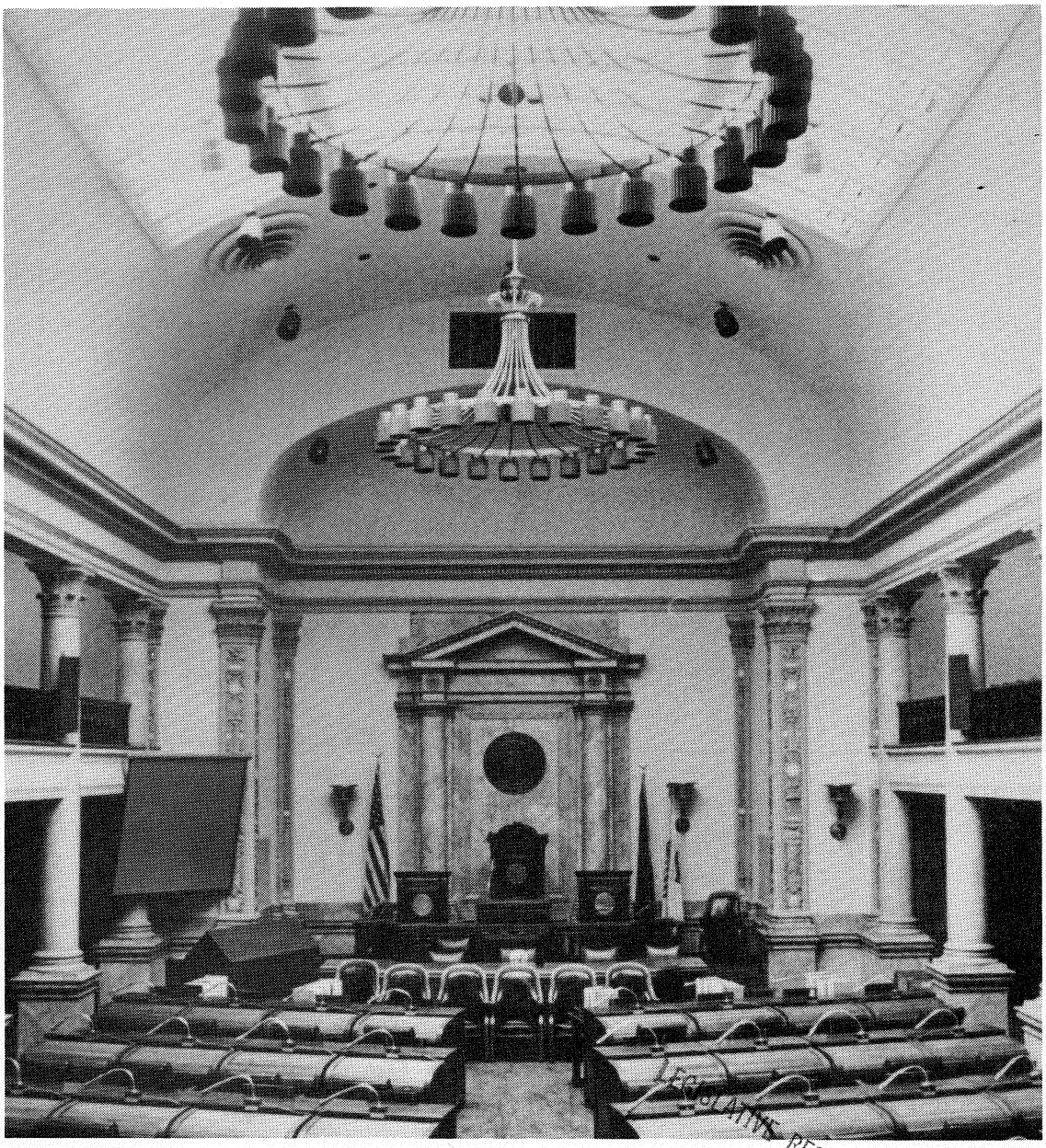
ISSUES CONFRONTING THE 1988 GENERAL ASSEMBLY



Informational Bulletin No. 160

LEGISLATIVE RESEARCH COMMISSION

Frankfort, Kentucky

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The Kentucky Legislative Research Commission is a sixteen member committee, comprised of the majority and minority leadership of the Kentucky Senate and House of Representatives. Under Chapter 7 of the Kentucky Revised Statutes, the Commission constitutes the administrative office for the Kentucky General Assembly. Its director serves as chief administrative officer of the Legislature when it is not in session.

The Commission and its staff, by law and by practice, perform numerous fact-finding and service functions for members of the General Assembly. The Commission provides professional, clerical and other employees required by legislators when the General Assembly is in session and during the interim period between sessions. These employees, in turn, assist committees and individual members in preparing legislation. Other services include conducting studies and investigations, organizing and staffing committee meetings and public hearings, maintaining official legislative records and other reference materials, furnishing information about the Legislature to the public, compiling and publishing administrative regulations, administering a legislative intern program, conducting a pre-session orientation conference for legislators, and publishing a daily index of legislative activity during sessions of the General Assembly.

The Commission is also responsible for statute revision, publication and distribution of the *Acts* and *Journals* following sessions of the General Assembly and for maintaining furnishings, equipment and supplies for the Legislature.

The Commission functions as Kentucky's Commission on Interstate Cooperation in carrying out the program of the Council of State Governments as it relates to Kentucky.

ISSUES CONFRONTING THE 1988 GENERAL ASSEMBLY

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FOREWORD

This collection of briefs, prepared by members of the Legislative Research Commission staff, attempts to bring into sharper focus some of the major issues which have received considerable legislative attention during the interim. The reports by no means exhaust the list of important issues facing the 1988 Legislature. At the same time the alternatives and comments suggested are neither exclusive nor exhaustive.

Effort has been made to present these issues objectively, unemotionally, and in as concise a form as the complexity of the subject matter allows. They are grouped for the convenience of the reader into the various committee jurisdictions and no particular meaning is placed upon the order in which they are presented.

Staff members who prepared the reports were selected on the basis of their knowledge of the subject matter and their work with the issues during the 1986-87 interim. Most of the staff has worked closely with the interim legislative committees which studied the issues and helped draft some of the proposed legislation.

Vic Hellard, Jr.
Director

Frankfort, Kentucky
August, 1987

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ADMINISTRATIVE REGULATIONS REVIEW SUBCOMMITTEE

STATUTORY ENACTMENT OF ADMINISTRATIVE REGULATIONS: 1986 HOUSE BILL 310

Prepared by Robert Sherman

Background

The Constitution of Kentucky allocates to the Governor, executive department and agencies within the executive the authority and duty to faithfully execute laws enacted by the General Assembly (Constitution Sections 81, 27 and 28). In many cases the General Assembly enacts statutes that are not specific regarding the details of their enforcement. Lack of specificity is often purposeful so as to allow an enforcement agency with particular expertise in a given field the freedom to utilize that technical expertise to regulate equitably. Agencies that are charged with executing such laws must then develop procedures which specifically describe the method of obtaining the general goals statutorily mandated by the legislature. These procedures are promulgated as administrative regulations and have the force of law.

Because of the wide scope and complex nature of the fields of human endeavor that require governmental scrutiny, executive agencies have found it necessary to promulgate increasingly large numbers of administrative regulations. The General Assembly is understandably keenly interested in the content and method of promulgation of regulations purporting to execute statutes enacted by that body.

Since 1942 the General Assembly has statutorily created methods of control and review of administrative regulations. The methods have tended to grow more stringent with the passage of time and have included:

(a) Requirements of form;
(b) Compilation requirements;
(c) Distribution requirements;
(d) Public hearing requirements;
(e) Review for compliance with statutory authority and legislative intent conducted by one or a number of committees of the Legislative Research Commission;
(f) Delay of effective dates for proposed regulations not meeting review standards; and
(g) General statutory limitations on the power of executive agencies to promulgate regulations absent specific grants of statutory authority through enabling legislation.

In 1984, the Supreme Court of Kentucky examined the authority of the General Assembly to oversee the process of regulation promulgation by the executive department. (*LRC v. Brown,* 664 SW2d 907 (Ky., 1984)). The regulation review process in place at that time required that proposed administrative regulations be reviewed for conformance with statutory authority by a subcommittee of the Legislative Research Commission. The effective date of regulations not meeting standards of review was "delayed" until the next legislative session.

The Court ruled this prevailing system of review unconstitutional. In so doing, the Court noted that executive agencies are constitutionally charged with the authority to execute or implement statutes passed by the General Assembly. The court further stated if a particular statute is silent as to the procedures to be used to implement it, the executive has the inherent constitutional authority and duty to promulgate regulations describing those

procedures. Further, any legislative plan that attempts to limit that rulemaking power across the board is unconstitutional. The Court implied that an executive agency's rulemaking authority may only be limited in regard to particular enabling legislation when that legislation is so detailed as to be characterized as self-executing.

Discussion

The decision in *LRC v. Brown* intensified frustration existing within the General Assembly in regard to its increasingly limited ability to affect the content of administrative regulations. Partially in response to this frustration, the 1986 General Assembly enacted House Bill 310, broadly relating to the jurisdiction of the board of claims and to administrative regulations. That portion of the bill relating to administrative regulations has greatly affected the activities of interim committees and will affect the business of the 1988 General Assembly and most executive agencies.

House Bill 310, specifically codified as KRS 13A.345, provides that administrative regulations now in effect shall be effective only until the general effective date for legislation enacted by the 1988 General Assembly, at which time they shall lapse. Similarly, any new regulation which is promulgated shall lapse upon the general effective date for legislation enacted by the succeeding General Assembly. The legislation directs that any administrative body which wishes to continue the effectiveness of a regulation must submit legislation proposing statutory enactment of the regulation. These legislative proposals must be received by the Legislative Research Commission at least 180 days prior to the convening of the next legislative session.

There are presently over 80 administrative agencies which promulgate regulations. Approximately 3,000 regulations have been promulgated by these agencies. In May of 1986, the Legislative Research Commission asked the various agencies to designate those regulations to be included in bill drafts for possible enactment as statutes pursuant to HB 310. Ninety percent of existing regulations were so designated, approximately 2,800 regulations intended for statutory enactment. In light of the fact that the 1986 General Assembly was confronted with a total of perhaps 1,800 pieces of legislation, regulation submissions under HB 310 represent a significant increase in legislative workload for 1988 and succeeding sessions.

The LRC has referred all agency designated regulations to appropriate interim committee jurisdictions. Committee staff administrators have recommended which regulations can be combined within bill drafts. As a result of these recommendations, 500 drafts comprising the entirety of designated regulations were ordered and assigned to LRC drafters. All drafts as of this writing have been completed and returned to agencies for their review, correction or alteration. Agencies have been advised that HB 310 grants them final authority as to legislation submission, thereby giving them complete freedom to deviate from LRC suggested draft content. Upon making any changes deemed necessary, agencies are instructed to officially submit their regulation enactment legislation for consideration by interim committees and the 1988 General Assembly.

HB 310 mandates that administrative agencies submit proposed legislation at least 180 days prior to the next legislative session. That time limitation as it pertains to the 1988 session falls on July 8, 1987. As of April 1, 1987, agencies had officially submitted thirty-nine percent of completed drafts, representing thirty-four percent of total regulations designated for statutory enactment. Nine percent of those submitted pieces of proposed legislation had been considered and prefiled by the appropriate interim committee.

The process of General Assembly review and subsequent enactment or expiration of administrative regulations which is provided by HB 310 has both advantages and disadvantages. On the positive side, this system provides the General Assembly and its interim committees with a formalized mechanism to be informed of, discuss, and amend existing regulations. Obsolete, unnecessary or unenforced regulations may thereby be identified and urged toward expiration. Administrative agencies will gain the opportunity to work more closely with legislators in formulating regulation and potential statutory content. The legislature will subsequently make the final determination of the content of regulations it chooses to enact into law.

Disadvantages to the HB 310 process also may be cited. The foremost disadvantage concerns the massive amount of regulatory material that must be reviewed by legislators during this implementation biennium. Many of the five hundred odd regulation enactment bills are extremely lengthy, and contain intricate subject matter. Considerations of time may therefore diminish the opportunity for careful deliberation of these bills. Another disadvantage is the loss of flexibility that occurs should a regulation become law. Such a regulation assumes the same character as other statutes and may not be altered until the next session of the General Assembly. This may be a particular problem with regulations which implement federal programs, the federally mandated requirements of which may change between sessions. Finally, it should be noted and expected that the successful implementation of HB 310 has the potential to greatly increase the volume of statutes within the published Kentucky Revised Statutes.

AGRICULTURE AND NATURAL RESOURCES

INCREASING FARM INCOME THROUGH DIVERSITY OF PRODUCTION

Prepared by Brooks H. Talley

Issue

Should the 1988 General Assembly take action to assist Kentucky farmers in increasing their income through greater diversity in production?

Background

American agriculture is having a difficult time during the 1980s. Farmers are leaving the farm, and there are fewer farms. In 1960, there were almost four million farms in the country. By 1982, there were 2.2 million, almost a 50 percent reduction. In 1960, the U.S. farm population was 8.6 percent of the total U.S. population; by 1983 it had dropped to 2.5 percent, a loss of 63 percent in farm population.

The reasons that American agriculture is having a difficult time are numerous. Interest rates are high, production expenses have increased, prices for crops are sluggish, farmland values have dropped, and a farmer's debt to asset ratio often has become too high. In addition, all of these conditions have increased the emotional stress of farmers.

Although Kentucky farmers have not been quite as drastically affected as some of the nation's farmers, they too are facing difficult times. In 1960, there were 161,000 farms in Kentucky, and in 1986 there were about 100,000, a 38 percent decrease. In 1960, Kentucky's rural population was 1,685,000 (55 percent of the state's population) and by 1980 it was 1,554,832 (49 percent of the state's population), a loss of 130,168 (7.7 percent). Since 1980, Kentucky's agricultural employment has declined 30 percent, from 131,000 workers to 91,000 in 1985, a loss of 40,000 jobs. Realized net farm income in Kentucky fell 29 percent, from $869,000,000 in 1980 to $619,000,000 in 1984. As a result, 51 percent of Kentucky farmers spend more than one-half their worktime off the farm.

Tobacco is a major reason that the Kentucky farmer has done slightly better than the farmers in the midwestern states. But tobacco continues to be attacked, and its economic dominance in Kentucky's agriculture has weakened. For example, the basic marketing quota for burley tobacco has been reduced five consecutive years (from 1983 to 1987) for a total quota reduction of 32 percent. In 1980, the cash receipts from burley tobacco to Kentucky farmers were $654,123,000; in 1986 they had dropped to $464,000,000, a reduction in income to growers of $190,123,000, or 29 percent.

Discussion

Realizing the plight of Kentucky's farmers, the legislative Subcommittee on Agriculture has devoted a great deal of time the last three years becoming informed about current statewide efforts to increase Kentucky farm income and to assist in increasing farm income whenever possible. For example, the subcommittee has heard reports from marketing cooperatives, the state Department of Agriculture, and the University of Kentucky College of Agriculture on their programs and activities to increase vegetable and fruit production.

The Subcommittee on Agriculture has been active in promoting increased agricultural production and farmer income. For example, three of the members of the subcommittee, along with the Governor, went to Taiwan to promote the purchase of Kentucky

agricultural commodities. As a result, a trade delegation from Taiwan came to Kentucky and purchased $19,000,000 of corn, soybeans, and tobacco.

The subcommittee plans to visit vegetable marketing cooperatives in Kentucky and in other states in order to recommend to the General Assembly appropriate measures for increasing farm income.

The subcommittee also conducted two public hearings out in the state, receiving ideas about establishing a statewide system for cash hay production and marketing. The subcommittee believes that such a system would be very valuable to Kentucky farmers by significantly increasing their income. This statewide system would provide the necessary elements of an adequate supply of high quality hay (mainly alfalfa), promotional activities, and a delivery system. Toward this end the subcommittee recommended and the parent Interim Joint Committee on Agriculture and Natural Resources approved the recommendation that the 1988 General Assembly appropriate funds to the University of Kentucky College of Agriculture for implementation of the system. This is one of various proposals to aid distressed Kentucky farmers that likely will come before the 1988 General Assembly.

KENTUCKY RIVER LOCKS AND DAMS

Prepared by Brooks H. Talley

Issue

Should the state own and operate locks and dams 5-14 on the Kentucky River?

Background

The Kentucky River Task Force was created by the 1982 General Assembly because the Corps of Engineers decided in 1980 that the Corps should no longer operate and maintain locks and dams 5-14 on the Kentucky River because of the lack of commercial traffic and the scarcity of federal funds. Through the efforts of Kentucky's congressional delegation, the Corps continued to operate locks 5-14 during 1981, and in 1982 operated locks 5, 6, 8, 9, and 10 on a limited basis during the recreation season. By September 1982, locks and dams 5-14 were all in a "caretaker status" (maintained to preserve structural integrity and prevent loss of pool). Locks 5-14 remained closed during 1983 and 1984.

Discussion

Through the efforts of the Kentucky River Task Force, the 1984 General Assembly enacted legislation appropriating $325,000 for operating locks 5-14 and for negotiating with the Corps of Engineers, but the Corps maintained that it had no money to reopen the locks. The Corps eventually did authorize the expenditure of up to $500,000, however, for repairing locks and dams 5-14. Although the members of the Kentucky River Task Force and the Governor realized this was insufficient funding to properly repair the locks and dams, a lease and memorandum of understanding were entered into in February 1985 between the Corps and the Commonwealth to reopen locks 5-14 to ensure an adequate and safe drinking water supply for more than 400,000 Kentuckians and to enhance recreation and tourism. Locks 5-14 were reopened May 24, 1985.

Under the terms of the lease and memorandum of understanding, the Commonwealth operates locks 5-14, provides maintenance for locks and dams 5-14 (major maintenance for locks and dams 9-14), and the Corps provides major maintenance for locks and dams 5-8. The lease and memorandum of understanding continue until October 15, 1988, by which time the Commonwealth must decide if it will acquire ownership of locks and dams 5-14 and the associated property.

The 1986 General Assembly created the Kentucky River Authority, which may issue revenue bonds to maintain the Kentucky River locks and dams in the event they are acquired by the Commonwealth; however, this legislation does not become operative until the Commonwealth acquires ownership of the locks and dams. The revenue bonds would be retired through water withdrawal fees.

The 1986 General Assembly also appropriated $308,000 for operating locks and dams 5-14 and $341,000 for maintaining them during the 1986-87 and 1987-88 fiscal years, a total of $649,000 for the biennium ($323,000 in 1986-87 and $326,000 in 1987-88).

Congress enacted the Water Resources Development Act of 1986, which authorizes the disposal of Kentucky River locks and dams 5-14 as recommended by the Louisville District Office of the Corps and the Cincinnati Division Office of the Corps in December

1982, and subsequently approved by the Secretary of the Army. In April 1987, the Louisville District Office of the Corps submitted to the Kentucky State Historic Preservation Officer information required for a determination to be made in accordance with the federal law on historic preservation whether or not locks and dams 5-14 and related property should be placed on the National Register of Historic Places. The Louisville District Office of the Corps is proceeding to dispose of locks and dams 5-14 by October 15, 1988.

The 1988 General Assembly will decide if the Commonwealth will acquire ownership of locks and dams 5-14 and continue to fund their operation and maintenance. It also will decide whether any adjustment should be made in the Kentucky River Authority statute.

1987 KENTUCKY WATER MANAGEMENT PLAN

Prepared by Daniel J. Risch

Issue

Should the 1987 Kentucky Water Management Plan prepared by the Division of Water of the Natural Resources and Environmental Protection Cabinet be funded by the 1988 General Assembly?

Background

Kentucky has focused on water management since 1982. The General Assembly of the Commonwealth of Kentucky passed House Resolution 62 in 1982 creating the first Kentucky Water Management Task Force. This task force was given "the primary mission . . . to assist the Department for Natural Resources and Environmental Protection in the development of a plan for the total management of the state's water resource."

The next initiative in the management of Kentucky's waters was taken by the Executive Branch. In August 1984, the Governor directed the Kentucky Natural Resources and Environmental Protection Cabinet to set goals and define the process by which the state manages the water resources of the Commonwealth. This undertaking produced the first Kentucky Water Management Plan and an infusion of 1.5 million state and federal dollars into the budget of the cabinet to begin implementation of the plan.

Then in 1986 the General Assembly again exerted its influence on the management of water in the state. First, the Natural Resources and Environmental Protection Cabinet was mandated to develop a comprehensive and systematic planning process for the long-range management and orderly development of Kentucky's water resources. Also, the Kentucky Water Management Task Force was re-established. Then, perhaps speaking the loudest of the intent of the General Assembly, the budget of the cabinet was increased by approximately 3 million dollars in order to continue the planning begun in 1984.

During the 1986-87 interim the Kentucky Water Management Task Force and the Division of Water in the Natural Resources and Environmental Protection Cabinet have worked closely together to update the 1984 plan.

The process was begun by the Division of Water. On November 1, 1986, the division sponsored six public meetings seeking input from citizens across the state on the water issues of greatest concern. From this process the division identified fourteen major topics deserving attention in the developing plan.

The Secretary of the Cabinet released a draft 1987 Kentucky Water Management Plan on February 2, 1987. This initiated another round of public comment. It also began the finalization of a planning document which, if implemented in its entirety, will demand a heavy financial commitment from the 1988 General Assembly. For example, the plan contains a request for an increase of $2,950,000 over the projected baseline budget of $7,476,000 for the Division of Water for FY 89 and a $3,931,000 increase over the projected FY 90 budget of $7,822,000. The choice for the General Assembly will be to determine to what extent the limited financial resources of the Commonwealth can be applied to carry out this plan.

The Kentucky Water Management Task Force will aid in making these choices. The Task Force is composed of citizens and legislators interested in the water resources of the

state and each is knowledgeable about different aspects of water management. For example, the Task Force includes a county health official, representatives of both rural water utilities and large urban water utilities, a consulting engineer, and representatives of commercial interests. This breadth of experience qualifies any consensus reached by the Task Force as being closely representational of the general public.

Given the complexity of water management issues, any basis of agreement on where state resources should be applied to these issues can benefit the 1988 General Assembly.

The following discussion highlights portions of the 1987 Kentucky Water Management Plan.

Discussion

The 1987 Kentucky Water Management Plan is a proposed strategy to help protect all waters of the Commonwealth for drinking, economic development and recreation. The major categories of the plan include groundwater protection, drinking water, surface water and water quantity management, point and non-point sources of water pollution, infrastructure financing, floodplain management, dam safety, public participation, planning, environmental emergency response, and cooperation and coordination needs. The plan is considered to be realistic in its reach. Although it would adequately protect the public, it does not seek the optimum in water protection activities.

Perhaps of all the categories of the plan demanding attention, the most urgent is infrastructure financing and construction review. How will Kentucky communities pay for repairing and constructing water and wastewater facilities and other water resources projects? Certainly not with federal money as in the past. The state and local communities must develop alternate financial resources to replace dwindling federal grants for water projects.

The financial burden being shifted to the state and local governments is staggering. A Division of Water assessment of the state's water system needs concluded that 3.74 billion dollars would be needed for the years 1984 through 2000. Such a large sum must be raised from a variety of sources.

Developing as perhaps the major source for infrastructure funding is the concept of a state revolving loan fund. This concept has been championed by the U.S. Environmental Protection Agency and adopted by Congress as the approach states should take to meet future infrastructure needs.

In early 1987, Congress reauthorized the Clean Water Act. Congress authorized 18 billion dollars to be used by the states to build and repair wastewater treatment plants. However, Congress also changed the rules for running the programs and spending the money.

Until the 1987 amendments to the Clean Water Act, the federal money was available to the states as grants, money which did not have to be repaid. The grant program is being phased out under the Clean Water Act amendments and state revolving loan funds are being phased in. The revolving loan fund concept would require Kentucky to establish a pool of money to be loaned to local governments to help finance water-related capital projects. A portion of Kentucky's share of the 18 billion dollars for all states can be used by the Commonwealth to begin a revolving loan program.

The 1987 Kentucky Water Management Plan proposes three such programs. A wastewater treatment fund using a combination of federal money matched with Kentucky

money is suggested. A second fund for wastewater and drinking water treatment facilities would be financed solely from state revenue sources. Last, a water resources fund to provide loans for dam repairs and flood abatement projects is suggested. This also would be state financed only.

The plan proposes a state appropriation of 36.8 million dollars for the 1989-1990 biennium to begin these three funds. Although this is a tremendous sum of money, it would finance only 30 percent of the average annual infrastructure requirements.

SURFACE COAL MINING

Prepared by Andrew Cammack

Issue

Should the 1988 General Assembly repeal the two-acre exemption and amend the permitting and bonding requirements for surface coal mining operations?

Background

Regarding the two-acre exemption, the federal Surface Mining Control and Reclamation Act (SMCRA) originally exempted "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." This two-acre exemption was designed to relieve small operators from the burden of permitting and full compliance with SMCRA's provisions. It was believed that the operations would be small in size and number and that their effect on the environment would not be significant. But according to the federal Office of Surface Mining and state authorities, the exemption was improperly used by some operators to avoid the SMCRA's reclamation requirements and the payment of abandoned land reclamation fees. This practice gave these operators a significant economic advantage. Frequent abuse of the two-acre exemption by some operators gave the coal industry a bad image.

Kentucky anticipated problems with the federal law's total exemption for two-acre operations, and the 1978 General Assembly set up a regulatory program with standards for two-acre permits which were less stringent than SMCRA's standards for operations larger than two acres. Kentucky's less stringent requirements also were taken advantage of and abused. Because of the abuses to the two-acre requirements, Kentucky tightened enforcement and issuance of the two-acre permit so that only a few have been issued this year.

In addition to the two-acre issue, there are a number of other minor surface mining issues that might also emerge in the 1988 session. Among them are issues related to streamlining the regulatory process or easing certain regulatory difficulties for the coal industry. One major concern that has been expressed by surface mining permittees regards lengthy and difficult permit requirements.

Obtaining reclamation bonding for surface mining permits also has been a concern. Bonds have become increasingly hard to obtain because bonding companies have become more selective and several have gone out of business because of increased forfeitures. These conditions have added to the difficulties encountered by operators.

Discussion

Two-Acre Exemption. Because of the problems with the two-acre exemption, and with the support of environmental groups and most of the coal industry, Congress drafted and President Reagan signed into law on May 7, HR 1963. HR 1963 repeals the two-acre exemption in the federal law and has the effect of cancelling the Kentucky two-acre mining permit. Thus, in order to comply with federal law those portions of KRS Chapter 350 which apply to two-acre operations must be repealed by the 1988 General Assembly.

Permitting. Legislative committees have examined and heard complaints about Kentucky's permitting requirements throughout the interim. These concerns surfaced at three surface mining public hearings held by the Subcommittee on Natural Resources in mid-

1986. The Interim Joint Committee on Agriculture and Natural Resources and the Subcommittee on Natural Resources focused on permitting in a number of meetings. The Governor has appointed a Task Force on Permitting Surface Mining Operations, which has three legislative members and continues to meet. In June a joint meeting of the Task Force and the Interim Joint Committee on Agriculture and Natural Resources heard a discussion of procedures used in West Virginia's surface mining permitting program to assist industry. These procedures included shortened and simplified review of permits and amendments, and allowing permitting work to be done in the field. The Task Force recommendations are due September 1.

Permitting issues include coal industry concerns over lengthy turn-around time, cost of preparing a permit, permit amendment procedures, and location of review. Some legislative changes could emerge from the ongoing discussion of these concerns. Decreasing turn-around time for permit issuance could require more permit reviewers and thus be a budget issue.

Bonding. The 1986 General Assembly provided major assistance in the bonding area by passing "bond pooling" legislation for surface mining reclamation bonds. Further assistance may be needed in the form of fine tuning to the "bond pooling" legislation. The Kentucky "Bond Pool" is a voluntary program which provides for lowered bonding fees and "pools" assets in order to cover individual operators' bond requirements.

Bonds have been scrutinized from another angle. Based on a limited study of five permanent program bond forfeitures, the federal Office of Surface Mining has suggested Kentucky's bond amounts are not adequate. The General Assembly could be asked to raise minimum bond amounts. Alternatively, more frequent inspections could be required. This could prevent lags in reclamation which increase the amount of disturbance which must be restored with a given amount of bond. This change could require more inspectors or other procedures and thus emerge as a statutory and a budget issue.

SOLID WASTE MANAGEMENT IN KENTUCKY

Prepared by Daniel J. Risch

Issue

Should Kentucky stop or limit the burial of out-of-state solid waste in Kentucky landfills?

Background

Before 1978, Kentucky regulated garbage and refuse disposal. In 1978, the General Assembly incorporated garbage and refuse into the more encompassing term "solid waste." A greater understanding of what citizens discard and a growing awareness of the perils of its disposal necessitated the broader definition. Correspondingly, the state program to regulate solid waste disposal also has grown.

The Division of Waste Management, which administers the program within the Natural Resources and Environmental Protection Cabinet, reported in its publication *Waste Management Practices in Kentucky for 1984* that approximately 3.4 million tons of solid waste is generated annually throughout Kentucky. The General Assembly has given the Division various tools to regulate this waste in order to protect the public health and the environment.

Within KRS Chapter 224 the Division has been granted the power to close open dumps and to issue permits for the siting and operating of landfills. In addition, the Division has been mandated to train and certify operators of landfills. Also, performance bonds are required of operators, inspections are made to ensure compliance with landfill standards and enforcement actions are undertaken when these standards are not followed.

What is the Division's purpose in administering this program? When the program controlled garbage and refuse, the worry centered on noise, foul odors, rodent and insect infestation. Now the program regulates solid waste to allay the additional concerns over air and water pollution which can result from the land disposal of household pesticides and paints, and small business waste products, such as wood cleaning residues or expended dry cleaning chemicals.

To meet the challenge from these additional, and, only recently understood, threats to human health and the environment, an increasingly complex and sophisticated array of technical requirements are being incorporated into the landfill regulatory program. Now, more is required in operating a landfill then simply compacting and covering each day's delivery of garbage. New landfills will be required to have a double liner to help prevent leakage of contaminants and leachate collection systems should the landfill leak, plus a groundwater monitoring system.

The booming growth in the amounts and regulation of solid waste, combined with its commonality, creates a problem not confined within the borders of Kentucky. The issue of how to provide safe and adequate disposal facilities for solid waste is a nationwide issue with special implications for Kentucky's solid waste management efforts.

Discussion

Nationwide, approximately 250 million tons of garbage are generated each year, according to the U.S. EPA. The greater portion of this waste is placed in landfills. Yet, few new landfills are being permitted and existing landfills are expanded only with difficulty. For some portions of the country, this has resulted in higher costs to bury garbage in landfills and an economic atmosphere where shipping solid waste great distances for disposal is financially possible. Some cost comparisons for landfilling between regions and comparing landfill capacity between states will illustrate the potential impact this national problem can have on Kentucky's waste management program.

The state Division of Waste Management reports that land disposal costs in Kentucky range between two dollars and eight dollars per ton of garbage. Disposal costs in the northeast United States runs between ninety dollars and one hundred and twenty dollars per ton. Kentucky has seventy-seven permitted landfills. New Jersey has less than ten. Of Kentucky's permitted landfills, approximately thirty-eight have the capacity to operate beyond five years. For comparison, Connecticut presently is approaching total capacity and likely will face a critical problem by late 1988.

These comparisons thus help make the point that conditions exist in the United States which may lead to a great influx into Kentucky for land disposal of other states' solid waste.

Should Kentucky take actions to forestall this importation of waste? This question raises an argument that proceeds point by counterpoint.

At the heart of the debate, economic development, as often is the case, spars with environmental protection. In general, expanding an existing landfill or constructing a new one may create jobs and have other beneficial economic impacts. Landfills, however, are generally perceived to threaten water resources. How these two concepts pair off in particular details can be seen by examining an existing Kentucky landfill actively pursuing additional business from other states.

The landfill rests in a rural county. A major metropolitan area is nearby. The portion of the site permitted for burying waste is approximately 80 acres, with an additional 300 acres available for developing. The Little Kentucky River flows through the county. An increased volume of waste to be received at this landfill, principally from the northeast, is expected to result in economic benefits, such as an additional one million dollar capital investment and hiring twenty to thirty new workers. An increase in the per ton fee for this waste is also anticipated. Lastly, the greater volume of waste is likely to lead to more opportunities for truck haulers, barge lines or railways.

Some argue these benefits would have a steep price. They counter the proponents of an increased waste stream by noting that the one-hundred additional truckloads of waste per day would rumble over portions of residential roads twenty-four hours a day and that the trucks may be uncovered and thus scatter wind-blown litter. In addition they point to many uncertainties in receiving wastes from states which may have controls on solid waste much different from Kentucky's. There is no practical way to screen for hazardous waste or infectious medical waste, for example, which may be contained in another state's "solid waste." They also view such an increase in buried waste as an unwarranted threat to the area's water resources, and finally, they are concerned that their community will develop an image as a dump site.

The arguments regarding this rural landfill, though illustrative, are local in their reach. The question of allowing or restricting the disposal of out-of-state waste in Kentucky landfills goes well beyond consideration of local concerns.

For instance, Kentucky shoulders up against seven other states. Many Kentucky communities along these borders engage in a regional give and take of solid waste with neighboring out-of-state communities. Any effort to control waste streams into Kentucky must recognize this regional commerce.

Another consideration with state-wide implications relates to the cost of building and operating a landfill. A large county system could cost $660,000, with annual operating expenses of $250,000. These expenses require a dedicated waste stream to ensure financial vitality. A long-term contract to bury a northeastern state's waste may solidify an otherwise economically shaky county landfill.

Moreover, suggestions have been made that the quantities of garbage that could be imported could be used as fill material to convert unproductive land into developable property, or, in the case of abandoned coal mines, result in reclamation.

Finally, but most important when analyzing the state-wide impact of importing significant quantities of out-of-state waste into Kentucky, debate of the issue must consider the effect on efforts to implement county plans for solid waste management. Since 1982, when the General Assembly passed the Solid Waste Planning and Management Act, Kentucky counties have struggled to fulfill their obligations under the Act. The law requires counties to plan in detail how local solid waste will be collected and disposed of, both in the near-term and for the future. Only since the spring of 1987 have counties achieved the goal of drafting the plans and, most importantly, carrying them out. The question of how a sudden increase in garbage coming into Kentucky counties will affect those plans and local efforts to meet local needs should be closely examined.

Before sounding the bell ending the match between economic development and environmental protection, it can be instructive to remember these same questions were debated prior to siting a land burial repository for low-level radioactive waste in Kentucky. The problems and risks associated with the Maxey Flats low-level waste site are significantly different from risks associated with the landfilling of garbage. However, there are enough similarities to suggest that however the debate ends on out-of-state garbage being transported into the state, Kentucky must take measures to protect its own interests.

APPROPRIATIONS AND REVENUE

PROPERTY TAX REVENUES

Prepared by C. Gilmore Dutton

Issue

Should House Bill 44 be repealed or amended to allow local governments more flexibility in raising property tax revenues?

Background

When the Kentucky General Assembly met in Special Session on August 23, 1965, it was in reaction to a June 8, 1965, Kentucky Court of Appeals decision ordering the Department of Revenue (now the Revenue Cabinet) to assess all property at its fair cash value. The court's landmark decision, *Russman v. Luckett,* gave Jefferson County parents the relief they had sought by reaffirming that Section 172 of Kentucky's Constitution did, in fact, require the assessment of property at its fair cash value.

At the time of the court's decision, property tax values averaged, state-wide, 30% of fair market value. Many school systems were levying the maximum statutory tax rate (and many local governments were at their constitutional rate limits), and because the majority of local property valuation administrators were not reassessing the property in their jurisdictions, little additional money was being made available for the operations of local schools (or cities or counties). This problem led to the legal challenge to the prevailing system of property assessment.

The result of the general assembly's action in that First Extraordinary Session of 1965 was House Bill 1. That act, which became popularly known as the "roll-back law," directed each taxing district to roll-back its tax rate for tax year 1966 to the point where the same amount of revenue would be produced under a 100% of value assessment system as was produced the year before under a partial value assessment system. House Bill 1 also gave each local taxing district the option of raising its rate by 10% in 1966 and the following year, but from that point on, House Bill 1 established a fixed ceiling for local property tax rates. In other words, the rate levied by school districts and other local taxing districts in 1967 was the **maximum** tax rate that could be levied from that point on.

During the ten-year period between 1965 and 1975, Kentucky's property tax system lived a rather quiet life. Property tax revenues increased annually at an average rate of about 5%, property tax assessments increased annually at a rate of about 5%, and property tax revenues to the local taxing districts increased annually at about 5%. While schools and local governments were not getting rich, they were, at least keeping pace with inflation, which was running at an annual rate of about 5%.

But in 1975, property values began to escalate at a very rapid rate. By 1978, property values were increasing at an annual rate of 10 to 12%. When local assessors increased their assessments by that same amount, the tax bills also went up by that amount, because the policy makers of the local taxing districts continued to levy the same tax rate, thus taking full advantage of the increase in assessments.

Taxpayers who had remained quiet with 5% increases in their tax bills now became irate at 10% increases. The legislative bodies of the local taxing districts countered by saying, "We didn't raise taxes, we just levied the same rate as we levied last year," and pointed their finger at the local assessor.

Consequently, property tax assessments began to fall behind, and by 1978 they had reached a level of 65% of fair market value, the lowest since 1966. The Department of Revenue took notice and ordered a number of county assessors to make substantial increases in their assessments for 1978. As a result of the department's action, the total, state-wide assessed value of property jumped by 11.4% in 1978. In some counties, 1978 assessments increased as much as 40 and 50%, a number increased by 20 to 30%, and still others by 10 to 20%.

By the fall of 1978, the taxpayers in a number of Kentucky counties were up in arms. In the face of substantial increases in the assessed value of property, the legislative bodies of the local taxing districts had levied the same rates that they had generally levied since 1977, often without a public explanation of their need for the additional funds. The public saw the major tax increases as unnecessary windfalls.

When the Kentucky General Assembly met in special session on the 8th of January in 1979, the property tax pot was approaching the boiling point. About half of Kentucky's 120 counties had received substantial increases in assessments in 1978; the other half were scheduled for substantial increases in 1979. As an example, the Department of Revenue had ordered for 1979 a 50% increase in farm land assessments and a 9% increase in residential property assessments for Jefferson County, a 19% increase in residential property assessments in Fayette County, a 14% increase in residential property assessments in Boyd County, a 22% increase in residential property assessments in Harlan County, and a 13% increase in residential property assessments in Madison County. With cries of anguish still ringing in their ears from the taxpayers whose 1978 assessments had jumped so dramatically, the General Assembly was looking at a long list of increases for 1979. The product of that special session, House Bill 44, combined full disclosure and public participation provisions with tax revenue benchmarks, to produce an effective mechanism for local property tax restraint.

To meet the requirements of House Bill 44, local taxing districts (counties, cities, school districts and special taxing districts) must annually perform several functions. The first of these is the computation of a "compensating tax rate." The compensating rate, zero growth rate, or fully rolled-back rate, as it is variously known, is the rate which, when applied to the current year's value of "old year" real property, will produce just the same amount of revenue as was produced from the same property the year before.

Next, if the local taxing district proposes to levy a rate which will exceed the compensating tax rate, i.e., a rate which will produce more revenue from the real property which was on the tax roll last year than was produced from that property last year, it must advertise and hold a public hearing on the proposed rate. The advertisement must include specified data about the amount of additional revenue the district would earn, in addition to time and place information about the hearing.

Finally, if the local taxing district levies a rate which produces more than a 4% growth in revenue from old year real property, it must again communicate with the local taxpayers through an advertisement, notifying them of its action and advising them of their rights under the law. Those rights involve the filing of a petition which places the question of the tax rate on the ballot at the general election held in November of each year. If the rate is approved by the voters, it stands as levied; if it is defeated, it is automatically rolled-back to an amount which will produce just a 4% increase in revenue from old year real property.

(The magic of the 4% level, set into law by the 1979 Special Session, was that a 4% growth in revenue from old year real property, plus a 3% growth in revenue from new real property and a 7% net growth in revenue from old and new personal property [the state-side averages in each of the three years prior to 1979], would give each taxing district an approximate annual 7% increase in revenues. Immediately prior to the General Assembly coming

into special session in 1979, then President Carter had asked all elements of business, both private and governmental, to hold wages and prices at or below 7%. Thus, the 7% increase for local governments complied with the President's request.)

Looming over the 4% benchmark tax rate, however, is the ultimate local property tax restraint, the maximum tax rate provision of 1965 House Bill 1. Retained in 1979 House Bill 44, this provision has had an even greater impact when coupled with the constraints added by House Bill 44.

While House Bill 1 established the tax rate levied in 1967 by schools and other local taxing districts as the maximum tax rate that could be levied in the future, when added to the provisions of House Bill 44, that feature took on a new dimension. If a local taxing district chose to roll-back its property tax rate to stay within the House Bill 44 4% revenue increase benchmark, that rate then became the new maximum tax rate that could be levied by that taxing district in future years. And, while that same process was present under House Bill 1, House Bill 1 lacked the impetus to roll-back rates that was present in House Bill 44.

That House Bill 44 has effectively restrained local tax rates cannot be denied by even the most casual observer of Kentucky's local taxing process. In the initial years subsequent to the enactment of House Bill 44, the impact of that act was dramatic. The vast majority of schools and local taxing districts chose to levy rates that produced revenues within the 4% benchmark, and a number even adopted the compensating rate as their tax levy, thus experiencing no revenue growth. During this same period, unfortunately, the cost-of-living increase grew to double-digits, reaching 11.5% in 1979 and 13.8% in 1980, and while most local governments were able to realize a full 7% annual increase in revenue, the disparity between income and expense made life more difficult for schools and local governments.

In recent years, the pendulum has swung to the opposite side. Inflation has been held in check at levels of 3 and 4%; but a new problem has arisen.

With a low rate of inflation, the increases in property values have also been extremely modest, frequently trailing the cost-of-living index. In fact, during 1984 and 1985, property values experienced little or no increases, and in many locales fell below their 1983 levels. Schools and local governments are trapped by the maximum tax rate provision of House Bill 44.

Given a situation where local taxing districts are unable to increase tax rates, and where property values are stagnant, no new revenues are forthcoming. And while annual cost-of-living increases are modest, the cumulative effect of no new revenues and annual 3 to 4% rates of inflation is beginning to take its toll.

Discussion

There are several options available to persons interested in allowing local governments more flexibility in raising property tax revenues. Since the immediate problem is the result of the maximum tax rate provision, it is only logical that any alternative include repeal of this provision.

One option would be to simply repeal the maximum tax rate provision, while maintaining the 4% benchmark, full disclosure and public participation provisions of House Bill 44. Another alternative would be to repeal the maximum tax rate provision and the 4% benchmark, substitute a floating benchmark pegged to an increase to the Consumer Price Index (CPI), a fraction of the CPI, or an economic index designed specifically for this purpose. A third alternative would include repeal of the maximum tax rate provision and removal of the 4% benchmark and the petition and referendum provisions, while retaining the public notice

and public hearing provisions. The proponents of this position argue that it gives local officials full flexibility to increase revenues, but also allows the taxpayers to make an informed decision at the ballot box at the next local officials' election. The fear of reprisal on election day would, presumably, keep tax rates within reasonable bounds.

A fourth alternative would involve the removal of the 4% benchmark and maximum tax rate provisions, thus allowing local officials to set whatever tax rate they choose, but giving the local taxpayers the right to petition for a referendum on any tax rate levied above the compensating tax rate. Under this proposal, of course, the public notice and hearing provisions of House Bill 44 would be retained.

The proponents of this last option claim that in the long run it would allow schools and local governments to realize more revenue than under any of the other alternatives. Removal of the 4% benchmark, which is seen as a psychological barrier, would make taxpayers more responsive to arguments by local officials for increased revenues. Local officials, knowing that taxpayers could voice their displeasure by voting down the rate rather than the officials, would be more likely to seek revenue increases. An increase in the percentage of signatures of qualified voters necessary for a valid petition could be a partial tradeoff for giving the public the opportunity to challenge any tax rate.

INSURANCE PREMIUM TAX REFORM

Prepared by Dee F. Baugh

Issue

Should Kentucky equalize its insurance premium tax rates to avoid lengthy litigation and potentially costly refunds to out-of-state insurers?

Background

In the early part of this century, Kentucky began taxing out-of-state insurers doing business in Kentucky. The rates, which with some exemptions remain the same as when initially levied, are either $2 per $100 of premiums received by the insurance company or 2% of receipts. While these premium taxes are paid by the insurers, they are assumed to be passed on to the policyholders.

Insurance premium taxes flow into the General Fund, and, in recent years, have made greater contributions to that Fund, which reflects the dramatic increase in insurance premium costs of recent years. The state collected over $50 million from these taxes in 1985-86. This revenue source, however, appears to be in jeopardy.

Kentucky's insurance premium taxes, which are levied only against out-of-state companies, appear to be threatened by a 1985 U.S. Supreme Court decision (Metropolitan Life Insurance Co. Et Al v. Ward Et At.) on a similar taxing mechanism in Alabama. That ruling held the Alabama tax to be unconstitutional in imposing "discriminatory taxes on non-resident corporations solely because they are non-residents." A justification that is usually given for the levy of Kentucky's insurance premium taxes is that those taxes equalize the total tax burden borne by insurance companies in that foreign insurance companies do not pay tangible or intangible property taxes.

At least eleven out-of-state insurers are currently seeking refunds from the Kentucky Board of Tax Appeals, arguing that Kentucky's law is also unconstitutional. The Alabama case has spurred several other states with similar legislation to equalize their rates. Some states have also paid substantial refunds to out-of-state insurers. However, the Alabama case is not definitive. The U.S. Supreme Court has returned the case to a lower court in Alabama to allow the state another opportunity to justify the discrepancy.

Discussion

The litigation involving Kentucky's insurance premium taxes is still in the administrative hearing stage. A final court decision on these cases is unlikely before the 1988 Session. With the Alabama case still in legal limbo, Kentucky's case could go to the Supreme Court for resolution. To resolve objections to the premium taxes, the tax burden would need to be equalized either by repealing the taxes now applied only to out-of-state insurers, or by imposing those same rates on domestic insurers. In the former case, the state would lose $50 million plus, per year; in the latter case it would gain an estimated additional $7.5 million per year.

PROPERTY TAX ON VEHICLES

Prepared by Calvert C. Bratton

Issue

Should the property tax that is applicable to motor vehicles be subject to the provisions of House Bill 44?

Background

Since January 1, 1984, the Motor Vehicle Tax System (MOTAX) has combined the collection of ad valorem property taxes on motor vehicles with the annual registration of motor vehicles. The county clerk has become the tax collector for the MOTAX system. This system is the result of 1982 legislation that prohibited the registration of a motor vehicle which has an unpaid property tax liability.

All taxing districts, the state, counties, schools and cities levy taxes on motor vehicles. These districts may levy a rate that does not exceed the rate that could have been levied on motor vehicles in 1983. This rate does not have to be rolled back in later tax years.

It is at this point that MOTAX departs from the provisions of House Bill 44 enacted by the 1979 Extraordinary Session of the General Assembly. House Bill 44, in part, prevents taxing districts from taxing inflation, that is, as properties increase in value, the tax rates are reduced to compensate for the increased value, thereby leveling the tax liability of properties. But no such restriction currently applies to revenue generated from motor vehicles.

The value of motor vehicles differs from real estate values in that motor vehicles tend to depreciate or lessen in value over time because of everyday wear and tear. The value of motor vehicles in a given taxing district is more quickly affected by depreciation than is real property. Because new motor vehicles are more expensive than older vehicles, as new cars are sold and old cars are junked or destroyed, the tax base for motor vehicles experiences fluctuation much more rapidly than does the real property tax base; however, the total statewide assessment may show only moderate growth from one year to the next. An Automated Vehicle Information System (AVIS) provides a centralized computer system for motor vehicle titles and registrations, and also provides the mechanism for the MOTAX system. Through the AVIS system vehicles are valued and the taxes due calculated at the same time titles and registrations are recorded.

Another result of MOTAX is that taxing districts must set their tax rate for motor vehicles in advance of the assessment date (January 1) in order to accommodate the registration of vehicles and subsequent collection of taxes on a monthly basis throughout the new year. This practice effectively precludes adjustment of rates to conform to a preestablished revenue benchmark, as in the case of real property and other forms of personal property.

Discussion

The total statewide motor vehicle assessment for 1983 was $6,027,677,008; the assessment for 1984, the first MOTAX year, was $8,369,037,836, an increase of almost 39 percent. The 1985 assessment totalled $8,636,299,875, an increase of only slightly more than three percent. The 1986 assessment is $8,659,719,999, an increase of less than 3/10ths of one percent. These assessment figures indicate that the rate of growth in the statewide value of

motor vehicles is small and growth in future years may be slight, probably not more than 2-3% annually. This growth rate doesn't approach the four percent growth in annual tax collections allowed (under House Bill 44) before taxing districts must make mandatory adjustments to reduce their tax rates or proceed through hearings and the possibility of recall petitions.

Although the statewide growth of motor vehicle assessments is relatively small, within individual taxing districts assessments may change dramatically. For instance, if a new factory opened in a county, substantial growth in assessments could occur from one year to another, causing a sharp increase in that county's tax revenues from motor vehicles. The effects of House Bill 44 would limit the tax increase if its provisions were in place. Absent the provisions of House Bill 44, the taxing district with a large assessment increase would receive substantial additional revenue, while under the provisions of House Bill 44, the taxing district would have to adjust for the large assessment increase with a tax rate reduction, to bring the taxation of motor vehicles under the same framework as that of real estate.

TAX AMNESTY

Prepared by Susan A. Pippen

Issue

Should a tax amnesty program be offered in Kentucky?

Background

One of the big issues in the field of tax collection is the use and abuse of state tax amnesty programs. Tax amnesty is a tax collection tool which, in some forms, has produced significant amounts of revenue. For this reason, certain state programs such as those in Massachusettes, Illinois and California have received much publicity, and have piqued the interest of legislators and revenue officials across the country in their efforts to balance ever-shrinking state budgets.

In its most basic form, a tax amnesty program involves the designation of a period of time, usually one to three months, during which previous non-filers of state tax returns may file delinquent returns, pay their outstanding tax liabilities with interest, and be granted immunity from civil penalties and criminal prosecution. Eighteen states have implemented tax amnesty programs, each designed to fit the individual state's needs and objectives, and all have met with varied degrees of success.

Although news reports tend to focus on the revenue raising aspects of tax amnesties, the success of a program is not necessarily measured by the number of tax dollars generated. Amnesty is a tax collection tool used by states which are concerned about the size or scope of unpaid taxes being lost to the state at the expense of honest taxpayers. The experiences of the pioneer states have shown that amnesties are, in fact, most effective when developed as one element of a broad program of stricter enforcement of a state's tax laws. In other words, the guiding principles in developing a tax amnesty program include both equity and revenue enhancement.

Discussion

In order to determine whether Kentucky would benefit from a tax amnesty program, several questions regarding goals and objectives must be answered. It is the intent of this type of undertaking which determines its scope, and it is the definition of its scope which allows for the measurement of success. An amnesty program offered for the sole purpose of generating a lot of money in a relatively short period of time will be designed somewhat differently from a program developed as part of a large-scale crackdown on tax evasion. Following is a list of elements important to the mechanics of a tax amnesty program, and a description of how and why these might be treated differently in different states.

1. Who would be responsible for tax amnesty? A state's revenue or tax agency charged with the responsibility of collecting taxes and enforcing tax compliance would be responsible for administering a tax amnesty program. Certain aspects of the program may require enabling legislation, depending on the scope of the department's authority to take such actions as waiving the penalties for tax offenses. (In Kentucky, most civil and criminal penalties for tax offenses are discretionary on the part of the Revenue Cabinet.) In some

cases, the enabling legislation simply authorizes the tax department to implement an amnesty program, but greater legislative control would be achieved with an enactment specifying the elements of the program desired.

2. Which taxes would be included? Obviously, the greater the number of state taxes included in the amnesty offer, the greater the potential revenues. States typically include (and receive the greatest revenues from) income and sales taxes. Some states have had enormous success with corporate taxes, especially Texas, which aimed its amnesty program at businesses not in compliance with state corporate tax laws.

3. Who would be eligible for tax amnesty? No other aspect of tax amnesty is more affected by the goal of the program than the decision as to which taxpayers will be eligible. States concerned with the rate of tax compliance, such as Arizona and North Dakota, offer tax amnesty to unknown non-filers only, in the hopes that many will be persuaded to come forward voluntarily to pay outstanding tax liabilities. The success of these programs is practically impossible to predict, and, because of their limited scope, the immediate revenue picture is not significantly enhanced. State officials argue however, that the objective of such programs is to get as many filers "on the books" as possible, resulting in a small but reliable increase in the tax base over the long range, and that fairness considerations prevent them from allowing known delinquent taxpayers, or accounts receivable, the privileges of tax amnesty.

   Those states which are also motivated by the revenue raising aspects of tax amnesty, such as Massachussetts and California, make all non-filers, known and unknown, eligible for amnesty, and argue that this method of eliciting tax payments is more efficient than the long and sometimes costly process of audit, protest resolution and litigation. Almost all states, however, have excluded from amnesty eligibility those known tax evaders who are involved with the state in criminal investigation or prosecution proceedings.

   Kentucky's Revenue Cabinet reports that as of April 30, 1987, 97,347 tax bills, worth $279,169,333, were in the "active" files. The active files include such tax bills as those under first and second notice, protest resolution, Division of Collections, and other levels of tax collection. At that same point in time, 112,874 tax bills, worth $65,852,073, had been labeled "inactive" by the Cabinet, meaning that they were no longer being actively pursued by state auditors.

4. How much would it cost? A successful tax amnesty program requires a degree of commitment and effort on the part of legislators and revenue department officials. Many states have learned that an appropriation of state funds can be a pivotal advantage. States with large-scale programs involving large numbers of taxpayers have hired extra agency personnel to answer phones, review applications and returns, and implement new enforcement procedures. Even states with smaller programs have found that an adequate publicity budget, used effectively, can have an enormous influence on the success of tax amnesty/increased enforcement programs.

Two points made above deserve emphasis. The first is that a state must offer tax amnesty only within the framework of a broad effort aimed at increasing overall tax compliance. Fifteen of the eighteen state programs, including Arizona's Tax Hunt, Kansas' Fair Share, Massachusetts' Revenue Enforcement and Protection Program (REAP), and Texas'

Wipe the Slate Clean, incorporated many other elements used both to discover previous non-filers of state taxes and to make the consequences of cheating on state taxes much more punitive. Some of these programs include expansion of audit staff and capabilities, increased use of criminal investigations, and most importantly, the establishment of much stiffer penalties for tax evasion. A strategy that has proven to be effective is the implementation of new enforcement procedures and harsher penalties in advance of the tax amnesty time period and the billing of tax amnesty as a one time only, last chance for non-filers to pay outstanding liabilities with immunity before the crackdown begins.

A second very important consideration in the development of a tax amnesty/compliance program is fairness. One criticism of tax amnesty is that amnesty is unfair to honest taxpayers, since it "forgives" the penalties for years of lawbreaking by tax evaders and delinquents. These grievances should be resolved by ensuring that everyone participating in amnesty undergoes some form of audit review in order to aid tax department officials in future efforts to enforce compliance, and that the tax interest rate charged on liabilities paid by amnesty participants is high enough to erase the advantage gained by breaking the law. (Kentucky's tax interest rate varies directly with the adjusted prime rate charged by banks. See KRS 131.183.)

In addition to the states that have already conducted tax amnesty/compliance programs, several more are considering such action. Moreover, U.S. Congressional leaders have been quoted as saying that a tax amnesty program might be a good project for the Internal Revenue Service. The literature published on tax amnesty is extensive, and includes descriptions of each state's programs, results, publicity schemes and press releases, and even "how-to" booklets, detailing the prizes and pitfalls of tax amnesty programs.

INDIVIDUAL INCOME TAX POLICY

Prepared by C. Gilmore Dutton

Issue

Simplicity, reform or revenue? What will be the Kentucky General Assembly's objective when it addresses the state's individual income tax law to consider changes suggested by the Federal Tax Reform Act of 1986?

Background

The Federal Tax Reform Act of 1986 has been labeled the most significant amendment to the nation's Internal Revenue Code since its adoption in 1954. So sweeping are the changes, in fact, that many observers suggest renaming the act, "The Internal Revenue Code of 1986."

Kentucky's individual income tax, since its inception in 1936, has been "coupled" with the Internal Revenue Code to the extent that Federal definitions of income and deductions have been adopted for state tax purposes. The reasons for conforming to the federal tax code are two: ease of administration and ease of taxpayer compliance. By adopting federal definitions, Kentucky and other states similarly coupled can rely upon case law generated in federal courts, thus saving the state government and its taxpayers the time and expense of litigating issues not explicitly dealt with in the statutes. The taxpayers' reporting burden is also eased by the ability to enter on their state income tax return many of the same figures used in completing their federal income tax return.

The Kentucky General Assembly maintains conformity with the federal tax code despite regular congressional changes to that latter body of law by periodically "adopting" the current version of the Internal Revenue Code. Such adoptions are usually, but not always, made during each regular legislative session.

Failure to enact "code update" legislation, as occurred in the 1984 Session, results in a two-year period of significant discrepancies between figures used for filing federal and Kentucky income tax returns. Kentucky has always elected, however, to update its law to conform with federal law by specific legislative action, rather than by providing for automatic adoption of changes to the federal tax code, as is the practice in several states. The requirement of affirmative action by the General Assembly allows for selective adoption of new federal tax policy, and avoids the constitutional (state) question of unlawful delegation of legislative authority to the executive branch of government.

Discussion

Because the Tax Reform Act of 1986 dramatically broadens the federal individual income tax base by adding taxable items of income and reducing deductions, as well as increasing standard deductions and personal exemptions, the Kentucky General Assembly must deal with a subset of conformity issues unprecedented in recent history.

Simplicity. More than three dozen differences between Kentucky and federal individual income tax law will exist when the General Assembly convenes in 1988. Some of these differences—for example, the deductibility of moving expenses—will affect only small numbers of Kentucky taxpayers, while other differences, the deductibility of state sales tax,

for example—will impact large numbers of state filers. For the average taxpayer, simplicity in filing a state tax return means similarity with the federal tax return. To maximize ease of filing, blanket adoption of all of the changes to the federal tax law would be in order.

But many of the amendments made by Congress are controversial, and not happily embraced by all of the taxpaying public. The repeal of the $100 per taxpayer dividend exclusion, the severe limitation on the deductibility of contributions to individual retirement plans and the repeal of the capital gain exclusion are only a few of the items which may result in a tax increase for a significant number of taxpayers, and which the General Assembly may wish to reject, but reject only at the risk of adding to the real, or at least perceived, complexity of filing the state tax return.

Reform. Kentucky grants each of its individual income taxpayers a $20 personal credit and a $650 standard deduction. The combined effect of the credit and deduction is to "shelter" $1,650 of income for each single taxpayer, and $3,300 of income for two married taxpayers, when both have taxable income. When the provisions of the Tax Reform Act of 1986 are fully implemented, federal personal exemptions will be $2,000 and the standard deduction will be $2,540 for single filers and $3,760 for married couples filing jointly. A federal single taxpayer will enjoy $4,540 of tax-free income, and a married couple filing jointly will not have to pay federal income taxes until their income exceeds $7,760.

According to Kentucky Revenue Cabinet estimates, approximately 60,000 Kentuckians will be removed from the federal income tax rolls who, absent any changes to state tax law, will continue to pay state income taxes. This revelation, coupled with the fact that federal poverty guidelines—$5,000 plus income levels—far exceeds the amount of state tax-free income, argues for an increase in the state's personal exemption or standard deduction, or both.

But an increase in personal exemptions or standard deductions will cost money. For example, a $10 per taxpayer increase in the personal credit would result in a revenue loss in excess of $15 million, and if dependents, who, like taxpayers, are currently granted a $20 personal credit, were awarded the same increase, the revenue loss would double.

Money considerations aside, some state policy makers argue that Kentucky's maintaining a low personal exemption and standard deduction, which result in taxation of income at relatively low levels, is sound public policy. Their contention is based on the premise that all citizens of the state should pay some taxes, and, given the exemption from sales tax for the basic commodities of food, medicine and residential utilities, many low income citizens would not otherwise make a contribution toward payment for services rendered by the state.

Revenue. Kentucky allows a deduction of federal taxes paid for individual income tax purposes. The deduction is "automatic"; that is, the deduction may be taken whether or not the taxpayer itemizes other deductible expenses. When federal taxes are increased, Kentucky taxpayers' deductions are likewise increased, and the state loses revenue. Conversely, when federal taxes are lowered, Kentucky taxpayers' deductions are likewise decreased, and the state gains revenue.

As a result of this phenomenon, the Kentucky Revenue Cabinet estimates that the state will gain approximately $25 million in additional revenue beginning in calender year 1987. Because Kentuckians' federal tax liability will be reduced by more than $365 million (per year), Kentucky will realize this additional revenue without any action by the Kentucky General Assembly. But if the General Assembly takes action to adopt the changes made in the federal Tax Reform Act of 1986, the state will gain substantial additional amounts of revenue.

According to Kentucky Revenue Cabinet estimates, the state would generate in excess of $110 million from adoption of the new amendments to the Internal Revenue Code. Added to the automatic revenue increases resulting from the reduced federal tax deductions, the result would be a total of approximately $115 million in new revenue in calender year 1988 and $135 million in calender year 1989.

The fact that Kentucky stands to gain significant amounts of revenue by adopting changes already embodied into federal tax law has already resulted in proposals that the General Assembly take such action. Proponents of these proposals point out that the additional revenue is almost exactly equal to a recently predicted shortfall in General Fund revenues, and they argue that the state would simply be substituting one tax for another by adopting the changes to the federal code. The proponents also point out that the federal tax savings would only be reduced by one-fourth to one-third, still allowing Kentucky income taxpayers to realize a net tax savings in excess of $250 million.

Opponents of the proposals to adopt the federal income tax changes point out that such action would constitute a state tax increase, and should be looked upon as such, irrespective of any federal tax savings. The opponents of the adoption proposals are not necessarily opposed to the changes in tax law which such legislation would put into place, but rather are opposed to the additional state tax burden that would be imposed. Thus, for them, an acceptable alternative would be an increase in the personal exemption or standard deduction in an amount sufficient to offset the additional tax raising effects of the base-broadening changes, so that a "fiscally neutral" condition would result.

As the reader will have surmised by now, the objectives of simplicity, reform and revenue are not questions isolated from one another, but are interrelated. No doubt the resolution of the issue of adopting for state income tax purposes the provisions of the federal Tax Reform Act of 1986 will combine elements of all three.

BANKING AND INSURANCE

INTEREST RATES: BANK CREDIT CARDS

Prepared by Greg Freedman

Issue

Should the statute regulating bank credit card interest rates be repealed, amended, or left unchanged?

Background

Historically, the regulation of interest rates has been a responsibility of the states. In 1981, the only states without general interest rate laws were Arizona, Maine, Massachusetts and New Hampshire. The importance of state interest rate ceilings, however, has been greatly diminished by court decisions and by the Depository Institutions Deregulation and Monetary Control Act of 1980—the first federal general interest rate law. Despite the erosion of the power of the states to regulate interest rates, state legislatures in recent years have amended their various interest rate laws in response to demands of constituents. The most frequently heard complaint today is that bank credit card rates are too high. In 1984, the Kentucky General Assembly increased the allowable rate on bank cards from 18 to 21 percent, at a time when the cost of funds to banks was high and two Kentucky banks either had moved or were moving their credit card operations to states with more favorable interest rate laws. Today, the cost of funds to banks has declined, but the rates charged by financial institutions remains around 18 percent. The legislature is faced again with the task of deciding whether the law should be amended. The difficulty of arriving at a rational policy of bank credit card interest rate regulation is apparent when one reviews the current state of general interest rate regulation. Various administrative, judicial, and legislative actions now infringe on what was once the exclusive domain of the states.

Bank holding companies (BHC) provide a bank with the means to avoid a state's interest rate regulations by operating through nonbank subsidiaries that are permitted to charge higher interest rates. Nonbank subsidiaries, such as consumer loan companies, are also not subject to a state's branching restrictions. State interest rate laws have become a significant factor in the acquisition by BHC's of consumer lending firms.

Federal legislation has severely restricted the power of states to regulate interest rates in two areas. Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980 permanently preempted state constitutional and statutory provisions that limit the rate or amount of interest on certain mortgage loans unless a state rejected the federal preemption by April, 1983. Restrictions on discount points and other charges were also preempted, but this can be overridden at any time. Only 14 states opted out of the mortgage interest provision by the deadline. The DIDC Act also preempted state law for all loans made by insured depository institutions to the extent that state interest ceilings are lower than the discount rate plus one percent. States have the option to override this preemption.

Court decisions have also diminished the power of states to regulate interest rates within their borders. In *Marquette National Bank v. First of Omaha Service Corporation,* 439 U.S. 299 (1978), the U.S. Supreme Court held that a national bank may charge its out-of-state credit card customers interest at the rate allowed by the jurisdiction where the bank is incorporated. This allows a bank in another state to export its interest rates to Kentucky regardless of Kentucky's interest rate laws.

Laws of other states affect a state's ability to regulate interest rates. South Dakota and Delaware allow out-of-state bank holding companies to own a bank in the state. Because these states do not regulate credit card interest rates, BHC's can establish subsidiaries in those states and charge a market rate of interest on their accounts throughout the country.

Laws within a state are often confusing if not inconsistent. Kentucky has a general interest rate law, KRS 360.010, that allows a lender to charge interest on a loan of $15,000 or less at a rate not to exceed 4 percent in excess of the federal discount rate or 19 percent, whichever is less. Under KRS 287.215 a bank may make an installment loan at a rate not exceeding eight dollars per one hundred dollars per annum. The Supreme Court of Kentucky in *Duff v. Bank of Louisville and Trust Company,* 705 S.W. 2d 920 (1986), held at page 924 that "it is not mandatory that all installment loans repayable in five years and thirty-two days and ten years and thirty-two days must be made under the provisions of KRS 287.215." The court further held at page 925 that "banks are authorized to execute loans under either KRS 287.215 or KRS 360.010. On over $15,000 loans, banks may structure their loans under KRS 360.010, including provisions for charges, rebates and fees, similar to those provided for and required under KRS 287.215, if it so elects and the parties agree thereto." A third statute affords state-chartered banks with another option in making loans. KRS 287.214 allows a state-chartered bank to charge interest on loans of less than $15,000 at the same rate allowed national banks.

The most favored lender doctrine further muddles rate regulation by providing financial institutions with still another option in making loans. The doctrine permits an insured depository institution to charge interest at the highest rate allowed by state law to any other lending institution. This means that a bank in Kentucky is not restricted by the rates allowed in the banking statutes discussed above, but may also use the rates allowed consumer loan companies in KRS Chapter 288 for loans up to $15,000 (which allows a rate of up to 36 percent) and credit unions under KRS Chapter 290 (which allows a rate of 2 percent per month). If a bank borrows one of these rates, it must also comply with the statutory restrictions establishing the rate. Although the most favored lender doctrine originally applied only to national banks, Congress now treats all insured depository institutions as favored lenders but permits states to override such treatment, except as to national banks.

Discussion

Approximately 75 million Americans, holding 186 million bank credit cards, owe $85 billion on credit card purchases, which represents a 150 percent increase in four years. It is estimated that $15 billion of that debt is attributed to interest and annual fees. In 1970, 16 percent of all families used bank cards and by 1983 the number had risen to 40 percent. In 1983, nearly 50 percent of all families that used credit cards stated that they nearly always paid their bills in full each month. Studies indicate that the proportion of families using credit cards increases with family income.

The 1984 Kentucky General Assembly amended KRS 287.740 to increase the maximum interest rate on bank credit cards from 18 to 21 percent. The legislature also amended KRS 287.750 to permit an annual fee not to exceed $20 annually. At the time of these changes the prime rate annual average had risen from 10.79 percent in 1983 to 12.04 percent in 1984 and the federal discount rate had increased from 8.5 percent in December, 1982 to 9 percent on April 9, 1984. After enactment of the statute to permit higher rates, the prime rate and federal discount rate declined. The discount rate dropped to 8 percent on December 25, 1984, to 7 percent on March 7, 1986, and to 6 percent in July, 1986. As of May, 1987, the rate is 5.5 percent. The prime rate slipped from 12.04 percent in 1984 to 9.93 percent in 1985 and to 7.5 percent in October, 1986. As of May, 1987, the prime rate is rising and stands at 8.25 percent. While the prime and discount rates have declined since 1984, the rate charged by banks on credit cards has remained around 18 percent.

Banks justify the high rates by citing billing and processing costs, losses and fraud. They point out that bank credit card rates are a complicated credit service, that no one is forcing consumers to use bank credit cards, and that banks lost money on bank cards when the maximum rate allowed was 18 percent and the cost of money was high. From 1972 through 1985, the annual net earnings of bank card plans before taxes averaged only 1.9 percent of outstanding balances. This compares with 2.3 percent on real estate mortgages, 2.4 percent on consumer installment debt, and 2.8 percent on commercial and other loans. (In 1984, however, the average profitability of bank cards increased to 3.4 percent and in 1985 it rose to 4.0 percent.)

The legislature must first determine whether regulatory constraints on bank credit card interest rates are necessary. Last year, 22 states considered legislation on bank credit card rates. Seven states enacted legislation. Recently, officials in California, Iowa and Tennessee have called for state laws to restrict rates. Opponents of constraints argue that such legislation forces card issuers to tighten credit standards which would affect the less affluent who have limited access to other sources of credit. Card issuers could initiate or increase annual fees and charges for each transaction. Penalty fees for late payment and for exceeding credit limits could be imposed. Card issurers might apply finance charges from the date of purchase rather than after the grace period expires. Finally, banks could move their credit card operations out of state and export the rate from that state to their Kentucky customers. After the 1982 legislature failed to change the statute on credit card interest rates, Citizens Fidelity Bank moved its bank credit card operations to Ohio and First National Bank of Louisville moved its operations to Virginia.

Despite the possibility of such possible actions by card issuers, proponents of regulatory constraints on bank credit card interest rates argue that, although banks are entitled to making profits, profits generated on extensions of credit to customers should not be the result of usurious rates. There is no justification for rates of 18 percent when the discount rate is 5.5 percent. They contend that the legislature gave banks relief in 1984 by raising the ceiling, but banks have failed to respond to the decline in their cost of funds by reducing the rates they charge their customers. When all banks continue to charge essentially the same high rate, customers are left with no bargaining power and must seek regulatory controls. Banks are vested with a public interest and are closely regulated to assure that their functions are adequately performed. When interest rates over a period of time remain unresponsive to a decline in the cost of funds, when competition is nonexistent in a market essentially free of constraints, it is incumbent on the legislature to impose reasonable constraints to assure adequate bank performance.

If the legislature determines that constraints are necessary, it must determine the best method to regulate rates. The present statute establishes a flat rate of 21 percent. It has been argued that a flat rate is inappropriate in an environment of fluctuating money costs. A rate set too low renders the bank credit card business unprofitable, to the detriment of banks and customers alike. A rate set too high does not necessarily provide for a competitive market. An alternative is a flexible rate which uses an index for setting ceilings. During the 1986 Session of the Kentucky General Assembly a bill was introduced that allowed banks to charge up to 5 percent above the federal discount rate on bank credit cards. It is argued that a flexible rate would provide a market that reflects the cost of funds, fosters competition, and provides reasonable rates for cardholders and profits for bankers. A bill now before Congress has a flexible rate of 8 percentage points above the yield on one-year Treasury securities. The Federal Reserve Board recommends against designating the discount rate as an index rate. It contends that the discount rate is an inexact measure of either marginal or average costs of loanable funds.

An alternative to amending the statutory rate is to direct the state treasurer to withdraw state deposits from banks that impose "excessive" bank credit card rates. This ap-

proach has been used in Illinois. It must be remembered, however, that whatever method is used, no constraints will affect out-of-state banks that export their rates to Kentucky. A state's ability to regulate bank credit card rates has been diminished with the exporting of rates and the only answer may be federal legislation.

Finally, the legislature must be mindful of factors that are changing the credit card market. Sears Roebuck and Co.'s Discover card and the American Express Optima card are stimulating competition in the market, as is the threat of federal legislation establishing a cap on rates. In addition, the 1986 tax law is phasing out over a five-year period the deductibility of credit card interest payments. This is causing a boom in home equity loans, which often carry low interest rates and for which much of the interest is still deductible. Home equity loans are expected to increase from $50 billion now to $300 billion by 1990 and much of that growth could come at the expense of credit cards.

INCREASED POWERS OF BANK HOLDING COMPANIES

Prepared by Bill Van Arsdall

Issue

Should the powers of bank holding companies be expanded?

Background

Until a few years ago, Kentucky law prohibited any individual or organization from controlling more than one bank. In 1984 the General Assembly repealed that law and permitted the operation of multibank holding companies; some limits on bank acquisitions were retained, however. Now there are suggestions that several of those limits should be removed.

In addition, some Kentucky bankers would like to be allowed to participate in a broad range of financial services now closed to banks, including insurance, real estate and securities.

Discussion

No bank may establish a branch outside its home county. If a bank is owned by an out-of-county company, it must have its own separate identity and its own board of directors. The legislature may be asked to change this rule and allow any bank affiliated with a holding company to be converted into a branch, whether that bank is inside or outside the holding company's county.

Another current limit on bank acquisition is a cap on the assets a company may control. No individual or group may acquire enough banks to control more than fifteen percent of the total deposits in the state. Some bankers feel this rule is too restrictive and should be changed.

There are also restrictions on the types of financial institutions a holding company may acquire. Savings and loan associations, for example, may not be purchased by bank holding companies. Some bankers would like to be allowed to acquire these institutions and convert them into banks.

In addition to the limits on the size and growth of holding companies, there are certain restrictions on the activities of banks which some financial experts would like to see removed. Banks have traditionally been confined to a small, clearly defined set of activities, but these barriers have been breaking down at the federal level and in several states. Increased competition from other financial institutions and a general trend toward deregulation have produced a new environment for banking, and some Kentucky bankers are eager to remove the barriers preventing their institutions from participating in new activities.

One such area is insurance underwriting. Bankers point to the present crisis in property and casualty insurance as evidence that increased competition is needed. If they were allowed into the field, bankers say, underwriting capacity would be increased and drastic swings in insurance prices could be avoided. Competition from banks would also force insurers to distribute their products more efficiently, according to these sources, and consumers would benefit from the resulting lower prices.

Other areas of the economy closed to Kentucky banks include securities and real estate. According to figures provided by the Kentucky Bankers Association, eight states allow banks to participate in the underwriting of securities, and four states allow banks to offer full-service brokerage of securities. Six states allow banks to provide real estate brokerage.

The Kentucky General Assembly took a step toward expanding the powers of banks in 1986. House Bill 709 permitted banks to invest in the development of real estate, subject to certain restrictions, and it allowed them to operate discount brokerage services and travel agencies.

There are those who oppose expansion of the powers of banks. People in the real estate and insurance industries object that the traditional separation of economic powers has worked well and that banks should be restricted to their present functions. Many bankers, particularly those represented by the Independent Community Bankers Association of Kentucky, feel that increased centralization of economic power will harm the financial community, resulting in impersonal control of banks and in a reduction of services to the consumer.

MORTGAGE LOAN RATE COMMITMENTS

Prepared by Greg Freedman

Issue

Should legislation be enacted to regulate mortgage loan rate commitments?

Background

During a six-week period in March and April, 1987, mortgage interest rates increased 1 1/2 to 2 percent. During this period, borrowers complained that lenders slowed the processing of applications or suddenly tightened credit standards in an attempt to get out of low-rate commitments. Similar complaints were raised during an earlier period of rising rates. At that time, lenders attributed the delay in processing applications to the heavy demand for loans and refinancing. Some borrowers have also discovered that, although they thought they had locked in a rate, their applications contained an escape clause permitting the lender to raise the rate if the Veterans Administration rate changed. Many mortgage applicants have been angered to find that their locked-in rates are not locked-in or that they are stuck with a higher rate because the loan wasn't closed before the rate-lock period (usually 60 days after the application is signed) ended.

Discussion

Some lenders have reacted by shortening the time for which they will lock in a rate. Others have begun to impose a separate charge of 0.5 percent to 0.75 percent of the loan for a locked rate for 60, 75 or 90 days.

Several legislatures have taken steps recently to rectify the situation. The legislature in Minnesota has legislation under consideration to require that all rate commitments be in writing and that commitments made over the telephone be confirmed within 72 hours. Connecticut has enacted a law to take effect on October 1 requiring that any rate commitment must be made for a period at least as long as the lender expects it will take to process the application. The Maryland legislature has passed a bill requiring lenders, within 4 days of receiving an application, to put the rate commitment in writing.

FUNDING THE DEPARTMENT OF FINANCIAL INSTITUTIONS

Prepared by Bill Van Arsdall

Issue

Should the method of funding the Department of Financial Institutions be changed?

Background

In 1982, the General Assembly created a trust and agency account for the benefit of the Department of Financial Institutions. Instead of receiving money through the General Fund, the department now pays for its operations solely out of this new account. All fees, assessments and examination charges earned by the department go into the account, and the department generates enough revenue to pay its own way.

When the 1982 change was adopted, the department was granted increases in the amounts it could charge financial institutions. Many legislators expected the additional revenue to pay for improvements in the bank examination process, allowing more examiners to be hired at higher salaries. These expectations have been largely disappointed.

The department has found it more difficult to obtain the funds than expected. Its trust and agency account is part of the state treasury, and an increase must be stated in the biennial budget request. The department is subject to caps on hiring and salaries along with the rest of state government, so its ability to upgrade the examination procedure has been limited. Some legislators question whether the department's funding procedure should be altered to more nearly accomplish the intent of the 1982 changes.

BANK FEES AND THE RIGHT TO A MINIMUM LEVEL OF BANKING SERVICES

Prepared by Greg Freedman

Issue

Should service charges and fees of financial institutions be regulated and should there be a minimum level of banking services available to all persons?

Background

The Consumer Federation of America and San Francisco Consumer Action conducted their third annual national survey on bank fees in April, 1986. The survey found "fees for routine services rising sharply for most depositors." Due to high fees and balance requirements, interest-bearing checking accounts are unavailable to nearly half of all American families. The 113 banks and 112 thrifts surveyed charged at least $5 for writing a check without sufficient funds, with a high of $40 and an average of $14. The charge for return of a deposited check ranges from $1 to $25; the average is $5. Over 72 percent of the institutions would not cash a government check for a noncustomer.

In its latest survey, released in June, 1987, the Consumer Federation of America found that every bank surveyed now charges at least $7 for each check returned for insufficient funds; the national average is now $14.26. The survey found that a majority of the institutions surveyed do not make clear to their customers the fees they charge. Interest bearing checking accounts at banks cost consumers an average $101.34 a year, while the same account at a thrift cost an average of $72.99. NOW accounts pay an average 4.61 percent interest on balances less than $1,000, which is down from 1986. In response to the survey, the American Bankers Association attributed the higher fees to diminishing bank profits due to increased competition.

A 1983 Federal Reserve survey found that 12 percent of all families held neither a checking nor a savings account. A 1986 Federal Reserve survey of persons without deposit accounts indicated that the primary reason for not having an account is that they would not write enough checks or have enough money to need an account. According to the survey, very few listed high service charges as a reason.

Discussion

In recent years banks have responded to the competition from nonbanking institutions and interest rate volatility with increased service charges, new fees, and higher minimum balance requirements. Opponents of regulation of fees and minimum balances contend that financial institutions should not be required to reduce prices when sellers of other goods and services are not also required to do so. They further argue that if the government believes all people should be entitled to banking services, the government should provide subsidies.

Proponents point to surveys indicating that a significant number of families do not have a deposit account. They advocate basic banking legislation to provide a minimum level of financial services for all persons. At least 15 states have considered basic banking legislation. Massachusetts was the first to adopt legislation in 1984, Rhode Island followed in 1985

and, in 1986, Illinois, Minnesota and Pennsylvania adopted legislation. As for the majority of families with deposit accounts, proponents of regulation of rates advocate that maximum fees should be established, financial institutions should be required to justify their charges for services, and there should be full disclosure of all account fees.

ELECTRONIC FUNDS TRANSFER

Prepared by Greg Freedman

Issue

Should legislation be enacted regulating electronic funds transfer?

Background

Electronic funds transfer (EFT) refers to the checkless, or nearly paperless, movement of money. Automated teller machines and point of sale terminals are two of the EFT systems. In 1978 the first federal regulation of EFT was adopted. The Electronic Funds Transfer Act (EFTA) provides protection for consumers by "establishing the rights, liabilities, and responsibilities of EFT participants." The Federal Reserve is authorized to adopt regulations that carry out the purposes of the EFTA. State laws are not preempted by the EFTA, except to the extent those laws are inconsistent with the EFTA. A state law that affords consumers greater protection than that provided by the EFTA is not considered to be inconsistent.

Kentucky statutes regulating financial institutions make no reference to EFT. What Kentucky has is a regulation that has been in effect since November 12, 1975. The regulation, 808 KAR 1:060, provides a procedure and set of criteria for the establishment of remote service units. It is questionable whether this regulation was promulgated with statutory authority. The statute cited as authority is the statute restricting branch banking. Section 13 of the regulation does provide that a remote service unit is not a branch, but the remainder of the regulation has nothing to do with the branch banking statute. The regulation permits a remote service unit to be used for the withdrawal of funds, instructing the financial institution to receive funds, and transferring funds for the customer's benefit. The Department of Financial Institutions must approve the establishment, use or sharing of a remote service unit before the actual use of the unit and after the financial institution submits certain information. Section 11 of the regulation provides that a financial institution may only operate or use a remote service unit that is located in the county in which the institution's principal office is located. There is an exception that permits an institution to share in the use of an out-of-county unit, but only if the unit is programmed so that the only type of transaction available to the out-of-county user is the dispensing of funds.

Although there are several EFT networks operating in Kentucky, it was the debut of the Quest network in August, 1986 that raised the issue of EFT regulation in Kentucky. The network was started by eight Kentucky banks, which contributed $200,000 each. The eight partners sell sponsorships to other financial institutions that want to participate in the network. The participants pay an initiation fee of $2,000 to $5,000 and annual dues of $1,200 to $5,000. The network links the automated teller machines (ATM) of the banks to a central computer or switching machine in Cincinnati, which routes the transaction to the cardholder's bank. The transactions handled by the network are withdrawals, transfers between accounts, and inquiries on account balances. As of May 5, 1987, there are 133 financial institutions participating, with 422 ATM's. Of the 133 financial institutions, 98 are banks, 30 are credit unions, and 5 are savings and loans. Ten of the financial institutions and 40 of the ATM's are located in Indiana.

Discussion

The regulation in Kentucky on remote service units is outdated and inadequate, as its use of the term "remote service unit" rather than "automated teller machines" would indicate. Its lack of a definition of electronic funds transfer is proof enough of its inadequacy. Legislation is needed that either clearly defines EFT and provides for its regulation or authorizes the commissioner of the Department of Financial Institutions to promulgate regulations. Because of the broad implications of EFT on the banking system, the legislature may want to exercise its legislative authority, rather than delegating it, by enacting legislation that designates permissible EFT systems and the types of transactions that each system may perform. Section 11 of the regulation points out the need for a statute that specifies the types of transactions that are permissible. That section provides that a bank or savings and loan may share in the use of a remote service unit located in another county, but only if the "only type of transaction available to an out-of-county user is the dispensing of funds." Despite the clear language of Section 11, EFT networks in Kentucky are not merely dispensing funds to out-of-county users, but are also handling transfers and account inquiries for them. This indicates that the regulation is not only outdated and inadequate, but also treated with indifference.

The operation of EFT networks across county lines in Kentucky has raised the issue of whether ATM's are branch banks. KRS 287.180 restricts the establishment of a branch to the county of the bank's principal office. EFT networks enable a customer of a bank in Paducah to withdraw funds from his or her account at an ATM in Louisville. If ATM's are deemed to be branches, the EFT networks operating in Kentucky are violating the statutory prohibition on cross-county branching. The General Assembly has not addressed the issue. In 1975, the Commissioner of the Department of Financial Institutions addressed the issue by proclaiming in Section 13 of 808 KAR 1:060 that a remote service unit is not a branch. What is and is not a branch bank is unclear, since Kentucky's statutes do not provide a clear definition. Under the McFadden Act a branch is a place "at which deposits are received, or checks paid, or money lent." In 1974 the Comptroller of the Currency issued a ruling that ATM's are not branches. The ruling was overturned in *Independent Bankers Association of America v. Smith,* 534 F.2d 921 (D.C. Cir. 1976). The federal court held that ATM's are branches under the McFadden Act. The Comptroller then adopted regulations stating that an ATM that is not owned or rented by a national bank is not a branch. This was challenged and upheld in *Independent Bankers Association of New York State v. Maine Midland Bank,* 757 F.2d 453 (2d Cir. 1985). It seems that an ATM not owned or rented by a bank is not subject to a state's branching laws, whereas an ATM owned or rented by a bank is subject to the branching restrictions of a state.

Although it is not certain whether an ATM is a branch in Kentucky (notwithstanding Section 13 of 808 KAR 1:060), it is certain that any EFT legislation must take into consideration the state's branching restrictions. If legislation is enacted by the General Assembly prohibiting cross-county use of ATM's, whether owned by the financial institution or not, state-chartered banks would be at a disadvantage to the extent that national banks participate in a system of ATM's not owned or rented by banks.

It is argued that prohibiting EFT networks will hurt small banks, which can use the network to compete more effectively with large banks. Small banks could also be harmed if ATM's are treated as branches, because federal savings and loan associations and credit unions are not subject to state branching restrictions. The General Assembly needs to determine whether the types of transactions performed by ATM's should be unrestricted. If so, should the branching law be changed to allow cross-county branching? If restrictions are imposed on the use of ATM's, what transactions should be permitted? There seems to be little, if any, objection to allowing EFT networks to use ATM's to dispense funds, transfer funds

from one account to another, and to respond to inquiries of customers. These are the functions currently being performed by ATM's for out-of-county users in EFT networks in Kentucky. The objections are raised in regard to the acceptance of deposits. There are those, including the Kentucky Bankers Association, who contend that the acceptance of out-of-county deposits by ATM's in an EFT network would amount to cross-county branching.

Finally, due to reports of increasing crimes against customers using ATM's, the General Assembly may want to address the issue of how far banks must go to make ATM's safe. Settlements were recently won by victims of ATM-related robberies in Florida and Michigan; several other cases are still pending. Many times the assaults occur after the customer has left the bank's property and may never be reported to the bank. A bank's liability might be reduced and customers protected if there were minimum standards for ATM location and lighting, brochures with warnings distributed to customers, and surveillance equipment installed at ATM's.

MOTOR VEHICLE INSURANCE VERIFICATION

Prepared by Bill Van Arsdall

Issue

Should the enforcement of Kentucky's motor vehicle insurance law be improved?

Background

Kentucky law requires all motor vehicles to be insured. Since 1978, the General Assembly has adopted two plans to enforce this law, but drivers still cheat. As many as 30% of the cars and trucks on Kentucky's roads may be inadequately insured.

From 1978 to 1985, all vehicles were required to carry window stickers. This system was designed to let police tell at a glance whether a vehicle was insured, but enforcement proved difficult. A dishonest motorist could buy insurance, obtain a sticker, and immediately cancel the coverage. The police would have no way to know for up to a year that the car or truck was uninsured. This program did not seem to significantly increase the percentage of insured vehicles on the road.

In 1984, the General Assembly did away with the sticker law, increased the penalties for driving without insurance, and instituted the present system of verification. No county clerk may now renew the registration of a car or truck until proof of insurance is presented. The state keeps computer records on the insurance status of each registered vehicle. Whenever a policy is cancelled or is not renewed, the Department of Motor Vehicles must instruct the owner to show proof of insurance within ten days. If such proof is not presented, the case is turned over to the county attorney for enforcement. Penalties include a fine, loss of driver's license, and suspension of license plates.

Discussion

This system has several problems. First, it subjects law-abiding citizens to an annoying set of rules and procedures. Every motorist who changes insurance companies receives a notice threatening legal action if steps are not taken to prove that insurance is in effect. These notices confuse and frighten many people.

Second, county attorneys refuse to enforce the law, because of the inaccurate data being provided to them. When a county attorney receives a report that a vehicle is being operated without insurance, there is a 25% chance that the vehicle identification number in that report is wrong.

A third problem concerns enforcement by the State Police. Regulations require insurance companies to furnish wallet-sized cards with each new automobile policy, and one of these cards must be carried with every insured vehicle. In theory, the police thus possess an easy method of checking for insurance violations: whenever an officer stops a car for any reason, the driver can be required to produce a proof-of-insurance card. However, the police currently refuse to use such an enforcement method because the card requirement is not part of a statute. As long as the rule is merely part of a regulation, it does not carry sufficient force of law to satisfy the legal division of the State Police.

To solve these problems, the Subcommittee on Insurance of the Interim Joint Committee on Banking and Insurance set up an informal study group. This panel included representatives of the county clerks, county attorneys, insurers, the Kentucky State Police, the Department of Insurance, and the Department of Vehicle Regulation. A number of solutions were offered, from expanding the current system to abandoning it altogether. The suggestions fell within three categories:

1. Increased Record-Keeping

One suggestion was to require insurance companies to report more information. All new policies would have to be reported, not merely all cancellations and nonrenewals. This may be the only way to keep a reliable list of the vehicles that are covered and those that are not. Insurance companies object, however, that this is an unnecessary invasion of their privacy. If required to report new policies, they would want their lists of insureds to stay out of the hands of the public and of competing insurers.

Another idea was to issue a card only for the amount of time a policy remains in force, printing the beginning and ending date of the policy on each card. This would also require companies to provide more information than they are currently giving.

A third suggestion was to make the cards more uniform. Some companies include more information on their cards than others do.

Everyone who recommended increased record-keeping acknowledged that it might require additional funding, but they were confident that the state possesses the capacity to keep track of the insurance status of all vehicles, and that this is the best way to verify that the insurance laws are being followed.

2. Strengthened Enforcement

Law enforcement officials recommended that it should be a crime to drive a motor vehicle without the insurance card. There would then be two separate offenses which county attorneys could prosecute: failure to possess insurance and failure to carry a card.

County attorneys requested wide discretion in punishing persons who do not carry cards in their vehicles. Enforcers would thus be able to impose stiff penalties on those who clearly have no insurance, while giving little or no punishment to those who do obey the law. It is much easier for a county attorney to prove that a person has been driving without a card than it is to prove that there is no insurance on the vehicle.

It was also suggested that Kentucky should close the loophole for cars registered in another state. Under present law, the first time an out-of-state car is registered in Kentucky, its owner does not need to show proof of insurance.

One participant suggested that the driver of each vehicle should be made responsible for its insurance coverage. Currently the owner may be punished for lack of insurance, but the driver bears no responsibility. Just as we cite drivers for failure to carry licenses and registration documents, we could also cite them when their vehicles contain no proof of insurance.

3. Administrative Procedures and Limited Reporting

Finally, the insurers at the meeting suggested that Kentucky does not need to maintain its current level of record-keeping and punishment. The state could require insurance

companies to report cancellations and nonrenewals only during the first 180 days of each policy period. This could eliminate expense and annoyance of the public, while catching most of the criminals who buy insurance only to drop it once they have obtained proof of coverage. Instead of imposing criminal penalties for failure to carry insurance, the state could establish a system of administrative suspensions. An administrative body separate from the criminal justice system could hear motor vehicle insurance cases and set punishments.

BUSINESS ORGANIZATIONS AND PROFESSIONS

OCCUPATIONAL REGULATION REVIEW

Prepared by Michael Greer

Issue

Should the state regulate occupational groups which are not now regulated?

Background

According to a study published in 1983 by the Kentucky Occupational Information Coordinating Committee, there are 97 occupations and professions that are licensed, certified or in some other way regulated by the state. Each legislative session bills are introduced to regulate still other occupational groups. Bills were introduced and considered in the 1986 General Assembly to license or certify denturists, dietitians and nutritionists, geologists, mental health counselors and marriage and family therapists, occupational therapists, physician assistants and private security officers. Most of these bills were unsuccessful but may be reintroduced in the 1988 session, along with legislation to regulate still other groups. The proliferation of licensing legislation is a national trend, particularly with groups in the health care and behavioral sciences areas.

Discussion

The decision on whether to regulate a particular occupation is not an easy one. The decision is often made more complicated when the scope of practice in a proposed bill overlaps with that of a licensed group, thus creating opposition with a vested interest. To address this situation, many states are implementing what are being called "sunrise" processes. "Sunrise" is simply a clever name for an orderly procedure for reviewing and evaluating new regulatory proposals. Since the purpose of occupational regulation is to protect the public health and safety, "sunrise" processes include criteria for determining the need to regulate.

The Kentucky Legislative Research Commission adopted "sunrise" guidelines in 1979 as part of the interim committee rules. These guidelines designate the Interim Joint Committee on Business Organizations and Professions as the committee of jurisdiction for new occupational regulation proposals. The burden of proof for justifying the proposals and for developing required documentation is placed on the proponents of the proposed regulation. They are required to develop information on the occupational group to be regulated and identify specific problems that are occurring as a result of unregulated practice. They are also asked to consider the various alternative forms of regulation in an effort to select the least restrictive form of regulation and the form most appropriate for the particular situation. "Sunrise" guidelines are applied to occupational groups seeking regulation by the Subcommittee on Occupations and Professions of the Business Organization and Professions Committee.

STABLING FOR HORSES IN TRAINING

Prepared by Michael Greer

Issue

Should Kentucky racetracks be required to keep their stable area open year round for horsemen to use for training purposes?

Background

Kentucky tracks have traditionally provided stall space for horses during meets, but few keep their stable areas open for horsemen to use for training purposes when a meet is not in progress. In November, 1986, Churchill Downs announced it would close its backside effective January 10, 1987, in order to complete certain renovation projects. At the November meeting of the Interim Joint Committee on Business Organizations and Professions a large group of horsemen protested the decision. They claimed that they were not given adequate notice and that the decision to close the stable area would place a financial hardship on them.

Discussion

On February 5, 1987, 88 RS BR 151 was prefiled; it would require all Kentucky tracks keep a minimum of 50% of their stall capacity open to horsemen for at least eleven months of the year at no cost to the horsemen. The bill was referred to the Interim Joint Committee on Business Organizations and Professions and was placed on the agenda for March, 1987. Track representatives testified that the legislation would impose a significant cost to the tracks, particularly those tracks whose stables are not winterized.

PROTECTION FOR SMALL LIQUOR RETAILERS

Prepared by Michael Meeks

Issue

Should legislation be enacted to assist small alcoholic beverage license holders in competing with large licensees?

Background

The Kentucky fair trade law was ruled unconstitutional by the Kentucky Court of Appeals in the case *Alcoholic Beverage Commission v. Taylor Drug Stores, Inc.* 635 S.W.2d 319 (1982). The fair trade law required distilled spirits and wine to be sold according to a minimum resale schedule, not including discounts for retailers as established in KRS Chapter 244. Chapter 244 requires that all sales from wholesaler to retailer include a minimum mark-up resale price of not less than thirty-three and one-third percent, not including discounts for retailers. This section of Chapter 244 has been upheld as constitutional; however, it has been construed to conflict with the Sherman Antitrust Act (15 USC§ 1 et. seg.).

At the present time, alcoholic beverage licensees are free to determine their own profit margins except that licensees shall not give away any alcoholic beverages for less than full monetary consideration. This creates the problem of large chain stores having advantages over small liquor outlets which cannot compete, due to the large volume, selection, and discounts available at such chain stores. Large discounts occur when individual stores in the chain order from the wholesaler or distributor as if one store placed the order. The wholesaler or distributor subsequently delivers the order to each store separately.

Further, many chain stores engage in businesses other than the liquor business at the same location thereby supplementing the liquor business and drawing more customers into their stores. The end result is that small liquor outlets cannot compete with larger chain stores which sell alcoholic beverages along with other non-alcohol items.

Discussion

The 1986 General Assembly looked at three bills which proposed to aid the small liquor outlets:

House Bill 388 would have prohibited the issuance of a retail package liquor license for any premises at which more than fifty percent of the gross receipts are derived from the sale of items other than alcoholic beverages;

House Bill 958 would have prohibited wholesalers from discriminating among alcoholic beverage retailers and provided for uniform maximum discounts which a wholesaler may give; and

House Bill 387 which provided for the same as House Bill 958 but concerned brewers.

CAPITAL CONSTRUCTION AND EQUIPMENT PURCHASE OVERSIGHT COMMITTEE

PROVIDING SPACE FOR THE COMMONWEALTH IN THE FRANKFORT/FRANKLIN COUNTY AREA

Prepared by Joyce A. Morse

Issue

Should the Commonwealth lease its increased space needs from the private sector or construct an office building in the Frankfort/Franklin County area?

Background

The state is currently leasing approximately one million square feet of space in the Frankfort/Franklin County area to house state agencies, at an annual cost of $4.5 million. Some of this space has been occupied by state agencies for a number of years, including 60,000 square feet in one building which has been leased by the Labor Cabinet for more than thirteen years. The Natural Resources and Environmental Protection Cabinet (NREPC) currently is housed in fifteen buildings, eleven of which are leased. The NREPC currently leases 169,000 square feet of space, some of which has been occupied by the agency for over thirteen years.

If the state continues to lease its new space needs, by 1991 the annual rental cost will be $13.2 million. This figure is based on the current one million square feet leased plus the agencies' projected need for an additional 990,000 square feet, at the current rental rate of $6.95 per square foot.

Discussion

There are several possible approaches to providing space for state agencies. These are:

1. **Lease space as needed.**

   Advantages

   - It is a quick way to provide space for short-term programs.

   Disadvantages

   - The rental payments are a non-recoverable expenditure. The state acquires no equity in the property.

2. **Construct office buildings as needed.**

   Advantages

   - The state has efficient modern buildings to meet its needs.
   - Ownership is more economical for long-term occupancy (over five years).

   Disadvantages

   - During a revenue shortfall, funds are not available for construction, unless the project is bonded.

3. **Lease-purchase space as needed.**

Advantages

- Lease payments would build equity in the property.

Disadvantages

- It would take the property off the tax rolls when the title is transferred to the state.

4. **Purchase buildings as needed.**

Advantages

- It would provide quick access to space.
- It would take advantage of the private sector's lower construction costs.

Disadvantages

- It would take the property off the tax rolls immediately.

CITIES

CONSTITUTIONAL REVISION FOR CITIES

Prepared by Jamie Jo Franklin

Issue

Should those sections of the Kentucky Constitution which affect cities be amended to reflect the current needs of Kentucky's cities?

Background

The 1891 Kentucky Constitution contains 47 sections which in some way affect cities. When the current constitution was being drafted the Commonwealth was essentially a rural state. The drafters of the constitution were primarily of rural backgrounds and could not have foreseen the changes which would be precipitated for all governmental entities over the next 96 years. Also, because of a great deal of questionable activities by "uncontrolled" local officials under previous constitutions, many of the 1891 drafters sought to limit the power and influence of cities.

Today a majority of the state's population lives in more than 400 cities across the state. Of these 400 plus cities, no two are exactly alike. True, all cities must fall under one of six constitutionally mandated municipal classifications and operate under one of four statutorily authorized organizational structures. In addition, they all must operate within constitutionally prescribed indebtedness and revenue generation limits. But variations in service provision and revenue generation methods create a patchwork of multifaceted municipal corporations across the state which must operate under the drastically outdated operational provisions of the 1891 constitution.

Discussion

Double digit inflation, federal revenue sharing and grant programs, local governments functioning as service providers, and industrial development revenue bonds were unknown to the drafters of the 1891 Constitution. But with the advent of these phenomena, what was thought of as "reasonable limits" for the operations of cities in 1891, have become severe restraints in terms of the structure, functions and financing of Kentucky's municipalities today.

For instance, the 1891 Kentucky Constitution provides for the division of Kentucky cities into six classes based on population (Sec. 156). With the enactment of "home rule" and the repeal of many class-related municipal statutes in 1980, city classification for organizational purposes has lost much of its significance. Yet some areas such as police and firefighters, municipal pension systems, and alcoholic beverage control are still affected by classification. But the improper classification of a large number of cities, due to the usage of questionable federal census data, makes it difficult to fairly regulate or administer programs in these areas. Therefore, consideration of a constitutional amendment seems justified.

The current constitution also limits the ability of cities to levy taxes and incur debt. Cities are limited in the types of taxes which they can impose (Sec. 181) and general obligation debt can only be incurred if approved by an extraordinary majority (2/3) of city voters (Sec. 157). Maximum tax rates and maximum limits of indebtedness are also set out in the Constitution (Secs. 157 and 158). Such limitations have prohibited or severely limited the ability of cities to borrow money at the lowest possible municipal rates, use tax incentives to encourage economic development and to have the full benefit of the taxing capabilities of the city.

In addition, recent changes in federal, state and local fiscal relationships, e.g., elimination of general revenue sharing, major cutbacks in most federal domestic programs and the Tax Reform Act, will increase the direct fiscal burden on cities to provide even the most basic municipal services. Therefore, the ability of cities to be flexible and creative in the financial arena will be of utmost importance.

Thus, the need for a comprehensive constitutional revision affecting cities seems greater than ever. Yet most amendments in this area have been accomplished on a one-by-one basis, with the most recent being the 1986 mayoral succession amendment. Since an unsuccessful 1966 effort, no proposals have recommended a comprehensive overhaul of the 1891 Constitution as it affects cities.

During the 1986-87 interim, county and municipal constitutional amendments have become vital issues. Both the Interim Joint Committee on Cities and the Interim Joint Committee on Counties and Special Districts have assigned the topic to a subcommittee for interim research. Also, the Legislative Research Commission has formed a Special Commission on Constitutional Review which has a subcommittee devoted to local government issues.

ENSURING LIABILITY INSURANCE FOR KENTUCKY'S CITIES

Prepared by Kathy A. Campbell

Issue

Should the General Assembly take steps to ensure the availabilty and affordability of liability insurance for Kentucky's cities?

Background

Local governments are caught in the midst of what has been deemed a public liability insurance crisis. In response to a number of factors, including increased liability risks of cities, falling returns on investments, and the inability to obtain reinsurance, insurance companies nationwide have been cancelling liability insurance coverage for cities without cause or prior notification, as well as doubling or tripling premiums charged while reducing the amount of coverage offered. Especially affected are the high risk activities municipalities engage in, such as police and fire protection, providing parks and recreational activities and mass transit. Because of the nature of municipal government, it is usually not possible for a city to limit or stop performing a particular high risk service for which it can no longer obtain coverage. On the other hand because of the limited resources of most cities it would be foolhardy to "go bare" and perform the service without any coverage.

Discussion

Virtually every state in the nation is currently grappling with how to address the liability insurance crisis. According to the National Conference of State Legislatures, 44 legislatures were in session in 1986, and in those states lawmakers introduced and debated some 1,400 pieces of legislation dealing specifically with liability insurance. The 1986 session of the Kentucky General Assembly was among those states striving to find palatable solutions to the insurance crisis for all parties involved.

House Joint Resolution 139 was enacted in 1986, creating the Kentucky Insurance and Liability Task Force to study and investigate insurance laws and regulations, insurance companies, the Department of Insurance, the availability of insurance to Kentuckians, the rate making process and other areas of insurance as necessary.

Senate Bill 330 was also enacted, requiring the Commissioner of Insurance to hold four public hearings to determine if insurance is generally available to Kentucky political subdivisions, if it is available at rates that are not excessive, inadequate or unfairly discriminatory, and if a competitive market exists for such insurance. The Commissioner of Insurance to date has not reported back to the General Assembly with the findings from these public hearings.

Many remedies to this issue are beyond the influence of state legislatures; however, legislative initiatives usually address the following areas:

Insurance Regulation

1. Expanded insurance reporting requirements.
2. Rate setting and review.

3. Mandatory notification of cancellations and nonrenewal of policies.
4. Alternative insurance mechanisms, such as joint underwriting associations, market assistance programs, and risk retention/group and self-insurance.

Civil Justice Reforms

1. Restoration in full or in part of sovereign immunity to municipalities.
2. Caps on damages.
3. Frivolous lawsuit restrictions and penalties.
4. Joint and several liability.
5. Punitive damages.
6. Comparative/contributory negligence.
7. Collateral source rule.
8. Structured settlements/Periodic payments.
9. Settlement offers (mandatory upon motion)
10. Statute of limitations.
11. Attorney fees.
12. Mandatory arbitration.
13. Itemized jury verdicts.
14. Interest on judgments.

Municipalities throughout the Commonwealth have begun to develop self-insurance pools as an alternative to the lack of affordable insurance. The Kentucky Municipal League has formed a self-insurance pool that was expected to be operational by June of 1987, while the City of Louisville began operating a self-insurance program late in 1986. It is hoped that the formation of self-insurance pools will ease the pressures exerted on municipalities by the insurance crisis; however, it is too early to know if premiums and coverages will actually result in substantial savings to local governments, by contrast, that is, with premiums and coverages offered by the commercial insurance and reinsurance markets.

The Kentucky Insurance and Liability Task Force is scheduled to report its findings and recommendations to the Legislative Research Commission on or before December 1st of this year. The Interim Joint Committee on Cities is awaiting those recommendations before preparing legislation relating to the availability and affordability of liability insurance for Kentucky's cities.

MUNICIPAL TORT IMMUNITY

Prepared by Sharon G. May

Issue

Should absolute governmental immunity be granted to Kentucky cities or alternative steps be taken to alleviate their tort liability?

Background

Governmental or sovereign immunity denies a citizen the right to sue a governmental unit. Although it was historically the general rule for state and local governments, beginning in the 1950's many states judicially or legislatively abolished governmental immunity either in whole or in part. In Kentucky, Section 231 of the Constitution has been interpreted to grant immunity not only to the state, but also to county and urban-county governments, unless waived by the General Assembly. (The General Assembly has waived state tort immunity to a limited extent under the Board of Claims Act (KRS Chapter 44)). Kentucky cities, however, are not protected by Section 231 and have governmental immunity only to the extent that common law allows.

Common law is interpreted by the Courts and it is subject to change over time. Apparently Kentucky cities began with no common law immunity. (See *Gas Service Co., Inc. v. City of London,* Ky., 687 S.W.2d 144, 146 (1985) (hereafter *City of London*).) Over time, Kentucky's highest court has sometimes construed common law as providing immunity to cities from most torts (i.e., the rule was immunity, the exception was liability), and at other times as imposing liability for most torts (i.e., the rule was liability, the exception was immunity.) Therefore, common law has never extended absolute city immunity or absolute city liability. While this switch back and forth between a general rule of liability or a general rule of immunity has resulted from the Court's attempt to mitigate against the harshness of an absolute rule and to provide a balance of equities, the existence of exceptions and the Court's struggle with applying exceptions has made it difficult to predict the result in a given case.

The present rule of law set out in *City of London* is a "rule of liability"—cities are liable for ordinary torts but they have immunity for torts committed while exercising their "legislative or judicial or quasi-legislative or quasi-judicial functions" (*Supra* at 742). Because the Court retained the judicial/legislative, quasi-judicial/legislative exception, an exception which courts have previously had difficulty in applying, the scope of liability and immunity remains uncertain. Whether uniformity of decisions will occur and whether the Court will clarify the scope of the exception so that cities will be able to foresee their potential liability remains to be seen. In *City of London,* three Justices expressed the view that retaining the exception will cause the same confusion and difficulty in application which have previously been experienced, and argued that exceptions to city liability should be uniform and should be made by the General Assembly.

While the problems with the Court's treatment of the immunity issue have created some concern, the primary reason that the city immunity issue has surfaced is financial. Liability insurance premiums have recently seen a tremendous increase. Indeed, a resolution which created the Kentucky Insurance and Liability Task Force in March, 1986, stated that one reason for creation of the task force was that "liability insurance premium increases of 25% to more than 1000% are being imposed on municipalities." Adding to cities' dilemma

is the fact that Kentucky law severely limits a city's ability to generate revenue—Section 157 of the Constitution prohibits the incurrence of long-term debt unless approved by an extraordinary majority in a referendum; Section 181 limits municipal taxing authority to property taxes and license fees; and KRS 132.027 (popularly known as HB 44) places a cap on increases in property tax revenues.

Discussion

Some major arguments for granting immunity and counterarguments have been made as follows.

1. Funds collected for public purposes should not be diverted to compensate a private person, but, on the other hand, as expressed by Justice Liebson in *City of London*: "The duty to exercise ordinary care commensurate with the circumstance is a standard of conduct that does not turn on and off depending on who is negligent." *City of London, supra* at 148;

2. Local governments perform necessary but risky services not performed by private business, but, on the other hand, most services performed by local governments could be performed by private business and indeed the trend has been for governments to contract with private business to provide public services (Justice Wintersheimer concurring in *City of London* noted that "almost every form of physical function that a city now provides can be delegated to private enterprise except for the ultimate basic pure-governmental decision making and the exercise of judgments connected therewith." *supra* at 151;

3. Fear of liability may discourage the performance of such services but, on the other hand, liability deters negligent conduct by encouraging the adoption of policies and procedures, and the enforcement of them, to assure that ordinary care is exercised by the local governments and their employees; and

4. A large judgment could have a catastrophic effect upon the limited resources of a local government, but, on the other hand, cities could be required to carry insurance and the insurance industry could be regulated to assure that insurance is both obtainable and affordable, and laws which restrict a city's ability to generate revenue could be made less restrictive.

Throughout the United States the common law doctrine of governmental immunity is virtually non-existent with respect to cities. Immunity has been abrogated in whole or in part in approximately 45 states. However, most states have enacted some form of protective legislation, usually known as tort claims acts.

The goal of a tort claims act should be "to create an equitable system through which a city can foresee and respond in reasonable damages in those instances where liability is appropriate, as well as be shielded from liability in those instances where financial exposure would threaten the public entity's solvency or ability to govern. (D. Holmes, *et al. 1984 Report to the Annual Conference,* Committee on Municipal Tort Liability of the National Institute of Municipal Law Officers, p. 10 (October 29-31, 1984).)

A tort claims act can take many forms. The following lists possible options open to the General Assembly. Of course, one option can be combined with another:

(1) Grant cities immunity, but waive it for enumerated categories of activities (i.e., operation of motor vehicles);

(2) Codify liability as established by common law but define the legislative/-judicial, quasi-legislative/judicial exception broadly;

(3) Codify liability as established by common law, but place a cap upon judgments;

(4) Prohibit or limit recovery for non-economic losses or for punitive damages;

(5) Limit a plaintiff's recovery to insurance coverage and require cities to carry insurance;

(6) Impose strict procedural requirements upon a plaintiff bringing an action against a city (i.e., special statutes of limitation or special notice requirements);

(7) Permit a city to pay a judgment in installments over several fiscal years;

(8) Authorize special taxing or bonding authority for a city ordered to pay a judgment; or

(9) Establish a statewide special fund to be used to assist cities in the payment of judgments.

The first two options may run afoul of Section 14 of the Kentucky Constitution, which guarantees citizens a right to redress for injuries, and Section 241, which guarantees recovery of damages for death which was caused by the negligence or wrongful act of a corporation or person.

Although the third option of limiting a city's potential liability with a cap is the most commonly used element of tort claims acts (twenty-four states use such a cap), that option as well as options (4) and (5) may be prohibited under Section 54 of the Kentucky Constitution, which states that the General Assembly has no power to limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.

As an alternative to a tort claims act or in conjunction with such an act, the General Assembly could regulate the insurance industry to assure that insurance is obtainable and affordable and require cities to be insured.

Whether immunity should be granted to cities or alternative steps taken to alleviate the tort liability of cities and what steps should be taken to affect such a goal continues to be studied by the Kentucky legislature. The 1986 General Assembly had before it two bills addressing this issue, both of which died in committee—House Bill 120, a tort claims act, which placed a cap upon judgments, permitted judgments against local government to be paid in installments, permitted a levy of taxes in excess of KRS 132.027 in order to pay judgments, and permitted local governments to jointly establish pooled self-insurance funds, among other provisions; and Senate Bill 262, which proposed to amend Section 54 of the Constitution to empower the General Assembly to establish recovery limitations for non-economic losses.

Currently this and related issues are being discussed by the LRC Special Commission on Constitutional Review, the LRC Insurance and Liability Task Force, subcommittees of the Interim Joint Committee on Cities, and the Interim Joint Committee on Counties and Special Districts. No committee has made specific proposals, as they are all awaiting the final recommendation of the Insurance and Liability Task Force, which is expected to be completed in September 1987.

UNIFORM FINANCIAL REPORTING SYSTEM

Prepared by Donna G. Weaver

Issue

Should a uniform financial reporting system be established for Kentucky's cities?

Background

Cities in the Commonwealth are required by state law to publicly present or report financial information on a limited basis: the annual or biannual audit required by KRS 91A.040, quarterly operating statements submitted by the executive authority, required by KRS 91A.030(11), and the preparation, submission and publication of an annual budget, as specified in KRS 91A.030. Currently there are no penalties for failure to comply with the provisions of KRS Chapter 91A, which seriously diminishes its effectiveness. The legislation requiring financial reporting was first passed by the 1980 General Assembly and in 1982 the first city audits were received by state government agencies.

Audits are to be conducted at the close of each fiscal year by all cities except those "which receive and expend from all sources and all purposes less than twenty-five thousand dollars ($25,000) and which have no long term debt" (KRS 91A.040). These audits must be performed by a certified public accountant or the state auditor of public accounts. Upon completion of an annual audit, the cities forward two copies of the audit report to the Kentucky Department of Local Government for information purposes. Since no state agency can enforce compliance with these statutes, and since annual audits do not provide that much information,, it is often difficult to find current and accurate data concerning the financial status of Kentucky's cities.

By contrast, county governments are required to have their budgets approved by the state local finance officer (KRS 68.210, 68.220, 68.240) and already have in effect a uniform accounting system for recording pertinent county financial data.

Discussion

The widely varying techniques of independent auditors have resulted in a scattered array of municipal financial statements, demonstrating the need for a uniform reporting system. Data currently received is often useless, either because it is too specific or too vague. Too much discretion is thus left for the interpreter of the data, creating a large margin for error. The unreliability of this information also hinders the Legislative Research Commission and other state agencies from developing a statewide data base which could be used to develop legislation and provide valuable local government financial information.

A uniform reporting system could easily be developed at the state level. A system similar to that for the reporting of county financial data would be acceptable.

Adoption of a uniform financial reporting system would result in municipal financial statements which would provide specific information for the Legislative Research Commission and other state agencies to use in the compilation of an annual data base. It would also provide cities the capability to compare their financial data with that of similar cities.

COUNTIES AND SPECIAL DISTRICTS

PROPERTY VALUATION ADMINISTRATION

Prepared by Adanna Keller

Issue

Should the General Assembly amend the current approach to funding the Property Valuation Administrator's office?

Background

The constitutional office of county assessor was abolished by the General Assembly in 1918 and was statutorily replaced by the office of county tax commissioner, later changed to property valuation administrator (PVA). PVAs are defined in statutes as elected county officials subject to the control and regulation of the Revenue Cabinet. The Kentucky Court of Appeals has classified the PVA as a divisional officer of the Revenue Cabinet, therefore a state officer, in Jefferson County Fiscal Court v. Trager.

The funding system for PVA offices provides for appropriations from state and local governments. State appropriations for PVA salaries, other employee salaries and office expenses are computed according to two statutory formulas. The funding formula for the PVAs' compensation is based upon three criteria outlined in KRS 132.590. The formula for employee salaries and expenses is based solely on assessments. The appropriations from the fiscal courts utilize a similar scale, based on the amount of assessment. The state has not allocated full funding as prescribed by the formula, thus causing the Revenue Cabinet to allocate and redistribute state and local funds among the PVA offices according to the Revenue Cabinet's judgment of need.

Discussion

Two funding policy alternatives the General Assembly might consider are: whether funding for PVA offices should be based upon a set of statutory formulas, or whether the more traditional agency budget approach should be used. Furthermore, the General Assembly might consider whether additional entities which raise taxes, such as school and special taxing districts, should contribute proportionally to the cost of operating the PVA offices currently funded by state, county and city governments. Another question for the General Assembly is how much each entity should pay. The proportion of the total appropriation paid by an entity could either be built into the structure of a funding formula or be based upon the percentage of revenue received.

The funding system for PVAs has been a point of controversy. A frequently voiced criticism of the funding formula is that the state formula is based on aggregate assessed value of property and is not necessarily a valid indicator of the amount of work which goes into making assessments. Several work-related variables could be used to establish a more credible funding formula. State and local appropriations and office expenditures show high correlations with the following workload-related variables: county population, residential and commercial parcels, intangible and tangible accounts, and the aggregate assessed value of property. Any of the above variables could be used to construct a formula which better reflects workload. Since these variables are so highly correlated with one another, one does not, however, gain any ability to predict office workloads by using several of them in the same formula.

Local funding is another problem area in the present funding system. Counties and cities allocated approximately 15% and 7%, respectively, of the monies used to support the PVA offices during FY 1986-87. Counties budgeted approximately $2 million, while cities' costs for services were estimated to be $1 million.

PVAs are required to manage all local funds subject to the guidelines of the Department of Property Taxation. Cities which use the PVA's assessments of property within their jurisdiction pay a fee prescribed in KRS 132.285. These city funds are placed directly into the property valuation office's bank account. With regard to county appropriations, the fiscal court simply pays the invoices for expenditures made by the PVA. According to KRS 132.590(10), unexpended county funds are to be carried forward and added to the next year's appropriations. However, this carryover is not allowed by all county fiscal courts.

A final source of inequity in the funding of counties involves the city usage of the PVA's tax roll. For instance, it is possible for two counties to have the same level of county funding because their aggregate assessments are nearly the same. However, the two may differ greatly in total appropriations because one county has significantly more municipalities willing to pay for the use of the tax rolls. The greater appropriation given to the county with more municipalities does not involve any significant amount of work on the part of the PVA's office.

Since the General Assembly has been appropriating less than what the full funding formula calculates, the Revenue Cabinet has had to allocate the available funds according to a determination of need. Determination of need includes the amount of unexpended local funds available to an individual PVA office. PVA offices which have small surplus funds frequently receive a greater percentage of the funding formula than counties which have a large carry-over of unexpended funds. Some PVAs regard this procedure as an injustice; PVAs who are frugal with locally appropriated funds feel penalized when their share of state funds is determined. Other PVAs view this procedure as justifiable in light of the size of the local surplus in some counties.

REFINING PROPERTY TAX ADMINISTRATION

Prepared by Jeff Travis

Issue

Should the Kentucky General Assembly require a computerized central tangible tax system, expansion of the MOTAX system and changes in deed laws to increase the identification of missing property and ensure its inclusion on the tax rolls?

Background

The 1986 Kentucky General Assembly passed House Concurrent Resolution 39, mandating a study of the Property Valuation Administrator's (PVA) office. This study was aimed at examining efficiency and effectiveness and identifying problems related to the operation of the office. One area that has historically been a problem is ensuring that all taxable property is on the tax roll. The Kentucky Constitution and the Kentucky Revised Statutes require that all property that is not constitutionally exempt be placed on the tax roll. Accordingly, the PVA has a mission to identify and assess all taxable property, and the Revenue Cabinet has the responsibility of ensuring that all property is assessed and placed on the tax roll.

Discussion

Missing property includes real, intangible and tangible personal properties. There is no way to accurately estimate the amount of revenue lost through property which is absent from the tax rolls. The implementation of two centralized computer systems and a change in deed laws and enforcement powers would provide state and local governments with additional revenues with no change in responsibility or liability to taxpayers. Several obstacles interfere with identifying taxable property.

Officials in the Revenue Cabinet have estimated that 30-50% of the total personal tangible property assessment is missing. This property is either being underassessed, due to the self-reporting of its worth, or is missing from the tax rolls completely. Due to the estimated significant percentage of tangible property missing from tax rolls, and because the state tangible property tax rate is not limited by HB 44, substantial state revenue increases could be realized with improved assessments of these properties.

The present tax system's reliance on self-reporting and non-uniform tax computation practices impedes PVAs' ability to make equitable assessments for tangible properties. A new centralized computer system for tangible personal property, patterned after the one recently implemented for intangible personal property, would help to assess tangibles at fair cash value and also to locate property missing from the tax rolls.

Revenue Cabinet officials have estimated that the implementation of a computerized tangible property system has the potential to generate an additional $5 million in revenue for the state and an additional $8 million for local governments in the first year. The future yearly potential is $30-35 million for the state and $50-60 million for local governments.

The assessment of watercraft and trailers presents PVAs with several problems. Watercraft and trailers are placed on the tax roll at the time of registration. If a new owner does not register the watercraft until after the PVA's second recapitulation is due, the property is omitted from the tax roll until the next year. Additionally, due to the difficulty in us-

ing the boat and motor valuation books, many PVAs rely on owner valuations of watercraft. A computerized system similar to "Motax" for watercraft and trailers would ensure more accuracy in assessments and the number of boats placed on the tax rolls.

The potential revenue benefits to be derived from a Motax-like system for watercraft is estimated at $1.2 million in the first year of operation. Revenue potential could increase to $2.1 million by the third year of operation.

Another problem in tracking down real property is the absence of laws requiring property owners to file their deeds at the courthouse or to provide detailed descriptive information about the conveyance. Consequently, land which has never been deeded may escape the PVA's notice. Additionally, deeds that are filed often contain vague information and are not usable by the PVA for assessment purposes.

One final problem in assessing real property is locating mobile homes and identifying property improvements. Many PVAs have suggested that, other than physical inspections, a list of utility hookups provides the best means of locating mobile homes in a county and identifying major construction activities. Some PVAs have requested lists of new customer hookups from utility companies, but cooperation from the utility companies has varied.

Missing intangible property is often identified through the use of 310 forms sent to the Revenue Cabinet by corporations. These forms list the names, addresses, and the intangibles of shareholders in the Commonwealth. The Revenue Cabinet forwards the 310 forms to the PVAs to check against their records. KRS 136.030 requires the corporations to provide these forms to Revenue by February 15. Revenue Cabinet officials report that only about 6% of the expected 250,000 forms had been received from corporations as of February 15, 1987. Some changes in regulatory enforcement powers might help to improve compliance in this area.

PROPERTY TAX ADMINISTRATION AND ACCOUNTABILITY

Prepared by Jeff Travis

Issue

Should the General Assembly require more accountability from the Revenue Cabinet and Property Valuation Administrators (PVAs) for administration of the state's property tax system and the quality of property tax assessments in the Commonwealth?

Background

The 1986 Kentucky General Assembly passed House Concurrent Resolution 39, mandating a study of the effectiveness and efficiency of the operation of property valuation administrator offices and identification of problems related to the operations of these offices. The study raised questions concerning the Revenue Cabinet's effectiveness in monitoring the quality of property tax assessments and the consistency and uniformity of assessments and assessment practices among 120 counties.

Kentucky's property tax system is based upon two underlying constitutional principles: property taxes shall be assessed in a uniform and equitable manner, and all taxable property shall be assessed at fair cash value.

These principles form the constitutional framework of the state's property tax system. The key parties working within this constitutional framework are the General Assembly, the Revenue Cabinet, and 120 Property Valuation Administrators.

Discussion

The General Assembly is obliged to establish a system to adhere to the constitutional principles of equity, uniformity and fair cash value and to ensure that an appropriate administrative structure is in place to allow for adequate enforcement, oversight and accountability. The Revenue Cabinet has the statutory duty to administer the state's property tax system. Accordingly, the primary mission of the Cabinet is to ensure that property is assessed equitably and uniformly among the 120 counties and that sufficient criteria are in place to assess the quality of the PVAs' assessment. A secondary mission of the Cabinet is to provide assistance to the PVAs in the performance of their duties.

Finally, the PVA is responsible for ensuring that all property is on the tax rolls and that all taxable property in the county is assessed equitably and at fair cash value.

The Program Review and Investigations Committee staff's study on Property Tax Administration in Kentucky had findings that are noted is summarized in the following paragraphs.

Since the General Assembly has given broad powers to the Revenue Cabinet to administer a property tax system which adheres to the principles of equity, uniformity and fair cash value controls must be in place to assure that the Revenue Cabinet is held accountable to the General Assembly and the PVA is held accountable to the Revenue Cabinet. In addition, all parties involved in administering the system must be able to account for the funds used to implement the system.

One of the findings involved the validity of the Revenue Cabinet's efforts to monitor real property assessment quality. The Revenue Cabinet uses assessment/sales ratio studies to gauge the quality of real property assessments. There are, however, problems with the assessment/sales ratio studies which place limitations on their validity. Appraisal/sales ratio studies have shown discrepancies in the assessment/sales ratio studies and should be considered a more valid indicator of the quality of assessments.

An additional problem that prevents the Revenue Cabinet from fulfilling its mission of equitable assessments is the large variance of assessments below and above the fair cash value. It is recommended that standards of acceptable variances and ranges be set.

Another finding was the inconsistent time frames for auditing the PVAs. The Revenue Cabinet conducted a one-time performance audit for calendar year 1984, to assess whether the PVAs were following approved procedures and policies. The performance reviews revealed several areas of noncompliance in some PVA offices and a failure to comply with basic Revenue Cabinet procedures on the part of some PVAs. This type of performance auditing should be conducted periodically as part of Revenue's monitoring and enforcement responsibilities.

The General Assembly might consider having the Auditor of Public Accounts perform annual fiscal audits on the PVAs to provide better financial accountability. This would deter unauthorized use or mishandling of state funds and protect out-going and in-coming PVAs from claims of mishandled funds.

It is recommended that the Revenue Cabinet submit the results of biennial performance audits, appraisal studies, and a statement on the quality of assessments in a formal report to the General Assembly to ensure that the system is being operated in accordance with the constitutional framework.

INCLUSION OF SHERIFFS IN THE KENTUCKY LAW ENFORCEMENT FOUNDATION PROGRAM

Prepared by Rhonda Franklin

Issue

Should sheriffs and their deputies be allowed to participate in the Kentucky Law Enforcement Foundation Program (KLEFP)?

Background

The 1972 General Assembly established KLEFP as an incentive for law enforcement training, and in 1982, HB 525 imposed a surcharge on certain insurance premiums to fund KLEFP. Each person participating in KLEFP receives a payment of $2500. Sheriffs and their deputies were specifically excluded from KLEFP. As local law enforcement officials, sheriffs and their deputies have requested inclusion in the program.

Discussion

The sheriff and his deputies are required by KRS Chapter 70 to provide law enforcement in the counties, in addition to preforming their tax collection duties. Many areas of the state must rely on the elected sheriff and his deputies for local law enforcement, particularly in rural areas. Sheriffs and their deputies may voluntarily attend a law enforcement training program provided by Western Kentucky University without additional compensation. Of approximately 800 sheriffs and deputies in the state, 90 have attended the program at Western.

The requirements for participation in KLEFP are more stringent than the requirements for participation in the sheriffs' training program. Each member of the sheriff's department would be required to possess a high school diploma or the equivalent (KRS 15.440). In addition, the KLEFP program requires initial training of 400 hours' duration, as opposed to 140 hours for the sheriffs' training program (KRS 15.440).

Two problems would have to be addressed if sheriffs and their deputies are included in KLEFP. The sheriffs' maximum salary is controlled by the Kentucky Constitution, Section 246. Sheriffs would be permitted to receive only that portion of the incentive pay which would not increase their salary beyond the constitutional maximum. Secondly, many sheriffs and their deputies are unable to leave the county for the length of time required to attend the training program. The sheriffs' budgets are unable to compensate those attending the training program and continue to provide law enforcement in the counties during their absence.

COUNTY REVENUE AND GOVERNMENT STRUCTURE

Prepared by Rhonda Franklin

Issue

Should the Constitution of Kentucky be amended to solve revenue and structural problems of county government?

Background

The current Constitution of Kentucky was adopted in 1891, when the state's population was basically rural and its economy agrarian. Kentucky was already divided into 119 counties. The reason for having a large number of small counties was to permit access for all county residents to the courthouse by horse or carriage on dirt roads within a day. Services provided by county government were few, counties generally constituting an administrative service arm of state government. The Constitution ratified by the voters in 1891 reflects the conditions of 1891, but it failed to allow for growing demands placed on local government following its adoption.

Provisions affecting counties are located throughout the Constitution, but five sections specifically limit county revenue and governmental structure. County government revenues are limited to ad valorem, or real property taxes, provided by Section 157, and occupational taxes, permitted by Section 181 subject to authorization by the General Assembly. Section 142 and 144 establish the fiscal courts, composed of the "judge of the county court" (county judge/executive) and from three to eight "justices of the peace" (currently referred to as magistrates) or three commissioners. Finally, Section 99 provides for election of the fiscal court members as well as the sheriff, jailer, coroner, clerk, assessor, surveyor, and constables.

The twentieth century has been a period of increased demands on local government, both nationally and in Kentucky. Population increases, technological advances and federal and state mandates, particularly in the last thirty years, have placed unprecedented demands on local government. Road construction and maintenance costs have escalated. Waste disposal and treatment programs are subject to stringent requirements from the state and federal governments, which are costly to implement and maintain. Federal requirements have increased the cost of operating jails. Emergency medical services, police and fire protection, libraries, airports, flood protection, and a number of other services are expected of local government, but were not anticipated in 1891. The proliferation of special districts highlights the increased demand for local services, which the counties are unable to provide.

Discussion

Kentucky's counties need the ability to develop innovative revenue raising measures and to tailor governmental structure to their individual needs. Permitting counties to develop alternative revenue sources could permit continuation of services in the wake of the loss of federal revenue sharing funds. Flexibility in structuring county government could result in reduction of administrative costs incurred by fiscal courts which are too large for many of the smaller counties.

The ad valorem tax is an accepted basis of county revenues, but options other than the occupational tax is an insufficient taxing option for areas of the state with low employment. A constitutional amendment could authorize the General Assembly to provide a list of taxing options in lieu of the occupational tax, subject to local approval.

Strengthening county revenues reduces the need for special districts. Special districts are generally formed to circumvent the taxing restrictions placed on county government. If county governments were able to finance and supervise many of the functions performed by special districts, the reduction of administrative personnel could result in savings to the taxpayers. Reduction of the number of special districts and control of special district functions by county government would lead to more accountability, permit coordination of services, and permit rational planning for service needs and demands.

Optional forms of government could also be permitted by constitutional amendment. The geographic, economic and population diversity among Kentucky's 120 counties requires some flexibility at the local level in determining the form of government. For example, the fiscal court with an elected executive may be satisfactory in a county with a population of 100,000, but a county of 10,000 may be better served by a smaller administrative body with a part-time executive. A constitutional amendment could authorize the General Assembly to provide a list of county government structural options, in lieu of the fiscal court.

The revenue and structural proposals for county government could be joined in one constitutional amendment to create an attractive option for county government operation subject to local referendum. A provision of the Constitution could permit each county to select a revenue option and a governmental structure option from statutory lists, which could be amended as needed. By local referendum or fiscal court initiative, a county charter commission could be selected to draft a charter setting forth the revenue and structural option selected within a set period of time, with submission of the charter to the voters for approval.

Nineteen states have adopted constitutional provisions permitting adoption of charter governments at the local level. Charters are simply locally drafted miniature constitutions which establish the form, function and power of local government, within limits established by the state constitution. Charter proposals are submitted to the voters in the county for adoption or rejection. Taxing options could be joined with charter options to provide alternatives to the occupational tax.

Charters are attractive for a number of reasons. First, the local electorate establishes its own form of government. Secondly, if coupled with taxing options, the taxing burden is determined by the local electorate. Thirdly, each county is more attuned to its revenue and structural needs than state government. Finally, the General Assembly is removed from decisions concerning local taxes.

One drawback of charter options is the possibility of the failure of local governments to avail themselves of the options and retain the status quo. Of the nineteen states offering charters to local governments, four have no charter governments in operation. However, the Kentucky precedent for charter government has been established in the Lexington-Fayette Urban County Government. Several other counties are currently discussing the urban-county option as they consider their revenue and administrative problems. An additional drawback to the charter concept is the necessity of a constitutional amendment. Kentucky voters are traditionally reluctant to alter their constitution, particularly in relation to local government. Past reluctance to alter the Constitution may be overcome, however, by concern over the financial plight of the counties. County officials are fully aware of the need for constitutional change to ensure continuance of county services and can be expected to support constitutional change.

Finally, intergovernmental cooperation could be encouraged by inclusion in a constitutional amendment. Cooperation between local governmental units is permitted by KRS

65.240-65.300. Intergovernmental cooperation is a viable means for local governmental units to use their limited resources to provide vital services cooperatively. Many states which have revised their constitutions in recent years to allow alternative forms of local government have included a provision in the revision for intergovernmental cooperation.

USE OF COUNTY ROAD FUNDS

Prepared by William Wiley

Issue

Should limitations be put on the percentage of county road funds which can be used for administrative purposes?

Background

Section 230 of the Kentucky Constitution limits the use of revenue from taxes on gasoline and other motor fuels, and the use of fees and revenues from taxes relating to registration, operation or use of vehicles, to expenditures for administration, construction, and repair of public highways and bridges, and to the expense of enforcing state traffic and motor vehicle laws. Counties receive such tax revenue in the form of a percentage of the state tax on gasoline, equal shares in 30% of truck license revenues, and a refund of twenty-five cents from the sale of each driver's license. During the 1986 session, the state gasoline tax was increased by five cents on the gallon and the percentage which counties receive from the tax was increased from 15.6% to 18.3%. The net effect of these two changes was that counties received an increase of approximately 75% in gas tax revenues. At the same time, the Congress was eliminating federal revenue sharing from the federal budget. The result was that counties, as a group, did not receive an increase in total revenues because of the gas tax increase. For many it was a no net gain situation. For some there was a small net gain, and for larger counties there was a net loss. Other factors were also affecting county budgets. For example, liability insurance premiums rose, jail costs increased, and solid waste became more expensive.

Discussion

County governments have come to depend heavily upon federal revenue sharing for general governmental expenditures. Salaries of county officials, such as the county judge/executive, the magistrates or commissioners, the treasurer and secretaries, have frequently been financed in this manner. When counties faced the loss of federal revenue sharing, and the increase in gas tax revenues, many of them took a predictable step to avoid budget problems. They began to pay county officials' salaries and other seemingly unrelated costs out of the road fund.

For fiscal year 1987, at least 52 counties budgeted approximately $3.5 million, or approximately 15% of total road fund revenue, for expenditures not clearly related to county roads. Nine hundred and ninety-three thousand dollars was budgeted for the office of the county judges/executive. Over a million dollars was budgeted for fiscal courts, about $93,000 for treasurers, $28,000 for county attorneys, $650,000 for insurance and $895,000 for "other" expenditures, which were difficult to classify. (A large percentage of insurance and "other" costs may have been for expenditures directly related to road programs).

The expenditure of considerable sums from the increased gasoline tax for the salaries of county officials met with opposition from taxpayers and members of the legislature. They had expected that the increase in the gasoline tax would be spent for tangible improvement of county roads. An argument put forth in response to this concern has been that it is legitimate for the county judge/executive and the members of the fiscal court to charge a percentage of their salaries to the road fund, because they spend much of their time administering the road program. The same could be said, to a lesser extent, for the treasurer, and perhaps for the county attorney.

Administrative costs are a valid use of road funds. This argument has been buttressed by two opinions of the attorney general, OAG's 80-377 and 82-466. The attorney general qualified these opinions by suggesting that county officials must document the amount of time that they spend on the road program. Those on the other side of this argument have said that if these "administrative" charges are legitimate they have been excessive.

The initial discussion has been carried on without a clear definition as to what is or is not legitimately related to the county road program. This is particularly the case with insurance and "other" or miscellaneous expenditures. At the same time, administrative expense has not been clearly defined. Thus it is difficult to isolate the total administrative costs of the program, in order to determine whether such costs are legitimate and reasonable.

Problems of defining administrative costs can be avoided by concentrating on where personnel are assigned. The road engineer, foremen, road workers, and secretaries assigned to the department are obviously road department employees. A case can be made that their salaries and fringe costs, such as social security, retirement, health insurance, workers' compenstion premiums, and unemployment insurance, are legitimate road program costs, whether or not one wishes to describe them as administrative. It should also be clear that fuel and lubricants, equipment, maintenance, insurance, and road materials are also legitimate road program costs.

If an agreement can be reached on personnel assigned to the road department, attention can then be directed to personnel who are not assigned per se to the road department. Each person who devotes some time to roads can be compensated or supported by the road fund to the degree the legislature will permit. These personnel might include the county judge/executive, the members of the fiscal court, the treasurer or finance director, the county attorney, the surveyor and the assistants and clerical personnel assigned to these offices.

If would be necessary to determine what percentage of costs of those employees not exclusively assigned to the road program could be paid out of the road fund. A determination of how much time such employees devote to the road programs would be useful. However, there are 120 counties with varying degrees of administrative capability, and it is expensive and time-consuming to measure time allocation. An alternative approach would be to set a reasonable limit on the percentage of compensation which a person working part time on the road program could receive from the road fund.

Another consideration emerges from the fact that counties make certain expenditures which are not clearly related to a particular department of the county government. For example, liability insurance coverage might be purchased for the county as a whole. The road program could be covered under this blanket coverage. In order to decide which fund should pay for such expenditures, it would be necessary to allocate the insurance costs to particular departments on a reasonable basis.

EDUCATION

IMPROVING THE TEACHING PROFESSION

Prepared by Sandra L. Deaton

Issue

How can the General Assembly improve the teaching profession to assure that certificate holders are qualified, but at the same time make the profession more attractive to educators?

Background

Educational reform has focused a great deal of attention on the teaching profession. This attention has centered on the need for better teachers and administrators, as well as the need to make the profession more attractive to current and future educators.

There are many problems in the profession which ultimately affect the quality of education pupils receive. These problems include low salaries, low esteem in the community, lack of parental support, increased academic and certification requirements, lack of involvement in decision making, and, in general, a lack of incentives for educators to strive for excellence. These problems cause poor morale in the profession and contribute to teacher shortages, particularly in technical fields such as math and science.

Kentucky's recent education reform movement has included initiatives to improve personnel. Requirements for admission to teacher preparation programs have been increased, and the state now requires the successful completion of the National Teachers Exam and a one-year internship before a teacher can receive certification.

In addition to the beginning teacher testing and internship program, in 1985 the General Assembly directed the State Board of Education to develop a similar program for beginning principals, based on the belief that the principal is the key instructional leader in the school. The development of the program is in process and recommendations for implementation will be made to the 1988 General Assembly.

Over the past four years, many states have implemented large scale teacher incentive programs. Though these programs are designed differently, they all strive to provide performance incentives for teachers and administrators. Kentucky established a committee in 1984 to develop a career ladder plan. The General Assembly received the report of that Committee and in 1985 established a commission to oversee a pilot program to test the feasibility of operating a statewide system to identify and reward excellent teachers and provide reliable information for making decisions on a teacher career incentive program. The commission must have a report ready by the beginning of the 1988 General Assembly. Proponents of a career ladder for teachers argue the need to professionalize teaching to attract bright people to the profession, improve the quality of education and avoid impending teacher shortages. Opponents are concerned that the evaluations of teachers will be unfair and that base salaries will not be increased.

Discussion

The key to a good education is good teaching. Teachers need to be treated as professionals, which means adequate pay, good working conditions, and inclusion in decision

making. In addition to increased benefits, the public must have assurance that teachers are of the highest quality.

Kentucky has made significant changes in the last four years in the area of quality control. Beginning teachers must successfully complete the National Teachers Examination. All certified personnel must be evaluated. All instructional and leadership personnel must complete in-service training.

In attempts to improve the working conditions, Kentucky has increased salaries, added longevity pay, provided duty-free lunch periods for teachers, and reduced class sizes. However, there has not been a total restructuring of the profession to encourage teachers to strive to excel in their profession by reaching specific goals and thereby receive monetary and professional rewards.

The 1988 General Assembly will have difficult decisions to make about the teaching profession. The General Assembly will have to decide whether to expand upon the recent initiatives and it must consider more complex issues, such as a career ladder, as it looks for ways to make substantial and lasting improvements geared toward attracting, holding and improving educators.

EDUCATION FINANCE

Prepared by Janie L. Jones

Issue

Should the current structure for funding elementary and secondary education be changed, and if so, in what manner?

Background

In 1954, the General Assembly enacted the foundation program law as the process for funding the public schools. The basic process for providing financial support to schools has remained virtually unchanged except for a short pilot test of the weighted unit method in 1975.

Discussion

In 1984, the General Assembly began a concentrated effort to upgrade the state's education system. In a special session in 1985, HB 6 provided for the implementation of numerous reform measures, although the measures were not funded until the regular session of 1986. With current projections that the state is facing a serious shortfall even before the 1988 session, some method of determining priority reforms must be developed.

Also in 1985, several school districts filed suit challenging the constitutionality of the current practice of allocating funds to districts. The suit charges that the current method does not provide an "efficient system of common schools throughout the state" as required by Section 183 of the Constitution. The 1986 General Assembly established a special committee to study the question of financing schools. That committee's work is to be completed and recommendations made prior to the 1988 session.

PROGRAMS FOR "AT RISK" CHILDREN

Prepared by Vida Murray

Issue

Should the General Assembly place greater emphasis on education programs designated for "at risk" children?

Background

The expression "at risk" is used to designate those children who traditionally fail in the public schools. These children are disproportionately poor and minority children and disproportionately show up in many educational statistics: grade retention, special education placement, school suspensions, low achievement test scores, and high school dropout rates. National and state reports have criticized recent education reforms for failing to address the particularized needs of children "at risk." These reports have proposed that schools be restructured so that they become interesting places where individualized differences are respected and encouraged. More importantly, these reports conclude that education reforms for poor and minority students are good, basic educational practices which benefit the advantaged student as well.

Discussion

Population trends indicate that the number of poor and minority children in Kentucky is increasing, while the total population under eighteen years of age is decreasing. Consequently, more of the children whom our schools traditionally fail to educate are entering school, while fewer of the children our schools best serve are entering.

Economic and social arguments for improving the educational opportunities of children at risk are persuasive. Statistics show that children who do not graduate from high school or who graduate with poor academic skills are more likely to be unemployed, thus causing Kentucky to forego tax revenues and expend monies for welfare and other forms of assistance.

A second economic argument for better educating "at risk" children is that Kentucky needs a highly productive workforce to attract industry to the state. A highly productive workforce is particularly important, since Kentucky's retirement age population is increasing and a relatively small working age population is expected to support a large retired population.

Similarly, the uneducated and the undereducated are overly represented in poverty statistics, arrests, court involvement and prison populations.

The high incidence of teenage pregnancies and high school dropouts further support a need for a greater focus on the "at risk" child. The General Assembly in the 1985 Extraordinary Session and the 1986 Regular Session made several reforms that have potentially far-reaching impact on the "at risk" population. These reforms include the establishment of a statewide policy on preschool education, reductions in class size, the establishment of model dropout prevention programs, and the establishment of a statewide adult literacy program.

Early Childhood Education. Many children, especially those from disadvantaged homes, have no educational stimulus prior to entering kindergarten. Extensive research has shown that the child who is exposed to a learning environment at an early age enters school with an advantage that continues throughout life.

Recognizing such a need, the 1985 General Assembly required the State Board of Education to develop a policy on preschool education. This policy resulted in the appointment of an Early Childhood Education and Development Task Force, which studied the need and feasibility of preschool programs and made recommendations to the Governor and the General Assembly. Based on these recommendations, the 1986 General Assembly funded model programs in twelve local school districts with grave educational and economic needs. The model programs, which allow participating parents to receive instruction in basic academic skills while their preschoolers work on developmental skills, are keyed to the percentage of adults not graduating from high school and the incidence of unemployment in the district.

Other initiatives include the establishment of the Governor's Office of Early Childhood Education and Development, and participation in the National Conference of State Legislators' Child Care and Early Childhood Education Project. The continuation or expansion of the model programs is an issue that will likely face the 1988 General Assembly. The high incidence of teenage pregnancies, the growing number of poor families with children below six years of age, the increasing number of working mothers, and the high dropout rate speak to a need for early intervention. Legislators, in considering whether to maintain or create programs when funding is scarce, are likely to encounter opposition from those who believe that preschool education is solely the province of parents. The issue of funding preschool education is likely to be further complicated by the lack of coordination in existing preschool programs, the need to fund related services, and the need to establish methods for identifying and screening "at risk" students.

Class Size Reductions. In 1982 the General Assembly began lowering the class sizes in grades one through three, with funding provided for one unit for each 25 students in average daily attendance (ADA). A class size maximum of four students above the ADA funding for grades kindergarten through 6 was established in 1984, with a procedure for exemptions. In the 1985 Extraordinary Session, a four-year plan for further reducing class sizes in grades 1 through 6 was adopted. Class size maximums were reduced in grades K-6 to three students above the ADA funding figures for the unit and a class size cap of 31 students was set for grades 7 and 8. While the reductions have resulted in smaller classes, they have also caused more classes with combination grade levels and some midyear shifts from classes.

While research indicates that smaller classes provide greater academic gains, it is too early to determine the effect of reduced class sizes on the education of "at risk" children.

Though the General Assembly has envisioned class size reductions over a period of several years, the state's projected budget shortfall will force a premature analysis of the effectiveness of present class size reductions. The questions likely to arise are:

Have split or combination classes had a detrimental effect on students?

Have the ceilings on class size improved education for the children as measured by improved test scores or other quantifiable data?

Have class size reductions resulted in a more individualized teaching approach?

Dropout Prevention. One-third of Kentucky's high school students drop out of school. While the dropout problem is symptomatic of many societal ills, some research has indicated that educationally-related factors, such as dislike of school, academic failure, low esteem, and lack of motivation, most closely influence a student's decision to drop out. The costs to society and the individual are astronomical. One estimate is that Kentucky loses $200,000 for each student it does not graduate in foregone tax revenues and welfare costs. Other costs are not as readily quantifiable, such as the loss of human potential and the negative image the high dropout rate conveys to the public about the quality of teachers.

The General Assembly in 1985 directed the State Board of Education to establish criteria for the development of dropout prevention programs and to award grants to as many as 20 school districts which have more than 100 students dropping out annually, and to as many as 20 more districts with high dropout rates and less than 100 students dropping out. The General Assembly appropriated $550,000 each year of the biennium. Additional moneys are provided through the Job Training Partnership Act and the Appalachian Regional Commission.

Advocates for children suggest that some recent education initiatives have exacerbated Kentucky's dropout problem. They assert that increasing graduation requirements without providing remedial programs to help "at risk" children meet the heightened standards, and withdrawing state funds for the purchase of high school textbooks may cause some poor students to quit school.

These advocates also assert that the model projects serve too few students and that, historically, the findings of model projects have not been implemented statewide because of lack of funding.

Another issue relating to dropouts that the General Assembly will probably confront is whether the 60-day cooling-off period mandated by KRS 159.010 is effective in discouraging students from dropping out. This legislation requires the parent or guardian of a student who wishes to withdraw to give written notice 60 days prior to withdrawal. During this 60-day period, the parent and child are to attend a counseling session where they are given information about the economic consequences of quitting school. Opponents of this provision argue that the requirement attempts to offer a simplistic and unrealistic answer to a complex issue. They maintain that the decision to drop out is a long-term process, attributable to multiple factors, and that current research indicates that counseling at an earlier age and at greater frequency is a preferable approach. Opponents, moreover, note that local districts have found this requirement unenforceable.

Adult Literacy. Kentucky ranks highest in the nation in the percentage of adults over twenty-five who have not graduated from high school. The General Assembly in the 1985 Extraordinary Session established the Governor's Commission on Literacy to formulate and promote a statewide plan for adult literacy.

The current system of education is reaching only a small portion of Kentucky's citizens who qualify as being functionally illiterate. Although major efforts are being made to insure that the next generation of adults will be literate, the educational level of today's adults must be considered in the overall social and economic structure of the state. Studies are presently underway to show the causal connection between the education attainment of the illiterate parent and the child's success in school.

The effectiveness of the adult literacy programs largely depends on volunteer manpower. Greater emphasis is being placed on making business and industry leaders and various citizen groups more aware of the impact of illiteracy on all aspects of economic

development. The General Assembly, in considering continued funding for literacy programs, will likely focus on the extent of illiteracy in the state, the broad characteristics of the illiterate segment of the population, and the coordination of existing services with any new ones.

The General Assembly is likely to have many issues relating to the education of "at risk" students on its agenda. As these students increase in number, their needs will become more prominent as Kentucky lawmakers strive to provide the best and most cost-effective programs possible.

TEXTBOOKS IN ELEMENTARY AND SECONDARY PUBLIC SCHOOLS

Prepared by Mary Yaeger

Issue

Should there be new legislation to improve the textbook selection process and to ensure that Kentucky students have current and quality textbooks?

Background

The 1986 HCR 74 directed the Program Review and Investigations Committee to do a study of Kentucky's textbook program. Findings of the study indicate that all new textbooks are not purchased in the first year of the 6-year adoption cycle, as specified in KRS Chapter 156. In fact, many of the textbooks are not purchased until the third and fourth year of the 6-year cycle. This means that while the State Textbook Commission is compiling an initial list of current textbooks for local districts to choose from in the next 6-year cycle, many districts have not yet worn out their existing textbooks or are using very worn or out-of-date books from a previous cycle. A major reason these purchases are out-of-sync with the 6-year textbook adoption cycle is that sufficient funding was not available to buy the new textbooks on schedule. In fact, General Fund appropriations for the past ten years have been collectively $43 million less than budget amounts requested by the Department of Education for textbooks.

Additional budgetary problems occur in the high school textbook program. Since Fiscal Year 1985, General Fund dollars have not directly supported the textbook program in high schools. Instead, a rental program was authorized, which 90% of the local districts use. Unfortunately, the rental program only generates 55% of the funds needed for textbooks. The remainder must come from local school district funds.

Rental fees would most likely generate sufficient funds to pay for textbooks if all students paid the fee. However, one-third of the high school students are indigent and do not have to pay for textbooks. Based on KRS 157.110, those students meeting the free and reduced lunch program criteria receive free usage or pay reduced rental prices. In all, 43 percent of the textbooks are provided without a charge to high school students. Local school officials are highly critical of the rental program because it does not cover necessary costs.

Finally, the study found that the centralized state textbook screening system lacked a clear and articulated purpose in legislation and departmental policy. Additionally, the current organizational structure of the State Textbook Commission was judged ineffective. It requires ten appointed members to select textbooks in all subject areas and for all grades, K-12, without adequate assistance or expertise.

Discussion

Suggested solutions related to purchasing textbooks within the 6-year cycle system consist of adequately funding the elementary textbook program and reorganizing subjects within the current six groupings in a manner which equalizes the budgetary impact over the cycle length. To address the purchase cycle disruptions caused by insufficient funds or cutbacks, "full" funding and "catch-up" funds were appropriated in the 1986-88 biennium. Approximately $5.8 million was appropriated in FY 1987 and $7 million in FY 1988 for "catch-up" of those textbooks underfunded in previous years.

One means of preserving the integrity of textbook funding, as recommended to the Program Review and Investigations Committee, may be to declare statutorily that textbook purchases are a necessary governmental expense or to define them in such a manner in the Appropriations Act similar to the School Foundation Program. Other recommendations for improvement are: the Department of Education should monitor local districts, to assure that funds are expended for textbooks as intended; and the Department should assess the need for varying the 6-year cycle length for some books that may need to be replaced more or less frequently.

Solutions to the problem of inadequate funding of the high school textbook program may differ from those of the elementary program. Most local school districts favor total textbook funding from state General Funds. Some districts think students should buy their own books and the rental program should be eliminated. Another partial solution consists of limiting the number of students who are defined as "indigent." This would require the use of a definition which is more restrictive than the federal free and reduced lunch guidelines. General Fund appropriations for only those students defined as indigent would be most useful to the poorest school districts. Increasing the rental fee of $4 per two-semester course would generate some funds. However, this solution may only penalize those parents already carrying the fee and taxation burdens.

The final discussion concerns an effective state level textbook selection system. Solutions recommended by the Program Review Committee consist of stating in statute the purpose of the State Textbook Commission and requiring guidelines and standard criteria in reviewing textbooks. Additional recommendations are for using Departmental staff and textbook reviewers with expertise in the particular subject areas being reviewed.

ESSENTIAL SKILLS TESTING

Prepared by Bonnie Brinly

Issue

Should the state continue the Kentucky Essential Skills Testing program?

Background

Kentucky began its statewide testing program in 1978 with the passage of the Educational Improvement Act. The law required the Department of Education to test students in grades 3, 5, 7 and 10 in the basic skill areas of reading, writing, spelling, language arts, mathematics, and the development of learning skills. The Department chose the Comprehensive Test of Basic Skills, a nationally normed achievement test, to fulfill the requirement.

In 1984, the General Assembly enacted SB 169, mandating the State Board of Education to identify the essential skills necessary for students to successfully complete each grade. The bill also required testing in all grades for mastery of skills in mathematics and reading in 1984-85 and added spelling, writing and library research reference skills in 1985-86. The Department contracted with CTB/McGraw-Hill for $1.96 million to develop the customized tests. The test results give both norm-referenced and criterion referenced scores.

In 1986 the General Assembly passed a sunset provision for the testing program at the completion of the 1987-88 testing cycle. The General Assembly also established a special subcommittee to study and make recommendations concerning the testing program.

Discussion

The General Assembly will decide whether to continue the Kentucky Essential Skills testing program in 1988. Proponents of the KEST say the customized test is an accountability measure, in that students are tested on the skills identified as important for them to learn. Opponents say testing restricts the curriculum, overemphasizing basic skills. Still others question whether there is a sufficient number of items to assess each essential skill, whether the test should be both norm-referenced and criterion-referenced, and whether remediation units should be allotted on the basis of test scores.

HIGHER EDUCATION

Prepared by Donna Weaver

Issue

What action can be taken by the General Assembly to strengthen higher education in Kentucky?

Background

In 1986 the Kentucky General Assembly, in conjunction with Governor Collins' executive budget, passed one of the most supportive higher education budgets for Kentucky in two decades, including initiatives to encourage excellence in our state universities. During the 1988 session of the General Assembly, legislators will have to determine whether the current programs should be continued and expanded or whether revenue for such programs should go into more basic educational programs.

Some of the programs that the General Assembly will review are the continuation of Centers of Excellence and endowed chairs, salary increases for faculty, and the selection process of university regents and trustees.

The 1986 General Assembly appropriated funds to the Council on Higher Education for the establishment of Centers of Excellence and endowed chairs at public universities. The Council views the Centers of Excellence as a way to identify and support distinctive and distinguished contributions to the quality of higher education in Kentucky. The awarding of centers will be based on innovative proposals which demonstrate substantial budgetary commitment to an existing area of superiority in quality and achievement. The endowed chair concept is viewed as a way to help recruit and retain exceptional faculty and garner the diverse benefits which accrue from attracting and keeping distinguished professors. A total of two million dollars has been allocated for four endowed chairs; $1,875,000 has been allocated for the Centers of Excellence. While some educators feel that these Centers of Excellence have merit, others are concerned that the Centers will be unattainable to small undergraduate programs for which state funding is already low.

Also included in the appropriations to the Council on Higher Education was 14.5 million dollars for a faculty salary incentive fund. According to the executive budget, this fund will be allocated annually to the Council on Higher Education. The Council will distribute this fund to individual universities to be used by the institutions as incentive payments to faculty and staff, which will then become a part of the salary base for the faculty and staff. Overall, the average faculty salary in Kentucky still falls below the national average and the individual university benchmark medians. This is a critical area in higher education that must be addressed in order to maintain the highest standards for our universities.

The selection process of university regents and trustees has become a controversial area in higher education. The 1980 General Assembly increased university board of trustees and regents' terms from four years to six years. In May, 1986, a Franklin Circuit Court ruled the six-year term unconstitutional, resulting in many questions regarding the current terms of university governing board members. The process of choosing trustees and regents has been discussed by legislators and advocates seeking excellence in higher education. A new selection process might result in stronger and more dedicated leadership for our eight public

universities. One such proposal includes the utilization of a citizens' screening committee, whose duty would be to recommend candidates for the boards, leaving the final choice to the governor.

The programs funded by the 1986 General Assembly were designed to increase excellence in higher education, and to keep Kentucky's institutions competitive with those of other states. As public dollars become scarcer, legislators must evaluate these programs to see if they further excellence in higher education.

TEACHERS' RETIREMENT

Prepared by William Wiley

Issue

Should Kentucky teachers be allowed to retire after twenty-seven years of service with no reduction in benefits for earlier retirement?

Background

Currently Kentucky teachers can retire with no reduction in benefits at age 60 after five years of service or at any age after thirty years of service. The "thirty and out" option was granted in 1974; it has also been adopted by fifteen other state teacher retirement systems. Three other states currently permit teachers with less than thirty years service to retire with no reduction in benefits. Alaska permits retirement after twenty years, and New Mexico and Montana permit retirement after twenty-five years.

Age sixty is a common retirement age for teachers and has been adopted by twenty-five states. Age sixty-five is also common and has been adopted in twenty-three states. These age requirements are often one criterion for retirement which, as in Kentucky, exists along with a service-only requirement. Only seven states have age sixty as their only criterion, and only four states have age sixty-five as their only criterion.

Discussion

Teachers tend to be career-oriented professionals who begin work after college and continue until retirement. For this reason, many would qualify for "twenty-seven and out" if it were granted. Based upon the current population of teachers, seventy-six percent could qualify. The actuary for the Teachers Retirement System estimates, however, that only twenty-three percent of teachers take "thirty and out" retirement when they are first eligible. He projects that this trend would continue for "twenty-seven and out." Thus, seventy-seven percent of teachers who are eligible would by-pass earlier retirement and continue to teach.

There is an employee cost associated with "thirty and out" retirement. It was established as .7% of salary in 1974 and has been a part of the teachers' contribution rate since then. The Teachers Retirement System actuary estimates that the cost of "twenty-seven and out" would be an additional .51% of salary. The Kentucky Education Association has proposed that the teachers pay half of this cost, and the state the other half. If this were the case, all teachers would pay .955% of their salary to fund retirement at twenty-seven years of service. Despite the fact that 24% of teachers cannot take advantage of this program because of their combinations of age and service, and the possibility that 77% of those eligible will by-pass the opportunity, the proposal seems to be a popular one. The argument given is that even if teachers don't use "twenty-seven and out," their morale is better if they know it is an option for them.

The justification for "twenty-seven and out," as presented by the Kentucky Education Association, is that teaching has become a stressful occupation. Stress factors cited include a change in the behavior of children which creates discipline problems, reduction in community support and respect for teachers, low pay, uneven support by administrators, unrealistic expectations of teachers who are asked to compensate for parental and societal

shortcomings and, in some cases, physical danger in the classroom. KEA, in testimony before the LRC Subcommittee on Early Retirement, has testified that "twenty-seven and out" is really an interim objective, and "twenty-five and out" is a long-term goal. The Department of Education has testified that they do not believe that "twenty-seven and out" would contribute to a teacher shortage, and in fact, would be an important tool for teacher recruitment.

Even if teachers pay half of the cost of earlier retirement and allowances are made for the replacement of high salaried experienced teachers by lower salaried teachers, there will be a net cost to the state. Committee staff projections prepared for the Special Subcommittee on Early Retirement indicate that if 23% of teachers take advantage of the program when they are first eligible, the first year cost will be about $900,000, and annual costs will grow to $1.41 million by the tenth year. The cost of the program must be taken into account when considering other budget priorities, especially the costs of educational reforms legislated but not yet securely funded.

Another cost implication which will not be felt for more than twenty years but which deserves attention is the possible effect of the increase in the teachers' retirement formula. In 1984 the annual accrual rate was increased from 2.0% to 2.5%. By the year 2014, a thirty year retirement will be worth 75% of salary rather than 60%, and a twenty-seven year retirement will be worth 68% of salary instead of 54%. These higher benefits may encourage earlier retirement and make twenty-seven or thirty year retirement the norm. In this case, costs will necessarily increase.

ELECTIONS AND CONSTITUTIONAL AMENDMENTS

REELECTION OF STATEWIDE CONSTITUTIONAL OFFICERS

Prepared by Geri Grigsby

Issue

Should the Governor and other statewide constitutional officers be permitted to succeed themselves in office?

Background

Sections 70 and 71 of the Kentucky Constitution provide that the Governor is to serve for a term of four years and may not immediately succeed himself in office. Likewise, the Lieutenant Governor, Treasurer, Auditor of Public Accounts, Commissioner of Agriculture, Secretary of State, Attorney General, and Superintendent of Public Instruction are prohibited from succeeding themselves in office (Sections 82 and 93).

These one-term limitations reflect the general distrust toward officeholders which existed in 1891 when the present Constitution was drafted.

Today, almost one hundred years since the writing of its Constitution, Kentucky is one of only four states that prohibit their governors from serving consecutive terms in office, the other states being Virginia, Mississippi, and New Mexico.

Critics of this one-term limitation argue that four years is not time enough to provide effective leadership and that the Constitution should be amended to allow officers to serve at least two successive terms. With one or more additional terms, the continuity required to set and achieve more long-range goals and policies would be possible. The voters themselves would continue to serve as safeguards against ineffective officeholders, the voters having the power of the ballot to prevent unwarranted second terms.

On the other hand, those in favor of retaining the one-term limitations maintain that officers may acquire too much power over any additional term of office. The current four-year term, they suggest, provides ample time for a prepared officer to efficiently execute his duties.

The issue of whether the Kentucky Constitution should be amended to allow particular statewide officers to succeed themselves has been brought before the General Assembly on numerous occasions. In the last five sessions of the General Assembly, approximately eighteen bills relating to this issue were filed.

The following chart lists the proposed amendments to the Constitution regarding such reelections which were passed by the General Assembly and submitted to popular vote, along with the outcomes of the proposals:

PROPOSED AMENDMENTS TO THE KENTUCKY CONSTITUTION REGARDING REELECTION OF CONSTITUTIONAL OFFICIALS

YEAR SUBMITTED TO POPULAR VOTE	SECTION(S) AFFECTED	PURPOSE OF AMENDMENT	OUTCOME
1959	99	Permit sheriffs to succeed themselves in office.	Rejected. For: 232,136 Against: 239,144
1973	91, 93, 95, 99 183, 209	Require appointment of the Supt. of Public Instruction, abolish the Railroad Commissioner, permit sheriffs to succeed themselves.	Rejected. For: 159,005 Against: 186,157
1981	71, 82 93, 99	Permit statewide constitutional officers to serve two successive terms and permit sheriffs to succeed themselves.	Rejected. For: 213,988 Against: 381,362
1984	99	Permit sheriffs to be reelected or act as deputies for succeeding terms.	Adopted. For: 512,741 Against: 303,987
1986	160	Permit mayors of cities of the first and second classes to serve two successive terms beyond their original terms.	Adopted. For: 297,883 Against: 219,201

Discussion

As the chart above demonstrates, the voters were receptive to proposals in 1984 and 1986 regarding the offices of sheriff and mayor of cities of the first and second classes. However, in 1981 they overwhelmingly rejected amending the Constitution to permit the Governor, other statewide officeholders and sheriffs to serve two successive terms.

PRESIDENTIAL PREFERENCE PRIMARY

Prepared by Geri Grigsby

Issue

Should the Kentucky presidential preference primary be retained, and if so, how should its costs be documented and reimbursed to the counties?

Background

As the result of legislation passed by the 1986 General Assembly, Kentucky, like thirteen other southern or border states, is scheduled to hold presidential preference primaries on "Super Tuesday" in March of 1988. At that time, nearly one-third of the delegates needed to win either party's presidential nomination will be selected from these states.

The presidential primary, however, is not an entirely new feature in the Commonwealth. The 1974 Kentucky General Assembly enacted legislation providing for a presidential preference primary. The state conducted such primaries that ran concurrently with the May primaries in 1976 and 1980. Because the general opinion was that the state had little impact upon the presidential nominations, which were all but decided by the time Kentucky held its primary in May, the General Assembly repealed the presidential preference primary provisions and returned to the party caucus system. This system, used in the 1984 presidential nomination process, received extremely low participation and was criticized as being ineffective. It was during this time that political leaders, many representing the Southern Legislative Conference, began calling for a regional primary to be held on "Super Tuesday." Proponents of this primary argued that by joining forces with other states, Kentucky would have more clout in the nominating process, receive more national attention, and insure that presidential candidates address issues of particular concern to its region.

The 1986 General Assembly responded by reestablishing the presidential preference primary. This legislation differs little in form from prior law, but provides an additional day to hold the primary, separate from the May primary. The provision states that the entire cost of this additional primary is to be paid by the state. It fails, however, to specify how expenses are to be computed and documented. In addition, no appropriations for funding the primary were made during the 1986 session.

Discussion

Currently, the fate of the Kentucky presidential preference primary is uncertain. Several members of the Elections and Constitutional Amendments Task Force have suggested repeal of the measure. Members stated during the 1986-87 interim that the additional primary would be a great expense to the Commonwealth and would create yet another election in the state. There are technical concerns to be considered if the provision is to be repealed. The 1988 General Assembly convenes on January 5, 1988. The State Board of Elections will meet on January 8 to nominate candidates, who will be notified by the Secretary of State of their nominations.

If the presidential preference primary is retained, legislation is desirable to specify the manner of reimbursement to the counties and to appropriate the necessary funds.

Under one approach for funding the primary, the county clerk would be required to document the actual cost of the primary, from which the state would reimburse the county. In order to implement this method, it may be desirable to specify exactly what expenses would be covered; for example, it may be desirable to clarify whether such costs as those necessary to store or replace voting equipment or to insure, heat and cool a building in which such equipment is stored, should be included. Because of the obvious difficulty in designating what expenses are to be reimbursed, it may be desirable to limit which items may be included and to estimate a ceiling for certain specified items.

Instead of reimbursing actual expenses, the 1988 General Assembly may allocate a specific amount per precinct to be reimbursed to the counties. KRS 117.345 currently provides for the state to reimburse each county at the rate of $85 per precinct for each primary or general election. It is generally agreed that this amount covers less than half of the actual costs. This method of "limited" funding may prove to be better in controlling spending but determining the overall cost would also require extensive research.

DECREASE IN NUMBER OF ELECTIONS

Prepared by Linda Wood

Issue

Should the Constitution of Kentucky be amended to permit the elimination of elections every second or fourth year?

Background

The Kentucky Constitution provides in Section 148 that only one election a year is to be held, except as otherwise provided in the Constitution. The primary is considered to be a nomination process rather than an election. Currently an election is held every year, resulting in large expenses to both the state and the counties.

When the Constitution was being drafted in 1890-91, federal legislation was pending which would have given the federal government supervision over elections at which a federal officer was to be elected, which were those held in every even-numbered year. The delegates inserted Sections 148 and 167 into the Constitution to prohibit the election of certain local officials in even-numbered years, thus avoiding the possibility of federal supervision. Those local officials who cannot be elected in even-numbered years are all officials of a city, county, or a subdivision of a city or county; an exception is made for the election of members of city legislative bodies.

Discussion

Proposed constitutional amendments were introduced during both the 1982 and the 1984 General Assemblies to eliminate elections every fourth year. These bills proposed to provide for one-time, one-year extension of the terms of certain officials so that after full implementation of the amendment, elections would be held three years out of four. A 1986 proposal would have eliminated elections every other year by eliminating those in odd-numbered years. Again, there was a provision for a one-time, one-year extension of some elected officials.

The chart which follows indicates when local, district, county, state, and federal elections are conducted in Kentucky. Recent election data from the State Board of Elections shows that the combined annual cost of these elections to the state and counties is in excess of $3.5 million. Legislation enacted by the 1986 General Assembly established a March presidential preference primary, with the state to pay all the costs. No cost estimates have been prepared since there is currently no provision for determining how costs will be computed.

	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
President			X				X				X				X		
U. S. Senate																	
Ford	X						X						X				
McConnell					X						X						X
U. S. House	X		X		X		X		X		X		X		X		X
State Officers (Governor, Lt. Governor, Treasurer Auditor, Secretary of State, Commissioner of Agriculture Attorney General, Superintendent of Public Instruction, Railroad Commission)		X				X				X				X			
State Senate																	
Even Districts	X				X				X				X				X
Odd Districts			X				X				X				X		
State House	X		X		X		X		X		X		X		X		X
Local School Boards	X		X		X		X		X		X		X		X		X
Supreme Court Justices																	
Districts 1, 2, 4, 6					X								X				
District 3	X								X								X
District 5							X								X		
District 7			X								X						
Court of Appeals Judges						X								X			
Circuit Court Judges						X								X			
Commonwealth's Attorneys		X						X						X			
Circuit Clerks		X						X						X			
County Officers																	
A. (Judge Executive, County Court Clerk, County Attorney, Jailer Coroner, Surveyor, P.V.A., Justice of the Peace, Constable Sheriff)				X				X				X				X	
B. Commissioners																	
District A				X				X				X				X	
District B,C		X				X				X				X			
City Officers																	
A. Mayor		X		X		X		X		X		X		X		X	
B. Legislative Body	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
District Judges				X				X				X				X	

LOTTERY

Prepared by Linda Wood

Issue

Should the Constitution of Kentucky be amended to permit the General Assembly to establish a state lottery?

Background

Lotteries were conducted in Kentucky during the nineteenth century, prior to adoption of the present 1891 Constitution, Section 226 of which includes a prohibition against lotteries. The first three Kentucky Constitutions, those of 1792, 1799, and 1850, included no such prohibition.

With the exception of 1978, a proposed constitutional amendment which would have permitted establishment of a lottery has been introduced during every regular session of the General Assembly, beginning with the 1970 Session.

Section 226 of the Kentucky Constitution would have to be amended to remove the prohibition before a lottery could be established in the state. Any lottery established must be in compliance with Title 18 of the U. S. Code, which includes the following provisions restricting lottery activities:

§1301	Prohibits the interstate or international sale or transport of lottery tickets.
§1302	Prohibits the mailing of lottery tickets, funds to pay for lottery tickets, or of newspapers containing lottery advertisements or prize lists.
§1303	Prohibits postal workers from knowingly delivering lottery tickets or advertisements.
§1304	Prohibits radio stations from broadcasting lottery advertisements or information.
§1307	**Exceptions:** The above provisions do not apply to the transportation or mailing of lottery tickets within the lottery state or to state lottery information published or broadcast within the lottery state or in an adjacent state which conducts such a lottery.
§1953	Prohibits carrying or sending in interstate or foreign commerce lottery tickets or supplies.
§1305	Prohibits the importing into the U. S. of lottery tickets or advertisements. A similar restriction is included in §1301.

Discussion

Section 256 requires that a proposed constitutional amendment be passed by sixty percent of the elected members of each chamber of the Kentucky General Assembly at a

regular session. The General Assembly convenes in regular session in January of each even-numbered year. Such a proposal would not be subject to gubernatorial veto and would be placed on the ballot for voter approval or rejection at the next general election. A proposed amendment passes if it receives a simple majority of the votes cast on the issue.

An amendment becomes effective upon voter approval unless a special effective date is written into the proposal. The proposals which have been introduced, beginning with 1970, would have either removed the lottery prohibition or would have empowered the General Assembly to establish a lottery. Thus, passage of these proposals would not necessarily have resulted in the establishment of a lottery. Even if the language were changed to actually require the establishment of a lottery, implementing legislation still would be necessary to provide for structure and operations. Legislation to implement a constitutional amendment may be passed at either a special or a regular session.

The first modern state lottery was established by New Hampshire in 1964. Currently twenty-two states and the District of Columbia conduct lotteries.

The following table lists for each lottery state the date of establishment; current annual net proceeds; total net proceeds to date; designation of funds; and the percentage of gross proceeds designated for expenses, for prizes, and for a specified purpose.

Scientific Games, a lottery supply company which collects lottery data, reports that in 1985 lottery states averaged a per capita net income of $37.49. This figure multiplied by the Kentucky population, 3,667,000, is $137,475,830. Data compiled for the same year by staff for the National Association of State Legislatures show a per capita net income of $37.83. This figure multiplied by the Kentucky population is $138,722,810. Apparently there is not available a reliable formula for predicting income to be realized from a lottery not yet established.

LOTTERY

INCOME AND UTILIZATION*

STATE	DATE BEGAN	NET PROCEEDS (IN MILLIONS)	TOTAL NET TO DATE	USE	FUND UTILIZATION PERCENT	PRIZES	EXPENSES
ARIZONA	07/01/81	$22	$115 million	Transportation	30%	45%	25%
COLORADO	01/24/83	$32	$115.1 million	Capital Construction	16%		
				Conservation Trust	12.8%		
				Parks & Recreation	3.2%	50%	18%
CONN.	02/12/72	$148.8	$715.7 million	General Fund	37.4%	52.1%	10.5%
D.C.	08/22/82	$35	$77 million	General Fund	31.7%	51.7%	16.6%
DELAWARE	10/31/75	$15	$72.3 million	General Fund	38.7%	50.1%	11.2%
ILLINOIS	07/30/74	$516.8	$1.6 billion	Education	46.7%	50%	3.3%
MAINE	06/27/74	$4.4	$27.7 million	General Fund	27.7%	49.7%	6%
MARYLAND	05/15/73	$250.1	$3.8 billion	General Fund	38.7%	53.6%	7.7%
MASSACHUSETTS	03/22/72	$341.1	$1.5 billion	Cities and Towns	34.1%	56.1%	9.8%
MICHIGAN	11/13/72	$360	$2.1 billion	K-12 Education	40%	49%	11%

NEW HAMPSHIRE	03/12/64	$4.3	$189.8 million	Education	28.3%	48.1%	23.6%
NEW JERSEY	01/16/70	$390.5	$2 billion	Education	42%	49%	9%
NEW YORK	06/01/67	$600	$2.2 billion	Two Formulas:			
				Education	45%	40%	15%
				Education	35%	50%	15%
OHIO	08/12/74	$338.6	$1.2 billion	Education	39.6%	49.3%	11.1%
PENNSYLVANIA	03/7/72	$565	$2.5 billion	Senior Citizens	43%	48%	9%
RHODE ISLAND	05/18/74	$18.7	$140 million	General Fund	36%	50.4%	13.6%
VERMONT	02/14/78	$1.2	$8.5 million	General Fund	25%	50%	25%
WASHINGTON	11/15/82	$51.9	$200.6 million	General Fund	40%	45%	15%

NEW LOTTERY STATES FOR WHICH NO ACTUAL FIGURES ARE AVAILABLE:

CALIFORNIA

IOWA

MISSOURI

OREGON

WEST VIRGINIA

*April, 1986, issue of State Legislatures magazine. Population and tax revenue from the year ending June, 1985, from the U. S. Census Bureau. Other data gathered from state lottery offices by NCSL staff.

ENERGY

ENERGY ASSISTANCE FOR LOW-INCOME HOUSEHOLDS

Prepared by Mary Lynn Collins

Issue

Should changes be made in Kentucky's current approach to energy assistance for low-income households?

Background

The energy crisis is still very much with the poor. At a time when the average American household spends five percent of its income on home energy bills, the average low-income family eligible for federal energy assistance, according to a report by the Economic Opportunity Research Institute, spends fifteen percent of household income on home energy.

Kentucky, like many other states, has no state funds committed to energy assistance for the poor. A mix of federal and private funds is available to help low-income Kentuckians pay their energy bills. The largest single source for direct assistance, by far, is the federal block grant, the Low-Income Home Energy Assistance Program (LIHEAP), which provides direct energy assistance benefits to households at or below 110% of the poverty guidelines. For the past several years this program, administered by the Department for Social Insurance, has consisted of a subsidy component for any income-qualifying household and a crisis component restricted to households without heat or about to be without heat. In Fiscal Year 1987 $16.6 million in benefits was distributed through LIHEAP.

The other large energy assistance program for low-income Kentuckians is a weatherization program. The Weatherization Assistance Program, administered by the Department for Employment Services, is funded through federal dollars from the the U.S. Department of Energy and from a transfer of LIHEAP funds. In Fiscal Year 1987 the Weatherization Assistance Program expended an estimated $7.5 million to weatherize 5000 homes.

A relatively new source of energy assistance dollars is the oil overcharge monies received by the state as a result of settlements of cases involving oil price control violation. The 1986 General Assembly directed that these monies (currently $38.8 million) be put in a trust fund to be continually reinvested. Any interest earned on those funds is to be used for weatherization and conservation services for low-income households.

Other resources are available for energy assistance, but on a much smaller scale. However, demand for energy assistance and weatherization far exceeds these resources. According to a response by the U.S. General Accounting Office, it will take Kentucky, at current funding levels, over fifty years to weatherize all homes eligible for the Weatherization Assistance Program. Historically, the largest assistance program, LIHEAP, has been able to assist only 30 to 50 percent of its eligible population, and that assistance has in many cases covered only a small portion of household recipients' energy costs. In Fiscal Year 1987, for example, the average LIHEAP benefit was $111, which would, for an average residential utility customer, cover one month's bill during a heating season.

Discussion

The 1986 General Assembly addressed the problem of stretching these limited resources by appointing a task force. The Low-Income Energy Task Force, whose membership includes legislators, utility representatives, low-income advocates, and representatives from agencies involved with energy assistance, was directed by the General Assembly to consider all aspects of energy assistance for low-income households and to specifically look at a relatively new concept being tried in other states, guaranteed service plans.

A guaranteed service plan, also called a percentage of income plan, is based on the concept that people who truly cannot afford utility service should not be threatened with service cutoff as long as they do manage to pay an equitable share of their income on energy bills. At least nine states have adopted a guaranteed service plan or have implemented pilot projects to demonstrate the concept. What these plans have in common is a requirement that qualifying low-income households pay—instead of their actual bill—a percentage of the household income (from 3% to 15%, depending on the state).

The most costly feature of a guaranteed service plan is the shortfall created by the difference in customers' required percentage of income payment and actual bills. States that have initiated guaranteed service plans statewide or as pilot projects are paying the shortfall with LIHEAP dollars, oil overcharge dollars, private fuel funds, and/or through other utility rate payers.

Proposals being considered by the Task Force and which may be recommended to the 1988 General Assembly include:

(1) **Implementation of a guaranteed service plan (or percentage of income plan) on a statewide basis.** Low-income advocates generally support a guaranteed service plan as a more equitable way to provide assistance, since participating households would pay equal proportions of income for their energy. In addition, households would be required to make regular utility payments in order to receive assistance. On the other hand, opponents point to the increased administrative and program costs such a plan would incur and to the fact that the guaranteed service plan concept would not be easily adaptable for households using a non-utility heat source.

(2) **Implementation of a guaranteed service plan pilot project.** Since such plans are still considered experimental and there remains a lot of uncertainty about the costs, some support a pilot project as a more cautious move towards the guaranteed service concept.

(3) **Alterations in the Low-Income Home Energy Assistance Program (LIHEAP) and in the Weatherization Assistance Program.** Since Kentucky's resources are so limited, consideration is being given to ways to better target benefits to those most in need. In order to accomplish this the subsidy component of LIHEAP could be phased out, allowing for more dollars in the crisis component. Or actual energy costs, not now considered, could be used to determine LIHEAP benefits. Since there appears to be a high number of recipients who repeatedly, year after year, apply for LIHEAP crisis benefits, targeting repeating LIHEAP recipients for the Weatherization Assistance Program might also be a way to better use dollars available for weatherization.

(4) **Increase energy assistance dollars.** Given the current financial situation, it is unlikely that the state will commit General Fund dollars for energy assistance. However, the $38.7 million of oil overcharge monies in the Low-Income Energy Assistance Trust Fund could be used for direct energy assistance, in addition to weatherization, if statutory changes were made.

OIL OVERCHARGE MONIES

Prepared by Mary Lynn Collins

Issue

Should Kentucky's plan to use oil overcharge monies be altered?

Background

Kentucky now has over $38.8 million dollars in oil overcharge funds. These dollars are the result of settlements of cases of price violations on crude oil and petroleum products during the period of 1973-1981. The bulk of these dollars came from two sources: Exxon and Stripper Well settlements. Since specific injured parties could not be identified in either settlement, the federal district courts involved directed that the states receive a portion of the refunds for certain energy-related programs. Under the Stripper Well settlement some transportation-related projects, such as bridge and road repair, were also allowed. Some of the oil overcharge cases have not been settled and Kentucky may, in the future, receive additional monies.

Legislation passed in the 1986 General Assembly and codified in KRS 42.560-42.574 requires that all oil overcharge monies received by the state be placed in a trust fund, with an oversight board consisting of the Finance and Administration Cabinet Secretary, Energy Cabinet Secretary, Human Resources Secretary, Revenue Cabinet Secretary and the State Treasurer. The General Assembly made the trust fund a perpetual source of funds for weatherization by specifying that disbursements from the trust fund be only from the interest earned and only for weatherization and conservation activities for low-income households.

Investment income from the trust fund available the first year, Fiscal Year 1986-87, was $618,226 which was used in the Weatherization Assistance Program administered by the Department for Employment Services. Over $2.6 million in interest is available for Fiscal Year 1987-1988. The trust fund board approved spending that interest in the following way: $124,449 to be deposited back into the fund to increase the principal; $1.9 million to be used for the Weatherization Assistance Program; $250,000 to the Kentucky Housing Corporation for a weatherization program for elderly homeowners; $200,000 to the Tennessee Valley Authority for a weatherization program in its Kentucky service area; $88,000 to support a Jefferson County volunteer weatherization program called Project Warm; and the balance for energy-conservation projects involving shelters, group homes, and other housing facilities for the poor.

Discussion

There may be strong support for preserving the trust fund as established by the 1986 General Assembly. The bill establishing the trust fund (SB 325) passed both Senate and House Chambers with a unanimous vote, and the trust fund, as currently structured, does provide the state with a stable funding source for low-income weatherization programs, which have had increasing budget cuts. But those monies also represent a potential funding source for other energy-related programs, which have also suffered funding cuts. The budgets of several energy-related federal programs were cut in Congress last year, at least in part because the states have the oil overcharge funds available for those programs. Consequently, there may be interest in opening the trust fund up, in order to replace lost federal dollars in those particular programs.

Several proposals submitted for consideration to The Low-Income Energy Task Force, established by the 1986 General Assembly to study energy assistance problems of low-income households, would require statutory changes in the trust fund. These statutory changes would include expanding the ways the trust fund dollars could be used and allowing the principal as well as earned interest to be spent. One proposal would use all of the funds to provide direct energy assistance payments to low-income households. Another proposal would use up to $2 million of the trust fund monies for energy assistance pilot projects.

The federal Department of Energy has, in two separate actions, objected to Kentucky's trust fund as a vehicle to distribute either Stripper Well or Exxon funds. At issue is the provision that the principal never be spent but continually reinvested. Attorneys for the Cabinet for Human Resources are currently preparing to argue Kentucky's case for the trust fund before both the federal Department of Energy's Office of Hearings and Appeals and before the U.S. District Court in Washington, D.C., where the Exxon case was originally settled. Depending on the outcome of these appeals, the General Assembly may have to modify the trust fund, at least to the extent of meeting the approval of the Department of Energy and the courts. If Kentucky is forced to alter its oil overcharge expenditure plan, one alternative which would preserve the weatherization trust fund concept and still meet the court's approval would be a limited trust fund which would expend both principal and interest over a set time period.

HEALTH AND WELFARE

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)

Prepared by Dianna McClure

Issue

Should the 1988 General Assembly mandate counseling and testing of selected populations for the presence of the Human immunodeficiency virus (HIV) as a means of detecting and preventing HIV infection and thereby preventing the spread of AIDS?

Background

Since the first published report identifying the Acquired Immune Deficiency Syndrome (AIDS) in the Spring of 1981, AIDS* has continued to increase in epidemic proportions nationally. **As of July 13, 1987, the federal Centers for Disease Control had received reports of 38,312 adult/adolescent and 527 pediatric AIDS cases in the United States. Since 1981 there have been 22,057 deaths from AIDS (a 58 percent death rate).** Although some experts think AIDS cases are underreported by at least twenty percent, at present, the United States Surgeon General has reported that by the end of 1991 there will be about 270,000 cases of AIDS in the United States, with 179,000 persons dead from the condition. Further, the number of persons in the U. S. currently estimated to be infected with the virus causing AIDS is about 1.5 million. Estimates are by 1991 another quarter of a million people will have been diagnosed as exposed to the AIDS linked virus. During the year 1991, it is currently predicted that 54,000 persons in the United States will die of AIDS. **The state Department for Health Services, Division of Epidemiology reported to the Committee on Health and Welfare in December, 1986 a prediction that in Kentucky 480 persons will have died of AIDS by the end of 1991.** By 1991, AIDS is likely to be the second-leading cause of premature death among American men, after accidents.

Beyond the United States, one hundred and thirteen countries have reported the presence of AIDS among their population. AIDS has crossed international borders faster than any other medical epidemic in recent history. As many as 10 million people worldwide already are infected with the AIDS causing virus, according to officials of the World Health Organization. Estimates are that between 50 and 100 million deaths from AIDS are expected worldwide by the early years of the next century.

Although initially the distribution of reported cases of AIDS was in states with the heavily populated areas of New York City, San Francisco and Los Angeles, by 1987, AIDS cases have been reported in all 50 states.

Who has AIDS in Kentucky? As of July 29, 1987, Kentucky had 85 total reported cases of AIDS. Twenty-eight reported cases (34 percent of total cases) of AIDS were in Jefferson County. Thirteen reported cases (16 percent of total cases) were in Fayette County. Eleven reported cases (representing 6 percent of total cases) were in the Northern Kentucky district comprising Boone, Kenton, Campbell and Grant counties. The remaining thirty three cases (39 percent of total cases) were scattered through the remainder of the state.

Other facts about AIDS in Kentucky are available by gender, age and ethnic group. Seventy-eight or 92 percent of the 85 reported AIDS cases have been males. This is roughly comparable to national data showing that 6.7% of people with AIDS are women. The average age of the diagnosed person with AIDS has been 36 years, although the age range has been from 19 to 71 years. Seventy or 82 percent of Kentucky's AIDS diagnosed cases

*See Glossary at end of paper for a definition.

have been white, with the remaining eighteen percent being black. There is a disproportionate number of blacks in Kentucky with AIDS, since based on the 1980 census data, only 7.1 percent of Kentucky's population is black. There have been 60 deaths in Kentucky from AIDS. Table I depicts the number of AIDS cases in Kentucky by year of diagnosis and the numbers of persons remaining alive to date.

TABLE I

KENTUCKY AIDS CASES BY YEAR OF DIAGNOSIS*

Year	Number	Number Alive
1982	3	0
1983	6	0
1984	12	0
1985	22	2
1986	23	8
1987	19	15

*July 29, 1987, Division of Epidemology, Kentucky Department for Health Services.

We do not know how many Kentuckians have been exposed to and infected with the HIV virus, nor do we know what the AIDS Related Complex (ARC) prevalence or incidence rate is. State health officials think that a significant degree of underreporting exists in Kentucky with regard to actual AIDS cases. Under Kentucky law and regulation, AIDS is a reportable disease (KRS 211.180 and 902 KAR 2:020). Physicians and hospitals are required to report AIDS cases within seven days to the local health department or the state Department for Health Services. The AIDS case may be reported with a reidentifiable code number assigned by the person reporting instead of reporting the name and address of person with AIDS. This constitutes anonymous reporting of AIDS cases. In addition, laboratories are required under 902 KAR 2:020 to report "any positive microbiologic or serologic test which indicates the presence of infection with an organism associated with any of the reportable diseases. . . . " identified by the state Cabinet for Human Resources. Thus laboratories are required to report any HIV positive test result to a local health department or state Department for Health Services. This report may also be made under a reidentifiable code number.

As of December, 1986, the state Division of Epidemiology presented data to the Committee on Health and Welfare to show that .01% of the blood donors during a 7 month time span had tested positive for HIV; .04% of military recruits tested positive; 21.5% of the high risk sexually transmitted disease clinic patients in Louisville and Lexington tested positive; and 15.5% of those being tested at the alternate screening sites in Lexington and Louisville were HIV antibody positive.

Who gets AIDS? Table II depicts the specified groups of people in the nation and in Kentucky who have been reported as having been diagnosed as having AIDS. From the federal Centers for Disease Control and the state Division of Epidemiology surveillance reports, the vast majority of AIDS cases have been sexually transmitted or linked to the shared use of hypodermic needles by intravenous drug users. A smaller percentage of peo-

ple have become infected as a result of receiving HIV-infected blood transfusions or using infected blood products. Reportedly, when the blood centers in Kentucky began screening for the HIV in March 1985, only 1 in 10,000 Kentucky Donors tested positive for the virus. About one million units of blood are donated in Kentucky each year. The CDC has estimated that 3.5 of every 10,000 Americans who received a blood transfusion from 1978 to April 1985 were infected with the virus. In Kentucky five percent (5%) of the current reported AIDS cases are from transfusion and blood components. Similarly, five percent (5%) of the reported cases are hemophiliacs. Although commercial lab tests to detect infection with HIV became available in March 1985, the CDC acknowledges that currently there is a period of up to 120 days after infection during which an HIV-infected person's antibodies may not be detectable with current laboratory technologies.

The Centers for Disease Control has stated that AIDS is not acquired through casual contact. It is a contagious, infectious disease but, according to the U. S. Surgeon General, it cannot be spread in the same manner as a common cold or measles or chicken pox. Casual social contact such as shaking hands, hugging, social kissing, crying, coughing or sneezing will not transmit the AIDS virus.

AIDS has a very high fatality rate (58% cumulative deaths for the Nation and 70% for Kentucky). Ninety two percent (92%) of the CDC reported AIDS cases in 1981 have died.

There is presently no cure for AIDS. Approaches to the treatment of AIDS have involved attempts to reestablish immune competence as well as treat opportunistic infections. On March 20, 1987 the U. S. Food and Drug Administration granted new drug approval to the drug AZT (marketed as Retrovir) as the first and only drug approved for treatment of AIDS or AIDS-related complex (ARC). Patients who took the drug in clinical trials seemed to live longer and have fewer opportunistic infections than did patients not on the drug. However, the drug can cause anemia so severe that frequent blood transfusions are necessary. Other drugs are being tested in clinical trials.

TABLE II

AIDS TRANSMISSION CATEGORIES

	# of USA* AIDS Cases	% of Total USA* AIDS Cases	# of Kentucky** AIDS Cases	% of Total Kentucky** Cases
Homosexual/Bisexual Male	(25,022)	68	(59)	69
Intravenous Drug Abuser	(6,185)	14	(09)	10
Homosexual Male/IV Drug Abuser	(2,870)	07	Not Reported	
Hemophelia/Coagulation Disorder	(343)	01	(04)	05
Heterosexual Cases***	(1,452)	04	(04)	05
Transfusion, Blood Components	(797)	03	(04)	05
Undetermined	(1,116)	04	(05)	06

*July 13, 1987, Centers for Disease Control, U. S. Department of Health and Human Services.

**July 29, 1987, Division of Epidemiology, Kentucky Department for Health Services.

***As defined by CDC: Heterosexual contact of a male or female person with one or more of the first four risk factors or one born in a country where heterosexual transmission is common.

Note that Table II excludes 527 children, under age 13 at the time of diagnosis, in the column for the total number of AIDS cases in the United States.

There is presently no vaccine which could prevent AIDS. Development of a vaccine is difficult because the genetic structure of the virus varies considerably from one strain to another. (There are at least 3 strains in the world.) Also, because of its ability to mutate at a high rate, several vaccines could be needed. According to at least one virologist, one vaccine may be effective against the pre-virus stage, another effective against the virus in the cells, and perhaps another could block transmission entirely. According to the U. S. Food and Drug Administration's Center for Drugs and Biologics, because of the virus' long incubation period, an effective vaccine may not be available for up to 10 years.

Because of the gravity of the biological challenge from the AIDS linked viruses and its potential implications for the health care system, federal and state legislative bodies are exploring a range of measures to attempt to prevent the spread of AIDS. These measures include education of the general public about risky behavior linked to increased probability of exposure to the HIV; recommendations directed toward "at high risk for HIV" populations about ways of altering risky behavior; and counseling and testing for HIV seropositivity of various populations known or thought to be at risk of exposure to the HIV virus. The testing programs are a method to measure the prevalence and incidence of the virus in a geographic region and within population groupings. Tests for HIV infection are now being used to screen donated blood and to screen new military recruits, active-duty soldiers and ROTC students.

Discussion

The issue of whether to statutorily mandate for selected population groups the counseling and testing for exposure to the Human immunodeficiency virus (HIV) has been discussed throughout the nation and in the Committee on Health and Welfare during the 1986-1987 interim. Given the national debate, selected populations which could be considered in Kentucky for such counseling and testing include the following:

1. All high risk for HIV exposure populations (The total number of such persons in Kentucky is unknown. See Table II for population groups reported with AIDS transmission categories.);

2. All persons being admitted to a hospital or at least those being admitted for elective surgery (According to the Kentucky Hospital Association, there were 578,834 admissions to 99 acute care hospitals in 1986. The number of elective admissions is unknown to the KHA.);

3. All health care workers routinely exposed to blood and body fluids (The total number of affected workers is unknown.);

4. All persons applying for a marriage license (According to State Vital Statistics, 46,588 marriage licenses were issued in Kentucky in 1986);

5. All inmates in correctional facilities (According to legislative testimony by Correctional staff in July, 1987, there are 6,633 persons in the system at this time, not including 1,300+ now being held in jails and local detention centers throughout the state); and

6. All persons seeking to purchase personal life and health insurance. (The number of such persons is unknown. The Kentucky Department of Insurance does not collect this data.)

Generally, the rationale for mandating counseling and testing for the HIV virus includes the following:

1. To combat this serious public health problem, for which there is currently no cure, information is needed on the prevalence and incidence of HIV infection. Testing provides important epidemiological information which would allow the nation and Kentucky to determine just how widespread exposure to the virus is and the rate at which it is spreading;

2. Persons infected with the HIV virus will want to know;

3. Persons counseled and found, through testing, to be infected with HIV will, because of this knowledge, assume greater personal responsibility and abstain from AIDS linked risky behavior, to avoid transmitting infection to others;

4. Infected persons should be counseled to avoid further transmission of the virus. Through counseling, infected persons may be encouraged and helped to inform any person with whom such person has had sexual contact of that person's risk for infection. Spouses, would-be spouses, and intimate partners of persons infected with the AIDS causing virus have a need and right to know; and

5. Health care workers have a right and need to know when they are at great risk of exposure to the virus. According to the Centers for Disease Control, as of May 1987, nine persons who provided health care to HIV infected patients and who denied other risk factors have been reported to the CDC to have HIV infection from work related exposure to the virus. Four cases followed needle-stick exposures to HIV infected blood. Two cases involved extensive contact with blood or body fluids of an HIV infected patient, without routine observance of barrier precautions. Three cases involved non-needle stick exposure to blood from HIV infected patients. These cases represent rare events and according to the CDC reemphasize the need for health-care workers to adhere rigorously to existing infection control recommendations for minimizing the risk of exposure to blood and body fluids of all patients.

*TABLE III

ELISA Test Performance in a Hypothetical Low-Risk Population[a]

	Actually Infected with HIV	Actually Not infected with HIV	TOTAL	Percentage true results
Positive ELISA	28	220	248	11.3%
Negative ELISA	2	99,750	99,752	100
TOTAL	30	99,970	100,000	

a. Based on sensitivity and specificity data supplied for the Abbott HTLV-III enzyme immunoassay.

*TABLE IV

ELISA Test Performance in a Hypothetical High-Risk Population

	Actually infected with HIV	Actually not infected with HIV	TOTAL	Percentage true Results
Positive ELISA	28,020	154	28,174	99.5%
Negative ELISA	1,980	69,846	71,826	97.2%
TOTAL	30,000	70,000	100,000	

*December 1986, Volume 14:506, *Law, Medicine and Health Care*, page 263

Generally, the rationale against mandating counseling and testing for the HIV virus includes the following:

1. Such a policy will create an unnecessary sense of panic among the general public, since most of the public is thought to be at low risk for HIV infection. The CDC currently estimates the actual prevalence of HIV infection in a low risk population is 0.1 or 1 person per 1,000. Although the number of HIV infected persons is unknown in Kentucky, only 85 people have been AIDS diagnosed to date. As of June, 1987, Kentucky had two-tenths of a percent (0.2%) of all CDC reported AIDS cases for the nation;

2. Persons engaged in AIDS linked risky behavior, because of concerns about confidentiality of test results, will avoid contact with public health officials and therefore may not receive counseling which could educate about risky behavior modification;

3. Mass HIV screening programs using the cheaper ELISA test as the initial screening test and with a mix of low and high risk populations, will yield a higher number of erroneous laboratory test results than do HIV antibody tests performed on high-risk populations. If public health and medical personnel act on erroneous test results, they may inform HIV infected persons that they are not infected (false negative) and they may inform non-HIV infected persons that they are in fact infected (false positive). There is a degree of error inherent in any testing procedure. Because of the implications of testing positive for HIV infection, the error rates inherent in the screening tests are not inconsequential. The accuracy of testing for exposure to the HIV virus depends upon the number of persons with infection in the sample. The ELISA detects antibodies to the HIV. It does not detect infection in its earliest stages, that is, before antibody is formed. The prevalence of antibody-positive individuals determines the types of false results that are produced. In a low-risk group, small differences in the specificity of the ELISA test can profoundly influence the probability that a positive test indicates actual HIV infection. Tables III and IV depict the performance rates of the ELISA test in a hypothetical low-risk population compared to a hypothetical high risk population. The ELISA test when used in a low-risk population yields many more false positives than true positives. Thus in the general population, where prevalence of HIV infection is very low, the ELISA has poor predictive value for being a true positive. In a high-risk population, where prevalence of HIV infection may be as high as 30% to 70%, a positive ELISA is almost always confirmed by the Western blot, thus giving a very high positive predictive value. Notification of a positive test result can have grave psychological impact. Researchers of the psychological impact of notification of seropositive test status report these individuals experienced dramatic increases in anxiety, depression, and psychological distress. About one-third who learned they were infected reported suicidal thoughts; and

4. Mass mandatory testing for exposure to the HIV virus is too costly compared to the expected benefit to society. A more effective approach is to educate and make accessible voluntary counseling and testing to persons who believe they have been exposed to the virus. The voluntary testing and counseling facilities now in place are not adequately staffed or financed to handle the increased workload resulting from a mass mandatory counseling and screening program. Currently, the average waiting time to receive services at the publicly funded voluntary counseling and testing sites (CTS) varies. In Lexington, all counseling and testing is one by appointment and the average waiting period is two weeks. In Louisville, counseling and testing is done on a walk-in basis. No waiting period is necessary. In Bowling Green and Pineville, the waiting time may vary from one to two days to as much as two weeks and depends on how distant the person requesting testing resides from the testing site. The Bowling Green CTS serves 34 counties in Western Kentucky. The Pineville CTS serves 31 counties in Eastern Kentucky.

What comprises "testing" for exposure to HIV? Testing to validate one's exposure to the Human immunodeficiency virus is currently accomplished through the use of two laboratory tests. These laboratory tests, the ELISA and the Western blot, detect antibodies in the blood to the HIV virus. The ELISA test is commonly used by blood banks to screen out blood contaminated with HIV. The Western blot typically is used to validate true and false positive ELISA results.

For the federally funded alternate HIV counseling and testing sites located in local health departments, the Regional Blood Banks perform the ELISA at reduced charge ($4.50). The cost of the Western blot HIV antibody test is about $25.00, since it is sent to an out-of-state laboratory. Other persons voluntarily seeking testing for infection with the HIV virus may pay higher laboratory fees. The average turnaround times on reporting of positive or negative HIV antibody test results are as follows:

ELISA—two to three weeks after reaching the laboratory.

Western Blot—four to five weeks after reaching the laboratory.

For those persons testing positive on the first ELISA test, the standard procedure is to retest the blood sample using the ELISA test kit and then to follow up by submitting the blood sample to the out of state laboratory for the Western blot procedure. These timeframes could change if more instate laboratories were approved to perform these tests.

Under Kentucky law governing sexually transmitted diseases, AIDS is termed a sexually transmitted disease (KRS 214.410(2)). All records, reports and information concerning any person infected or suspected of being infected with a STD are strictly confidential and only STD control personnel of local health departments and the Cabinet for Human Resources are authorized access to such information, records and reports (KRS 214.420). However, statutory provision is made for the release of certain medical or epidemiological information to specified medical or epidemiological personnel.

In Kentucky there are currently four federally subsidized alternate HIV counseling and testing sites. These sites are termed "alternate" counseling and testing sites because they were designed to divert high risk for HIV infection populations from donating blood to local blood banks and plasma centers in order to have such persons voluntarily tested for exposure to the HIV virus. These sites offer anonymous or appropriately safeguarded confidential and free testing for HIV exposure. **At these sites, for the first six months of 1987, there were an average pre-HIV test counsels per month of 251.7 and an average of 141.3 HIV tests per month. There has been increased counseling and testing activity over time at these sites since, by comparison, during the first six months of 1986, there were an average pre-HIV test counsels per month of 82.8 and an average of 46.8 HIV tests per month.**

The sites for public funded voluntary HIV counseling and testing are:

Louisville-Jefferson County Health Department
Speciality Clinic
834 East Broadway
Louisville, Kentucky 40204
(502) 625-6699

Lexington-Fayette County Health Department
650 Newtown Pike
Lexington, Kentucky 40508
(606) 255-6152

Bowling Green-Warren County Health Department
1133 Adams Street
Bowling Green, KY 42101-1157
(502) 781-2526

Bell County Health Center
P. O. Box 97
Park Avenue
Pineville, Kentucky 40977
(606) 337-7046

Seven other district and county health departments have staff trained in HIV counseling and testing. These are in the towns and cities of Newport, Ashland, Shelbyville, Richmond, Bedford, and Morehead.

What comprises "counseling" for persons being tested for exposure to HIV? Generally, according to experts in the field, counseling of persons voluntarily obtaining the test for HIV infection includes discussions with the person prior to consent to the taking of the blood specimen, transmission of the test results to the person, and any follow up supportive counseling to persons with confirmed, positive test results. A July, 1987 U. S. Conference of Mayors report of a survey by the U.S. Conference of Local Health Officers, found that counseling accounts for a signifcant part of the cost of HIV antibody programs. The survey found the time spent in pre-test counseling ranges from 10 minutes to one hour. Post-test counseling ranges from 30 minutes to several hours.

New York has the largest number of reported AIDS cases (10,905) in the nation. Therefore, this state has had the most experience with HIV counseling and testing programs. The New York State Health Department in March, 1987, suggested HIV test counseling should provide individuals with:

- Assessment of the person's risk for HIV infection and AIDS.
- Assessment of the test's usefulness in promoting risk reduction practices.
- Information about transmission and risk reduction practices.
- Evaluation of the person's ability to implement risk reduction practices.
- Information about possible psychosocial problems which may arise such as fear or depression or employment or housing discrimination.

According to the federal Centers for Disease Control, state and local health officers consulted by CDC most frequently cited a cost of $45 per person counseled and tested. These cost figures do not include the cost of referring and counseling sex partners, training and supervision of new counselors, increasing laboratory and support capabilities and quality assurance programs necessary for expanded testing programs, or the development and distribution of educational materials.

American Medical Association guidelines for physicians recommending HIV testing for their patients include but are not limited to counseling the patient about the possibility of positive or negative test results, that the infection is persistent and probably for life, the inability to predict the development of AIDS from a positive test result, and the possible loss of insurance or employment if a positive result is revealed to an insurer or employer.

The research activities directed toward determining the prevalence and incidence of the Human immunodeficiency virus, developing of safe and effective drugs for the treatment of AIDS, and the quest to discover one or more vaccines to prevent infection with the AIDS causing virus are continuing. New findings are reported almost daily. New AIDS information will be available to the 1988 Regular Session. The choices made will undoubtedly require additional state expenditures.

Glossary of Terms Commonly Used When Discussing AIDS

AIDS (Acquired Immune deficiency syndrome) is a disease complex characterized by a collapse of the body's natural immunity against disease. Because of the failure of the immune system, affected persons are vulnerable to rare infections or cancers that do not pose a threat to anyone whose immune system is working normally. AIDS is caused by the virus called HIV. The time between HIV infection and the onset of symptoms seems to range from about 6 months to 5 years or more. At this time, there is no known cure for AIDS. At this time, there is no vaccine to prevent AIDS.

ARC (AIDS-related complex) is a combination of physical problems ranging in severity from mild to extremely serious, which indicates infection of a person with HIV. Symptoms may include fatigue, fever, weight loss, diarrhea, skin rashes, night sweats, swollen lymph nodes and lack of resistance to infection.

HIV (Human immunodeficiency virus) is the causative agent of AIDS. The virus attacks and destroys selected white blood cells of the immune system, leaving the infected individual susceptible to a variety of opportunistic infections and cancers. The virus may attack the central nervous system and cause damage to the brain. Infected persons may remain virus-positive for years, perhaps for life. Infection with the virus may not always lead to AIDS. According to the federal Centers for Disease Control, HIV is transmitted by three routes: sexual contact, parenteral inoculation of blood (most often through intravenous drug abuse), and perinatally from an infected woman to her fetus or newborn. The risk of infection with HIV is increased by having multiple sex partners, either homosexual or heterosexual, and sharing of needles among those using illicit drugs. The CDC states that HIV is not acquired by casual contact. This means through shaking hands, coughing, sneezing, eating utensils, or office equipment.

Seropositive Test Status means that laboratory testing for exposure to the HIV has identified the antibody to the virus in a person's blood and that the person has at some time been infected by the virus. The test does not indicate whether the person will eventually develop AIDS. However, some experts predict 40% of those exposed to HIV will develop AIDS within 5 years and 80% within ten years. The risk of developing AIDS may actually increase rather than decrease with the passage of time after exposure.

AFDC NEED STANDARD AND BENEFIT LEVEL

Prepared by Mary Yaeger

Issue

Should the General Assembly increase the need standard and benefit level of the AFDC payment?

Background

The Social Security Act of 1935 created the Aid for Families with Dependent Children (AFDC) program. The goal of the program is to maintain and strengthen family life by providing financial assistance and care to needy dependent children in their own homes or those of caretaker relatives. In Kentucky, 60,000 families, or 4.4% of all Kentucky's families, receive benefits. Most of these families are headed by mothers who do not receive adequate support for their children who live in the home.

The federal government requires the states to establish "need standards," which are defined as income levels necessary for a minimally adequate standard of living. AFDC benefits are based on these need standards and, in Kentucky, the dollar amount of the need standard and benefit level are the same. Kentucky's need standards include eight basic needs: food, clothing, household supplies, personal care items, transportation, school supplies and utilities. Housing, a major family expense, is not included.

Kentucky's need standard is the lowest of those in the 50 states and the benefit level is 44th in ranking of all states. Kentucky's AFDC benefit is approximately one-fourth of the monthly income set by the federal government as poverty level for a family of three. To illustrate, an unemployed mother with two children receives a monthly benefit of $197 compared to the poverty level amount of $775.

While most federal benefit programs receive mandatory inflationary adjustments, the AFDC program does not. Kentucky has raised its benefit levels four times in the last twenty years. If 1967 benefit levels had grown according to the Consumer Price Index, the $2,364 a family of three will receive in 1987 would be $5,444, or an increase of $3,080.

Kentucky's low need standard also becomes a disincentive to employment. If an AFDC recipient earns income exceeding 185% of the need standard, she would be ineligible to receive any benefits. Gross income of $365 monthly would disqualify the family. Despite work earnings, the family's standard of living may be lowered, due to a combination of new work-related expenses, loss of AFDC benefits, a decrease in food stamp allocation, and total loss of health coverage, through Medicaid, four months after the AFDC benefits are discontinued.

Discussion

Since the federal poverty level is indexed for inflation and Kentucky's AFDC benefits are not, the disparity between the two has been growing. Even with the addition of Medicaid and food stamps, the current AFDC household benefits are approximately one-half of the poverty level. This growing disparity makes it difficult for the program to attain its goal of maintaining and strengthening family life for dependent children.

A separate but related issue is the non-working welfare recipients' efforts to become employed self-sufficient citizens. This issue is getting a great deal of discussion in the states, as well as in Congress. While accomplishment of this goal requires multiple strategies, one strategy that can be accomplished by the General Assembly is to increase the need standard. This can be done independently of increasing the benefit level itself. If this were done it would **not** increase an AFDC recipient's benefit amount, but it would allow that recipient to earn more income before she becomes ineligible. Therefore, increasing the need standards may encourage AFDC recipients to seek employment which could lead to a long-term work experience. Because the loss of health coverage is an important issue to the working poor, increasing the need standard would also allow the AFDC recipient to keep medical assistance for a longer time as well.

Any increase in AFDC benefit levels or the need standards would require additional General Funds. An increase in AFDC benefits can require a sizable amount of revenue because each AFDC adult and child is affected by the change. Increasing the need standard would not require as much additional revenue because only those families with incomes approaching the gross income limit would be affected. (For a family of three, this monthly income limit is now $364.)

The exact amount of revenue needed would be based on the amount the benefit or standard would be raised. In the 1986-88 Cabinet for Human Resources budget request, a 5% increase in the benefit level would require $7.6 million of General Funds in the first year. This increase would equate to a $3.63 increase in the average payment per AFDC recipient. However, the state would incur the smaller portion of the total cost. The federal government will pay 71 cents for every 21 cents paid in AFDC benefits. Additional administrative costs would be shared 50/50 by the state and federal governments. In this way, states that set their benefit levels and need standards higher access more federal funds than does Kentucky.

CERTIFICATE OF NEED REFORM

Prepared by Bob Gray

Issue

Should the Kentucky health facilities and health services Certificate of Need law be repealed?

Background

Since 1972, Kentucky has had a certificate of need program (KRS Chapter 216B), designed to provide for the orderly development of health facilities and services and to insure availability and access to quality health services to all citizens at a reasonable cost. The certificate of need program was required by the federal Health Planning and Resources Development Act. KRS Chapter 216B, the State CON law, requires health care providers to obtain a certificate of need prior to building a new facility; making expenditures in excess of $600,000 on a facility (adjusted annually for inflation); making a substantial change in bed capacity; acquiring major medical equipment or changing locations. A statutorily created seventeen member Kentucky Health Facilities and Health Services Certificate of Need and Licensure Board is the body which decides to issue a certificate of need in cases where the proposal is consistent with the needs identified in the State Health Plan (a document developed by the Cabinet for Human Resources describing the health needs of the population).

Acting on the belief that certificate of need programs have not been effective in controlling health care costs, Congress recently repealed the federal health planning law, thus removing the requirement that states have a CON program. A number of states have acted to repeal their CON legislation. As of January 1987, nine states (Arizona, New Mexico, Utah, Texas, Idaho, California, Louisianna, Kansas and Minnesota) have no CON program. In all but two of these states (Arizona and Utah), the Section 1122 review under the Medicaid program is still conducted to determine whether to allow the capital expenses associated with a new facility to be reimbursed by the Medicaid program. Therefore, some controls still exist despite the lack of a CON program in these states. A number of other states have moved in the direction of deregulating their CON programs by raising the amounts a facility may spend before CON review is required.

Discussion

Prior to 1985, the Kentucky CON Board approved over 90% of all applications to establish new facilities and services. However, in November 1985, the 17-member board was abolished by Executive Order of the Governor and replaced with a full time three-member Commission for Health Economics Control in Kentucky with the same duties. Since the new Commission was established, the approval rate for new facilities and services has dropped to 59%. The Commission has argued that without the CON program unneeded beds and services would be built, leading to the additional utilization of services, much of which may not be necessary. The Commission has also cited data from Arizona and Utah that there has been a proliferation of new services at an additional cost to health care consumers.

On the other hand, those in favor of CON repeal would argue that the marketplace should decide whether a new facility should be established. This view holds

that competition is the best way to control health care costs and that investors will not take the risk of establishing a service unless they feel it can be operated efficiently at a profit, it can be offered at a competitive price and that there is a demonstrated need for the service.

REDIRECTING EXPENDITURES FOR LONG-TERM CARE

Prepared by Bob Gray

Issue

Should State expenditures for institutional based long-term care services be redirected to fund expanded in-home services for disabled and senior citizens?

Background

Long-term care has been a long-standing issue of interest in the Kentucky General Assembly. Considerable legislative attention has been given in past sessions to the licensing and regulation of long-term care facilities, Medicaid reimbursement for long-term care, and the development of in-home services. Medicaid is the largest payor of long-term care in Kentucky, paying for approximately 50% of all skilled nursing beds and 78% of all intermediate care beds. At present, this represents over $220 million per year in Medicaid expenditures, about 36% of the total Medicaid budget.

There are now 30,638 licensed long-term care beds in Kentucky, including 5,441 Skilled Nursing Facility beds, 16,121 Intermediate Care Facility beds, 1,203 Intermediate Care Facility-Mentally Retarded beds and 7,873 personal care beds. The projections of the future need for long-term care beds is contained in the Kentucky State Health Plan. The State Health Plan is a document prepared by the Cabinet for Human Resources health planning staff which inventories health services in Kentucky, considers the need for new health services, and serves as a guide for achieving acceptable health care goals. The State Health Plan is used by the Commission for Health Economics Control in Kentucky (formerly the Certificate of Need and Licensure Board) in determining whether to allow new health care facilities and services to be built or established in Kentucky. For the long-term care facilities, the projections are based on the current number of beds, the ratio of the number of beds per 1000/population of age 65 and over, and the desire to provide more care to persons at home rather than in a nursing home. Based on these projections, the State Health Plan shows a statewide surplus of 437 skilled nursing beds, 1,269 intermediate care beds and 714 personal care beds.

The maximum number of beds allowed in the 1987 State Health Plan reflects a 15% reduction, due to the inappropriate use of nursing homes. Cabinet for Human Resources estimates have shown that 20 to 25% of the residents of nursing homes could be cared for at home with in-home services; therefore, the State Health Plan recommends the further development and use of in-home services instead of building new nursing homes. This statistic appears to be at odds with the fact that long-term care facilities have high occupancy rates (89.7% for SNF and 97.5% for ICF) and many have long lists of persons waiting to be admitted. However, a recent CHR study (*Long-Term Care in Kentucky*, October, 1986) points out that there is a difference between the **demand** for a service and the actual need for the service. It is argued that if persons who could be cared for at home were moved out of facilities and appropriate in-home services were available, the demand for nursing home beds would decrease.

In an attempt to reduce the amount the state pays for long-term care, a moratorium prohibiting the construction of new long-term care beds has been in place since 1980. It has been estimated that each additional 100 beds approved will cost the Medicaid program an additional $1.1 million in 1985 dollars. Thus, proposals to build new beds are not being approved by CHECK.

The state is trying to encourage the development of in-home services by increased appropriations to the Homecare program (a program which provides social services only to the elderly in their own home) and by a Home and Community Based Waiver Program under Medicaid, which would allow for Medicaid to pay for similar services provided in the home. Federal Medicaid regulations will not allow Medicaid funds to be used for services provided outside of a health care facility. However, a waiver of this restriction is permitted if a state proposes to prevent elderly persons from being institutionalized by providing services to them at home. The Home and Community Based Waiver Program under Medicaid has only been operating in the Bluegrass Area Development District, but an appropriation of $2.4 million was included in the 1986 Executive Budget to make the program statewide by FY 1988.

In addition to the Home and Community Based Medicaid Waiver Program, CHR operates the Homecare program, created by the General Assembly in 1982. Homecare offers such services as home delivered meals, housekeeping and home repair, and assistance with bathing, grooming and other personal needs, and is designed to serve persons at risk of entering a long-term care facility. Homecare services are not covered by Medicaid—services are paid for by the client based on a sliding scale of fees. Approximately 7,000 persons are receiving services under the Homecare program, at a cost of $6.8 million per year; the 1986 General Assembly appropriated an additional $3.2 million to expand the program to serve more persons.

Discussion

At issue is whether to allow the further expansion of long-term care beds or whether to redirect expenditures towards in-home and community based services. Actions taken by the 1986 Kentucky General Assembly tend to support further development of in-home and community based services. These actions include:

(1) Requiring all health insurers in Kentucky to offer coverage for long-term care;

(2) Establishing a program of preadmission screening to assess all persons prior to entering a long-term care facility to determine if the persons need long-term care facility services or could be cared for at home; and

(3) Increasing funding for the Homecare and Home and Community Based Waiver Programs, as described above.

The combined effect of these actions should be to encourage the development of a private source of financing for long-term care through the availability of private long-term care insurance, ensure, through preadmission screening, that only those persons who really need to be in a long-term care facility are allowed to be admitted, and provide more alternatives to institutionalization through the expansion of in-home and community based services.

Should the 1988 Kentucky General Assembly wish to continue in this direction, the following alternatives could be considered:

1. Continue to increase funding for the Home Care Program, Home and Community Based Waiver Program under Medicaid, and other programs designed to care for people at home.

2. Examine new methods of reimbursing long-term care facilities, such as patient-based reimbursement, which pays according to the actual condition of the patient instead of

a flat fee for an entire level of care. This could also address the concern that current reimbursement is inadequate to cover costs in long-term care facilities.

3. Enact a statutory limit on the number of new long-term care beds approved for construction.

4. Publicize in-home and community based services to let senior citizens know that alternatives to nursing homes exist.

5. Expand the 1986 legislation relating to long-term care insurance to require health insurers to offer coverage for in-home and community based services in addition to home health and nursing home services.

CARE FOR THE MEDICALLY INDIGENT

Prepared by Karen Main

Issue

How should the State address the problem of the medically indigent?

Background

Based on 1986 information from the Current Population Survey of the Census Bureau, there are between 620,000 and 820,000 Kentuckians who do not have health insurance and who are ineligible for public programs. Between 280,000 and 320,000 of these have annual incomes below the federal poverty level. Ninety percent of the remainder are only slightly above the poverty level. Some of these persons are employed full or part-time, most frequently in small businesses which do not provide health insurance benefits. Additionally, there are persons who become medically indigent because their insurance benefits are exhausted or whose insurance does not cover necessary treatment. The number of these cases in the population is not known, but they do represent 21% of the charity cases requiring hospital care. Many of these have extremely costly hospitalizations. In a 1987 study by the Kentucky Hospital Association it was shown that five percent of the medically indigent incurred costs exceeding $10,000 and that the financial resources consumed by this group were 35% of the hospital dollars spent for charity care. Although a number of medically indigent persons receive free or reduced-charge ambulatory care from a voluntary physician-sponsored program, health departments, and university and other primary care providers, the unmet need for primary care is unknown because there is no coordinated information system which can provide an unduplicated count of persons receiving services.

Medicaid provides reimbursement for services to persons who would be medically indigent without it. Approximately half of the population below the federal poverty guidelines is eligible for Medicaid. Recipients include the categorically needy, who also receive cash assistance, and the medically needy, persons who have too much income to qualify for cash assistance. In either case, eligible **individuals** must be aged, blind or disabled and receiving federal or state supplemental security income with income not exceeding $192 a month. Eligible **families** must be receiving AFDC money payments, based on the death, absence or incapacity of a parent, and with an income not exceeding $225 per month for a family of two up to $383 per month for five, plus $50 per month for each additional dependent. Generally children in these families who are under age 18 and pregnant women are the eligible recipients. The major factor which prevents Kentucky's Medicaid program from covering more of the medically indigent is the very restrictive income requirements. The program provides a wide range of benefits to those who qualify. Until recently, it was not possible to increase the income limitation without simultaneously raising the income eligibility level for AFDC. The program has not had sufficient funds to pay for this expansion in the past.

Discussion

Presently there are insufficient and uncoordinated sources of funds to pay for health care for low income and uninsured persons. Some services are provided voluntarily, such as those from doctors in the Kentucky Physicians Care Program. Others are underwritten by state and federal funds, as in the case of health department programs. Hospitals

have tried to compensate by shifting the costs through higher charges to other payors. However, because of increasing cost containment activities on the part of major purchasers of health care, the profit margin previously available to hospitals to support charity care has been shrinking rapidly. This problem is most acute in small rural hospitals and at the University of Kentucky hospital because of their large proportion of indigent patients. Some relief for hospital indigent care in Jefferson County has been found in a city-county-state contract with Humana, Inc. As stated previously, Medicaid provides reimbursement for approximately half of the indigent who fall below the federal poverty level, but it has been financially restricted in the past from expanding to a larger population because of federal requirements that AFDC eligibility criteria must be identical to Medicaid eligibility levels. However, as a result of provisions in the 1986 Omnibus Budget Reconciliation Act (OBRA), it may now be possible to reach some additional medically needy populations without expansion of AFDC. Section 9401 of OBRA 1986 provides that states may choose to cover a new categorically needy group, pregnant women and children under age one whose income is not in excess of the federal poverty level. This age level can be increased by one year in each fiscal year until all children below age six who are below the poverty level are covered. States which elect this optional group may also cover additional aged and disabled individuals whose income does not exceed the poverty level. Medicaid officials estimate that an additional 3,500 pregnant women and 5,000 aged or disabled persons could be covered in the first year if the state elects these options, which would cost about $11.7 million. In the second year a total of 14,500 additional persons could be covered, for a combined cost of $21.2 million.

The legislature must consider two difficult problems: programmatic solutions which assure access to needed care for the indigent and identifying sources of revenue which are efficient and do not place an unfair burden on any segment of the population.

The Current Health Care Issues Subcommittee of the Interim Joint Committee on Health and Welfare is studying these problems throughout the interim. Among the solutions which will be considered are:

Maximizing the use of private and public insurance by means of

- Mandating benefits and broadening eligibility rules,
- Providing health insurance to the uninsured or marginally insured working population through multiple employers trusts,
- Developing "limited" benefit packages at affordable prices for the uninsured employed,
- Providing health insurance to high-risk individuals,
- Expanding Medicaid coverage to other eligible populations,
- Implementing a state medical indigency program, and/or
- Implementing a catastrophic expense program.

Providing direct financing to major providers through

- Providing financing or subsidies to disproportionate share providers and/or
- Funding providers for specific services.

Ensuring efficient use of existing funds by

- Expanding such primary care sources as health departments,
- Encouraging participation in prepaid plan and/or
- Selectively contracting with providers.

Assuring fair sharing of financing and care burdens by

Developing indigent care financing pools,
Implementing care or share arrangements,
Restricting hospital patient transfers and/or
Legislating all-payer rate-setting.

STATE SPONSORED HEALTH DATA COST PROGRAMS

Prepared by Karen Main

Issue

Should Kentucky establish a public health data/cost information system?

Background

As of June, 1987, thirty states had passed legislation requiring the collection of health care data which is to be publicly disseminated. Twenty-seven of the states collect detailed discharge data. Most of these also require financial data. Three states collect financial data only. These laws mandate state-operated data systems which provide information to inform large purchasers and individual consumers about comparative prices and uses of health services. Some programs are limited to hospitals while others may require data from nursing homes, doctors or third-party payors.

Discussion

These laws hold in common an interest in health care cost containment and the belief that competition among providers is an important strategy in achieving cost containment. They rest on several assumptions which are discussed below.

First, it is suggested that **comparative data is an important means of fostering competition which, in turn, leads to cost containment.** It is assumed that if a corporation or an individual has information regarding choices among insurance plans or among providers they will select the one which costs less, all other factors being generally equal. Sellers of insurance or services therefore must compete for customers on the basis of costs, range of services and quality. However, even in the absence of comparative data it appears a competitive environment has developed rapidly in Kentucky in the past few years. For example, in 1982, there were only two pre-paid plans in the State. Now there are fourteen plans. Also, growing numbers of multiple-hospital arrangements, increased advertisement of hospital services and wide diversification from the traditional hospital role all suggest that competition is developing in Kentucky. It should also be noted that the current trend among corporate purchasers is to manage cost containment themselves through such mechanisms as pre-admission review, concurrent review and out-of-pocket penalties for employee use of providers other than those with whom the most favorable rates have been negotiated. Nevertheless, data system advocates contend that a marketplace which does not offer purchasers price information cannot be as competitive as one that does.

Secondly, **it is assumed that comparative cost and utilization data are not available to purchasers.** Presently many major employers, such as state government, request bids for services in order to negotiate favorable rates. These requests require comparable cost and utilization data from competing providers. However, smaller employers and interested individuals may not have access to this information; state-generated data could help them to purchase more effectively.

Third, it is assumed that data which compares outcomes such as mortality, infection rates, and readmissions will **enhance the quality of care.** But experts concede that the crude mortality and admissions data are not very helpful in measuring quality of care because they fail to account for whether a given provider sees a larger proportion of

critically ill patients than other providers (case mix), do not measure the severity of illness on an individual basis and are based on multiple interpretations of non-comparable medical records. However, a number of new measures of quality care have recently been developed and are being refined. When these advances have been tested and are generally utilized, it may be important to determine whether analyses resulting from this data collection should be available and utilized as a means of public health protection.

The fourth assumption is that **individuals will select providers more appropriately on the basis of published data.** Currently, selection of a facility continues to be based primarily on the limitations of an individual's insurance plan and/or the preference of the physician the individual has selected. In turn, individuals working for large employers generally select insurance plans on the basis of compared benefits, out-of-pocket costs or preference for a particular provider, rather than on the basis of comparative charges or utilization. However, consumers have become increasingly sensitive to health care costs as they have been required to pay a greater share through larger deductibles and co-payments and there may be a trend toward comparison shopping by individual consumers who would use such data.

Finally, it should be noted that the state Cabinet for Human Resources annually publishes hospital-specific data on utilization and services. This information is routinely used by hospitals for planning purposes and by state agencies. It is available to the public. It does not contain comparative cost and/or charge information. Utilization information is also available for long-term care institutions. Utilization information may be helpful to purchasers in the sense that under-utilized specialized services often have higher morbidity and mortality. Utilization information can also raise questions as to whether the most highly utilized services and facilities are therefore the best or whether a better price can be negotiated with providers that are utilized less. Data regarding physicians is currently collected only by the Kentucky Medical Licensure Board and the peer review organizations. This information does include several measures of quality of care but the data are difficult to access and generally confidential.

In summary, legislators should consider if a new state health data/cost system is needed, if it is affordable because cost containment would offset the cost of the system, if it would enhance cost containment and whether quality of care could be improved by publishing information on outcomes.

WELFARE REFORM

Prepared by Rob Williams

Issue

Should the General Assembly enact enabling legislation with sufficient appropriations to comply with potential federal welfare reform measures?

Background

Over the last several years, various states and national associations concerned with low-income families have advocated restructuring the Aid to Families with Dependent Children (AFDC) program from what is primarily an income assistance system in which a small percentage of recipients participate in work and training programs into a system that requires a larger proportion of recipients, as a condition of benefit eligibility, to participate in training, education and employment programs, provided necessary support services are furnished or reimbursed. Attention has also focused on increasing benefit levels to provide all recipients with adequate financial support. In response, several reform bills have been introduced in Congress this session, but H. R. 1720, The Family Welfare Reform Act of 1987, is the major vehicle under consideration. A Senate version is also expected to be introduced. This report outlines the required and optional programmatic changes and fiscal impact of H. R. 1720 and describes the services and targeted populations of the proposed education, training and employment programs.

Program Impact. The Interim Joint Committee on Health and Welfare was briefed on the mandated and optional provisions of H. R. 1720 at its April meeting and is monitoring its progress throughout the interim. The Committee has learned that H. R. 1720 would make the following amendments or additions to existing AFDC and child support enforcement laws:

(1) Effective October 1, 1989, the AFDC and Work Incentive (WIN) programs would be replaced by the Family Support Program (FSP) and Network, which provides a broad range of education, training and employment opportunities with required participation by a majority of recipients, as well as necessary day care, transportation and other work and training expenses;

(2) Presently, AFDC is available only if a household with dependent children is deprived of parental support due to absence, death or disability of a parent. Effective January 1, 1989, income-eligible two-parent households would also be eligible for FSP benefits, and consequently for Medicaid as well, if the principal wage earner is unemployed;

(3) Effective October 1, 1988, current earned income disregards for determining eligibility and calculating benefits would be replaced with a standard deduction of $100 per month to cover work-related expenses, plus 25 percent of remaining earnings. The disregards would not be time-limited, as under current law, and the $100 standard deduction would be adjusted annually for inflation;

(4) Effective October 1, 1987, states must continue to provide day care expenses and Medicaid benefits on a sliding fee basis for up to six months to recipients who become ineligible for FSP benefits because of increased earnings or receipt of child support;

(5) Effective October 1, 1987, child support enforcement measures would be strengthened to require: (a) automatic withholding of non-custodial parents' wages; (b) im-

plementation of uniform guidelines in setting and reviewing child support awards; (c) increasing the number of paternities established each year; and (d) doubling the amount of child support which is "passed through" to the FSP mother instead of being retained by the state to recoup benefits paid to the FSP recipient. Wages are currently withheld from non-custodial parents' wages only if there is an arrearage in support payments, so withholding would be expanded to begin at the time support orders are finalized;

(6) Effective October 1, 1987, unmarried parents under age 18 who receive FSP benefits must live with their parent(s) or guardian unless it would be inappropriate to do so. The state may also require minor FSP parents to attend school or participate in parenting or family skills classes, so long as child care and transportation are provided; and

(7) Effective October 1, 1988, states which increase FSP benefit levels would have their benefit match amounts reduced from 30 percent to 25 percent.

Fiscal Impact. In FY 1987, Kentucky's basic AFDC benefits and administrative costs totalled $156.7 million. The state share of that total was $49.8 million ($40.7 million for benefits and $9.1 million for administration). An average of 160,175 recipients in 59,754 households received AFDC benefits each month, with average monthly payments per recipient and household equalling $72.02 and $193.05, respectively. The cost and recipient figures would remain approximately the same under the FSP program, at least initially, unless benefits are increased, but H. R. 1720's provisions, when fully implemented, would cost an additional $96.9 million annually. The state share of that total would be $33.4 million annually ($20 million for program services and $13.4 million for administration). Therefore, the total FSP benefits, program services and administrative costs would equal approximately $253.6 million per fiscal year, with a state share of $83.2 million. Additional FSP costs and recipients affected are outlined in a chart at the end of this discussion.

Network. FSP recipients must participate in a multi-faceted education, training and employment program known as Network, which would be administered by the state in all political subdivisions in which it would be feasible. FSP recipients and the state agency would develop employability plans and execute contracts for Network participation. Participants who did not fulfill their contracts would be removed from the families' FSP grants until they complied, but benefits to children would continue. Necessary day care, transportation and other work or training expenses would be furnished or reimbursed to Network participants.

Network services which states must offer are: (1) high school diploma program or equivalency; (2) literacy education; (3) group and individual job search; (4) job readiness activities; (5) counseling information and referral regarding personal and family problems; and (6) job development, job placement and follow-up services. In addition, states must offer at least two of the following: (1) on-the-job training; (2) skills training; (3) work supplementation (grant diversion); (4) Community Work Experience Programs (CWEP); and (5) other education and training activities.

All FSP recipients would be required to participate in Network except: (1) persons who are ill, incapacitated or age 60 or above; (2) persons caring for ill or incapacitated family members; (3) parents or caretaker relatives of children under age three (this exemption is the only difference from WIN exemptions, in that parents or caretaker relatives of children under age six are exempt under WIN); (4) persons working at least 20 hours per week; (5) children under age 16 or children under age 18 if attending school full time; (6) pregnant women at the sixth month of pregnancy; and (7) persons residing in areas where Network is not offered. States may also require parents of children ages one to three to par-

ticipate if appropriate infant care can be provided within funding limits. Network services would be primarily targeted to parents under age 18, recipients of FSP for more than two years and families with children under the age of six, as these groups are at risk of becoming long-term recipients; then other mandatory and voluntary participants would be served.

Discussion

The thrust of H. R. 1720 is comprehensive reform of the present welfare system by attempting to help welfare recipients move toward self-sufficiency and, consequently, off the welfare rolls. In part, the impetus for this comprehensive approach is a result of reservations expressed by the U. S. General Accounting Office regarding the effectiveness of the WIN and WIN Demonstration programs and other work options states may pursue, such as public service employment (CWEP) and grant diversion (subsidized employment). The GAO noted that work training programs presently serve a minority of adult AFDC recipients and exempt those with severe barriers to employment, such as women with young children. They recommended increasing the number of mandatory participants and consolidating program activities, as Network does, to provide consistent federal funding and program direction. Kentucky's experience with work programs for welfare recipients is outlined in a chart at the end of this discussion. Mandatory Network participation by women with children ages three to six, as well as targeting Network services to those on FSP over two years (approximately 58 percent of the total caseload) might improve results displayed on the chart.

Several bills were introduced in the 1986 Regular Session to require, rather than permit, implementation of the CWEP program and to place welfare teens and other economically disadvantaged youth into training and employment programs, but they were not enacted.

Enactment of some of the provisions of H. R. 1720 appears likely, though what will finally be mandated is uncertain at this time. Some Congressmen advocate deleting the benefits and support services provisions for unemployed parents in two-parent households, the most costly component of the bill. That deletion would reduce the state share of H. R. 1720's program and administrative costs by 40 percent, to $20.3 million annually. However, there is also interest in increasing the period during which employed former FSP recipients would receive Medicaid benefits, which would obviously increase estimated costs.

Whatever final version of H. R. 1720 or other substitute bill may emerge, the most important role the legislature would play is enacting conforming legislation with sufficient appropriations for state matching funds to qualify for federal funding for mandated program services and administration.

The legislature may also become involved in the necessary education, training and employment decisions and budget considerations associated with implementing mandated and optional provisions of H. R. 1720.

Further, in order for the state to receive enriched federal funding for FSP benefits, the legislature may consider increasing the state's minimum benefit levels. The current standard of need is 51 percent of the federal poverty level for a family of four, or $246 per month. Kentucky ranks last among the 50 states in standard of need and 44th or 45th in payment amounts for families of two, three and four. The Cabinet for Human Resources has estimated that each 10 percent increase in the standard of need would cost $4.3 million annually. Such an increase could be accomplished through an additional appropriation in the Executive Budget.

Those expressing reservations regarding H. R. 1720's comprehensive approach contend that the state cannot afford such costly reforms at this time, given the known state revenue shortfall and potential future shortfalls. They also argue that prior work programs have not produced hoped-for results in helping recipients become self-sufficient. Those advocating adoption of the bill concede that its provisions are expensive but assert that streamlined work, education and training programs with appropriate support services and stricter child support enforcement would eventually show a long-term gain by increasing clients' self-sufficiency, thereby reducing the costs of welfare programs. They also assert that requiring the large group of women with children ages three to six, or the even larger group with children ages one to three to participate in Network would yield more desirable results.

Those concerned with implementation of Network note that significant funds would be spent preparing participants for jobs that might not exist in many parts of the state, especially in rural areas. Others note that Network must be implemented only in those areas where it is feasible to do so. They also contend that the legislature could help create jobs through increased participation in economic development efforts by the state. Both sides generally agree that only economic growth focused on the creation of jobs would effectively reduce the level of poverty and, therefore, the number of persons on welfare.

The Cabinet for Human Resources expects implementation of all of H. R. 1720's programs to be difficult, especially in rural areas. Approximately 800 additional personnel would be necessary statewide, contributing significantly to the level of required administrative costs.

ESTIMATED ADDITIONAL ANNUAL COSTS OF THE FAMILY WELFARE REFORM ACT OF 1987

PROGRAM	TOTAL FUNDS	FEDERAL FUNDS	STATE FUNDS	RECIPIENTS AFFECTED
NETWORK-Training and Support Services (effective 10/1/89)	$17m	$11m	$ 6m	15,450/month
TRANSITIONAL DAY CARE Up to 6 Months (effective 10/1/87)	$105,000	$74,500	$30,500	350/month
TRANSITIONAL MEDICAID Up to 6 Months (effective 10/1/87)	$5.7m	$4.2m	$1.5m	18,000/month
CHILD SUPPORT PASS-THROUGH INCREASE (effective 10/1/87)	$3.2m	$2.4m	$800,000	6,000/month
Benefits for UNEMPLOYED PARENTS (effective 1/1/89)	$33m	$23.9m	$9.1m	40,000/month
Medicaid for UNEMPLOYED PARENTS (effective 1/1/89)	$8.7m	$6.3m	$2.4m	11,200/month
SCHOOLING AND SUPPORT SERVICES FOR MINOR PARENTS (effective 1/1/89)	$438,650	$317,125	$121,525	500/month
TOTAL	**$68.2m**	**$48.2m**	**$20m**	
ADMINISTRATION				
BASIC FSP	$19m	$9.5m	$9.5m	
NETWORK-DSI	$4.5m	$2.7m	$1.8m	
NETWORK-DES	$2m	$1.5m	$500,000	
UNEMPLOYED PARENTS	$3.2m	$1.6m	$1.6m	
TOTAL	**$28.7m**	**$15.3m**	**$13.4m**	
TOTAL-PROGRAM AND ADMINISTRATION	$96.9m	$63.5m	$33.4m	

TOTAL ESTIMATED FSP ANNUAL EXPENDITURES

TOTAL ANNUAL FSP BENEFITS, NETWORK AND OTHER PROGRAMS, AND ADMINISTRATIVE COSTS	TOTAL FUNDS	FEDERAL FUNDS	STATE FUNDS
	$253.6m	**$170.4m**	**$83.2m**

KENTUCKY'S TRAINING AND EMPLOYMENT PROGRAMS FOR WELFARE RECIPIENTS

	WIN[1]	CWEP[2]	AFDC-UP[3]	KHCED[4]	CETA[5]	JTPA[6]
PROGRAM DURATION	1968-present	3/79-9/80	7/75-7/77	10/80-9/82	12/73-10/83	10/83-present
PROGRAM LOCALE	1968-74 statewide 1982-44 counties 1986-25 counties 1987-10 counties	statewide primarily in 24 active WIN counties	benefits statewide; re-employment 24 active WIN counties	4 state hospitals	statewide	statewide
NO. OF WELFARE PARTICIPANTS	1985-1,844 of 20,303 registrants	917 recipients:	FY 1977: 13,126 adults 17,399 children	252	55,410	13,229
PARTICIPANTS OFF WELFARE	2,195 (10.8% of registrants)	141 (15%)	INA	142 (56%)	18,895 (34%)	2,198 (17%)
WELFARE SAVINGS	$5.3m annualized	included in WIN savings	INA	$255,289 annualized	$43 m est. annualized	$5 m annualized
TOTAL STATE COST	1985-$2.2 m	$701,462	$19.9 m	$1.1 m	$527.9 m total (not all for welfare recip.)	$110.9 m total (not all for welfare recip.)
COST PER PARTICIPANT	$599	$765	$663	$3,499 (demonstration project)	$1,768	$1,066

1. WIN funding has been reduced 70 percent over the last six years and would be phased out with Network implementation.
2. The Community Work Experience Program placed unassigned WIN registrants in volunteer public service jobs to "work off" their AFDC grants.
3. The AFDC-Unemployed Parent program primarily provided family support payments, as re-employment efforts were required in only 24 counties.
4. The Kentucky Health Care Employment Demonstration used grant diversion to subsidize training and employment.
5., 6. The Comprehensive Employment and Training Act and Job Training Partnership Act programs were not solely for welfare recipients, but also targeted other economically disadvantaged groups and those with severe barriers to employment.

TASK FORCE ON
INTERNATIONAL TRADE AND DEVELOPMENT

PROMOTION OF KENTUCKY PRODUCTS IN INTERNATIONAL MARKETS

Prepared by William A. Miller

Issue

Should the Kentucky General Assembly pass legislation to assist small and medium sized businesses in promoting Kentucky products in international markets?

Background

There has been much recent discussion regarding what specific role state governments should have in helping local industries, agricultural businesses and mining operations promote their products in the international markets. Various state governments have responded differently to this issue, depending upon their philosophical interpretation of the situation, state resources available to assist small and medium sized businesses, and the type and amount of assistance requested by the private sector.

Discussion

Proponents of active state government participation in promoting Kentucky products argue that:

(1) There has been an internationalization of the world economies; whereupon, the economies of most nations have become so interdependent that if a positive or negative economic action is implemented, it will definitely impact the other economies. No one economy is able either to be completely insulated from international actions or to dominate the international economy;

(2) U.S. businesses should export more products overseas, which will help reduce the growing trade deficit, which was approximately $160 billion in 1986;

(3) The U.S. domestic market is reaching its capacity to consume very many additional products; therefore, businesses will need to export overseas, if they wish to expand their operations;

(4) By increasing exports, the U.S. will provide additional employment opportunities, which should improve the general welfare and raise the standard of living; and,

(5) Local businesses need specialized assistance to develop skills in international marketing and financing to make them more effective in exporting their products.

The opponents of increasing the role of state government contend that:

(1) The United States has the strongest world economy and largest marketplace; therefore, the U.S. is able to effectively determine the rules and parameters of economic interaction with its trading partners;

(2) Eventually, the devaluation of the U.S. dollar will correct the growing trade imbalance;

(3) The U.S. domestic market will continue to consume a larger share of products produced in the U.S.;

(4) The increased internal consumption of domestic products in the United States will also enhance employment opportunities, improve the general welfare and raise the standard of living; and,

(5) The private sector has sufficient resources available to help it compete in the international marketplace.

COORDINATION OF KENTUCKY STATE GOVERNMENT'S INTERNATIONAL TRADE PROGRAMS

Prepared by William A. Miller

Issue

Should there be a greater coordination among the Kentucky state government programs that assist small and medium sized businesses to increase their exports of manufactured goods, mineral resources, and agricultural products to international markets?

Background

Over the past several years, various state governments have taken specific actions to coordinate the diverse state governmental programs designed to assist small and medium sized businesses in exporting to overseas markets and in promoting economic development within their states. A variety of different proposals have been implemented; for example, one state passed legislation requiring such major agencies as the Department of Commerce and the Department of Agriculture to develop a uniform, feasible export strategy and to coordinate closely on international trade programs and activities. Another state gave its Lt. Governor responsibility for all international trade and economic development activities.

Discussion

The proponents of greater coordination of state agency international trade programs and activities contend that:

(1) There is a lack of resource coordination and a duplication of effort when identifying, planning and implementing trade and development programs by various state agencies;

(2) It is confusing when a foreign buyer has to deal with several program directors scattered throughout three or four export related agencies and the buyer is unable to attain all the necessary information from one central, knowledgeable source; and,

(3) There is a problem with sharing and following-up on "business leads" when they are communicated from one agency to another.

The opponents of greater coordination argue that:

(1) The fact that the Kentucky Department of Agriculture is headed by a constitutionally elected official while the other executive agency chief executive officers are appointed by the Governor, which creates a jurisdictional problem and hampers coordination;

(2) Foreign buyers understand that the United States and Kentucky governments are organizationally, administratively, and programmatically more decentralized than those of many other countries; and,

(3) Various state agencies have efficiently communicated with one another in the past and have informally coordinated their activities and effectively complemented each other's programs.

ESTABLISHMENT OF AN INTERNATIONAL TRADE AND ECONOMIC DEVELOPMENT COMMITTEE

Prepared by William A. Miller

Issue

Should the Kentucky General Assembly create a permanent standing Committee on International Trade and Economic Development

Background

The Kentucky General Assembly does not have a specific standing committee that is mandated to exert jurisdiction over the issues under the broad, comprehensive heading of "international trade and economic development." Such diverse issues as coal export promotion, export promotion workshops, establishment of overseas trade offices, and issuance of industrial development bonds have fallen under the jurisdiction of several different legislative committees, such as Appropriations and Revenue, Labor and Industry, Energy, and Agriculture and Natural Resources.

Discussion

The Special Task Force on International Trade and Development has discussed the feasibility of establishing a permanent standing committee in the Kentucky General Assembly to focus attention upon, and promote discussion of, international trade and economic development issues.

The proponents of establishing an International Trade and Economic Development Committee argue that:

(1) Kentucky state government should develop a more active role in assisting small and medium sized businesses in exporting their products to international markets and in recruiting reverse economic investment to Kentucky because: (a) other state governments help their industries in these highly competitive areas; (b) the domestic economy has almost reached its capacity for internal product consumption, thus making it necessary to export; and, (c) special training and information are necessary for businesses to compete effectively in the international market.

(2) As a co-equal branch of government, the Kentucky General Assembly (and the executive branch as well) should have a permanent mechanism that allows continuous input into developing policies and programs in the areas of trade and development; and,

(3) The current LRC committee system is not organizationally and jurisdictionally structured for one committee to focus attention upon international trade and economic development issues; ultimately, the trade and development issues have traditionally been discussed in an incremental, piecemeal approach by several committees.

The opponents of establishing an International Trade and Economic Development Committee contend that:

(1) State government should not expand its assistance to small and medium sized businesses, because the private sector has the available resources to promote its products in the international market;

(2) The Kentucky General Assembly has limited input into developing international trade and economic development policies through the Task Force on International Trade and Development. Also, the Executive Branch has the responsibility to take the "lead" in promoting Kentucky products overseas and attracting investors to Kentucky; and,

(3) All of the international trade and economic development issues will fall under the jurisdiction of one of the Legislative Research Commission's fifteen standing committees or under one of the Appropriations and Revenue Committee's Budget Review Subcommittees.

JUDICIARY-CIVIL

REDISTRICTING JUDICIAL CIRCUITS

Prepared by Patricia Hopkins

Issue

Should the judicial circuits, and the judicial districts contained therein, be realigned in the interest of more equitable distribution of available judicial manpower?

Background

Since the Constitution was written in 1891, additional judicial circuits were created by the legislature for such reasons as demonstrated need due to population growth and political expediency. When the Judicial Amendment to the Constitution was passed in 1975, the number of circuits was frozen. No attempt was made to realign them at that time. Six new circuit judgeships have been created, due to enlarged caseloads; such creation can only be done when the Supreme Court issues a certificate of need to the General Assembly. At the present time, three times as many cases are filed in some circuits as are filed in others. These inequities are the subject to be dealt with by the Task Force to Study Judicial Circuits. The General Assembly gave the Task Force the following charge in 86 HCR 62: " . . . to examine . . . the need for and feasibility of altering the composition of the judicial circuits established by KRS 23A.020 for the purpose of equalizing the weighted case loads of the various judicial circuits and individual circuit court judges; the impact of said teritorial adjustments on the district court shall also be considered."

The concomitant problem must be faced in realigning judicial districts, as district courts are set up in districts coterminous with existing judicial circuits.

Discussion

The Task Force at its first meeting focused on various aspects of the problem and was given figures on case filings and judicial workloads. Remedial alternatives were called for to be brought to future meetings. At the second meeting, six possible redistricting plans were presented and discussed. At the third meeting, scheduled for mid-June, three more alternatives will be presented.

DIVISION OF MARITAL PROPERTY SUBSEQUENT TO DIVORCE; SPOUSAL MAINTENANCE

Prepared by Patricia Hopkins

Issue

How can marital property be divided in a more equitable manner? What can the legislature do to improve spousal maintenance and child support?

Background

The committee found that the "no-fault" system of divorce operates well except in the area of allocation of financial resources. Following divorce, a man's income will increase but a woman's generally decreases. The greatest sufferers are young women who are custodians of young children and the older divorced woman who has been out of the job market for several years.

Discussion

The following suggestions have been presented by various legal practitioners and interested parties relative to these domestic-relations issues and are options for consideration by the General Assembly:

(1) Expand definition of marital property to recognize economic ability and potential.

(2) The words "without regard to marital misconduct" to the spousal maintenance statute.

(3) Mandate asset disclosure statements prior to property division, with non-disclosed property being considered marital property.

(4) Create a rebuttable presumption of a 50-50 division of marital property.

(5) Exclude worker's compensation awards from the definition of marital property.

(6) Amend KRS 405.465 to delete the one month delinquency requirement prior to initiation of collection in child support cases.

(7) Make child support orders flexible enough to accommodate changes in living standards that naturally occur (See KRS 403.250).

(8) Amend KRS 403.190 to adjust the provision which excludes a person's pension from marital property when the spouse's pension has been statutorily excluded.

PRIVATE ADOPTION

Prepared by Robert Sherman

Issue

Should the General Assembly consider omnibus revision of statutes relative to private adoption?

Background

During the 1984-85 and 1985-86 interim periods, the Interim Joint Committee on Judiciary-Civil received testimony that evidences potential problems that may arise with private adoptions undertaken according to statute. These problem areas, described below, are varied in scope and could be addressed individually or through omnibus legislation. Adoption statutes may be found in KRS 199.410 et seq. KRS Chapter 625 governs termination of parental rights.

Discussion

The first subject of concern involves the scenario of a pregnant woman acting in reliance and furtherance of a plan to offer her child-to-be for adoption to particular adoptive parents. Where such a woman is an out-of-state resident, coming to Kentucky merely for the purpose of the birth and subsequent adoption by particular parties, should she be required to be domiciled in this state for a residency period prior to petitioning for termination of parental rights? It has been argued that to do otherwise allows the biological mother to avoid jurisdiction of her home state with application of its adoption statutes, and invokes an undue burden on Kentucky should the adoption not achieve finality subsequent to the biological mother returning to her state of actual residence. Further, in such a scenario, should there be statutory limitations on the expenses of a biological parent that may be assumed by the adoptive parents? The purpose of such a limitation would be to discourage open ended expense reimbursal agreements between biological and adoptive parents that might degenerate into threats of withholding children from adoption absent exorbitant reimbursals only vaguely related to the expense of pregnancy.

Another subject area receiving attention relates to the five day time period which must elapse after a birth before a biological parent may petition for a termination of parental rights hearing. It has been suggested that this is not sufficient time for a mother to make a nonrevocable decision concerning termination, free from such factors as natural depression following childbirth.

Similarly, the legislature may wish to examine the timing of the placement of the child in the physical custody of the adoptive parents. Should this placement be allowed to take place prior to the filing of the voluntary petition to terminate parental rights, as is alleged to occur presently, or should such physical custody be delayed for a longer period of time? It has been suggested, as one extreme, that physical custody be withheld until some point in the process where eventual finality of the adoption can be perceived as occurring, so as to avoid the trauma to child and adoptive parent of separation upon any collapse of the proceedings.

Also of interest to the legislature may be the business practices of service professionals attending the needs of adoptive and biological parents as they travel through the

adoption process. For example, in Kentucky there is no statutory prohibition (and no prohibition by the bar) of an attorney representing both the natural and adoptive parents in a private adoption proceeding. It has been asserted that this is a per se conflict of interest situation, with one party certain to receive inadequate representation should an adoption break down prior to finality. On the other hand, should statutory law require separate representation to both parties, will the state bear the cost of providing counsel to indigent parties (in many instances, the natural parent)? In a related matter, should the fees charged by adoption service professionals be regulated by statute, including placement agency fees and attorney fees? KRS 199.590 presently requires that the court be informed of amounts of money paid for an adoption, including attorney's fees. This provision has not been utilized, however, to limit fee imposition in a standardized manner. It could be argued that such standardization of fees can eliminate any appearance that an exorbitant fee has more to do with adoptive child procurement than services rendered attendant to beneficial child placement.

Finally, the Interim Joint Committee on Judiciary-Civil has received suggestions that the General Assembly enact legislation which would protect adoptive parents from asset and time consuming litigation which occurs after an adoption has been declared final. As an example, this might occur should a natural parent attempt, through litigation naming the adoptive parents parties defendant, to set aside a voluntary termination of parental rights, alleging that duress was associated with the decision to terminate. It was suggested that prior to allowing adoptive parents to be named parties to such litigation, the local circuit court conduct a "threshold hearing" in which to determine whether the petitioner has reasonable grounds or probable cause to proceed. Such a safeguard could prevent a waste of the adoptive parents' time and money should a frivolous claim be raised. As a contrary view, it might be reasoned that adoptive parents would not wish to be excluded from any proceeding which might determine their rights to a child, including a proceeding designed to protect them. Further, the opinion has been offered that it may be impossible to statutorily make any legal proceeding, including an adoption, final and invulnerable to subsequent attack.

VIDEOTAPING OF WILLS

Prepared by Robert Sherman

Issue

Should the General Assembly enact legislation which would permit the evidentiary use of videotaped wills?

Background

With the increased availability, falling prices and simplicity of operation of videotape recorders, cameras and associated equipment, it is to be expected that new and varied uses for this video technology will occasionally appear. One such use recently receiving attention in the legal community involves the recordation, by means of videotape, of the reading of a written will by the testator, as well as the subsequent signing and witnessing of the document. The tape could then serve as the will itself or, rather, as an evidentiary tool to help prove the validity of a written will. Present national discussion seems to envision an evidentiary role for the "videotaped will." Courts do not, however, consider taped evidence of will validity during the probate process absent statutory authorization.

Indiana is the only state which statutorily allows a videotape to be admitted as evidence to prove the proper execution of a will. Other states, including Alabama, Ohio and Texas, have begun consideration of the issue.

Discussion

It has been argued that a statute drafted to allow the broad evidentiary use of a videotaped will would be most valuable in the probate process. Such a statute would allow admission of the tape to show:

(1) Proper execution (signing of the will);

(2) Intention of the testator (more clearly expressed through his reading of the will);

(3) Mental capacity of the testator (visually accountable through behavior on the tape); and

(4) Actual authenticity of the document (using close camera shots of the document itself).

Opponents to the use of the videotaped will cite a lack of confidence in a technological process which might allow alteration of the tape for dubious purposes. The existence of the tape as an evidentiary adjunct to the will would also be feared by some as unnecessarily complicating the process by which a testator amends or revokes his will, as well as actually confusing the evidence of the will before a court. Finally, opponents fear the use of the videotape as a "vanity will," a means for a testator to merely entertain or criticize relatives or beneficiaries through a final visual appearance.

AMENDMENT OF PROBATE AND RELATED STATUTES

Prepared by Robert Sherman

Issue

Should the General Assembly enact legislation which would amend various probate and related statutes?

Background

The probate section of the Kentucky Bar Association presented two recommended pieces of legislation for consideration by the 1986 General Assembly. House Bill 466 related to the uniform transfers to minors act and was enacted into law. The second bill, House Bill 467, did not gain passage, however. House Bill 467 was considered omnibus probate legislation and the more substantial portion of the probate package. It was thought by some that the bill's failure could be attributed to a lack of adequate time for full deliberation of an admittedly technical subject during the hectic days of the session. For this reason, the Interim Joint Committee on Judiciary-Civil has devoted early interim consideration to the probate amendments contained with 1986 House Bill 467. A committee bill draft containing probate reform is expected for the 1988 regular legislative session.

Discussion

The following probate and related subjects were treated within 1986 House Bill 467 and have been or will be considered for possible inclusion in 1988 legislation by the Subcommittee on Probate of the Interim Joint Committee on Judiciary-Civil.

(1) Sale of real property of a person under legal disability by a fiduciary;

(2) Judicial determination of heirship in instances of intestacy;

(3) Rights of inheritance in instances of illegitimacy;

(4) Nonrevocation of a will by subsequent marriage, where the will expressly provides for the person subsequently married by the testator;

(5) Court approval of a fiduciary's proposed final settlement; and

(6) Revision of KRS Chapter 396, relative to claims against decedents' estates.

MOTOR VEHICLE INSURANCE REQUIREMENTS PERTAINING TO LEGAL ACTIONS

Prepared by Robert Sherman

Issue

Should the General Assembly consider amendment of various statutes related to motor vehicle insurance and legal actions?

Background

KRS Chapter 304, Subtitle 39, contains statutes regulating "no-fault" motor vehicle insurance. A number of the subjects addressed therein also pertain to legal actions, specifically actions in tort arising due to a motor vehicle accident. During the 1986-87 interim period, the Interim Joint Committee on Judiciary-Civil received testimony from both the plaintiff and defense bars concerning suggested amendments to statutes relating to some of those subjects.

Discussion

Suggestions received by the interim committee concerning motor vehicle insurance and legal actions include:

(1) KRS 413.140 and KRS 304.39-230 should be amended to establish a consistent two year statute of limitations for personal injury actions;

(2) KRS 304.39-230, relating to underinsured motorist insurance, should be amended to require insurance companies to provide such insurance absent written rejection of the insured. Underinsured motorist coverage should be defined so as to clearly require its application to the uncompensated damages of the insured as represented by the amount of the judgment recovered for damages on account of injury due to a motor vehicle accident less payments made to the insured in partial satisfaction of the judgment. Payments made to the insured in partial satisfaction of the judgment, through liability insurance coverage or other source of the party found liable for such damages, should not be calculated as applying towards the policy limits of the underinsured motorist coverage; and

(3) KRS 304.39-070 should be amended to require that an insurance company which has paid no-fault benefits to an insured, seek subrogation benefits from the insurance company of a party at fault through arbitration only, thereby eliminating the option of the company seeking subrogation of joining as a party in an action that may be commenced by the person suffering the injury.

Two suggestions were received concerning motor vehicle insurance generally:

(1) KRS 304.39-110 should be amended to increase levels of required motor vehicle liability insurance coverage; and

(2) KRS 304.39-020 should be amended to allow funeral charges paid up to $4,000, rather than the current limitation of $1,000, to be considered as "medical expenses" for the purpose of eligibility for basic reparation benefits.

JUDICIARY-CRIMINAL

VIOLENT OFFENSE SENTENCES

Prepared by Norman Lawson

Issue

Should sentences for various types of crimes, such as violent offenses, be increased?

Background

During the 1986 session of the General Assembly, legislation was passed to increase the amount of time which violent offenders must serve before parole from 20% of total sentence to 30% and increase from six to eight years the time which much be served on a life sentence.

Discussion

Proponents of the legislation wish to keep dangerous felons separated from society for the maximum period of time possible. The original proposals were from 50% on a term of years and 12 years on a life sentence. They also feel this would have a deterrent effect on serious assaultive crimes.

Opponents of the legislation cite prison overcrowding and feel that other felons must be left out early to accommodate the longer sentences for the violent offenders. They also feel that excessively long sentences do not aid rehabilitation but hamper it, thus compounding the crime problem.

DETERMINATE SENTENCING

Prepared by Norman Lawson

Issue

Should the General Assembly replace the present method of indeterminate sentencing with determinate sentencing, which would eliminate parole?

Background

The present method of sentencing felons in Kentucky utilizes a maximum sentence which is determined by a court or jury but which relies on a parole board to let various felons out of prison before their sentences have been fully served. Determinate sentencing would provide for a flat sentence which must be fully served, from which there is no parole. In modified form, as introduced in the 1970's, the provisions would have included "good time" provisions which would have let prisoners out much earlier if they behaved well during incarceration. These proposals might also be accomplished by sentencing guidelines which would narrowly restrict sentences by judges and juries.

Discussion

Proponents of such legislation feel it would help eliminate sentencing disparity, since everyone committing the same crime would receive the same flat rate sentence, and feel that the cost of the parole board and cost of supervising parolees would be eliminated.

Opponents cite lengthy flat rate sentences as resulting in an increase in prison overcrowding, the lack of incentive to participate in educational and industrial programs (particularly if sentences are shortened) and the loss of discretion by judges and juries.

DRUG LAW REVISIONS

Prepared by Norman Lawson

Issue

Should laws governing controlled substances be revised?

Background

Kentucky's controlled substances act was written in 1972, and although it has been amended numerous times, it has never been totally revised and updated.

Discussion:

Proponents cite the fact that new drugs have been introduced and have not been added to schedules in the statute and that the present law is out of date. They also believe that penalty development has been sporadic. They want to completely update the law, make provision for adding new drugs, and revise the penalties.

Opponents feel that the law is working well as drafted and that the General Assembly has updated the law as necessary to take care of marijuana sales, look-alike drugs, drug paraphernalia and other matters of importance. They feel that the law as presently constituted can be handled through amendments, as in the past.

LABOR AND INDUSTRY

WORKERS' COMPENSATION

Prepared by Linda Bussell

Issue

Should the 1988 General Assembly enact into legislation the recommendations of the Governor's Task Force on Workers' Compensation?

Background

Workers' compensation benefits are awarded for work-related injuries and diseases. In Kentucky, employers, through private insurance or self-insurance, and the special fund, are responsible for paying workers' compensation benefits to disabled employes.

Employes who become disabled as a result of work-related injuries or diseases receive benefits from their employer. However, if an employe has an occupational disease or a dormant nondisabling disease or condition brought into disabling reality by a subsequent work-related injury, disease or condition, the employer pays for the amount of the disability resulting from the subsequent injury and the special fund pays for the remainder of the disability.

The Kentucky special fund, like similar funds in other states, was created after World War II and was originally designed to encourage employers to hire handicapped workers. Generally, these funds pay a portion of the disability benefits awarded to handicapped workers who become further disabled as a result of work-related injuries or diseases. However, Kentucky's special fund has evolved into more than a fund to encourage the employment of handicapped workers and has become one of the most utilized and expensive funds of its type in the country.

The liability of the special fund is growing at an estimated rate of approximately $100 million annually and the total projected unfunded liability of the special fund has been projected to be $1.6 billion. The liability of the special fund and other workers' compensation problems were the primary reasons behind the creation of the Governor's Task Force on Workers' Compensation following the 1986 legislative session. The Task Force was charged with the responsibility of conducting a comprehensive review of the workers' compensation program and finding a way to reduce the increasing liability of the special fund. The Task Force held meetings from May, 1986 through June, 1987 and formulated a set of major recommendations which, among other things, would significantly alter the administration of the workers' compensation program; strengthen the rehabilitation provisions of the program; restructure the board and clarify the responsibilities of the Kentucky Reinsurance Association (KRA), which was created in 1982 as a funding mechanism for all special fund liabilities incurred after July, 1983; institute medical costs containment measures; and revise the black lung benefit structure.

The Task Force recommendation relating to black lung would generate the most significant savings in the future liability of the special fund. The recommendation proposes to revise the blacklung benefit structure by imposing a 3-tiered benefit structure as follows:

1st tier—A miner who has x-ray evidence of Category 1 black lung but no functional impairment would receive a weekly benefit of $120 for 208 weeks.

2nd tier—A miner who has x-ray evidence of Category 1 black lung and mild to moderate respiratory impairment would receive a maximum weekly benefit amount of $241 for 425 weeks.

3rd tier—A miner who has x-ray evidence of Category 1 black lung and significant respiratory impairment or Complicated Coal Workers' Pneumoconiosis would receive a maximum weekly total disability benefit of 100% of the state average weekly wage.

The black lung recommendation would reduce future annual black lung costs to the special fund by approximately 68.8%, since, under the revised benefit structure, approximately 80% of all future black lung awards would result in benefits payable for 208 weeks at a maximum weekly benefit of $120. Under current law, most blacklung awards are total disability awards, which are payable for the life of the claimant at a maximum rate of 100% of the state average weekly wage.

Discussion

Although the recommendations of the Task Force call for sweeping reforms in the workers' compensation program which would reduce the total future annual growth in the special fund liability by approximately 50%, and therefore relieve employers of significant future special fund costs, employers are still faced with paying the liabilities of the special fund which were previously incurred. The amount of the liability and the methods to finance the special fund have become the focus of the controversy surrounding the workers' compensation issue. The projected unfunded liability of $1.6 billion has been challenged by those who do not agree with the reported magnitude of the special fund liability and by those who do not agree that there is a crisis in the workers' compensation program.

Currently, the pre-July, 1983 special fund liability is funded on a pay-as-you-go basis. That is, funds sufficient only to pay benefit payments and administrative costs in the current year are collected annually from employers. This amount has averaged $50 million annually.

The liability of the special fund incurred since July, 1983 is the responsibility of the KRA. Earlier this year, the KRA adopted a 10-year pre-funding plan of $55 million annually for liabilities incurred during 1983, 1984 and 1985. The first installment of $55 million was scheduled to be collected from Kentucky's employers during the fiscal year beginning July 1, 1987. Funding plans for liabilities incurred after 1985 have not been finalized by the KRA.

To meet the obligations of the pre-July, 1983 pay-as-you-go liabilities and the KRA's 10-year funding plan for liabilities incurred during 1983, 1984 and 1985, annual assessments could exceed $100 million. Economic development officials contend that annual assessments to employers of $100 million or more to fund the special fund will devastate economic development efforts. These assessments have been delayed pending completion of the work of a newly created group to review the liabilities and financing methods of the special fund. This group, which was appointed by the governor should complete its work within the next few weeks. Finding a solution to the financing of the special fund and consideration of the recommendations of the Governor's Task Force on Workers' Compensation are issues which are likely to face the legislature in the 1988 regular session, or perhaps earlier, should there be a special session of the General Assembly.

PLANNING AND LAND USE MANAGEMENT

Planning and Land Use
Regulation of Environmentally Sensitive Areas

Prepared by Gordon F. Mullins

Issue

Should units of local government not participating in planning and zoning be permitted to identify and regulate environmentally sensitive areas?

Background

KRS Chapter 100 provides for local planning and zoning. Implementation of planning and zoning is optional in Kentucky. Although many communities view zoning with historical antipathy, many rural communities have expressed a desire to adopt some form of land use regulation without engaging in a full blown planning and zoning program, as prescribed in KRS Chapter 100. There is a growing concern that local governments, especially rural communities, need the authority to regulate land uses which, if unregulated, may endanger the public health, safety and welfare, e.g,. development in flood plains and facilities for the treatment, storage and disposal of hazardous waste.

Discussion

This topic has been given renewed status with the Pyro-Chem controversy in Lawrence County and the possibility of a hazardous industrial waste recycling and incineration plant in Morgan County. Environmental advocates and local officials alike have called for an option to KRS Chapter 100. They maintain that some rural counties and small cities are not willing to participate in regular planning and zoning programs. However, the need to regulate development within flood plain areas, dam breach inundation areas and abandoned hazardous waste areas is just as great in rural areas as it is in urban areas.

In an effort to afford local governments an option to KRS Chapter 100, the Special Committee on Planning and Land Use Management prefiled, with a recommendation for passage, 88 BR 111. This bill would create KRS Chapter 100A to permit cities and counties not participating in planning and zoning to identify and place into districts environmentally sensitive areas, and would authorize the enactment of local environmental protection ordinances. BR 111 also would permit a city or county to restrict the placement of hazardous waste facilities within its jurisdiction, provided however, the local governing body justifies such restrictions. Conditions applicable to justifying the designation of areas inappropriate or incompatible for the placement, siting, construction or operation of any facility, establishment, installation or system whose principal purpose is the treatment, storage, disposal, or combination thereof, of hazardous waste are stipulated. There is not, however, a planning prerequisite contained in the bill.

Additionally, BR 111 would afford a city or county not participating in a regular planning and zoning program an optional method of complying with federal flood insurance program land use planning requirements. Optional authority to regulate development in dam-breach inundation areas designated by the state, and authority to restrict land development around abandoned hazardous waste sites also are included under this bill. The committee considered including authority to regulate development in ground water recharge zones and wetlands ; however, these areas were excluded from the final version.

The general consensus is that KRS Chapter 100 provides ample authority to regulate development in these areas, and the planning requirements of KRS Chapter 100 are needed to complement such regulatory authority.

Proponents hold that BR 111 promotes land use protection in rural communities without requiring large expenditures of tax dollars to implement planning programs. Others are more cautious. They maintain that the current enabling laws are adequate, and that the creation of an optional program without mandating a specific planning component is not warranted. Further, they state that a planning component is needed to justify the regulation of land. Without planning, they hold, the rationale for the regulation of land development becomes suspect and may not pass constitutional muster. Regardless of the professional differences, support for BR 111 came from all quarters. As one person stated before the committee, "BR 111 is needed; we wish it went further."

General Revision of Planning and Land Use Statutes

Prepared by Gordon F. Mullins

Issue

Should KRS Chapter 100 (Planning and Zoning) be revised further?

Background

During the 1984-85 interim the Special Committee to Study Local Planning and Zoning heard testimony from numerous organizations and spokespersons. The result was Senate Bill 35 (1986), the most comprehensive update of state planning and zoning laws in nearly a decade. Several issues discussed by the committee during the 1984-85 interim remain unresolved by SB 35, e.g., the application of the term "agricultural use," application of subdivision regulations, conditional zoning authority, exclusionary zoning practices, and standardization versus flexibility in the local planning process.

While SB 35 did much to simplify and to clarify the language of KRS Chapter 100, many land use professionals and others called for further study and changes. In response, the 1986 General Assembly enacted Senate Joint Resolution 26, establishing the Special Committee on Planning and Land Use Management. Not only did SJR 26 authorize the committee to continue the work begun by the committee's predecessor, but it expanded the committee's jurisdiction to include a study of any state law "applicable to or affecting the provision, practice or conduct of local planning and land use management regulation, functions and services."

Discussion

During the 1986-87 interim the Special Committee on Planning and Land Use Management has continued to discuss the aforementioned issues, while continuing efforts to simplify the language of KRS Chapter 100. Innovative land use techniques and legal impediments to implementing them also have been discussed extensively. Additionally, a recent decision by the United States Supreme Court, regarding compensation to a land owner when a land use regulation constitutes a "taking" of the owner's property, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angles*, No. 85-1199, sl. op. (U.S. Supreme Court June 9, 1987), has raised additional concerns regarding the future of local land use regulation.

In discussions of the unresolved issues from the 1984-85 interim, numerous suggestions have been given to bring uniformity to the term "agricultural use." Among these are linking the definition of "agricultural use" to Kentucky's real property tax statutes, establishing an agricultural productivity factor to the land and changing the minimum acreage requirement for agricultural land. Proponents of these changes state that the existing definition of "agricultural use" in KRS 100.111, combined with the agricultural use exemption of KRS 100.203, promote the loss of prime agricultural lands and encourage urban sprawl. Opponents argue that tightening the definition and removal of the statutory exemption could result in detrimental restrictions being placed on legitimate agricultural operations.

Outside of the definition of agricultural use, no other issue appears to be more controversial than the application of subdivision regulations. Specifically, what constitutes

a subdivision under KRS 100.111? Does the sale of a tract larger than one acre every twelve months constitute a subdivision under the provisions of KRS 100.111 (22)? Some local officials think so, and they contend such practices subvert the intent of KRS 100.277, which requires planning commission approval of subdivision plats.

Does a division of land for agricultural and residential purposes constitute a subdivision? Proponents claim that developers often circumvent local land use regulations by claiming a statutory exemption from regulation for a subdivided tract of land consisting of three of more parcels of five or more contiguous acres each. In an effort to curtail such development, one planning commission reports requiring developers to provide an affidavit attesting that such a division will be used only for agricultural purposes. Advocates for more stringent regulations argue that such requirements are not adequate to stop this practice. They have asked the committee to consider strict statutory standards applicable to any agricultural division. Another related issue is whether an agricultural division not involving a new street requires an approved final plat. In 1985, the committee heard testimony that title insurance has been denied in a land transaction involving an agricultural division where no plat exists.

An additional issue considered this interim was conditional zoning. SB 35 authorizes conditional zoning within certain limits for urban county governments. Conditional zoning often involves approval of a rezoning, subject to the developer's agreement to comply with certain conditions. This concept is closely akin to contract zoning, which has been ruled unconstitutional in some states. The major difference is that conditional zoning does not bargain away the local government's authority to regulate, the theory being that regardless of the applicant's agreement, nothing precludes the local government from altering the regulations applicable to the property in question. Proponents argue that conditional zoning affords local governments greater flexibility in rezoning cases, and that all local governments should be authorized to condition rezoning requests. Opponents maintain that conditional zoning leaves a developer hostage to the whims of local authorities and that strict limits should be placed on this practice by state law.

Issues surrounding the application of exclusionary zoning also surfaced early in the interim. Simply stated, exclusionary zoning occurs where local zoning regulations exclude specific uses from certain zoning districts; e.g., group homes for developmentally disabled persons often are excluded from single-family or low density multi-family residential areas, or mobile homes often are restricted from areas comprising stick-built homes. Advocates for exclusionary zoning maintain that some uses are not compatible. Therefore, incompatible uses should be excluded to avoid conflicts, e.g., salvage yards located in a typically residential neighborhood. Opposition usually occurs when a zoning regulation restricts uses similar to permitted uses, e.g., group residences for the mentally retarded excluded from a residential zone permitting fraternity houses or nursing homes. The group home controversy is an emerging issue in Kentucky, with group home advocates seeking exemption from regulation under KRS Chapter 100.

The committee also has discussed standardization versus flexibility in the planning process. This issue draws into question the intent of KRS Chapter 100. When Kentucky's planning and zoning enabling act was amended in 1966, the intent was to promote uniformity in the practice and operations of local planning and land use regulation. Although some distinctions were made between large urban areas and the remainder of the state, much of KRS Chapter 100 does not distinguish between rural and urban areas. Some testimony before the committee indicated that minimum standards for planning are often a dichotomy of urban and rural or county and city. Such standards must be flexible enough to allow simplification of the regulatory process for such items as costs, time frames, the permitting process, and public hearings. Others caution against too much flexibility. They hold that the land use problems confronting Kentucky's various communities and differ only slightly.

A continuing issue is the simplification of the language contained in KRS Chapter 100. Those portions of the chapter most often mentioned are definitions and those sections regarding the adoption and amendment of zoning regulations and zoning maps. Proponents of more simplified language state that too often neither planning commission members nor applicant understands the statutory requirements applicable to zoning map amendments. Further, they state that simplification of the statutes would help reduce the costs of zoning changes to the applicant and the local government. Others caution against wholesale changes. They point out that land use regulation is by its very nature contentious, and that too much change may only exacerbate such conflicts.

A recent and major issue discussed by the committee is the subject of governmental taking as a result of restrictive land
use regulations. A recent U. S. Supreme Court decision, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, has raised serious concern about the future of local land use regulation. The Court held that when a land use regulation so limits the use of property to constitute a "taking," the governmental unit imposing such regulation shall provide just compensation to the property owner. The Court did not state what constitutes a taking in this particular case; therefore, it is questionable how far government land regulations may go in restricting land uses before a "taking" occurs. Others question whether Kentucky's enabling statutes adequately guide local governments in this matter.

The issue of regulatory taking is especially applicable in regards to conditional and exclusionary zoning practices, which have been previously discussed. Local governmental officials are rightfully concerned about the possible implications of *First English Evangelical Lutheran Church*. Some legal experts are of the opinion that the Court's decision is limited. Others argue that local regulations often go too far, and that state enabling laws should limit the ability of local governments to severely restrict land uses. Unfortunately, answers to many of these questions may not come quickly. Future judicial decisions may be required to resolve these and other related issues.

ZONING RESTRICTIONS ON COMMUNITY RESIDENTIAL FACILITIES

Prepared by Mike Benassi

Issue

Should the General Assembly enact legislation to prohibit cities and counties from excluding group homes for the developmentally disabled from single family residential areas?

Background

An issue important to planning and land use management practitioners is the siting of shelters and group homes, and the compliance of this siting with local zoning ordinances. In a recent publication, the American Planning Association stated that in the past, local zoning codes have discriminated against group homes for the developmentally disabled. Further, some codes have used narrow, traditional definitions of "family" to exclude such housing, while in other instances the requirements for special or conditional use permits have been employed to restrict locating these group homes.

While the focus of attention during this interim has been on siting of residences for the developmentally disabled/mentally retarded, the Special Committee for Planning and Land Use Management has heard from and studied problems cited by other advocacy groups, including advocates for the mentally ill, teenage runaways, battered spouses, recovering alcoholics/drug abusers, institutionalized criminals awaiting release, and foster children.

Some advocates have claimed that in the absence of explicit siting legislation community residential facilities should be immune from local zoning codes when such facilities perform functions licensed by the state or federal governments. These claims of governmental immunity from local control usually have been struck down, notably by the highest courts in Maine and Georgia.

Further, in Nevada and Tennessee (two states with preemptive siting legislation) the state legislatures have distinguished between governmentally operated facilities and nonprofit or proprietary facilities, noting that only noncommercial facilities are immune from local zoning regulations.

Advocates for the mentally retarded have long held that there has been an overwhelming degree of community opposition and prejudice toward situating mentally retarded persons in residential areas. The developmentally disabled have claimed that, as a group, they should receive a higher degree of scrutiny in the application of law and that mere rationality is not enough. In short, ordinances that single out the developmentally disabled should be given heightened scrutiny and should be struck down, unless the government can show an important reason to justify treating residential facilities for the retarded differently from facilities for nonretarded persons.

Disscussion

The result of such action was the U. S. Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985), in which a group home sponsor challenged the special permit denial of the city of Cleburne, Texas, on equal protection grounds.

The city of Cleburne had required a special annual permit for "hospitals for the feebleminded." However, in this instance the permit was denied on the grounds that the proposed group home threatened local property owners and elderly neighbors, that nearby school students would harass the group home's residents and that the group home was to be placed in a 500-year floodplain. Further the city contended that the size and intensity of the structure (13 residents plus staff) would be incompatible with the neighborhood, although apartment and boarding houses, hospitals, nursing homes and other intensive uses were allowed by right in the same zoning district.

The U. S. District Court had previously determined that, if the residents were not retarded, the group home would be allowed by right under the existing ordinance. However, the court stated, the city's rationale for denying the special use permit was adequate to meet equal protection standards under the mere rationality standard of review. The mentally retarded were not a quasi-suspect class under existing U. S. Supreme Court doctrines.

The U. S. Court of Appeals reversed the lower court after determining that heightened scrutiny should have been the proper standard of review, because the mentally retarded had been discriminated against in the past and, as such, constituted a quasi-suspect class.

The U. S. Supreme Court heard the case in 1984. It reversed the Fifth Circuit's holding that the developmentally disabled constitute a quasi-suspect class. However, it struck down the city of Cleburne's zoning decision on the grounds of rationality after subjecting the city's actions to a heightened scruntiny standard of review.

The Court rejected the quasi-suspect classification, stating that the developmentally disabled may truly possess different abilities from the population in general and that the state had a legitimate reason for treating them differently. In its decision the Court noted state and federal legislation on behalf of this group which singled out the group for special treatment and indicated that it was not politically powerless.

The Court concluded that once it opened the doors to expanding protection afforded this class of citizens, closing the door later against other classes of persons claiming to be the victims of prejudice would be difficult. The Court stated that any legislation distinguishing between mentally retarded and the nonretarded had to be only rationally related to a legitimate governmental interest to survive equal protection challenge.

The Court rejected the city's reasoning that denial addressed fears of neighbors. It also rejected all the other reasons the city employed to support the special permit requirements for the group home, after determining that no other similar use permitted in the district would be affected by these considerations.

A recent article for the American Bar Association noted that thirty-four states have enacted legislation authorizing the siting of group homes in residential areas. These statutes state the type of facility, number of residents and type of population served, state licensing required, the zone(s) in which the facility is permitted and whether local zoning authorities may impose conditions on such use.

These state statutory approaches may be classified into six non-mutually exclusive categories:

1. Statutes establishing group homes as a permitted use in all residential zones, either expressly exempted from the imposition of local zoning

restrictions (Iowa, North Carolina, Rhode Island, West Virginia, and Wisconsin) or subject only to those restrictions that are otherwise applicable to single-family residences (Arizona, Connecticut, Delaware, Idaho, Michigan, New Jersey, and Oregon).

2. Statutes differentiating between smaller and larger population group homes, with the smaller (six or fewer) being treated as a single-family residence permitted in all residential zones, and the larger (seven or more) permitted in either all or only multi-family residential zones with varying degrees of local control, by special permit (Arizona, Maryland, Minnesota, New Jersey, North Dakota, Ohio, and Wisonsin).

3. Statutes authorizing group homes in residential zones either without expressly limiting the power of political subdivisions to impose special permit requirements (California, Louisiana, Nebraska, Tennessee, Texas, Vermont, and West Virginia) or affirmatively preserving such local land use power (Colorado, Hawaii, Indiana, Montana, Missouri, Nevada and Utah).

4. Statutes differentiating between types of permitted residents in group homes (Connecticut, Maryland, Rhode Island, and West Virginia) or between public and privately operated group homes (Maryland).

5. Statutes in which a group home is either considered a family or deemed a residential use but in which a municipality has potential veto power over site selection (Louisiana, Maryland, New York, and South Carolina).

6. Statutes mandating or recommending that group homes be permitted within municipalities but preserving local autonomy regarding the determination of the appropriate district and the conditions to be imposed upon such use (Florida, Maine, New Mexico, and Virginia).

As mentioned above, numerous spokespersons have addressed the Special Committee on Planning and Land Use Management. The following is a synopsis of the recommendations proposed:

1. The General Assembly should consider public policy to establish community residences in residential areas. Further the General Assembly should make void and unenforceable any restrictive covenants or other private legal impediments which directly or indirectly prevent or restrict the establishment of licensed community residences for eight or fewer mentally disabled persons. Additionally recommended were Rhode Island statutes which specify that "wherever six or fewer retarded children or adults reside in any type of residence in the community, they shall be considered a family and all requirements pertaining local zoning are waived." Rhode Island also considers a group home licensed by the state with not more than eight mentally disabled or mentally retarded persons as a family for zoning purposes.

2. The committee should give serious consideration to "the preclusionary effect that local zoning ordinances have on such facilities."

This does not call for forbidding a local legislative body from imposing reasonable regulations, rather for a statutory provision which would disallow total preclusion by a local ordinance.

3. A representative of a direct access facility for runaway youth gave three recommendations:

a. Add a provision to KRS 100.321 that a negative decision by the local legislative body cannot be arbitrary and unreasonable and must be supported by substantial evidence adduced from either facts derived from the commission's hearing or from facts found as a result of its own subsequent hearing.

b. In KRS 100.361, provide for state immunity under certain circumstances where private organizations are fulfilling a government function.

c. Consider a provision in the Kentucky Revised Statutes which would revoke or curtail a municipality's power to bar emergency shelters, group homes or similar facilities but allow local control over reasonable locations and density requirements.

4. One city planner requested that the General Assembly consider the consequences of legislation proposed by representatives from one locality that might impact the entire state. Further, he stated that state pre-emption of zoning is not good policy and requested that the General Assembly scrutinize KRS 100.361 regarding the question of immunity.

5. Another city planner recommended that KRS Chapter 100 be viewed as enabling legislation and that no changes are needed to address the issue of group homes and temporary shelters.

PLANNING AND LAND USE ASSISTANCE TO LOCAL GOVERNMENTS

Prepared by Mike Benassi

Issue

Should state government assist local governments with planning and zoning issues?

Background

Prior to 1980, planning and land use assistance for local governments was provided by the Department for Local Government. However, with the demise of HUD 701 program funding—a federal funding program for state and local planning—and reorganization of the Department for Local Government within the Commerce Cabinet, this function ceased. Therefore, there is no executive branch agency with the statutory mandate to act as a clearinghouse to collect and disseminate planning and land use data or to provide technical assistance to local planning and zoning commissions.

Discussion

A chronic need exists for a central repository for planning data and local land use documents and ordinances. Furthermore, there is an expressed need based on telephone inquiries and committee testimony for state government to provide legal and technical assistance to local governments relative to local planning and land use regulation. Since 1984, this function has been performed by Legislative Research Commission staff, who, although familiar with pertinent statutes and case law, are not planning and land use practitioners. The creation of such a function within state government would fall within the scope of KRS Chapter 147A (Program Development) and would necessitate budgeting for staff professionals and support personnel.

SMALL BUSINESS TASK FORCE

DOMESTIC PREFERENCE BIDDING LAWS

Prepared by Randy Bacon

Issue

Should the general assembly pass a retaliatory or reciprocity statute in response to other states' domestic preference bidding laws?

Background

Many states have enacted laws which require that preference be given to in-state firms, products, or labor. According to a 1983 study done by the Research Department for the Minnesota House of Representatives, Kentucky was one of seven states (KY, NH, NJ, NY, PN, TX, VT) which did not have any type of domestic preference laws.

Sixteen states, according to a recent Maryland survey, give in-state bidders a two to fifteen percent advantage over out-of-state bidders. Therefore, Kentucky firms are effectively penalized by those amounts when they bid for business in those states. However, firms from those same states which penalize Kentucky bidders are given equal footing with Kentucky businesses when they bid on the Commonwealth's business.

Several Kentucky business firms have complained that this is unfair. As a result, the 1986 General Assembly passed Senate Concurrent Resolution No. 97, requiring the Task Force on Small Business to study this issue and report its findings and recommendations to the Legislative Research Commission by November 30, 1987.

Discussion

Although many states have preference laws of some type, apparently the biggest competitive problem for Kentucky firms is those states where a percentage bidding preference is given to in-state firms. However, while protecting domestic firms by preferential treatment, the effect of this policy is to increase government costs for services and products up to the amount of the percentage preference.

There are several possible legislative responses to this issue:

(1) Give a percentage preference, typically five percent, for Kentucky firms over out-of-state firms when bidding on Kentucky government business.

(2) Enact a reciprocity or retaliatory statute which would penalize out-of-state firms biddings on Kentucky government business by the same amount of preference they are given in their home state. Nineteen states have elected this option.

(3) Pass a retaliatory statute forbidding firms from those same protectionist states to bid on any Kentucky government work.

(4) Retain the present system in which the Commonwealth is free to accept the lowest bid regardless of its origin.

After considering its research findings, which will include a study of how Kentucky businesses are being hurt by other states' laws and how Kentucky government might be hurt fiscally by enacting a retaliatory or reciprocity statute, the Task Force will recommend that the 1988 General Assembly exercise one of these options.

GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE

Prepared by Randy Bacon

Issue

Should the state and local governments be permitted to engage in programs which are in direct competition with private enterprise? If so, to what degree?

Background

During the 1984 session of the General Assembly, the House of Representatives passed HR 50 and the Senate passed SR 59, which directed that the Legislative Research Commission, through the Small Business Task Force, identify governmental activities which may be in competition with private enterprise and study the desirability of contracting out government services to the private sector. As a result of the resolutions passed during the 1984 session the Task Force held hearings in Owensboro, Louisville, Ft. Mitchell, Lexington and Lake Cumberland. It also received testimony on this issue at several meetings in Frankfort.

At these hearings various businesses testified regarding government services which they felt were competing unfairly. Many marina, campground and resort owners, for example, felt that either the state should not be providing marina or camping services at all, or that, if it did, the state's prices should not be set so low that state facilities competed unfairly with private developments. They suggested that fees charged by state agencies should reflect fair market value. Private day care operators, particularly in Jefferson County were concerned about after-school day care services which had been provided in some schools for the first time during the 1984-85 school year and were scheduled to be expanded during the 1985-86 school year. A drug testing laboratory was concerned because its services at Kentucky racetracks had been replaced by those of a state-created laboratory at the University of Kentucky. Other, similar concerns were presented to the committee, including those of a computer firm and a computer trade organization, who were upset about computer services provided by area development districts and by the University of Kentucky's College of Engineering. Activities of prison industries and state vocational schools were also reviewed by the Task Force.

In addressing a particular camping development at E.P. "Tom" Sawyer State Park, the Task Force wrote to the state Parks Commissioner on November 15, 1985, asking for the following:

"Regarding the development of the campsite at Sawyer State Park and any other state park development, the Task Force respectfully asks you to consider adopting the following policies:

1. A consideration of need which would take into account any adverse impact such development might have on similar private sector services already being provided in the area.

2. A consideration of the possibility of bidding out an entire development including its capital cost to the private sector through a request for proposals.

3. A consideration of private management of state development facilities to be awarded through a bid process.

4. A consideration of fees charged in the private sector before setting fees at state park facilities.

While we do not wish to discourage appropriate development of our state park system, we think it is important to consider the private sector in the process of such development."

Discussion

The policy statements in the November 15, 1985, letter cited above accurately reflected the sentiments of the Task Force regarding the issue of government competition generally and contracting for service in particular. Commissioner Hudson responded favorably to these policy statements but noted in respect to item 3 that " . . . private management . . . should only occur when the total capital cost has been invested by the private sector."

At the last several meetings of the Task Force during the 1984-85 Interim, several different drafts of legislation to restrict government competition with private enterprise were considered. The last two drafts drew features from SB 301 of the 1984 session, the Arizona statutes, and the policy sentiments expressed in the letter to the Commissioner of Parks. However, the committee did not prefile such legislation.

"Government Competition with Private Enterprise", Legislative Research Commission, Research Memorandum No. 432, was issued July 1986. The Task Force plans to begin taking testimony and discussing this issue in preparation for the 1988 session in July and August 1987. Business groups such as the White House Conference on Small Business, the National Federation of Independent Business and the Chamber of Commerce have all identified this as an important small business issue.

SMALL BUSINESS CAPITAL FORMATION

Prepared by Randy Bacon

Issue

Should legislation be enacted to increase the availability of capital for small business development?

Background

The heightened interest in the capital formation needs of small business can be traced in part to extensive studies by David Birch at MIT, who published data indicating that between 1970 and 1980 eighty percent of all new jobs were created by companies with fewer than one hundred employees. Studies of the Kentucky economy, where ninety-seven percent of the 58,000 businesses have fewer than 100 employees, confirm these national data. A recent study by Jeanne Garvey, Director of Kentucky Commerce Cabinet's Division of Small Business, shows that nearly seventy percent of all new jobs created between 1979 and 1986 were created by firms with fewer than one hundred employees. In-state job creation trends in the 1980's, therefore, mirror the Birch data.

However, officials at the Commerce Cabinet indicate that they have found clear financing gaps for firms with fewer than one hundred employees, when compared to larger firms, and an even more significant gap for firms with less than twenty employees, given the capital demand of such firms.

Discussion

The capital needs of Kentucky small businesses appear to be of three kinds: (1) Venture capital for high growth, rapidly expanding companies. These firms represent less than one percent of the firms with capital needs. (2) Affordable capital or long-term capital at fixed but affordable—near prime—rates. This kind of capital need affects many more firms than does the need for venture capital. These firms are generally growing more slowly and are somewhat less profitable than the venture firms. (3) Gap financing capital. This term refers to the gap which often exists between a company's assets and its short-term capital needs. Firms with such gaps may show a growth potential sufficient to carry the capital debt needed to adequately finance the business but lack the fixed assets or accounts receivable to secure the loan. The need for capital by this group of firms is the greatest of the three types discussed here.

There are several ways the state could intervene in the capital formation market to make more dollars available to Kentucky small businesses. One way is to fund a capital pool either directly through an appropriation or bond issue or indirectly through tax credits. Secondly, money could be earmarked from certain pools to be loaned through banks to small businesses in order to meet the affordable capital needs discussed above. In an attempt to address this issue, twenty to twenty-five states have initiated some sort of program through state government. For example:

Indiana, for example, has established a program of tax incentives whereby a firm may get a thirty percent tax credit for contributing capital to a pooled fund for research and development. This effort has raised some $20,000,000 since 1980-81. For example, if Eli Lily

had a tax liability of $1,000,000 and contributed $1,000,000 to the fund, it would get a $300,000 tax credit, thus reducing its state tax liability to $700,000. In this case, the treasury of Indiana is, in effect, subsidizing the fund through a tax shift.

There is a need for private and public sector cooperation in state capital formation efforts. Most states show a preference for public sector leadership and initiatives and private control of the lending and distribution process.

Two approaches are emerging from the Task Force on Small Business: (l) a $17.5 million Commonwealth Venture Fund proposal modeled along the lines of the Indiana effort; (2) a $37 million "linked deposit" investment effort directed at agriculture and small business, similar to an Ohio initiative.

STATE GOVERNMENT

STATE GOVERNMENT EMPLOYMENT

Prepared by Joyce Honaker and Joy Blanton

Issue

Should the 33,000 cap imposed in 1982 on the hiring of permanent, full-time employees in the Executive Branch of state government be retained, raised or repealed? Should the number of different types of appointments in the Executive Branch be retained or reduced?

Background

In 1982, the General Assembly limited the number of permanent, full-time employees in the Executive Branch to 33,000. Prior to the limitation, the number of permanent full-time employees could and did exceed 33,000 (see Chart I).

Other types of apointments permitted by the state personnel laws (KRS Chapter 18A) are not similarly restricted by statute to a particular number of employees, although there are statutory restrictions on use or duration of such appointments. In many instances, alternatives to a permanent, full-time appointment are of shorter duration and do not entitle the appointee to as high a level of fringe benefits. Except for permanent, part-time positions, they are generally exempt from the classified service, or merit system, whereas the majority of permanent, full-time positions are covered.

The State Personnel Commissioner has said that recent increases in executive branch employment have been due to program expansions required by the General Assembly, federal agencies and a federal court order concerning prisons.[1] As Chart I indicates, growth has come partly through increased use of positions other than permanent, full-time.

The lower direct costs and lack of merit coverage of alternative types of appointments, combined with the cap on permanent, full-time appointments, are possible reasons for their increased usage. Whereas there were only 4.3% more permanent, full-time employees in July, 1986, than in June, 1982, total executive branch employment was 11.2% higher in mid-1986 than in the month before the cap became effective. Seasonal employment was 93% higher, temporary employment was 136.7% above mid-1982, and federally-funded, time-limited employment was 39.9% higher. All three types of appointments are exempt from the merit system. Temporary, emergency, and seasonal appointees to positions of nine months' or less duration do not qualify for retirement system membership, for state-funded individual health and life insurance coverage, or for paid annual leave time. Federally-funded, time-limited (FFTL) appointees are eligible for the aforementioned benefits. Permanent, part-time employees are not exempt from merit coverage as a class, but must work an annual average of at least 100 hours per month to be eligible for retirement and insurance coverage, and annual and sick leave benefits.

Discussion

The 1988 Session of the General Assembly will need to determine whether, and at what level, to fund growth in state employment and whether or not growth will occur in positions having a full range of fringe benefits and merit system coverage.

The employer's advantage, if growth is in positions lacking a full range of benefits, is the lower direct cost of such positions. State government pays a total of $850 per employee per year for health coverage and life insurance.[2] Current employer contribution rates for retirement system coverage are 7.45% of the employee's salary for nonhazardous position coverage and 14% of salary for hazardous position coverage.

Possible disadvantages to the employer of providing a lower level of benefits are: positions will be less attractive for recruiting purposes, the morale of incumbents will be lower, and turnover will be fairly high. These disadvantages may lead to indirect costs in time spent training new employees and in lost efficiency.

An additional problem identified by several members of the Interim Joint Committee on State Government's Subcommittee on Personnel is the lack of employee information about, and understanding of, the fringe benefits that are and are not available to them through different types of appointments.

Critics of the growing use of FFTL, seasonal and temporary positions have charged that they are over-used and thereby circumvent the merit system, the protections it provides covered employees, and the principles of hiring and promotions based on competitive examinations and meritorious performance rather than non-job-related considerations. An additional criticism voiced concerning nonmerit appointments is that they lead to frequent turnover and the resulting hardships for managers.[3] The Personnel Board and Personnel Department have litigated the issue of the scope of the statutory definition of the "federally-funded, time-limited" position. In a June 26, 1987, decision, the Franklin Circuit Court upheld the Personnel Board's narrower interpretation of the types of positions that may be categorized as "federally-funded, time-limited" employment.[4] The ultimate effect of the decision on employees in positions improperly categorized as FFTL is unknown at this writing. The Subcommittee on Personnel has directed its staff to gather data on the extent of the recurring use of "seasonal" appointments, particularly those approaching the statutory limit of eleven months per year in duration.

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[1] *The State Journal*, Frankfort, Kentucky, March 9, 1987.

[2] Information provided by telephone by Bill Smith, Employee Benefits Division, Department of Personnel, June 3, 1987. Health insurance or HMO coverage costs state government about $69.79 per employee per month, or $837.48 per year. The state provides each employee $5,000 in life insurance at $1.05 per month, or $12.60 per year.

[3] Personnel Board minutes, September 12, 1986, pages 2 and 8-9.

[4] *Greenwell v. The State Personnel Board*, Civil Action No. 86-CI-1879 (Franklin Circuit Court, Division I, June 26, 1987).

CHART I

NUMBER OF EMPLOYEES—EXECUTIVE BRANCH

Month/ Year	Permanent Full-Time	Permanent Part-Time	Prov.	Seasonal Full-Time	Seasonal Part-Time	Temporary Full-Time	Temporary Part-Time	Emergency	FFTL
7/79	36,681	1,516	134	3,840	132	56	4	20	264
1/80	37,546	1,681	128	391	331	56	17	10	213
7/80	35,206	1,667	176	2,562	61	37	12	2	210
1/81	34,171	1,798	85	360	238	35	16	6	307
8/81	33,450	1,888	71	1,922	69	31	10	7	376
1/82	31,886	1,872	63	250	133	32	2	4	360
6/82	31,494	1,851	60	1,606	95	55	24	17	351
1/83	31,508	2,070	108	358	139	39	105	5	309
7/83	30,963	2,037	5	2,587	130	125	74	13	326
1/84	30,748	2,159	0	457	137	48	156	5	430
7/84	30,630	2,200	3	2,123	130	69	40	11	417
1/85	31,076	2,244	5	1,048	176	86	30	2	450
7/85	31,795	2,215	4	2,730	131	155	21	4	496
1/86	32,466	2,620	13	856	233	129	26	11	503
7/86	32,854	2,714	1	3,052	233	168	19	6	491
1/87	32,725	2,828	0	1,283	277	193	14	11	510

Includes the following elective offices:

Unified Prosecutorial System
Attorney General
Auditor of Public Accounts
Lieutenant Governor
Secretary of State
State Treasurer
Department of Agriculture

SOURCE: Kentucky Department of Personnel, April 21, 1987.

PERSONNEL BOARD HEARING OFFICERS

Prepared by Joy V. Blanton

Issue

Should the Kentucky Personnel Board be required to use more than one hearing officer per hearing?

Background

The 1986 Kentucky General Assembly enacted Senate Bill 340, which, among other things, places the Personnel Board in the unique position of having to schedule two hearing officers for every hearing. Furthermore, it specifically exempts the two elected board members from such duty [KRS 18A.095 (1986)].

Discussion

Proponents of having two hearing officers for every Personnel Board hearing believe this requirement will guarantee that at least one of the hearing officers present will be an attorney.

Opponents point out that this mandate places a financial drain on the Board's already overtaxed budget, and that no other administrative body, arbitration board, or judicial body is statutorily required to have, or uses, more than one hearing officer, arbitrator or judge. Also, it has been pointed out that it is often difficult to get an "even" number of people to agree on anything.

Various methods for selecting hearing officers have been proposed over the years. Such methods range from the creation of a "pool" from which every board and commission can draw, to mandating that all hearing officers be attorneys.

PERMANENT, FULL-TIME EXPERIENCE REQUIREMENT

Prepared by Joy V. Blanton

Issue

Should the Kentucky General Assembly change its mandate that only permanent, full-time experience be considered when determining whether an employe meets the minimum requirements of a job classification?

Background

KRS 18A.032 was amended by the 1986 General Assembly to prohibit the consideration of any type of job experience other than that gained through permanent, full-time employment when determining whether an employe meets the minimum requirements of a job classification. In an attempt to clarify the language of the amendment, at the request of its sponsor, a note was inserted at the end of the section by the Revisor of Statutes. It reads:

> We have been advised by the sponsor of the amendment that created subsection (5) of this section that the intent of this subsection was to require that **permanent, full-time experience and not part-time or unclassified service experience in state government, be the basis for job classification changes, such as promotions and transfers. [Emphasis added]**

Discussion

Advocates of the amendment allege that the Executive Branch discriminates against the career employe by appointing lesser qualified applicants "seasonally," "temporarily," or to federally-funded, time-limited positions and promoting them once they have acquired the necessary experience.

Opponents of the amendment say that it is too restrictive as written and its intent is unclear.

PREGNANCY LEAVE

Prepared by Joy V. Blanton

Issue

Should the Kentucky General Assembly enact a statute granting pregnancy leave, and should it be applicable to female employes only, or should it be gender-free, like Kentucky's adoptive-leave statute?

Background

A federal law, pending federal legislation, and a recent U. S. Supreme Court decision significantly impact this issue. They are the federal Pregnancy Discrimination Act of 1978, the federal Parental Leave Act, and *California Federal Savings and Loan (Cal Fed) v. Guerra.*

THE FEDERAL PREGNANCY DISCRIMINATION ACT OF 1978

In response to a challenge issued by the United States Supreme Court, the Congress of the United States passed the Pregnancy Discrimination Act of 1978 (PDA) and in 1980 our General Assembly amended the Kentucky Civil Rights Act to bring it into compliance. There is one significant difference, however, between Kentucky's Act and the Federal Act. Kentucky's Act is more restrictive in that it affects a larger number of employers, those with eight or more employes rather than 15 or more.

The PDA amends Title VII of the federal Civil Rights Act of 1964 and requires all firms to treat pregnancy and pregnancy-related conditions on an equal basis with all other illness. To be more specific, it requires that pregnant employes be treated the same as employes with other temporary disabilities; i.e., if male employes are granted leave for temporary disabilities, pregnant females must be granted disability leave. Conversely, if males are not granted disability leave, neither are females. Its primary impact is on hospitalization and major-medical insurances, sick-day provisions, and temporary disability or salary continuation plans. In addition, however, it would also affect the ways in which seniority and retirement credits were calculated during pregnancy absences.

The need for the PDA is evident when one recalls the policy of firms during World War II. Compulsory leaves of absence resulted in loss of both income and other rights of employment. As a consequence, women turned to the courts to resolve the question of whether such treatment constituted a violation of Title VII. Two Title VII cases eventually reached the Supreme Court and Congress.

In a case involving General Electric, the Court was confronted with a case dealing with G. E.'s policy of specifically excluding pregnancy from coverage under its nonoccupational sickness and illness policy. Women were forced on mandatory unpaid maternity leaves, with resultant discontinuation of all other benefits. One plaintiff suffered a miscarriage shortly after starting her leave, then subsequently suffered a pulmonary embolism. General Electric denied her claim, arguing that her leave made her ineligible for such benefits. The Supreme Court upheld G. E.'s plan as valid and challenged Congress to more precisely define what it meant by prohibiting "discrimination based on sex" [*General Electric v. Gilbert*, 429 U.S. 125 (1976)].

In another case, involving Nashville Gas Company, employes who were placed on mandatory maternity leaves lost all accumulated seniority upon their return to work. When Satty (the plaintiff) returned from leave, she found that her previous full-time position had been eliminated; instead, she was given a temporary position at a lower salary. This temporary position was eventually abolished as well, and she found herself with no job at all. The U. S. Supreme Court held that the imposition of such maternity leaves was not in itself a violation of Title VII, although the denial of seniority rights was in this particular instance [*Nashville Gas Company v. Satty*, 434 U.S. 136 (1977)].

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION V. GUERRA

When the U. S. Supreme Court in January of this year held, in *Cal Fed v. Guerra*, that the California pregnancy leave statute was not preempted by federal law, it upheld a state's right to treat pregnant employes more favorably than other employes with temporary disabilities. The California statute requires employers with five or more employes to give female employes up to four months' unpaid leave for disabilities arising from pregnancy or childbirth, and to reinstate them to their previous jobs, or equivalent jobs, upon their return. The case arose when Garland, a receptionist at Cal Fed, took a leave of absence from her job because of her pregnancy in January, 1982. She tried to return to work in April of that same year but was told that her job had been filled and that no other similar job was available. Garland filed a complaint with the California Department of Fair Employment and Housing, which, after reviewing the case, charged Cal Fed with violating the California statute. California Federal Savings and Loan Association then sued the state agency, alleging that the California pregnancy leave statute was preempted by Title VII of the 1964 Federal Civil Rights Act and the PDA.

While the *Guerra* decision has made pregnant employes more aware of their rights, it is much narrower than originally thought. In fact, unless you are in one of the states which has enacted a law similar to that of California, you must continue to follow the principles of the PDA.

THE FEDERAL PARENTAL LEAVE ACT

A proposed law in Congress shows the trend toward treating pregnant employes, and those who recently gave birth, more favorably than employes with other temporary disabilities. This law, dubbed the Parental Leave Act, expands the rights of pregnant employes still further. It has included, at different times, provisions that require employers with 15 or more employes to grant 18 weeks of unpaid leave for childbirth, adoption, or the serious illness of dependent children or parents, and 26 weeks of unpaid leave for an employe's own serious illness. Employers would have to continue employe health coverage during such leave and reinstate the employe to the same or equivalent job upon returning.

Discussion

According to the Kentucky Department for Employment Services, approximately 42.3 percent of the Kentucky civilian workforce is female. It is predicted that between now and the turn of the century this percentage will significantly increase.

Opponents of the pregnancy leave issue say that small business will simply refuse to hire female employes if the Kentucky General Assembly enacts a statute similar to that of California.

Advocates who favor granting pregnancy leave to females believe this argument to be incorrect. They say that employers who make such statements are placing themselves in

jeopardy. Not only will employers who refuse to hire females be in violation of the federal Civil Rights Act of 1964, and similar Kentucky statutes, they will quickly discover that men will demand higher wages to perform jobs traditionally held by females. They further argue that the enactment of such a law would be a modest attempt to bring the United States in line with the rest of the western industrialized world. More than 100 countries now have a government policy establishing the right of mothers to take time off to care for infants without fear of losing their jobs. Many nations require employers to continue paying salaries for part of that time.

Opponents counter that women in other countries do not have the job opportunities that American women have had. They say the United States stands to lose more, economically, because American women often hold higher level positions than their foreign counterparts.

INDEPENDENCE OF THE STATE AUDITOR

Prepared by Anita Taylor

Issue

Should the General Assembly redefine the duties of the Auditor of Public Accounts to make that office more autonomous or should the Auditor be made more accountable to the legislature?

Background

The Auditor of Public Accounts is an elected state official, as provided in Section 91 of the Kentucky Constitution. Although the office is one of constitutional stature, Section 91 leaves to the General Assembly the discretion to prescribe the powers and duties of the Auditor. There has been some question as to whether the Auditor, along with other constitutional officers, should continue to be elected, but it is generally agreed that the people of the Commonwealth are unlikely to give up the right to elect an officer whom they perceive as their "watchdog" over state government.

During the 1987-88 interim, the General Government Subcommittee of the Interim Joint Committee on State Government conducted an extensive analysis of the historical development of the Auditor and the current statutes which prescribe the duties of the office. Also, the Subcommittee focused on the role of the General Assembly in defining the nature of the office as it affects the independence of the Auditor, and on attempts by the Legislature to establish its own auditing system by creating the Legislative Audit Committee in 1966. That committee functioned as a statutory subcommittee of the Legislative Research Commission until it was abolished in 1974. During the eight years of its existence, the Audit Committee, along with an appointed Legislative Auditor, performed post-audits, provided the General Assembly with financial information, and examined expenditures of state agencies for purposes of audit reports and recommendations.

Several attempts have been made through the years to redefine the Auditor's duties and to make the officer more independent. As indicated by the defeat of many of those proposals in the General Assembly, the legislature has been quite reluctant to grant the Auditor more authority than is currently allowed by statute.

Discussion

In response to the constitutional mandate that the legislature prescribe the duties of the office, the General Assembly has developed a rather detailed outline of the powers and duties of the Auditor. The heart of the law prescribing the duties of the Auditor is in KRS Chapter 43. The Auditor is recognized in KRS 43.050 as a "disinterested and independent official" whose duties range from annual audits of state agencies to county audits. Some of the major duties of the Auditor include:

- Audit annually (or when deemed appropriate) the accounts of all state agencies and all private and semi-private agencies receiving state aid or handling state funds.

- Audit and verify all state monies handled by local officials for or on behalf of the state when demanded in writing by LRC, Secretary of Finance and Administration or the Governor. Such audit may be conducted whether or not it is demanded.

- Conduct special audits and investigations, as per the Governor's instructions.

- Audit the statements of financial conditions of the state government as they relate to the budget process; supply audit and comments to the General Assembly.

- Report to the Governor, LRC and the Secretary of Finance and Administration any unauthorized, illegal or unsafe use of state funds or any improper practice of financial administration. Also, the Auditor is to report any obstruction encountered by his staff in the audit/investigation process.

- Assist LRC at legislative hearings and in preparation of reports to be given to the General Assembly.

- The Auditor **may** investigate all state and county officers authorized to handle state monies or who manage or control state property or who make estimates or records which are used as a basis for disbursement of state funds.

Another major area of responsibility of the Auditor involves auditing the accounts of county officers. KRS 43.070 requires the Auditor to conduct an annual audit of each county's budget and the books, accounts and papers of all county clerks and sheriffs. The Auditor may audit the books, accounts and papers of all county judges-executive, county attorneys, commonwealth attorneys, coroners and constables. As provided in KRS 64.180, the counties have the option, with appropriate notice to the Auditor, to employ private firms to perform these examinations. Due to the workload of the Auditor's Office, this is apparently done frequently. The Auditor does have the right to review the work of the private CPA, and if discrepancies are found to exist and go uncorrected, the Auditor may then conduct his own audit, which shall be considered the official audit of the county.

The question has often arisen, and has generated much debate during the 1987-88 interim, as to whether the Auditor's Office, given current staffing and funding, can fulfill the numerous duties listed above in a timely and efficient manner. Some legislative committees have expressed concern with regard to the backlog of reports, the number of audits which have been contracted out, and the delays which have resulted in some audits being released as much as two years late. The Auditor's Office has explained that these delays and backlogs are the result of limitations placed upon its ability to hire additional personnel, as well as restrictions on the ability of the Auditor to exercise the independence needed to get the job done. These questions have resulted in various legislative proposals, including HB 941, which failed to pass during the 1986 Session. Among other things, that bill contained the following provisions:

- Remove all officers and employees of the Auditor's Office from the merit system.

- Exempt the Auditor from various statutes governing management and administrative actions by other constitutional officers to allow

the Auditor to hire, fire, lease, build, print and purchase without being accountable to other entities. Also, the Auditor would submit his own budget bill separate from the budgets of the three branches.

- Require the Auditor to conduct an annual audit of all county and independent school districts.

- Abolish requirement that the Auditor respond to audit demands of the Governor and LRC.

- Delete statutory authority of the Governor to direct the Auditor to conduct special audits and investigations.

- Give the Auditor control over fees collected and permit the Auditor to issue warrants to the Treasury for expenditure of the funds. The bill contained no provision for the Auditor to be audited.

The ongoing debate has resulted in something of a stand-off, with the Auditor again asking for greater autonomy and expanded authority, while the legislature expresses concern over the performance of the Auditor's Office, and questions whether the legislature should reinstate some form of legislative audit. There is some feeling that, even though the General Assembly defines the duties of the Auditor, there is no corresponding accountability, as would presumably exist with a legislative auditor or could result from a revision of the current system. There is frustration on both sides—for the Auditor because of what is considered inadequate authority and staffing in the face of a heavy workload, and for the legislature because of its inability under current law to effectively hold the Auditor accountable for performance.

KENTUCKY'S PRISON FARM SYSTEM

Prepared by Joyce Crofts and Kenneth Carroll

Issue

Should the General Assembly take action concerning the state's prison farms?

Background

In 1983, a budget review subcommittee expressed concern regarding the efficiency of operations of the state's five prison farms. One suggestion was to contract the management and operations of the farms. In April, 1986, responding to those concerns, the Corrections Cabinet issued a Request for Proposals. It later cancelled the RFP when all of the bids exceeded the funding limit. In the fall, the Subcommittee on Prison Farms was appointed to study the issue of privatization of the operations and management of the prison farms. Determining that the best approach was to analyze current operations, the Subcommittee conducted an extensive study over the months to follow.

Discussion

The Subcommittee's report included several unsatisfactory findings. However, the most severe problem was the absence of vital financial and crop production records. This finding was confirmed by officials of the University of Kentucky Department of Agricultural Economics, who reported that records were inadequate to accurately measure profit/loss in any portion of the operation or the operation as a whole. The report of the Auditor of Public Accounts, released June 9, 1987, also confirmed that records were incomplete and inaccurate. The audit further confirmed the Subcommittee's finding that the program was "costly and inefficient"—costly because they had a two-year operating loss of almost $1.2 million, and inefficient because operations could be expanded to provide the greatest number of inmate jobs in relation to operating profit and loss. Moreover, much of the food produced on the farms could be purchased more cheaply on the open market.

All parties in the study recognized the uniqueness of the prison farms with regard to the inmate labor and the mission of the program, and agreed on the importance of evaluating the operations in view of both economical operations and of effectiveness in accomplishing the stated objective of providing work to the inmates.

The Cabinet has recently requested technical assistance from the U. K. Department of Agricultural Economics to design a comprehensive recordkeeping system. It has also indicated that an additional central office accounting position has been established with the principal duty to develop and implement the new system. The Auditor recommended that once the new system is in place, a reevaluation of each operation should be made.

As the Subcommittee's study of the prison farms has progressed, several options have been discussed. The Subcommittee's final recommendation could include one of the following:

A. To maintain the status quo;
B. To contract out the management and operation of the farms (privatization) to a private contractor;
C. To eliminate the farms and provide other employment opportunities for the inmates;
D. To retain state control of the prison farms and make improvements which could be monitored with legislative oversight.

CREATION OF AN OFFICE OF PRINTING AND DUPLICATING MANAGEMENT

Prepared by Gregory D. Blackburn

Issue

Should an Office of Printing and Duplicating Management be created to maximize the state's investment in printing and duplicating equipment?

Background

Currently, there are seven executive branch agencies operating independent print shops. This decentralized approach to printing and duplicating has resulted in the duplication of equipment, personnel, and services, as well as causing the print shops to operate below minimum production standards. Previous administrative attempts to control printing costs have involved centralizing all printing operations within a single print shop. This approach has been criticized for being unresponsive to agency needs. Some states have dealt with this problem by creating a system of distributed print shops under a common management authority.

Discussion

Opponents of creating an Office of Printing and Duplicating Management argue that the specialized needs of their agencies justify the maintenance of individual agency print shops.

Proponents, however, contend that a centralized administrative authority, responsible for managing, coordinating and planning the printing and duplicating services of all state agencies, could save the state money by reducing the duplication of services, equipment and personnel. They also maintain that centralization would maximize production and facilitate the determination of how to best meet agency needs at the lowest possible cost, now and in the future.

TRANSPORTATION

SIXTY-FIVE MILE-PER-HOUR SPEED LIMIT

Prepared by James R. Roberts

Issue

Should the General Assembly increase the speed limit to sixty-five mile-per-hour on rural interstate highways?

Background

In January of 1974, the United States Congress enacted the Emergency Highway Energy Conservation Act, which established a temporary national speed limit of fifty-five mile-per-hour. The legislation prohibited the Secretary of the United States Department of Transportation from approving any federal-aid highway project for a state which had a speed limit on any highway in excess of fifty-five mile-per-hour. The temporary speed limit became permanent by passage of a Congressional act on January 4, 1975.

The General Assembly of Kentucky reacted to this legislation by lowering its speed limits in 1974 with the passage of House Bill 184. The 1974 Act also included a provision which stated as follows:

> This Act shall cease to be in effect and stand repealed on or after the date which the President declares that there is no fuel shortage under the provisions of HR 11372 or on June 30, 1976 whichever date occurs first.

In 1976, after Congress enacted fifty-five mile-per-hour as the permanent speed limit, the Kentucky General Assembly amended KRS 189.391 to give the Secretary of the Kentucky Transportation Cabinet the authority to alter the speed limit in the event that Congress changed the restrictions. In 1982, the General Assembly amended KRS 189.391 again to mandate that the Secretary of Transportation alter the speed limits on Kentucky highways in the event of a change by the United States Congress.

On April 2, 1987, Congress enacted Legislation to allow a sixty-five mile-per-hour maximum speed limit on those interstate highways outside urbanized areas of fifty thousand population or more. On June 2, 1987, the Attorney General of the Commonwealth of Kentucky stated that the Kentucky Transportation Secretary was under direction to increase the speed limit to sixty-five mile-per-hour on applicable portions of the interstate highways. On June 8, 1987, the speed limit was altered accordingly.

Discussion

Despite the fact that the Secretary of the Kentucky Transportation Cabinet signed an order increasing the speed limit on rural interstate highways, the issue will need legislative attention. The General Assembly needs to address the issue by introducing legislation to amend the existing state speed limit statute to reflect the changes made by order of the Secretary. The introduction of the legislation to comply with the Secretary's order will present an opportunity to debate the merits of increasing the speed limits.

The debate may be expanded to include several highway safety issues. A spokesperson from the Kentucky State Police requested the Transportation Committee to

examine such issues as mandatory seat belts, penalties on child restraint laws, a ban on radar detection devices and alteration of the point system used to penalize traffic offenders regarding speeding on limit access highways.

The issues were brought to the attention of the Interim Joint Committee on Transportation with expression of concern that the higher speed limits will increase accidents and traffic fatalities and proposals that additional safety measures be adopted to prevent an increase in highway deaths.

Another issue ancillary to the increase of speed limits on rural interstates is that such an increase on the four-lane parkways and toll roads in Kentucky was not included in the congressional act. Many of Kentucky's toll roads are designed very close to interstate engineering standards and have significantly less traffic volume than many portions of the affected interstate highways. Although, the speed limits on these routes cannot be altered until the passage of additional federal legislation, statutory changes could be offered which would permit the Secretary to alter these limits to coincide with the enactment of corresponding federal legislation.

BRIDGE REPLACEMENT PROGRAM

Prepared by Jerry Deaton

Issue

Should the General Assembly enact legislation to implement a bridge replacement program which is separate and distinct from the existing federal-matching program?

Background

A major bridge disaster over the Ohio River on December 15, 1967, prompted the federal government to create a national bridge inspection program to inspect and inventory all bridges on federal routes. This program was expanded in 1978 to include all bridges located on public roads.

The State of Kentucky has 12,624 bridges in its state and local systems. The local system includes 4,400 of these bridges. Of this total, 3,967 have been rated substandard. "Substandard" in this instance does not necessarily mean the bridge is in immediate danger of collapsing, but rather that the bridge either contains some structural deficiency or is in need of repair.

It has been determined in meetings of the Highways and Vehicle Regulation Subcommittee of the Interim Joint Committee on Transportation that 1,520 of these 3,967 substandard bridges are rated at ten tons or less. Typically these bridges are between 30 and 50 feet in length and were not designed properly when built. Such improper design, as well as poor state of repair, could be attributed to either insufficient funding, or possibly to the fact that the county system that built the bridge had no professional engineer available at the time.

Transportation of Kentucky's abundant natural resources require the use of many heavy coal trucks, which often have little choice but to use substandard bridges. Loaded school buses can also exceed the ten ton limit. In some instances, students are unloaded from a bus and forced to walk across the bridges because of the dangers of structural deficiencies.

Discussion

Tennessee has taken the lead in turning state attention to the bridge problem. Tennessee officials determined that it would take the regular federal bridge replacement program approximately forty years to replace or repair the 6,767 closed and posted bridges on Tennessee's public highway system.

On the average, a federal replacement project required two years to bring to contract, which could include the purchase of right-of-way, movement of utilities, and letting of contracts, and eighteen months to construct, at an average cost of approximately $250,000. The delays and increased cost of these projects are due to the fact that each phase of the project must receive federal approval, which often involves a waiting period. An examination of state contract figures showed that a replacement program, with the state working in conjunction with local government, required only twelve months on the average and completion costs usually ran in the range of $40,000 to $60,000. The state process differed only in that it did not have to meet all the federal standards and did not have to wait for federal approval.

One the basis of these figures, the Tennessee officials have developed a program to divide responsibility for bridge replacement between state and local governments. The state is responsible for supplying 80% of the funds, setting specifications, approving plans and performing final inspections. Local governments obtain professional engineering services, prepare plans and supervise construction, obtain right-of-way, relocate utilities and construct roadway approaches. The local goverment's 20% share of the costs could be provided in cash or in kind services.

Between July 1, 1982, and November 1, 1984, Tennessee replaced 1,453 structurally deficient bridges, at a total cost of $50.3 million, an average of $34,618 per structure. The bridges were all designed and built according to state and American Association of State Highway and Transportation Officials specifications.