” The courts have come out two ways on these annexations. First, where the “corridor” possessed some urban value, the courts have allowed the annexation. Second, where the “corridor” had no urban value, the courts have invalidated the annexation.

In many other instances the annexation has sought to include large agricultural areas. Annexation of agricultural land alone is usually not allowable unless the owners consent, the land is part of a greater comprehensive plan, or the city can demonstrate the suitability of development without unreasonable delay.

Unincorporated Territories Occupied By Industrial Plants

One final consideration is in the case of unincorporated territories occupied by industrial plants. KRS Chapter 81A encourages industrial development by disallowing unfair annexation of unincorporated territories occupied by industry. However, the statutes do not entirely prevent such annexation. KRS 81A.510 provides three conditions which allow a city to annex these territories if:
(1) the representative of the industrial plants request to be annexed;
(2) the territory is included in a comprehensive and compact plan; and
(3) the registered voters in the territory equal fifty percent of the number of employees of the industrial plant(s).
Once a determination is made that the territory is fit for annexation, the annexation process may be considered. As mentioned above, annexation contains a five-step process common to all annexation. However, the differences included within these common steps, must be examined as well. These steps contain differences based on three criteria: (1) whether the city is a first class city; (2) whether the city is a first class city, with a cooperating agreement with the county, where the city is located; and (3) whether the city is classified as a second through sixth class city. Only two of these criteria are relevant because K.R.S. 79.310 requires an agreement between the first class city and its county. The examination of the process will contain two parts, one for cities of the first class with cooperating agreements and another for all other cities.

In the case of a first class city, with a cooperative agreement with its county, the city desiring to annex must hold two public hearings on the annexation to be proposed. Notice of the hearings must be published pursuant to K.R.S. Chapter 424. A first class city must also prepare a report explaining a comprehensive plan for the incorporation of the territory and extension of city services. The report must be prepared and available at the above mentioned hearings. The city may then propose an ordinance that accurately describes the area to be annexed and give notice of its intent to annex the territory. The mayor must deliver a copy of the ordinance to the clerk of the county who will have the questions, "Are you in favor of being annexed to the city of .......?" placed on the next general election following the second Tuesday in August that comes after delivery of the ordinance to the clerk. If more than fifty percent of the voters approve the annexation, the city may then enact an ordinance annexing the territory to the city. If less than fifty percent approve, the ordinance proposed for annexation fails.

For all other classifications of cities, second through sixth, the following process applies. The city must hold two hearings proposing that an annexation ordinance be enacted. The hearings must be published according to K.R.S. Chapter 424. The city must then enact a proposing ordinance. The ordinance describing the unincorporated territory to be annexed must be published. The property owners must be sent notice individually by first class mail. The city must then wait sixty days for any protest. Protests must be presented, in the form of a petition, to the mayor of the city. In order for the protest to be of consequence, fifty percent of the property owners and resident voters must petition the mayor. If an adequate protest is made, the mayor must present a certified copy of the ordinance to the clerk of the county, who shall place the question, "Are you in favor of being annexed to the city of .......?", on the ballot at the next regular election. If less than fifty-five percent of the voters oppose the annexation the territory becomes part of the city. After the election results are certified the city must enact an ordinance annexing the territory. If fifty percent or more of the voters oppose annexation, the ordinance fails.

After annexing the unincorporated territory, the city must file with the county clerk a map of the territory and demographic information. The same information must be filed with the Secretary of State and the Department for Local Government.

As a result, when a city is experiencing a need to annex new unincorporated territories it must first consider the fitness of the territory under applicable law. If the unincorporated territory is fit, the city may begin the process of annexation. Once the proposed annexation survives any protest and any constitutional challenges the unincorporated territory will become a part of the city. The city may then tax the newly annexed territory in an amount commensurate with the remainder of the city, but it must provide all major services it offers at large.

Constitutional Taking Claims

Although, not specifically included in the statutes, constitutional taking claims must be considered as a method by which annexations are avoided. When a claim challenging the constitutionality of an annexation is brought, it is brought in the form of a claimed taking of property without compensation. The underlying notion is that in exchange for the inclusion of a property owner's property within the boundaries of a city, the property owner must receive some benefit. These benefits have been found in the form of police and fire protection and reduced insurance rates. These are considered compensation for the new taxes imposed on the land. Absent some benefit to the property owner the annexation may be invalidated.

City Liability

Beyond the consideration of what territory may be annexed, and how annexation is accomplished or avoided, city administrators must consider the impact of the annexation on the city's liability.

A city annexing unincorporated territory assumes all tax liability and indebtedness of the territory, distributing the burden citywide to be absorbed by all inhabitants. The city must extend to the new territory all major services provided throughout the city. This should include at a minimum police and fire protection. In most instances, it is likely that water, sewer, trash and utilities already exist in the new territory. In the case of these services, except utilities, the city may allow the entities rendering service to continue or may implement the city's services. If existing services remain the city shall not tax for these services. The statutes and the courts provide that existing utilities such as electricity should remain with the existing providers.

Once a city has annexed unincorporated territory it may, in exchange for services, tax the territory in a manner generally applicable to the city at large.

Conclusion

As a result, when a city is experiencing a need to annex new unincorporated territories it must first consider the fitness of the territory under applicable law. If the unincorporated territory is fit, the city may begin the process of annexation. Once the proposed annexation survives any protest and any constitutional challenges the unincorporated territory will become a part of the city. The city may then tax the newly annexed territory in an amount commensurate with the remainder of the city, but it must provide all major services it offers at large.
Note: New Legislation
During the 1998 Legislation Session, the Kentucky General Assembly amended KRS Chapter 81A. The following statutes became effective on July 15, 1998:

1) HB 610: This Act relates to third, fourth, fifth, and sixth class cities. This Act creates a new section of KRS 81A to allow third through fifth class cities to annex adjoining sixth class cities, rather than to requiring a merger of the two cities. Third through fifth class cities may annex sixth class cities if the legislative bodies of both cities agree and pass identical ordinances regarding the annexation. Also, the public must approve the annexation through petition or at the election polls. Upon approval of the annexation, the sixth class city dissolves into the larger annexing city, and the local option status of the annexing city applies to the dissolved sixth class city as well.

2) HB 624: This Act amends KRS 79.310 relating to cooperative compacts between cities of the first class and their counties. This Act also amends KRS 81A.005 as it relates to the annexation powers of a city of the first class with a cooperative compact. Pursuant to this Act, the first class city may amend annexation ordinances which state their intention to annex after this act becomes law and prior to September 30, 1998. The amendment permits these proposed areas to be annexed by another city, and sets forth other provisions.

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Kentucky Supreme Court Rules Judges’ Wives on Payroll Permissible Under Judicial Ethics Code

The Kentucky Supreme Court ruled in May, 1998 that three judges, whose wives are their legal secretaries and on the state payroll, are not violating the Judicial Ethics Code. The five-judge majority opinion, written by Justice William Graves, ruled that the judges did not violate the ethics code because the wives were hired as legal secretaries before the judges were appointed to the bench, and all three wives were qualified.

District Court Judge Stephen Bates, Carroll, Grant, and Owen counties; Circuit Court Judge Eddie Lovelace, Clinton, Russell, and Wayne counties; and Circuit Court Judge Danny Caudill, Floyd County, all employ their wives as legal secretaries.

Although the Judicial Ethics Commission issued an opinion that judges should not hire spouses, Justice Graves' opinion pointed out that the ethics code provision in dispute does not prohibit hiring relatives, but states that judges should avoid nepotism and favoritism. Justice Graves stated that “favoritism based upon relationship is evil to be eliminated through anti-nepotism provisions. It is the motivation and reasons for hiring which determine whether nepotism is involved, not merely the employment of a relative.”

The majority opinion held that the ethics rules allow a judge to employ a relative qualified to perform the job. However, Chief Justice Robert Stephens, in a separate opinion joined by Justice Joseph Lambert, held that although the judges did not violate the rule, the anti-nepotism provisions do not turn on qualifications and are meant to combat the appearance of impropriety.
Local Government Clinical Program Successfully Concludes Summer Program

The Chase Local Government Law Center successfully completed its first summer clinical program on August 5. The Local Government Clinical Program placed seven Chase College of Law students in internships with local officials across the Commonwealth.

The second and third year law students worked with the following local officials: Don Buring, Kenton Commonwealth’s Attorney’s Office; Bill Kuster, Harrison County Attorney’s Office; Robert Russell, Madison County Attorney’s Office; Darrell Herald and Lynn Herald, Commonwealth’s Attorney’s Office for Breathitt, Powell, and Wolfe Counties; and Randy Strauss and Susan Gormley Tipton, Administrative Hearings Branch, Cabinet for Families and Children. One student interned with Kelly Malone, Cincinnati Legal Aid Society.

One law student, Karlyn Schnapp, Ph.D., interned with the Law Center and drafted model ordinances regarding hazardous material emergency response procedures. Dr. Schnapp’s project was coordinated with Pat Connelly of the Kentucky Disaster and Emergency Services. These model ordinances will assist cities and counties throughout the Commonwealth comply with federal and state laws, relating to emergency response procedures. These model hazardous material ordinances are available from the Law Center.

The law students interning with local agencies and officials focused on practical legal skills and criminal trial techniques. They also gained insight into how government agencies and local officials operate. The student placed with the Cabinet for Families and Children interned under administrative law judges. He learned about the administrative appeals process for businesses that must comply with state regulations, and the legal reasoning behind administrative judicial decisions.

Several students qualified for their limited license to practice law, pursuant to Supreme Court Rule 2.540. These temporary intern licenses permitted the students to argue in court, participate in trials, and consult with clients, while under the supervision of a practicing attorney. The limited licenses and the opportunities available through the internships enhanced the students’ practical legal skills, and increased their confidence in trial skills. The agencies also benefited from the additional legal assistance.

As part of the clinical program, the students attended an accompanying classroom component. This summer, the classroom component focused on criminal law. The students learned about victims’ services, Emergency Protective Orders, and Domestic Violence Orders from representatives of the Northern Kentucky Women’s Crisis Center, Northern Kentucky Child Advocacy Center, and the Family Nurturing Center. Jack Porter, Assistant Commonwealth Attorney, Campbell County discussed effective opening and closing statements in criminal trials. Prof. Kathleen Gormley Hughes discussed ethics and the duties of prosecutors and public defenders.

Several guest lecturers focused on children and the criminal justice system, and criminal investigations. Hugh Convery, Department for Public Advocacy, Morehead Division, lectured on the legal representation of juveniles facing the death penalty. Susan Blake, Special Assistant Attorney General discussed interviewing the child witness in a child sexual abuse case, and handling child abuse cases. The students also toured the facilities of the Kentucky Medical Examiner’s Office and the State Police Central Crime Laboratory in Frankfort. They learned the role of coroners and local police, and how local authorities and state agencies cooperate in criminal investigations.

The clinical program is part of the Law Center’s expanded mission to assist city and county governments, while providing a legal education to law students, and legal information to local government officials and attorneys. The Law Center appreciates the time and efforts of the field instructors and guest lecturers involved in this program. Without their support and dedication, the program would not succeed. The clinical program operates during the fall and spring semesters, and the summer session. For more information, please contact Prof. Hughes.

Local Legislators Absolutely Immune from Liability in Enacting Ordinances

The United States Supreme Court unanimously ruled, in a decision written by Justice Clarence Thomas, that local officials cannot be sued for the laws they pass. The Supreme Court held on March 3, 1998 in Bogan v. Scott-Harris, that “[l]ocal legislators are entitled to absolute immunity from liability for their legislative activities.” The Supreme Court held that if a local ordinance is proper on its face, and the local legislators acted within their discretionary powers, they cannot be sued for passing the ordinance. This absolute immunity applies even if the local officials’ motives behind the ordinance intentionally violate the civil rights or liberties of others.

Specifically, the Supreme Court overturned a $231,000 verdict Janet Scott-Harris, an African-American woman,
won after being subjected to racial slurs by an employee serving temporarily under her, and then had her job eliminated by the city council after she complained. Ms. Scott-Harris, worked for the small Department of Human Services in Fall River, Massachusetts as an administrator. She was the first African-American to work for the city. Beginning in 1990, Ms. Scott-Harris became aware that an employee temporarily serving under her, Dorothy Bilcliff, made repeated racial and ethnic slurs about other co-workers. Ms. Scott-Harris began termination proceedings against Ms. Bilcliff.

Ms. Bilcliff used her political connections with state and local officials to handle the situation. These political connections included Marilyn Roderick, vice president of the Fall River City Council.

The city council held hearings and suspended Ms. Bilcliff for 60 days without pay. However, the mayor of Fall River, Daniel Bogan, later substantially reduced the penalty and called for the dismantling of the Department for Health and Human Services, of which Ms. Scott-Harris was the sole employee. Mayor Bogan rationalized that a possible reduction in state aid would require freezing other city employees' salaries and eliminate jobs.

The city council ordinance committee, chaired by Ms. Roderick, drafted the ordinance eliminating Ms. Scott-Harris' job. The city council passed the ordinance, and Mayor Bogan signed the ordinance.

Ms. Scott-Harris sued the city, Ms. Roderick, and Mayor Bogan pursuant to 42 U.S.C. § 1983, claiming the job elimination was retaliation for her exercising her First Amendment rights when she filed a complaint against Ms. Bilcliff. The U.S. District Court denied Mayor Bogan's and Ms. Roderick's claim of legislative immunity, and a jury ruled in favor of Ms. Scott-Harris, finding her protected speech was the motivating factor behind the ordinance eliminating her job.

The First U.S. Circuit Court of Appeals upheld the district court with regard to the claims against Bogan and Roderick, and rejected the argument that Mayor Bogan and Ms. Roderick had legislative immunity. The Court of Appeals ruled that their actions were administrative, not legislative.

The Supreme Court reversed the Circuit Court and rejected the distinction between administrative and legislative action. Also, the Supreme Court held that the issue is not whether the motives behind an ordinance were proper, but whether their acts were legislative. The Supreme Court held that the mayor and city council member had absolute legislative immunity in enacting an ordinance eliminating the government office, because local lawmakers have absolute immunity for everything that comes within "the sphere of legitimate legislative activity."

The Supreme Court held that introducing, voting on, and signing an ordinance are legislative activities. Although the intent and motive behind the ordinance may not have been proper, the council's legislative action was within their discretionary power. Ms. Roderick's voting on an ordinance was a legislative act. Mayor Bogan's introduction of a budget and signing of the ordinance was a legislative act, although he is an executive official. Executive officials are entitled to legislative immunity when they perform a legislative act. Most important, Justice Thomas wrote, the actual piece of legislation "bore all the hallmarks of traditional legislation", because it reflected a policymaking decision on the city's services and budget.

The Supreme Court ruled in the past, that state and regional legislators have absolute immunity, and cannot be sued for the laws they pass. The ruling in Bogan v. Scott-Harris extends this protection to local legislators. Justice Thomas wrote, "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited ... by a fear of personal liability."

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1998 General Assembly, Regular Session:
A Legislative Update

The Kentucky General Assembly enacted several pieces of legislation relating to local governments. These statutes became effective July 15, 1998. Following is a brief overview of selected statutes:

**SB 43:** County financial management; Amends KRS 68.275

Unless otherwise permitted by the state financial officer, fiscal courts may adopt standing orders to pay recurrent monthly payroll and utility expenses only. The standing order must be renewed by July 1 of each year, or it expires.

**SB 45:** Local government budgets and escrow accounts; Amends KRS 68.260 and KRS 371.160

Proposed county budgets must be published at least seven (7), rather than ten (10) days, prior to final adoption by fiscal court. Also, local governments are not required to place the retainage for governmental contracts on improvements to real property in an escrow account.

**SB 103:** Fiscal Court organization; Amends 67.050

The required number of signatures to bring about an
election on the fiscal court structure is either 1,200 voters or a number equal to 15% of the county voters who participated in the preceding presidential election, whichever is less. Previously, the statute required signatures from 100 legal voters.

**SB 114: Community foundations; Creates a new section of KRS Ch. 65**

Defines a “community foundation” as a “charitable nonprofit community foundation established to accept assets, owned, given, or bequeathed to a local government for the purposes of meeting charitable objectives for the citizens of the community”. The Act also permits local governments to donate proceeds to a community foundation and clarifies when the foundation must return donations to a local government.

**SB 269: Municipal utilities; Amends KRS 96.530 and KRS 95.520**

Provides that city may give pay raise to utility commission members. Also, authorizes second through sixth class cities to provide telecommunications services. Sets forth procedures for a city to establish an electric and/or gas utility, or an affiliate.

**SB 288: Emergency service personnel; Amends KRS 65.156, KRS 72.415, and KRS 189.920**

Local governments may create length of service awards programs for emergency services personnel, volunteer firefighters, life squad, and rescue personnel. Also, coroners may install flashing, or oscillating blue lights in their cars for use in their official duties.

**SB 326: Vacancy in County Judge/Executive Office; Amends KRS 67.705**

Governor must fill vacancy in office of judge-executive within 30 days of the vacancy. Also, fiscal court members must elect one member to serve as temporary judge-executive until Governor appoints replacement.

**HB 127: Special districts; Amends KRS Ch. 65**

Fiscal courts must review special districts’ budgets. The special districts’ budget does not take effect until submitted to fiscal court for review. The county attorney may prevent expenditure of funds if the special district does not comply with statute. Also, special districts with an annual budget of less than $200,000 must be audited every four years; special districts with an annual budget of more than $200,000 must be audited each year.

**HB 168: Cellular telecommunications facilities; Creates new sections of KRS Ch. 100**

HB 168 is a lengthy and detailed Act that permits local planning units that have adopted planning and zoning regulations pursuant to KRS Ch.100 to control the siting of cellular antenna towers in their area. The statute explicitly exempts any county containing a first class city from all sections of this bill.

**HB 201: Joint sewer agencies; Creates a new section of KRS Ch. 76**

Allows third through sixth class cities to establish a sewer agency with the fiscal court or a sanitation district.

**HB 230: Payroll deductions for local governments; Amends KRS 65.158**

Authorizes local governments to establish payroll deduction plans upon the written request of a minimum of thirty percent (30%) of its employees.

**HB 305: Minimum wage; Amends KRS 337.275**

Adopts the federal minimum wage as the state minimum wage. Also requires that tipped employees be paid at least minimum wage.

**HB 432: Powers of fiscal court; Amends KRS 67.083; EMERGENCY ACT**

This emergency act extended the fiscal courts powers to include regulation businesses or commercial enterprises providing adult entertainment and adult entertainment activities.

**HB 610: Annexation of a sixth class city by a third, fourth, or fifth class city; Creates a new section of KRS Ch. 81A**

(See Note: New Legislation in William Elkins’ article, page 4)

**HB 697: Local Government Code Enforcement Boards; Amends sections of KRS Ch. 65**

Local code enforcement boards are authorized to enforce zoning violations. Also, cities and counties are prohibited from establishing criminal and moving vehicle offenses as civil offenses. The Act also permits boards to consist of three (3) members and sets forth procedural requirements for the boards.
Opinions of the Attorney General are legal opinions that the Attorney General’s Office provides to public officials. These opinions clarify Kentucky law for public officials, and represent the official position of the Attorney General’s Office. Although these opinions do not have the force of law, they are persuasive and may be cited in court.

OAGs are called formal opinions. The Attorney General’s Office may also issue letters to public officials providing informal advice or information. These letters do not receive the same review as OAGs, and are not considered legal authority. Therefore, this newsletter will not publish informal opinion letters.

Following is an overview of selected formal OAGs issued since March 1, 1998 to June 30, 1998, which discuss local government issues. Portions are reprinted directly from the OAGs. If you would like a copy of a complete OAG, please contact our office.

**OAG 98-4: Health insurance coverage for retired state employees**

**Issue:** Whether the Pension Board is required to provide a minimum level of health care benefits to retirees.

**Requested by:** Mike Kurtzinger, Kentucky Professional Firefighters

**Date:** March 9, 1998

**Synopsis:** The courts have not addressed this issue, and the statute may be interpreted differently than in the OAG’s opinion. Pursuant to KRS 18A.225(2), the Kentucky Retirement Systems offer retired state employees health insurance benefits with “the same benefits as provided under Kentucky Kare Standard as of January 1, 1994.” The definition of “state employee” includes an elected public official of a municipal, urban-county, or county government whose legislative body participates in the state health insurance program. Although “benefits” must be provided, this statute does not require a particular form of health insurance coverage, or guarantee that the state will provide funds for a particular plan. How courts will define “benefits” remains unclear.

**OAG 98-6: The authority of the President of the Board of Alderman to discipline board members**

**Issue:** President of the Board of Alderman has no statutory authority to unilaterally discipline any member of the board.

**Requested by:** Reverend Louis Coleman

**Date:** May 1, 1998

**Synopsis:** KRS 83.470 gives exclusive power to discipline a member of the Board of Aldermen for disorderly conduct to the full Board. The President has no authority to unilaterally discipline a member. A first class city clearly has a strict standard of separation of powers between the legislative and executive branches of government. Therefore, the Mayor (executive branch) may not intervene in the disciplinary actions of the Board of Aldermen (legislative branch).

**OAG 98-7: Retirement benefits for hazardous duty employees who are members of CERS and KERS**

**Issue:** HB 250, enacted in the 1998 Regular Session, extends retirement benefits for hazardous duty employees who are members of the County Employees Retirement System (CERS), and for members of the Kentucky Employees Retirement System (KERS).

**Requested by:** William P. Hanes, Deputy Commissioner of Benefit Services, Kentucky Retirement Systems

**Date:** May 6, 1998

**Synopsis:** HB 250 computes a retirement benefit for hazardous duty employees who are members of CERS, State Police, and KERS based on the highest salary during three years. A retirement benefit for all other employees is based on five years. The bill also increases the contribution rate for hazardous duty employees who are members of CERS and State Police from 7% to 8%. The contribution rate for hazardous duty employees who are members of KERS remains at 7%. HB 250 did not set forth a basis for the difference in the contribution rates.

**OAG 98-8: Liability for reintroduced wildlife**

**Issue:** The Department of Fish and Wildlife incurs no liability for damage done by reintroduced wildlife.

**Requested by:** C. Thomas Bennett, Commissioner of the Kentucky Department of Fish and Wildlife Resources

**Date:** May 21, 1998

**Synopsis:** Pursuant to KRS 150.015, the Kentucky Department of Fish and Wildlife began reintroducing elk. They asked whether this would impose liability on KDFWR for damage caused by the elk. The answer is no. The General Assembly did not waive immunity from wildlife damage. Also, as stated in OAG 90-70, because the KDFWR has no proprietary ownership interest in the wild elk, it cannot control the actions of the wildlife. Therefore, it has no duty to prohibit damage from the elk. The KDFWR merely oversees and manages the wildlife, and serves as a trustee for the public. For these reasons, the KDFWR may not be liable under a negligence theory.

**Executive Branch Ethics Commission Advisory Opinion**

The Commission issued the following opinion on its own initiative:

**Issue:** The definition of a “tangible gift,” which a public servant may receive.
Requested by: Commission’s own initiative
Date: June 25, 1998
Synopsis: In HB 275, the 1998 General Assembly amended KRS 11A.045 to prohibit a public servant, his/her spouse, or dependent child from knowingly accepting “tangible gifts” or gratuities valued over twenty-five dollars ($25), travel expenses, meals, alcoholic beverages, lodging or honoraria of any value. The Commission defined “tangible gifts” as items that can be touched (i.e., flowers, candy, and country ham). Non-tangible items “include monetary gifts, agreements to pay, forgiveness of debt, reimbursement for expenses, ... and tickets to events.” Tickets are not considered tangible because the gift is the attendance to the events.

Open Meeting Decisions and Open Records

The Office of the Attorney General issues opinions on open meeting complaints and open records complaints. These opinions review citizens’ complaints that a public agency improperly denied review of public documents or access to an open meeting. These opinions are legally binding. Pursuant to KRS 61.880, if these opinions are not appealed within thirty (30) days, the opinions have the effect and force of law.

98-ORD-89
In re: David M. Cross/Office of the Clinton County Judge/Executive
Date: May 13, 1998
Issue: Whether the Judge/Executive’s Office violated the Open Records Act by not permitting Mr. Cross to inspect Federal Emergency Management Agency (FEMA) records.
Synopsis: The Judge/Executive’s Office denied inspection claiming disclosure resulted in an unwarranted invasion of privacy, and that disclosure was prohibited by federal law or regulation. However, the judge/executive failed to state why the agency’s privacy interests outweighed the public’s interest in inspection, and failed to provide the federal law that prohibited disclosure. The County Attorney asserted that the records contained information obtained for individual assistance. The Attorney General ruled that the judge/executive failed to meet the statutory burden of proof for denial of inspection.

98-OMD-96
In re: Richard E. Moore II/City of Madisonville
Date: June 9, 1998
Issue: Whether a city committee created to review sign ordinances is a public agency subject to the requirements of the Open Meetings Act.
Synopsis: The City of Madisonville created a committee to review sign ordinances and make recommendations. The City claimed the committee was an informal working group and not a public agency, because city council did not appoint members by formal action, and the committees had no authority to act on behalf of the City.

The Attorney General stated that the committee is a public agency because the sign committee “play[ed] a critical role in the formation of public policy.” Also, the committee was appointed by a public agency. Statutes do not require the city to make appointments through formal actions. Because the committee was appointed by a public action, and made formal recommendations, it was a public agency subject to the Open Meetings requirements.

98-OMD-105
In re: The Bourbon Times/Bourbon County Fiscal Court
Date: June 23, 1998
Issue: Whether Fiscal Court violated the Open Meetings Act by improperly conducting a closed session to discuss potential litigation.
Synopsis: The newspaper claimed the Fiscal Court improperly conducted a closed session because, although the road situation was embarrassing, at no time was there a threat of litigation. The Fiscal Court contended that the county was threatened with potential litigation. The county was unable to describe the general nature of the proposed litigation or the immediacy of the threat of litigation. Therefore, the possibility of litigation was too remote to justify a closed session.
98-ORD-95

**In re:** Sue Schumacher/Breckinridge County Fiscal Court  
**Date:** June 8, 1998  
**Issue:** Whether Fiscal Court may require prepayment of copying charges prior to mailing open records; definition of excessive copying charges  
**Synopsis:** The Fiscal Court partially violated the Act. Ms. Schumacher sent identical requests to the judge/executive and the fiscal court for eleven types of county dog warden and dog pound documents. Only the judge/executive replied. He stated the records were available for inspection, or they could be mailed, but payment of a deposit on copying charges was required before mailing the documents. Copying charges were 25 cents per page. Ms. Schumacher claimed the deposit and excessive charge are a de facto denial of request. KRS 61.872 and KRS 61.874 allow for prepayment of copying costs prior to mailing documents. However, pursuant to OAG 82-396, a public agency may not charge more than the actual cost of the copying. Anything above this amount is excessive.

98-ORD-99

**In re:** Don Mahan/Office of the Whitley County Judge/Executive  
**Date:** June 16, 1998  
**Issue:** Whether the Whitley County Judge/Executive’s Office violated the Open Records Act by not responding to requests for documents on the salaries and employees of the County Clerk’s Office.  
**Synopsis:** The judge/executive’s action was inconsistent with the Open Records Act. The judge/executive claimed he was not the custodian of the payroll records. The clerk’s office handled payroll. However, the judge/executive had records of matching Social Security and monthly retirement reports. He denied the request because the records contain personal information (e.g., names, addresses, social security number, and retirement amount). The Attorney General held that the judge/executive should provide the name and location of the official custodian of records. If the judge/executive has some of the requested material, pursuant to KRS 61.878(4) he should redact the confidential information, and provide the public records.

98-ORD-101

**In re:** Paul B. Osborne/Office of the Russell County Judge/Executive  
**Date:** June 18, 1998  
**Issue:** Whether the judge/executive improperly denied Mr. Osborne’s request for records on the status and location of generators purchased from the Div. of Surplus Property, and copies of checks written from county government to the “Charles M. Smith Coca Cola Fund”, a machine located in the courthouse.

Synopsis: The judge/executive responded that the generators were located in the county garage and the county did not write funds to the CMS Coke Fund. Mr. Osborne claimed this response was insufficient because it did not mention the status of the generators, and did not mention the electric bill for the machine. The Attorney General held, pursuant to 97-ORD-6, public agencies are not required to compile information, but are required to make available documents which may yield the information sought. If such documents exist, the judge/executive should affirmatively state. Therefore, any checks written in connection with the Coke fund are subject to public inspection.

98-ORD-109

**In re:** Randy L. Turner/Transportation Cabinet  
**Date:** June 25, 1998  
**Issue:** Whether the Cabinet must turn over driving history records for a nine year period; whether the Cabinet may charge $3.00 for the records  
**Synopsis:** Pursuant to KRS 186.018, the Cabinet maintains records only for five years. Also, KRS 186.018 requires the Cabinet to assess the $3.00 charge for driving history records. Therefore, “the Cabinet’s legal position is sound.”

98-ORD-110

**In re:** Jerry Wayne Welsh, Jr./Daviess Circuit Court Clerk  
**Date:** June 29, 1998  
**Issue:** Whether the Circuit Clerk violated the Open Records Act by not releasing records of Mr. Walsh’s arrest and conviction  
**Synopsis:** No. Pursuant to 98-ORD-6, the Circuit Court Clerk is not subject to the Open Records Act. Mr. Walsh must appeal his grievance through the courts.

98-ORD-111

**In re:** Robert Barker/Nicholas County Water District  
**Date:** June 29, 1998  
**Issue:** Whether a public agency may orally respond to an Open Records request; whether a public agency must justify denial of a request  
**Synopsis:** The Open Records Act procedural requirements are part of an essential process, not mere formalities. Pursuant to KRS 61.880(1), the Water District, a public agency must respond to requests in writing. The Attorney General relies on these writings to resolve disputes. The Water District’s failure to do so, was a procedural violation. Also, a public agency must justify denying an Open Records request. It must record in writing the appropriate exception that applies to the document. Because the Water District did not respond in writing, this was a violation of KRS 61.880(1).
In re: Gerald T. Kemper/City of Owenton

Date: June 29, 1998

Issue: Whether the City violated the Open Records Act by denying request for the Owenton Police Department’s March Activity Log

Synopsis: The City procedurally violated the Open Records Act, but was otherwise consistent with the Act. The City responded that the police department did not maintain a daily activity log, and no other records satisfied the request. However, due to an illness, the city clerk did not respond within three days. The City was reminded that the requirements of the Open Records Act are not mere formalities, and should “insure that future responses conform to the requirements. Otherwise, the City fully complied with the Act, because a public agency is not required to provide access to nonexistent records, or records not in its custody or possession.

The following cities were reclassified during the 1998 Regular Session of the General Assembly:

Crescent Springs, in Kenton County, was reclassified from a 5th class city to a 4th class city; and Simpsonville, in Shelby County, was reclassified from a 6th class city to a 5th class city.

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Local Government Law News

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