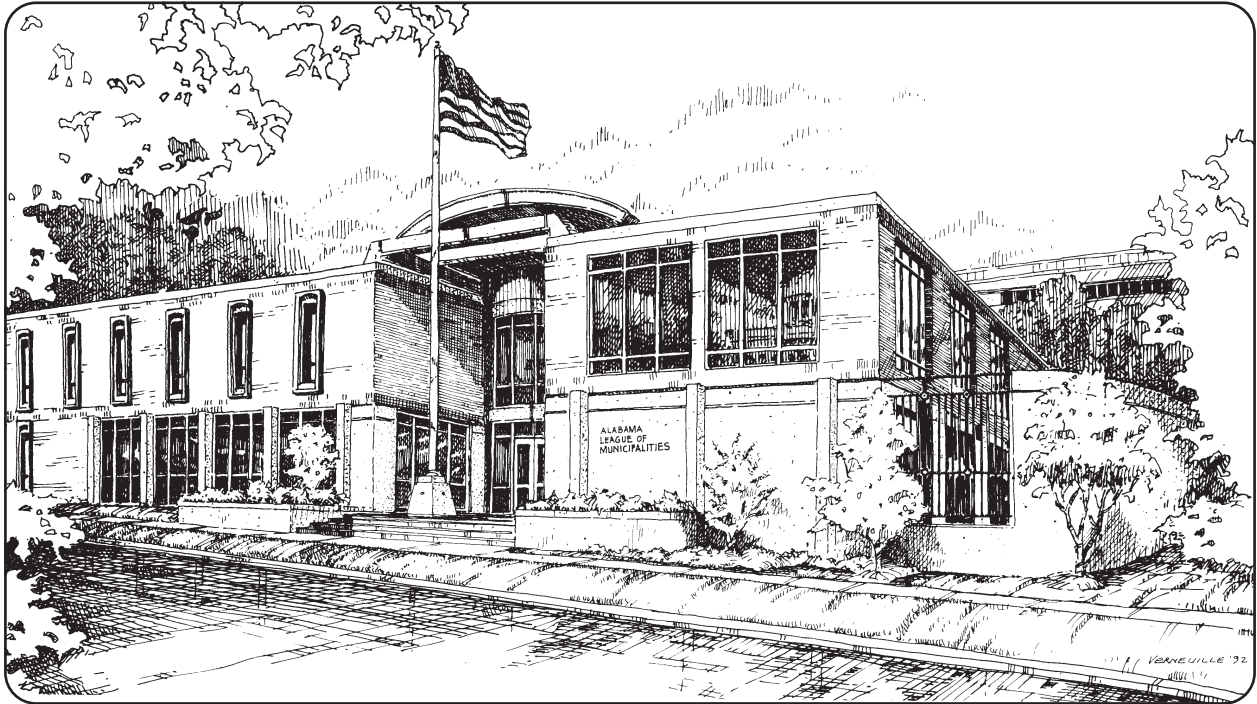


Selected Readings for the Municipal Official

2020 Edition



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Preface

Municipal officials face a broader range of duties, responsibilities and activities than any other group of public officials. *McQuillin's Encyclopedia on Municipal Corporations* is contained in 20 large volumes and each year literally thousands of new entries are added to its contents.

No municipal official, veteran or newly-elected, can be expected to know the answers to even a small portion of the questions which, at one time or another, could be presented for decision. Nevertheless, there are certain fundamentals of municipal government which every municipal official must endeavor to master.

Throughout its 85-year history of the League, it has been noted that certain questions are asked again and again. Every new administration seeks advice on questions relating to council organization, parliamentary procedure, basic municipal powers, territorial jurisdiction, revenue powers, municipal courts and a number of other pertinent issues. From time to time, such subjects are reported on in the League's official publication, *The Alabama Municipal Journal*. This collection of *Selected Readings* is based on articles which have appeared in that magazine, although other new works have been included with each subsequent edition. This publication is distributed in an electronic format as a searchable PDF.

We hope that these articles will prove helpful to newly-elected Alabama municipal officials in the orientation process and to veteran municipal officials as a reference on municipal government.

It should be emphasized that this collection of articles is not intended to be an exhaustive study of all aspects of municipal government. Nor is the advice the definitive "last word" on any of the subjects. This is a reference work. If this book answers a number of fundamental questions and encourages readers to look for more information, then it will have accomplished its purpose.

While it would be impossible to recognize the many people who have contributed articles over the years, it is only fitting that sincere thanks are expressed to Rob Johnston, Teneé Frazier, Carrie Banks, Karl Franklin and former executive director Ken Smith for their dedicated contributions to this edition of *Selected Readings for the Municipal Official*.

Lorelei Lein
General Counsel

October, 2020

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1. What Is the League?

One of our distinguished past presidents very aptly described the Alabama League of Municipalities as this state's "Community of Communities." In a very real sense, the community spirit that vitalizes each city and town in Alabama finds expression in the structure and the activities of our municipal organization. The League is a composite of the concerns, problems and goals of its 450+ municipalities. It has demonstrated repeatedly throughout its more than 85-year history that the unified voices and the collective actions of dedicated municipal officials, working through the League, are a compelling force in articulating the concerns, solving the problems and achieving the goals of its individual member municipalities.

The League was organized in 1935 as a voluntary association of about 100 member municipalities. Through the years, its voluntary membership has more than quadrupled. Its staff operation has become vastly more capable of meeting the ever-growing needs of municipal officials and personnel for legal and technical assistance and for information services during a period of revolutionary urban growth and change. Still, the League has retained the same basic objectives that motivated its founding more than 85 years ago:

- To conduct continuing studies of the legislative, administrative and operational needs, problems and functions of Alabama's municipal governments and to publish the results of these studies for the benefit of member cities and towns.
- To maintain a staff capable of finding answers to legal and administrative questions asked by elected officials and personnel of member municipalities.
- To hold conferences and meetings at which views and experiences of municipal officials and personnel may be exchanged.
- To encourage in the people of Alabama a sympathetic appreciation of the duties, responsibilities and rights of both municipal government and its citizens.
- To work to secure enactment of legislation, at both the state and federal levels, that will enable all cities and towns to perform their functions more efficiently and effectively.

Organization of the League

As an organization, the League consists of the executive director, president, vice president, and a board of directors made up of five to seven elected municipal officials from each of the state's congressional districts. In addition,

the League has an executive committee composed of all active past presidents of the League which serves as the League's nominating committee. Officers and members of the board of directors are elected by the voting delegates at the League's annual convention.

In addition, the Legislative committee and standing committees established by the board of directors are charged with the review and development of League policies and goals which encompass a broad spectrum of issues affecting municipal government. The chair and vice chair of each of these standing committees are also elected annually at the convention. Committee members are selected by the respective committee chairs to provide representation from each congressional district and to ensure representation of cities and towns of all sizes on each committee.

Besides developing policies and goals for the League, the standing committees are responsible for reviewing national municipal policy developed by the National League of Cities (NLC). Committee members, through our League representatives on NLC committees, may suggest amendments to the national policy during NLC's annual Congress of Cities.

League Committees

Standing committees of the League meet annually with resource advisors to review existing League policy and recommend adoption of revised goals and recommendations in the respective areas of each committee. The Legislative committee meets before each Regular Session of the Alabama Legislature to consider the recommendations of standing committees and to develop the League's legislative program.

The Legislative committee also carefully studies proposed legislation which may prove harmful to municipal government. While the legislature is in session, the committee may meet to assess the progress of the League program and to review potentially dangerous legislation. The committee has the additional duty of meeting at the annual League convention to review resolutions prepared for submission at the annual business session and to receive suggested resolutions from individual delegates.

Participation in NLC

Since 1935, the Alabama League has been a member of the National League of Cities (NLC), our national counterpart. Members of our League are thereby entitled to participate in the annual Congress of Cities where national municipal policy is formed and educational programs are conducted. Our members may become direct members of

NLC if additional benefits and assistance are desired from the national organization. Throughout the years, Alabama municipal officials have been extremely active in NLC.

Individual Services to Members

Individual service to member municipalities, on a day-to-day basis, is one of the most important functions of the League. These services include research to help local officials make decisions in the performance of their many duties; legal opinions from the League's attorneys; publication of the League's magazine, *The Alabama Municipal Journal*; distribution of *This Week*, a weekly electronic newsletter; distribution of the *Statehouse Advocate*, ALM's weekly legislative e-bulletin when the legislature is in session; and publication of booklets and information bulletins to better enable officials and personnel to perform their duties. In addition, the League has an extensive website – **almonline.org** – as well as an official presence on Facebook, Twitter and Instagram.

The League has filed *Amicus* briefs ("friend of the court" briefs) in cases affecting our cities and towns and serves as a resource for municipal attorneys, prosecutors and judges. League staff and officers frequently appear before state agencies and legislative committees to testify on rules, regulations and proposed legislation affecting our members.

The League has also established a number of special programs for member municipalities. Some of these programs are operated directly by the League while others are privately held companies whose products or services are endorsed by the League. Any League member city, town or instrumentality of the League member may contract for any or all of these services at very competitive rates.

League-Operated Programs

Over the years, ALM has created a number of programs and services to aid municipalities. In many cases, these programs save Alabama's cities and towns a substantial amount of money each year.

- Since 1942, the **Municipal Revenue Service** has collected unpaid and escaped delinquent insurance license taxes from insurance companies doing business in Alabama's municipalities.
- The **Municipal Workers Compensation Fund, Inc.** (MWCF) was established in 1976 to provide workers compensation insurance to municipalities, housing authorities, utility boards and other city and state agencies.
- The **Alabama Municipal Insurance Corporation** (AMIC) was founded in 1989 as a mutual insurance company that writes all lines of insurance and is

owned by its member municipalities. In 2018, AMIC endowed a historic municipal law chair at Samford University's Cumberland School of Law to ensure that future lawyers are educated in municipal law and that issues affecting municipalities receive sound scholarly research.

- In 2002, AMIC and MWCF created a joint **Loss Control Division** to provide additional staff and expanded services at a much-reduced cost to their members. The Loss Control Division has 11 dedicated staff members and offers a variety of services, including on site risk management reviews, an Employee Practices Law Hotline, a DVD Safety Library, regional and training programs on a number of loss prevention topics as well as exclusive, state-of-the-art training such as the SkidCar defensive driving program and the Firearms Training System (FATS).
- The **Alabama Municipal Funding Corporation** (AMFund) was created in 2006 to assist Alabama's municipalities with refinancing existing debt and funding local projects and purchases through cost-effective financing.
- The **Alabama Association of Municipal Attorneys** (AAMA) and the **Alabama Municipal Judges Association** (AMJA) are open for membership to municipal attorneys, prosecutors and judges and provide joint legal training twice a year.
- In January 2015, ALM launched **League Law**, an online legal research system allowing subscribers to search selected Alabama and federal cases affecting municipalities, including summaries of Alabama Attorney General's opinions, Ethics Commission opinions and Alabama and federal court opinions.
- In late 2015, ALM launched **Municipal Intercept Services** (MIS), a program designed to allow local governments to recover a portion of monies owed from an individual's State tax refund through the Alabama Department of Revenue.

League-Endorsed Programs

- **Cable Television Franchise Management Service** – This League-endorsed program provides technical assistance to municipalities relating to cable television franchise management.
- **Model City Ordinance Review Program** – This program uses the expertise of law students working through the Alabama Law Institute to revise municipal ordinances.
- **CGI Streaming Video** - Founded in 1988, CGI's

products and services for Community Image Marketing have been used by over 2000 communities in North America! All of CGI's programs are offered at NO COST to municipalities, and are specially designed to streamline communication and strengthen communities. The League continues to look for even more programs to benefit its member municipalities. Besides saving money for our members, all of these programs contribute to the operation of the League and help keep membership dues down.

- **IT in a Box** - In April 2019, ALM partnered with Sophicity, now part of VC3, to offer "IT in a Box" which provides cities and towns in Alabama with state-of-the-art information technology tools supported by experienced, highly skilled IT professionals.
- **Alabama First Responders Benefits Program** - Firefighters are community heroes. The Alabama First Responders Benefits Program was created for cities and counties within the State of Alabama to help care for our 20,000+ firefighters and their families. Under ACT 2019-361, firefighters throughout the State of Alabama are entitled to an enhanced cancer and disability coverage program provided by their municipality, county, public entity or fire district for both Career Paid and Volunteer Firefighters. The Alabama First Responders Benefits Program provides multiple options for both career and volunteer firefighters and is a way to further protect our community heroes.
- **American Fidelity Assurance Company** - The public sector is constantly evolving, with expectations changing as rapidly as the technology. American Fidelity Assurance offers the latest trends in employer benefit solutions and builds custom recommendations for your organization. American Fidelity specifically focuses on helping the public sector overcome benefits administration challenges.

The Legislative Function

In every session of the Alabama Legislature since 1935, the League has served as the guardian and the voice of municipal interests. This is a vitally important function, since Alabama municipalities are creatures of the Legislature and are dependent upon it for their powers and their very existence. League legislative programs through the years have produced over hundreds of general acts which directly benefit municipal government and its citizens. Cities and towns in Alabama now receive many millions of dollars annually in state-shared revenues as a direct result of the League's legislative efforts. In addition to working for passage of League legislative proposals, the League staff continuously monitors and reports on all types

of legislation, at both the state and federal levels, which may affect cities and towns.

Training Programs

Over the past years, the League has worked closely with the University of Alabama, Auburn University, Jacksonville State University, the University of North Alabama, Faulkner University and other educational institutions and groups to sponsor training programs for municipal officials and employees. In 1987, the League, in cooperation with the College of Continuing Education at the University of Alabama, established the John G. Burton Endowment for the Support of Municipal Programs. The fund honors the League's first president and the "Father of Municipal Education in Alabama." This perpetual fund, to which municipalities, individuals and corporations may contribute, is used to increase training programs and opportunities for municipal officials and employees.

In 1994, the League established the Elected Officials Training Program for elected municipal officials. This voluntary program was the second in the nation and provides elected officials an opportunity to receive continuing education training. Upon obtaining 40 credit hours of training, the elected official will be presented with the designation of Certified Municipal Official (CMO). Several years later, due to the program's popularity, an Advanced CMO Program was established. In 2015, the League introduced a new training level, the Emeritus level, which recognizes meritorious continued participation in League training programs, events and service.

Publications and Communications

The League publishes *The Alabama Municipal Journal*, a magazine prepared by the staff which annually provides more than 400 pages of timely information on the operation of city and town governments. *The Alabama Municipal Journal* is mailed to all elected officials and to top administrative and legal personnel of member cities and towns. Members of the Legislature also receive the magazine as well as the Alabama Congressional Delegation, sister leagues throughout the country, subscribers and friends. The total circulation of *The Alabama Municipal Journal* is approximately 4,500.

The League provides a weekly e-newsletter, *This Week from the League*, that informs and updates members on meetings, training and other items of importance.

As mentioned earlier, the League's *Statehouse Advocate* is electronically transmitted weekly to each member municipality when the Legislature is in session. In addition to these regular publications, the League staff prepares numerous books, information bulletins and special reports on specific subjects of interest to municipal officials and

maintains a presence on Facebook, Twitter and Instagram.

The League staff continually attempts to keep the public and the news media informed about issues affecting municipal government in Alabama and to promote the objectives of the League and its member municipalities.

Conclusion

As the foregoing notes indicate, the League is a multi-purpose organization, the goals of which are to promote more efficient and effective government for the citizens of Alabama. The League is a tremendous resource for municipal officials and personnel. Municipal officials are urged to take advantage of these resources, to call on the League staff whenever necessary and to attend as many educational programs, seminars and conventions as possible. The rewards will benefit you as municipal officials and the citizens that you have been elected to serve.

League Staff

League staff members may be reached by calling League Headquarters at **334-262-2566** or through their individual e-mail addresses, a list of which is available on the League's website at **www.almonline.org**. The physical location of the League headquarters is 535 Adams Avenue, Montgomery, AL 36104. Written correspondence can be sent to the League at P.O. Box 1270, Montgomery, AL 36102.

2. Legal Department – A User’s Guide

One of the League’s most important functions is responding to legal inquiries from its member municipalities. The League maintains a legal department to provide its members with direct legal assistance when needed. While the legal department has many roles, with over 450 members – representing literally thousands of officials, employees, board members and others who may make requests – there are limits to what the department can do. This article will help readers make the most effective use of the legal department. It is intended simply as a guide and should be read that way. Because our goal is to serve our member municipalities, League attorneys attempt to remain flexible in the services they provide.

What Services Are Available?

The legal department’s primary function is to represent the interests of member municipalities throughout Alabama. Therefore, we attempt to have an attorney available by telephone every day during regular business hours. However, the Legal department is not a substitute for local legal representation. The volume of requests we receive makes individual representation impossible. Therefore, we have to restrict our activities to those which we feel best serve all our member cities and towns.

In addition to providing direct legal assistance, the Legal department provides other services, such as: preparation of *amicus curiae* (friend of the court) briefs in appellate cases; preparation of monthly summaries of court decisions and Attorney General’s Opinions for the League magazine and the League’s Law on Disc computer program; monthly legal articles in the *Alabama Municipal Journal*; drafting manuals explaining the duties and responsibilities of municipal officials and employees; providing sample and model ordinances; conducting educational and training seminars; managing the Alabama Association of Municipal Attorneys (AAMA) and the Alabama Municipal Judges Association (AMJA); and assisting with the League’s lobbying efforts.

Who Can Inquire?

This question raises complex ethical conflicts of interest issues concerning the responsibilities of the League’s attorneys. Explaining it simply, the League represents its member municipalities and not individuals, even if they are municipal officials.

The League answers inquiries from mayors, council members, board members, clerks, attorneys and other representatives of member municipalities. League attorneys do not advise officials about their private legal matters.

Additionally, conflict of interest rules generally prohibit us from advising members of the public regarding municipal legal matters, although we do share articles or other general information we have on hand with private citizens. Please do not encourage citizens who are not municipal officials or employees to contact the League for legal advice as we may have to refuse assistance.

Further, the League’s attorneys cannot take sides in disputes involving one municipality against another or in conflicts between municipal officials. League attorneys exercise discretion in these situations and will generally refer you to your local attorney where a potential conflict of interest appears likely to arise. If it appears that we are being asked to resolve a dispute between two or more officials, we may ask that the question be reduced to writing with an agreed to statement of facts between the concerned parties so that we may respond to all sides jointly. We will also make every effort to encourage cooperation on questions involving disputes between municipal officials.

How to Use the Legal Department

Whether you inquire by telephone or e-mail, the following guidelines will help us give you the most prompt, accurate response:

- Call or write as soon as possible after identifying your problem – immediate deadlines make responses difficult since often a question requires research.
- Give us as many facts as possible. On questions involving boards, it is best to know under what section of the Alabama Code the board was created.
- If you are following up on an issue you have been discussing with one of our attorneys, please advise the receptionist so that your call may be directed to that attorney.
- If you have inquired with a particular attorney but have not received a response please indicate that information in any follow-up inquiry so as to avoid duplicate effort on the part of attorneys in the department. Please be patient as some responses take time and may require discussion among all the attorneys in the legal department in order for us to develop a consensus answer and avoid conflicting and/or confusing responses.
- If you are under a deadline, let us know when it is and we will try our best to meet it.
- Municipal officials and employees are welcome to

discuss matters in person at League headquarters in Montgomery. Please call in advance to make an appointment. If your questions involve a review of documents, we may ask that they be forwarded prior to the meeting so that we may review them.

Telephone Inquiries

As noted above, the legal department's primary goal is to have an attorney available by telephone every day during business hours. Of course, there are exceptions, such as during the League's convention or when we are trying to meet a deadline, or on hectic meeting days of the Alabama Legislature. We try to return calls either the same or the following day and we try to give an answer over the telephone. Not every question, however, has a clear legal answer. In these cases, we will try to give you our best legal opinion, based on years of municipal legal experience and knowledge of state and federal laws.

Further, some questions require research before a knowledgeable answer can be given. Therefore, it is best not to put off calling until just before a deadline. Of course, not every question can be anticipated, and when a quick legal response is needed, we will make every effort to provide a speedy answer.

Written Inquiries

Because of the volume of calls, it is difficult to confirm telephone advice in writing. However, we are happy to answer *written* inquiries in writing and try to do so in a timely fashion. All requests for written responses should be submitted in writing, laying out the question and any relevant facts. Written inquiries are generally answered in the order received and the response time depends upon time available to draft a response. Again, we will try to accommodate a deadline, but this is not always possible. As always, it is generally best to work with your local attorney if a quick response is needed.

E-mail

Because of the nature of e-mail requests, they may be treated as either a written request or a telephone inquiry. League attorneys attempt to respond to electronic questions as quickly as possible, but please bear in mind that when our attorneys are out of the office, they may not have access to a computer, which will delay any reply. If you have an e-mail question that must be answered quickly, but have not received a response, it is generally advisable to follow up with a telephone call to be sure that the message was received, and that the attorney you are attempting to reach is in the office. Please inquire as to the status of the attorney you are requesting information from before simply sending

your request to another attorney in the office. This will help us avoid duplicate effort on inquiries.

***Amicus Curiae* Briefs**

While the League does not file lawsuits on behalf of its members, we do sometimes file *amicus curiae* briefs in cases on appeal to either the Courts of Appeal or to the Alabama Supreme Court if the issues involved in the case have statewide significance. If you are involved in a case on appeal and you think the Court should have input from the League, please review our Amicus policy on our website under the legal services tab. If your case meets that criteria, please send a detailed written request, with supporting documentation, to the legal department.

Sample Ordinances

We maintain a large supply of sample ordinances on many topics. These samples come from several sources. Our most important source for ordinances is our members. If you adopt a new ordinance, it would benefit all League members if you could forward a copy to the League's legal department for our files.

Please remember that these ordinances have not been drafted by the legal department. Before using one as a guide, it is important to adapt these ordinances to your local needs and to obtain advice from your local attorney regarding compliance with statutes and case law.

We are often called upon to review ordinances or to interpret a word or phrase in an ordinance. While we can offer a cursory reading of an ordinance, we cannot be familiar with the circumstances which require the adoption of an ordinance, nor can we investigate facts which might influence the meaning of specific words or the inclusion of specific sections. Our interpretation is not intended to be definitive and should be used merely as a second opinion for your local municipal attorney. He or she is in the best position to provide you with a detailed analysis of your ordinance and provide you with a final answer.

Coordination with Local Attorneys

Each municipality should have its own attorney. The League's legal department is a resource to assist your municipal needs; it is not a replacement for your municipal attorney. Nothing we do or say is meant to interfere with the critical relationship between your municipality and your attorney. When the law is unclear or the inquiry presents substantial risk of litigation, we'll often suggest that you seek advice from your attorney, because he or she will have to represent you should you have to go to court. When your attorney provides advice, he or she does so in the belief that the recommended action puts the municipality in the most defensible legal position. Your municipal attorney is also

in the best position to know local factors which influence the need to proceed in a particular manner. Therefore, we generally encourage municipal officials and employees to follow their attorney's advice, especially on questions where the law is open to interpretation or factual matters require further development. Of course, we are always happy to discuss an issue with local attorneys or to verify their interpretation of a statute or case.

You should not seek our advice in the hopes that we will second-guess your attorney. We are here to assist, and not compete with, your attorney. If you have already discussed the matter with your attorney, please advise us of this when you call or write. Legal opinions are fact-specific and people who are not lawyers are often unaware of how a fact which seems unimportant to them might affect the legal response. Thus, if our opinion differs from that of local counsel, we will generally advise you to follow the advice of your local attorney.

To further help municipal attorneys represent their clients, the League created the Association of Municipal Attorneys (AAMA) in 1992. AAMA provides a number of services to municipal attorneys. It conducts two training seminars annually for municipal attorneys, publishes updates of ongoing litigation and also maintains an internet forum to enable attorneys to communicate with each other on legal issues. In addition to AAMA, the League created the Alabama Municipal Judges Association (AMJA) in 2007 to provide similar services and training opportunities for municipal judges. We strongly encourage all municipal attorneys, prosecutors and judges to join AAMA or AMJA and hope that all municipal officials will request that their local attorneys and judges join and participate in these important organizations. For more information, contact the League's legal department, or visit the League's web site, where links to information about AAMA and AMJA are posted.

Local Political Disputes

As attorneys, we answer your questions regarding municipal law. We often receive calls for "legal assistance" where the caller is seeking resolution to a political disagreement. Every municipality has political disagreements; most cannot be resolved by looking at a statute. In many cases, statutes are subject to multiple interpretations, especially where the responsibilities and duties of municipal officials are concerned. These calls are awkward, and we cannot give you an answer about who is right and who is wrong. These disputes are best resolved in the political arena through compromise and cooperation rather than through legal guidance.

Coordination with Other Agencies

The League often serves as a contact point on municipal issues for other agencies, including state departments like the Attorney General's office, as well as other entities, such as regional planning commissions. League attorneys often provide advice to representatives of these offices and frequently serve as speakers at educational conferences and seminars run by these agencies. Because of our relationships with these agencies, we may refer you to one of them if we feel they can assist you with your questions.

Relationship with League Affiliated Programs including the Municipal Worker's Comp Fund (MWCF) and the Alabama Municipal Insurance Corporation (AMIC)

The League administers two risk-pooling type programs for municipalities – Municipal Workers Compensation Fund, Inc. (MWCF), and the Alabama Municipal Insurance Corporation (AMIC), which provides liability coverage for municipalities. It is important to understand that the League's legal department does not represent these entities. We do not provide advice regarding coverage or on matters in which one of these entities has an interest. Further, following our legal advice does not guarantee coverage. Questions regarding specific coverage issues or other matters related to these entities should be directed to them, and not to the League's legal department.

Limitations

Excluded from our advisory services are matters such as:

- drafting individualized ordinance and contracts
- comprehensive review of ordinances, contracts, applications for grants or legal responses
- on-site training for individual municipalities (although League attorneys will meet with representatives of a municipality at League headquarters if an appointment is made)
- litigation
- direct representation or negotiations with third parties on an individual municipality's behalf
- Further, it is important to remember the following:
 - we cannot take sides with one municipality or one official against another
 - we generally cannot respond to questions regarding the League's worker's compensation or liability programs; inquiries on these programs should be directed to the appropriate representative

Have a Question? Don't Hesitate to Call

This user's guide is not meant to discourage you from contacting the League's legal department. On the contrary, we hope that understanding the scope of our services will help you make better use of them. When in doubt about whether we can help you, please don't hesitate to call. Of course, if ethics prohibit us from responding to your question we may have to refuse to answer it, or may refer you to someone who does not have a conflict. We hope you will take advantage of League services and programs. If there is anything we can do to help, please let us know.

3. Forms of Municipal Government in Alabama

On June 2020, Alabama had 463 incorporated municipalities located in 67 counties. These entities are designated by state law as either **cities** (2,000 or more population) or **towns** (under a population of 2,000). These municipalities range in size from the state's largest city, Birmingham (population 212,247) to the town of McMullen (population 10). Alabama is predominantly a state of small municipalities. This is illustrated by the following population breakdown:

• Cities more than 100,000	4	.86%
• Cities between 50,000-100,000	5	1.08%
• Cities between 25,000-50,000	11	2.38%
• Cities between 12,000-25,000	35	7.56%
• Cities between 6,000-12,000	36	7.78%
• Cities between 2,000-6,000	89	19.22%
• Towns between 1,000-2,000	78	16.85%
• Towns between 500-1,000	80	17.28%
• Towns less than 500	125	26.99%

There are 287 municipalities with a population less than 2,000 with 125 out of the 281 with a population less than 500.

The Code of Alabama authorizes two distinct forms of municipal government for Alabama municipalities. This article presents a general discussion of these three forms of municipal government and the variations of each one.

Classification of Municipalities

Section 104(18) of the Alabama Constitution, 1901 prohibits the Legislature from creating or amending by local legislation the charter powers of municipal corporations. The only exception to this restriction on the Legislature is the power to change or alter the corporate limits of cities and towns by local acts. Because of this constitutional provision, the laws governing the incorporation, organization and operation of cities and towns in Alabama are general in nature and either apply to all municipalities in the state or to all municipalities within a specified population group. The basic statutes providing for the creation, organization and functioning of cities and towns are found in Title 11, Code of Alabama 1975, and amendments thereto.

Prior to 1978, the state Legislature adopted numerous statutes to provide powers for municipalities with very narrow population ranges. These laws were known as **general laws of local application**. In 1978, the Alabama

Supreme Court, in the case of *Peddycoart v. Birmingham*, 354 So. 2d 808, held that the state Legislature could no longer adopt general bills of local application. The court held that the Legislature could pass only statewide general bills affecting every jurisdiction in the state or local bills affecting single jurisdictions. Since Section 104 of the Alabama Constitution prevents amendment of municipal charters by local acts, another method of enacting such amendments was needed.

The League was successful in obtaining passage by the Legislature, and ratification by the voters, of Amendment 397 (Section 110) Alabama Constitution, 1901, which authorizes the Legislature to establish no more than eight classes of municipalities based on population. This provision also allows legislation to be passed which affects one or more of such classes and provides that any such legislation shall be deemed to be general laws rather than local laws.

Sections 11-40-12 and 11-40-13, Code of Alabama 1975, established the eight classes of municipalities as follows:

- **Class 1** – Cities of 300,000 inhabitants or more
- **Class 2** – Cities of not less than 175,000 and not more than 299,999 inhabitants
- **Class 3** – Cities of not less than 100,000 and not more than 174,999 inhabitants
- **Class 4** – Cities of not less than 50,000 and not more than 99,999 inhabitants
- **Class 5** – Cities of not less than 25,000 and not more than 49,999 inhabitants
- **Class 6** – Cities of not less than 12,000 and not more than 24,999 inhabitants
- **Class 7** – Cities of not less than 6,000 and not more than 11,999 inhabitants
- **Class 8** – Cities and towns with a population of 5,999 or less.

The population figures refer to the 1970 federal decennial census. Any municipality incorporated after June 28, 1979, shall be placed in one of the above classes according to the population of the municipality at the time of its incorporation.

Amendment 389 (Section 106.01) Alabama Constitution, 1901, validates most general acts of local application, which were enacted prior to January 13, 1978, that were otherwise valid and constitutional even though they were not advertised as required by Section 106 of the State Constitution. This provision provides that the acts shall forever apply only to the county or to the municipality

to which they applied on January 13, 1978, despite changes in population. Such acts can only be amended by advertised local bills. In cases where a general law exempts cities of a certain stated population from being subject to said law, Section 106.01 will not help the city maintain its exemption when a change of population has caused them to fall outside the protected population bracket. *Birmingham v. George*, 988 So. 2d 1031 (2007).

Mayor-Council Government

The mayor-council form of government is found in most Alabama cities and towns. This form is provided for by Chapter 43, Title 11, Code of Alabama 1975, as amended. There are two variations of the mayor-council form of government. In cities with 12,000 or more inhabitants, the governing body is generally composed of a mayor and five councilmembers. These officials are elected by the voters of the city or town at-large unless the council, at least six months prior to an election, has voted to elect the councilmembers from districts. Section 11-43-2 and Section 11-43-63, Code of Alabama 1975. In Class 1, 2, and 3 municipalities where councilmembers are elected from districts, Section 11-43-63, Code of Alabama 1975, permits up to nine councilmembers. Section 11-43-64, Code of Alabama 1975, provides an additional means of increasing the size of the city council in a Class 3 municipality. The mayor and the members of the council are elected to serve four-year terms.

In municipalities with less than 12,000 in population, the legislative functions are exercised by the council which is generally composed of the mayor and five councilmembers. Section 11-43-63, Code of Alabama 1975, permits up to seven councilmembers in municipalities which are districted. The mayor presides over all deliberations of the council. At his or her discretion, the mayor may vote as a member of the council on any issue coming to a vote except in the case of a tie vote, in which event he or she **must** vote. Section 11-43-2, Code of Alabama 1975. However, the mayor may never vote more than once on any issue that comes before the council, even in the case of a tie vote. *Jones v. Coosada*, 356 So. 2d 168 (Ala. 1978). All of the legislative powers of the municipality are exercised by the council acting as a whole.

Municipalities with less than 12,000 in population according to the immediate past federal decennial census that have a population of 12,000 or more, but less than 25,000 after the most recent federal decennial census must continue to operate as municipality with population less than 12,000 for 30 days after the release of the federal decennial census.

During the 30 day period, by ordinance adopted by a majority vote of the council and the mayor together, the

city may elect to continue to operate as a city with less than 12,000 population as it relates to the exercise of the legislative functions of the mayor until the release of the next federal decennial census.

Thereafter, if the city continues to have 12,000 or more but less than 25,000 inhabitants after the most recent federal decennial census, by the same procedure, the city may elect to continue to operate as a city with less than 12,000 population as it relates to the exercise of the legislative functions of the mayor until the 30 days after the release of the next federal decennial census. Section 11-43-2(c) 1975; Act 2018-281.

The mayor is the chief executive officer of the municipality and has general supervision and control over all other officers and affairs of the city or town. The council may not enact an ordinance authorizing council committees or individual councilmembers to direct or supervise the work of departments assigned to their study and observation. The mayor has exclusive authority to supervise and control the administrative personnel of the municipality. AGO to Hon. Gilbert Watson, October 8, 1957; Section 11-43-81, Code of Alabama 1975.

The mayor has the power to appoint all officers of the city or town, but state law or municipal ordinance may provide for a different appointing authority. The mayor may remove for good cause any non-elected officer appointed by him or her and fill the vacancy permanently. The mayor may remove any officer elected by the council or approved with its consent and **temporarily** fill the vacancy. The mayor must report such removal and the reasons therefor to the council at its next regular meeting. If the council sustains the mayor's act of removal, the vacancy shall be filled permanently as provided by law. Section 11-43-81, Code of Alabama 1975. The Supreme Court of Alabama has limited this authority where the council is voting on whether or not to dismiss an employee or whether or not to uphold the mayor's dismissal of an employee. In the Court's opinion, the mayor can cast a vote on the question for the purpose of documenting his or her position on the issue. However, the mayor's vote cannot be counted in determining whether a sufficient number of those elected to the council approved the officer's removal. *Hammonds v. Priceville*, 886 So. 2d 67 (Ala. 2003).

In cities with a population of 12,000 or more and a mayor-council form of government, the legislative functions of the city must be exercised by the council, except as provided in Section 11-43-2 as it relates to the legislative functions of the mayor in cities and towns having a population of 12,000 or more but less than 25,000 inhabitants according to the last or any subsequent federal decennial census. Section 11-43-40, Code of Alabama 1975, provides several alternate council structures for such cities.

The number of councilmembers may vary from five to twenty persons elected for four-year terms from the city at-large or from districts. The population of the municipality may have some bearing on the council form chosen.

The council is presided over by a president who is a voting member of the council. In some cities, the council president is elected by the voters at-large. In other cities, he or she is chosen by the council membership at their organizational session. Cities with populations of 12,000 or more with five councilmembers elected from single-member districts pursuant to a federal court order may provide for eight councilmembers elected from districts and a council president elected at-large. The city council of a Class 8 municipality having a population of 60,000 or more inhabitants may provide that the city council be composed of seven members elected at large. Section 11-43-40, Code of Alabama 1975.

The mayor of a city with a population of 12,000 or more has the same powers and duties as the mayor of a smaller municipality with the exception being that he or she is not a member of the council. However, all ordinances and resolutions of general and permanent nature are subject to the veto power of the mayor. Any ordinance or resolution vetoed can be overridden by a two-thirds vote of the council. Section 11-45-4, Code of Alabama 1975. The mayor of a city or town who operates pursuant to Section 11-43-2 as it relates to the legislative functions of the mayor in cities and towns having a population of 12,000 or more but less than 25,000 inhabitants according to the last or any subsequent federal decennial census, may not exercise veto power pursuant to this section and his or her signature as the mayor may not affect the validity of an ordinance or resolution passed by the council while the mayor is a voting member of the council. Section 11-45-4(b) 1975; Act 2018-281.

Although the general law provides for the mayor and council to be elected at the same election for four-year terms, the state Legislature has adopted several laws applicable to specific cities and towns establishing staggered four-year terms for councilmembers. In addition, Section 11-43-40, Code of Alabama 1975, authorizes the city council of a Class 6 municipality elected citywide to provide for the election of the city council for staggered terms.

More detailed information on the mayor-council form of government can be found in the League's *Handbook for Mayors and Councilmembers*.

Council-Manager Government

Any municipality in the State of Alabama can hire a city manager as provided for in Title 11, Chapter 43, Article 2, Code of Alabama 1975. But the fact that a city has a manager hired under the provisions of this statute does not give the municipality a true council-manager form

of government. In view of this fact, the state Legislature adopted the Council-Manager Act of 1982, codified at Sections 11-43A-1 through 11-43A-52, Code of Alabama 1975, as amended, to allow all Class 2 through Class 8 municipalities the option of becoming a city or town with a true council-manager form of government.

The governing body of a municipality organized under the council-manager form of government is known as a council and is composed of five or seven members. One member shall be the mayor who is elected at large, who shall be a voting member of the council. And either four or six members shall be council members elected either at large or from single-member districts, as the resolution shall provide. Section 11-43A-1.1 1975. If a municipality has single-member districts for the election of council members when the council-manager form of government is adopted in the municipality, the municipality must continue with either four or six council members elected from single-member districts and the mayor shall be elected at large. The officers elected shall serve for four-year terms. In Class 6 cities, the governing body may elect to have a nine-member governing body composed of a mayor elected at-large and two councilmembers from each of four dual-member wards. The mayor is the presiding officer of the council and may vote on any issue coming before that body. Section 11-43A-8, Code of Alabama 1975.

All powers of the municipality are vested in the council. The council has the power to appoint and remove a city manager and to establish other administrative departments and distribute the work of such departments. Section 11-43A-17, Code of Alabama 1975.

According to the Act, the city manager is the head of the administrative branch of the municipal government and is responsible to the council for the proper administration of all affairs of the municipality. These powers are listed at Section 11-43A-28, Code of Alabama 1975.

Currently, Auburn, Tuskegee and Vestavia Hills operate under this form of government.

An additional council-manager act was enacted in 1991. This law is codified at Article 2, Chapter 43A, Code of Alabama 1975.

Other City Governments

The state Legislature has adopted specific legislation to provide either a form of government for a particular municipality or to provide a procedure by which the form of government of certain municipalities may be altered. These laws generally apply only to a single city or town. Those municipalities affected by specific enactments are:

- **Anniston** – Council-Manager, Act No. 71-1049
- **Phenix City** – Council-Manager, Act No. 77-71

- **Montgomery** – Mayor-Council, Act No. 73-618
- **Birmingham** – Mayor-Council, Act No. 55-452
- **Troy** – Mayor-Council, Sections 11-44A-1 through 11-44A-16, Code of Alabama 1975
- **Opelika** – Mayor-Council, Sections 11-44D-1 through 11-44D-21, Code of Alabama 1975
- **Prichard** – Mayor-Council, Sections 11-43C-1 through 11-43C-92, Code of Alabama 1975
- **Tuscaloosa** – Mayor-Council, Sections 11-44B-1 through 11-44B-22, Code of Alabama 1975
- **Bessemer** – Mayor-Council, Sections 11-43D-1 through 11-43D-22, Code of Alabama 1975
- **Gadsden** — Mayor-Council, Sections 11-43B-1 through 11-43B-32, Code of Alabama 1975
- **Mobile** – Mayor-Council, Sections 11-44C-1 through 11-44C-93, Code of Alabama 1975
- **Dothan** – Class 5 cities with a mayor-commission-manager, Sections 11-44E-1 through 11-44E-221, Code of Alabama 1975
- **Talladega** – Council-Manager – Amendment 738 (Talladega 13), Alabama Constitution, 1901 provides that the city shall operate under the council-manager form of government authorized by Chapter 43A of Title 11 of the Code of Alabama 1975, with certain modifications.

Additional laws have been enacted to assist Class 7 and Class 8 municipalities change to the mayor-council form of government. Sections 11-44A-30 through 11-44A-32, Code of Alabama 1975, apply to Class 7 municipalities; Sections 11-44F-1 through 11-44F-3, Code of Alabama 1975, apply to Class 8 municipalities.

In addition to these laws, certain cities and towns have laws applicable to them which modify the general laws pertaining to their forms of government.

Changes in Form of Government

Many of these statutes provide procedures to be used in adopting or changing the form of government. Any change from one form of government to another requires compliance with the applicable statutes. AGO 1999-254.

4. General Powers of Municipalities

The Constitution of Alabama does not recognize any inherent right of local government. Except where restricted by limitations imposed by the state and federal Constitutions, the Legislature of Alabama is vested with complete, or absolute, power. In the exercise of this power, the Legislature used general statutes to create municipal corporations and declared them political and corporate entities. These municipalities are delegated a portion of the sovereign powers of the state for the welfare and protection of their inhabitants and the general public within their jurisdictional areas. All powers, property, and offices of a municipal corporation constitute a public trust to be administered as such within the intent and purposes of the statutes which created them and within the limitations imposed by the state and federal Constitutions.

The powers of Alabama cities and towns are delegated by the Legislature and are subject to removal and limitation of power by the Legislature. Regardless of the origin, the powers of municipal corporations should not be viewed as weak, unimportant, or second rate. When the Legislature adopted the Municipal Code, which today is found in Title 11 of the Code of Alabama, a broad array of power was granted to the cities and towns of Alabama. The Legislature has continued to grant new powers that enable municipalities to deal with the changing times of today. The best way to understand the importance of municipal powers is to visualize society without them.

In providing for the organization and administration of mayor-council cities and towns, the Legislature deemed that the legislative functions of a municipality should be vested in the council. Sections 11-43-2, 11-43-40 and 11-43-43, Code of Alabama 1975. Section 11-43-43 of the Code states that all legislative powers and other powers granted to cities and towns shall be exercised by the council, except those powers conferred on some officer by law or ordinance. Therefore, the state Legislature has entrusted the municipal council with the duty and responsibility of exercising a wide variety of the sovereign powers of the state which vitally affect the life, liberty and property of citizens within their jurisdictions. Further, where cities have adopted the council-manager form of government, the council is also authorized to exercise all legislative functions of the municipality. Section 11-43A-83, Code of Alabama 1975. The following paragraphs discuss basic rules of construction relating to the powers which mayor-council cities and towns may exercise through their councils.

Sources of Power

The sources of power of a municipal corporation

include the Constitution, the statutes of the state, and special acts of the Legislature, particularly where such acts are in the charter for specific cities or towns. In an early Alabama case, *Mobile v. Moog*, 53 Ala. 561 (Ala. 1875), Justice Manning quoted Judge Dillon from his work on municipal corporations: “It is a general rule, and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation – not simply convenient, but indispensable.”

McQuillin cites this case as authority in stating that Alabama cities and towns have no inherent powers, but such a statement requires an understanding and agreement on the meaning of the word “inherent.” See 2A *McQuillin, Municipal Corporations*, 3rd Ed. Section 10:12. It is true that a city has no authority to confer upon itself power it does not possess. Courts in Alabama follow the Dillon Rule in determining whether or not a city or town is authorized to exercise a particular power. See *New Decatur v. Berry*, 7 So. 838 (Ala. 1890); *Best v. Birmingham*, 79 So. 113 (Ala. 1918).

In *Best v. Birmingham*, the Supreme Court of Alabama held that the Court of Appeals erred in holding that municipal corporations have no implied powers. In so ruling, the court pointed out that except for the power of taxation (and probably some others not necessary to mention here), municipal corporations are clothed with powers implied or incidental. As a guide, the court noted that these incidental or implied powers must be germane to the purpose for which the corporation was created. Municipal powers cannot be enlarged by construction to the detriment of individual or public rights. The power must relate to some corporate purpose which is germane to the general scope of the object for which the corporation was created or has a legitimate connection with that object. *Harris v. Livingston*, 28 Ala. 577 (Ala. 1856).

Unfortunately, no precise definition distinguishes “indispensable powers” from powers which are merely useful or convenient. As a general policy, municipal corporations are held to a reasonably strict observance of their express powers. *Ex parte Rowe*, 59 So. 69 (Ala. App. 1912). The safest rule is that if there is substantial doubt as to the existence of a particular power, such power will be held by the courts not to exist.

The powers of a municipality may be derived from a single express grant or from a combination of enumerated

powers which must be construed together. The purpose of all rules of construction is to arrive at the intent of the Legislature. It follows that if fairly included in or inferable from other powers expressly conferred and consistent with the purposes of the municipal corporation, the exercise of the power should be resolved in favor of the municipality to enable it to perform its proper functions.

Municipalities are but subordinate departments of state government and it is essential to the health, growth, peace, and wellbeing of their inhabitants that the states delegate to them all police powers which are necessary to their orderly existence. *Ex parte Rowe, supra*.

Types of Power

Two basic types of powers are delegated to and exercised by Alabama cities and towns. The two basic types of power are those of a political body (legislative) and corporate body (ministerial). As a political body, municipal powers are general in application and public in character. As a corporate body, a municipality has powers that are proprietary in character, powers exercised for the benefit of the municipality in its corporate or individual capacity. Such powers are for the internal benefit of the municipality as a separate legal entity. *State v. Lane*, 62 So. 31 (Ala. 1913).

As a political body, a municipal corporation exercises legislative powers of a general and permanent nature which affect the public generally within the territorial jurisdiction of the municipality. In this instance, the council acts very much as an arm of the state Legislature. As a corporate body, a municipality exercises powers of a ministerial nature for the private benefit of the corporation. In this case, a municipality acts in a manner comparable to the board of directors of a private corporation.

The distinction between these two types of powers is important to determine if a council must formally adopt an ordinance to exercise a particular power. If the power exercised requires the action of the council in its legislative capacity, then a formal ordinance is required in the manner prescribed by statute. If the action is of a ministerial nature, then the council may exercise the power by resolution or simple motion set forth in the journal.

The formalities required by statute for the adoption and publication of ordinances of a general and permanent nature are set out in Sections 11-45-2 and 11-45-8, Code of Alabama 1975, and must be followed closely by the council.

Exercise of Powers

The powers of a municipality, both corporate and legislative, are required to be exercised by the council in legal meetings as prescribed by statute. Action taken by petitioning individual councilmembers will not suffice.

The municipal journal is the only evidence acceptable in determining the action which the council took on a particular item of business, and parol evidence will not be received to establish such action. *Penton v. Brown-Crummer Inv. Co.*, 131 So. 14 (Ala. 1930).

The method of exercising a power granted by the Legislature is dependent upon whether the statute prescribes the manner of performance or not. The prescribed procedure for adopting ordinances of a general and permanent nature is mandatory. In exercising ministerial powers, it should be noted that sometimes procedures are prescribed by statute. In some cases, courts recognize such procedures as mandatory and in other instances they are declared to be directory only.

Generally, where a statutory grant of power provides that a municipality “**shall**” or “**must**” perform an act in a prescribed manner, the statute is declared mandatory. *Prince v. Hunter*, 388 So. 2d 546 (Ala. 1980). Where a statute provides that the municipality “**may**” perform an act or exercise a power, it is declared to be directory or permissive. *Jackson v. State*, 581 So. 2d 553, 559 (Ala. Crim. App. 1991). However, it is important to note that in all cases of statutory interpretation, the legislative intent ultimately controls over the use of the words “shall,” “may,” or “must.” *Mobile Cty. Republican Executive Comm. v. Mandeville*, 363 So. 2d 754, 757 (Ala. 1978)

Where performance is left to the discretion of the municipal council, the council must use reasonable methods or procedures within the restrictions of the state and federal Constitutions. The general rule is that unless restrained by statute or constitutional provision the council may, in its discretion, determine for itself the means and method of exercising the powers delegated to the municipality. The rule of strict construction, often applied to determine if a municipality has the power to perform a particular function or act, is not generally applied to the method used by a council to exercise a power which is plainly granted.

Discretion Not Reviewable

Where a council has acted within the sphere of powers granted to the municipality, it is well established that courts will not sit in review of the proceedings of municipal officers and departments in the exercise of their legislative discretion. Cases where bad faith, fraud, arbitrary action, or abuse of power are affirmatively shown are exceptions to this rule. *Hamilton v. Anniston*, 27 So.2d 857 (Ala. 1946). Where a power exists, there is a legal presumption that public officials properly and legally executed it in a reasonable manner. It is often stated that if the result of a given action of the council is an economic mistake, an extravagance, or an improper burden on the taxpayers, the answer is at the ballot box rather than a court proceeding.

Courts do not inquire into the motives prompting a municipal governing body to exercise a discretionary power, be it legislative or corporate in nature, unless there is a showing of fraud, corruption or oppression. *Pilcher v. Dothan*, 93 So. 16 (Ala. 1922). Error or mistakes in judgment do not constitute an abuse of discretion.

Non-Delegable Powers

Legislative powers rest with the discretion and judgment of the municipal council. The council cannot delegate or refer such powers to the judgment of a council committee or an administrative officer. There is a distinct difference in delegating the power to make a law, which involves discretion and judgment, and conferring authority or discretion to execute a law pursuant to the directions contained in the law. The council can appoint administrative agents to perform ministerial duties to carry out the legislative will.

An ordinance not outlining a guide or a rule for the exercise of administrative discretion, leaving the whole matter to the discretion of the officer, is an unwarranted delegation of legislative power. Such ordinances are universally held unreasonable, arbitrary, or oppressive. When adopting ordinances, a council should provide standards and guides to be used by officers responsible for administration of the ordinances.

The council may appoint investigative committees to study and report facts, but final discretion as to any action required must be made by the council.

The council may authorize the mayor to make a particular contract which the council alone is authorized to make, and subsequently ratify such contract and take action pursuant thereto. Here the ratification constitutes the performance of the duty imposed on the council.

The council cannot, by agreement, bind its successors to forgo or exercise their legislative powers. *City of Birmingham v. Holt*, 194 So. 538 (1940); AGO 97-00118.

Necessity for Council Action

In some instances, statutes relating to municipal powers are self-executing. However, in most instances, the grants of power are not effective until the council takes legislative action to set them in motion. The authority to levy a tax or impose a license, for example, must be put in motion by affirmative action by the council before such powers can actually be administered. In other words, the Legislature generally places municipal powers at the discretion of the municipal council or governing body, to be exercised or not, according to the judgment of the council. Such action is taken by the adoption of an ordinance, resolution, or motion as the granting authority may require.

Extraterritorial Powers

It is a general rule of law that the powers granted to cities and towns can be exercised only within their territorial limits, unless specifically provided otherwise by statute. Fortunately, Alabama cities and towns have been expressly granted a host of extraterritorial powers. Section 11-40-10, Code of Alabama 1975, provides that the ordinances of a municipality enforcing police or sanitary regulations and prescribing fines and penalties for violations shall have force and effect within the corporate limits, in the police jurisdiction thereof and on any property or rights-of-way belonging to the municipality.

This section states that the police jurisdiction of cities and towns of less than 6,000 in population shall extend for a distance of 1.5 miles beyond the corporate limits. In cities of more than 6,000 in population, this jurisdiction extends for a distance of three miles beyond the corporate limits. Municipal police officers are authorized to make arrests for violations of municipal ordinances within the municipal police jurisdiction, and county lines are no barrier to the exercise of this power. One exception exists, however. Municipal police officers may not enforce speed limits outside their corporate limits. Section 32-5A-171(9), Code of Alabama 1975; AGO 2000-005.

In addition to this statute creating a police jurisdiction, a number of statutes authorize cities and towns to exercise particular powers inside and outside the corporate limits, in the surrounding territory, or within a specified territorial radius beyond the police jurisdiction. See the article titled *The Municipal Police Jurisdiction* in this publication.

Legislative and Executive

Alabama municipal corporations are vested with legislative and executive powers. Legislative power is the authority to make laws and is vested in the council. Executive powers are generally vested in the mayor and heads of departments. The crucial test to determine the difference between legislative powers and executive or administrative powers is whether an ordinance makes a new law or executes a law already in existence.

The question of whether an act is legislative or executive often arises in connection with the power of the courts to interfere with the exercise thereof. Courts will not review proceedings of municipal officials which involve legislative discretion except in cases of fraud and arbitrary or capricious action. *City of Huntsville v. Smartt*, 409 So.2d 1353 (Ala. 1982).

The legislative powers of the council are not to be confused with the power to administer or execute the laws of the municipality. It is the responsibility of the mayor to see that the officers and employees of the municipality

faithfully execute the laws and policies established by the council. *See* 11-43-81, Code of Alabama, 1975.

This centralization of administrative and executive power in the mayor was established by statute in the *Municipal Code of 1907* after the Legislature witnessed the waste, inefficiency and confusion which resulted under prior laws which established no centralized administrative authority. While it is certainly within the province of a council to determine if the ordinances of the municipality are being administered properly, it is not the intent of the law for the council to step out of its legislative role to personally direct officers and employees of the municipality.

Impressive Powers

While it is not within the scope or intent of this discussion to list the powers entrusted to the discretion of a municipal council, the following examples provide an impressive idea of the power of a council: (1) to levy taxes on real property; (2) to establish privilege licenses; (3) to adopt police regulations for the safety, health and welfare of the community; (4) to punish by fine and imprisonment; (5) to condemn property; (6) to sue and be sued as a corporate entity; (7) to borrow money by general obligation bonds, warrants and negotiable notes; (8) to acquire property by purchase or lease; (9) to sell or lease municipal property no longer needed for municipal or public purposes; (10) to pledge municipal revenues to the payment of municipal obligations; (11) to assess property for public improvements; (12) to grant franchises for the use of municipal streets; (13) to regulate the use of streets and prohibit selling in the streets; (14) to acquire, own and operate water, gas, sewer and electric utilities; (15) to manage and control municipal finances and property; (16) adopt building laws; (17) abate nuisances; (18) adopt zoning regulations; (19) enter into contracts; (20) establish and maintain municipal buildings, hospitals, jails, magazines, museums, art galleries, and recreational facilities; (21) to acquire and regulate cemeteries; (22) to require witnesses to appear before the council or a council committee and punish for contempt for failure to do so; (23) to provide for the health and sanitation of the community; (24) to promote the industrial development of the community and to advertise for such purposes; (25) to establish numerous separately incorporated boards to promote particular municipal projects and appoint directors of the boards; (26) to vacate streets; (27) to enter into written contracts with counties to perform any services common to all contracting entities.

In exercising these and other powers, the governing body of a municipality sets the pace and determines the course of the municipality.

Federal or State Grants

Municipalities have broad authority to receive federal or state money and to comply with the conditions placed upon these funds by the grantor. Section 11-64-2, et seq., Code of Alabama 1975.

Principal Constitutional Provisions Relating to Municipalities

Section 68 – Prohibits municipalities from granting extra compensation after a service has been rendered.

Section 77 – Authorizes Legislature to empower municipalities to measure and inspect merchandise.

Section 89 – Prohibits municipalities from adopting ordinances inconsistent with general laws of state.

Section 91 – Prohibits legislature from taxing the property of a municipal corporation.

Section 94 – Prohibits municipality from lending its credit or granting public money or things of value to private persons or corporations or becoming a stockholder in any corporation, association, or company, by issuing bonds or otherwise.

Section 94.01 -- Permits a city to provide public funds to a public or private entity to attract economic and industrial development within the city.

Section 211 – Requires all property to be assessed in exact proportion to its value. (Exemption and reasonable classification allowed.)

Section 212 – Power to levy taxes not to be delegated.

Section 216 – All municipalities authorized to levy five mills ad valorem tax on property as assessed for state taxation without an election. Certain cities specifically authorized to levy higher millage than five mills.

Section 217 – Requires uniformity of tax rates on all properties. This has been construed to require uniform assessments.

Section 218 – Prohibits Legislature from requiring municipalities to pay charges presently payable out of state treasury.

Section 220 – No person, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys or public places of any city, town or village for the construction or operation of any public utility or private

enterprise, without first obtaining the consent of the proper authorities of such city, town or village.

Section 221 – The Legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license or other tax to the state of Alabama and relieve him of it from the payment of all other privilege and license taxes in the state.

Section 222 – Authorizes Legislature to empower municipalities to issue bonds. Election required.

Section 223 – Restricts municipal public improvement assessments to increased value of abutting property by reason of special benefits derived from improvements.

Section 225 – Municipal debt limit amended by Amendment 268 to 20 percent of total assessed value of properties located therein. This section does not apply to Sheffield and Tuscumbia.

Section 227 – Subjects utilities operating on streets to costs of damages to abutting property.

Section 228 – Prohibits municipalities over 6,000 population from granting franchises in excess of 30 years.

Section 235 – Requires municipalities to pay just compensation before taking property for public use and subjects municipalities to compensatory damages for taking property for public use and for consequential damages requiring bond in double amount of damages assessed on appeal.

Section 280 – Prohibits persons from holding two offices of profit at same time, except postmasters.

Section 281 – Prohibits an officer from receiving an increase or decrease in compensation during term for which he has been elected or appointed.

Amendment 8 (Section 216.01) – Increases tax millage authorized for specified cities and towns to 15 mills. Election on amount over last five mills.

Amendment 13 (Section 216.03) – Increases tax millage authorized for specified cities and towns to 10 mills. No election required.

Amendment 17 (Section 216.02) – Increased tax rate for specified cities and towns to 15 mills

Amendment 54 (Winston 9) – Increases Haleyville's rate of taxation to 10 mills

Amendment 56 (Section 216.04) – Authorizes all cities and towns to levy up to 12.5 mills. Election required on all rates over five mills.

Amendment 80 (Madison 19) – Special Huntsville school tax of five mills.

Amendment 84 (Marion 4) – Industrial development powers for municipalities in Marion County. Up to 20 mills taxing power without election. [Unique].

Amendment 94 (Fayette 2) – Industrial development powers to municipalities in Fayette County. Up to 20 mills taxing power. Election required.

Amendment 95 (Blount 3) – Economic development in Blount County. Up to 20 mills taxing power. Election required.

Amendment 104 (Winston 10) – Industrial development powers to cities of Haleyville and Double Springs. Up to 20 mills taxing power. Election required.

Amendment 107 (Section 222.01) – Authority for municipal revenue bonds without involving debt limit.

Amendment 108 (Section 222.02) – Declaring debts of utility corporations created by cities and towns separate from such municipalities even though municipality transferred property to such corporation.

Amendment 126 (Section 225.01) – Debt limit limitations in municipalities of less than 6,000 population.

Amendment 133 (Walker 7) – Prohibits licenses, excises, fees or taxes on wages or salaries by municipalities in Walker County.

Amendment 147 (Lee 9) – Special school tax for Opelika.

Amendment 148 (Lee 11) – Special school tax for Auburn.

Amendment 155 (Perry 5) – Industrial development powers to Uniontown.

Amendment 170 (Colbert 8) – Educational tax in Tuscumbia.

Amendment 171 (Colbert 7) – Special school tax for Sheffield.

Amendment 172 (Colbert 6) – Special school tax for Muscle Shoals.

Amendment 178 (Lauderdale 9) – Special school tax for Florence.

Amendment 183 (Autauga 2) – Industrial development authority for municipalities in Autauga County.

Amendment 186 (Franklin 2) – Industrial development authority for municipalities in Franklin County.

Amendment 188 (Greene3) – Industrial development authority for Greene County.

Amendment 189 (Lamar 3) – Industrial development authority for municipalities in Lamar County.

Amendment 190 (Lawrence 3) – Industrial development authority for municipalities in Lawrence County.

Amendment 191 (Madison 4) – Industrial development authority for Huntsville.

Amendment 192 (Mobile 21) – Pensions to former public officers in Mobile County.

Amendment 197 (St. Clair 5) – Industrial development authority for municipalities in St. Clair County.

Amendment 209 (Jefferson 18) – Additional tax in city of Mountain Brook.

Amendment 217 (Clarke 2) – Industrial development authority for municipalities in Clarke County.

Amendment 218 (Madison 20) – Special school tax for Huntsville.

Amendment 219 (Mobile 30) – Requiring election before municipalities in Mobile County may levy income or occupational license tax.

Amendment 220 (Mobile 35) – Industrial development authority for Bayou La Batre.

Amendment 221 (Sumter 7) – Industrial development authority for York.

Amendment 228 (Section 222.04) – Ratifying power of municipalities to issue revenue bonds for industrial development to acquire and expand such projects.

Amendment 232 (Calhoun 16) – Special school tax authority for Anniston.

Amendment 233 (Dallas 1) – Special school tax for Fort Payne.

Amendment 240 (Jefferson 17) – Special property tax for Birmingham for bonds.

Amendment 242 (Lee 12) – Special property tax for Auburn for recreation.

Amendment 244 (Limestone 13) – Economic development authority for Town of Lester.

Amendment 245 (Madison 4) – Amending Huntsville’s industrial development powers.

Amendment 246 (Marion 3) – Refunding of securities by municipalities in Marion County.

Amendment 248 (Mobile 29) – Amendment to Mobile County municipalities taxing powers.

Amendment 251 (Sumter 6) – Industrial development powers of Livingston.

Amendment 253 (Walker 13) – Special school tax authority for Jasper.

Amendment 256 (Winston 8) – Industrial development authority for Lynn and Addison.

Amendment 259 (Conecuh 6) – Industrial development authority for Evergreen.

Amendment 261 (Mobile 36) – Industrial development authority for Bayou La Batre.

Amendment 263 (Geneva 2) – Industrial development authority for municipalities in Geneva County.

Amendment 268 (Section 225) – Increasing municipal debt limit to 20 percent of assessed valuation for state taxes.

Amendment 269 (Section 215.05) – Authority for municipalities to levy special tax for library purposes.

Amendment 277 (Walker 11) – Industrial development powers for Carbon Hill.

Amendment 279 (DeKalb 9) – Special school tax power for Fort Payne.

Amendment 295 (Dale 3) – Special school tax power for Ozark.

Amendment 299 (Blount 6) – Special school tax power for Oneonta.

Amendment 302 (Pickens 5) – Industrial development powers to municipalities in Pickens County.

Amendment 303 (Morgan 6) – Industrial development powers to Hartselle and Decatur.

Amendment 305 (Madison 21) – Special school tax power to Huntsville.

Amendment 312 (Bibb 4) – Industrial development powers to municipalities in Bibb County.

Amendment 313 (Hale 2) – Industrial development powers to municipalities in Hale County.

Amendment 316 (Jefferson 19) – Special school tax power for Mountain Brook.

Amendment 319 (Baldwin 13) – Authority for municipalities in Baldwin County to levy a special property tax for library purposes.

Amendment 325 (Section 217) – Relating to ad valorem taxes.

Amendment 336 (Jefferson 20) – Additional tax for city of Mountain Brook.

Amendment 350 (Calhoun 18) – Education tax in Anniston.

Amendment 352 (Jefferson 21) – Additional property tax in city of Vestavia Hills.

Amendment 373 (Section 217) – Amendment to Section 110 relating to adoption of “general laws.”

Amendment 376 (Calhoun 5) – Development of parks in Anniston.

Amendment 385 (Marengo 11) – Demopolis five mill ad valorem tax for schools.

Amendment 389 (Section 116.01) – Validation of certain population-based acts.

Amendment 407 (Madison 20) – City of Huntsville school tax.

Amendment 409 (Shelby 10) – City of Alabaster ad valorem tax.

Amendment 415 (Calhoun 4) – Industrial park projects and industrial sites in Calhoun County.

Amendment 425 (Section 284.01) – Adoption of proposed constitutional amendments affecting only one county.

Amendment 429 (Bullock 3, Coffee 3, Coosa 2, Dallas 2, Etowah 5, Geneva 3, Houston 3, Jefferson 7, Lawrence 4, Macon 5, Madison 5, Marengo 3, Mobile 13, Morgan 7, Shelby 2, Talladega 4, Tuscaloosa 3) – Economic development authority for certain counties and the municipalities therein.

Amendment 435 (Conecuh 4) – Annual license taxes, registration, etc., on trucks, trailers, etc., in Conecuh County.

Amendment 450 (Section 219.02) – Alabama Trust Fund.

Amendment 456 (Morgan 22) – Hartselle city school taxes.

Amendment 462 (Dale 4) – Ozark school tax.

Amendment 468 (Marengo 4) – Marengo County industrial development.

Amendment 469 (Marshall 1) – Annexation in Marshall County.

Amendment 475 (Section 94.02) – Tax increment districts in counties and municipalities.

Amendment 477 (Clarke 7) – City of Jackson port authority.

Amendment 488 (Section 219.03) – Investment of capital and income from Alabama Heritage Trust Fund or Alabama Trust Fund.

Amendment 491 (Section 111.04) – Effectiveness of laws providing for expenditure of municipal funds (Unfunded Mandates).

Amendment 499 (Limestone 8) – Municipal police jurisdiction in Limestone County.

Amendment 500 (Mobile 15) – Investment of municipal funds and county funds by Mobile County.

Amendment 514 (Madison 18) – Appropriations to certain nonprofit organizations by city of Huntsville.

Amendment 531 (Madison 9) – Municipal jurisdiction in Madison County.

Amendment 535 (Elmore 7, Tallapoosa 7) – Election of board of education of city of Tallassee.

Amendment 536 (Escambia 2) – Distribution of oil and gas revenues by Escambia County Commission.

Amendment 537 (Etowah 11) – Election of board of education in city of Attalla.

Amendment 539 (Jefferson 13) – Business license taxes in Jefferson County.

Amendment 541 (Mobile 23) – Investments of assets of Class 2 municipalities police and firefighter pension plans.

Amendment 544 (St. Clair 9) – Election of board of education for Pell City.

Amendment 548 (Talladega 14) – Election of Talladega City Board of Education.

Amendment 550 (Walker 12) – Bingo games in city of Jasper.

Amendment 552 (Houston 6) – Election of Dothan City Board of Education.

Amendment 553 (Morgan 19) – Election of Decatur City Board of Education.

Amendment 555 (Section 284.01) – Amending Amendment 425.

Amendment 558 (Section 94) – Amending Section 94.

Amendment 566 (Cullman 2) – Election of members of Cullman City Board of Education.

Amendment 568 (Franklin 3) – Incorporation of regional airport authority by city of Red Bay.

Amendment 570 (Lee 5) – Police jurisdiction and planning and zoning authority of municipalities of Lee County.

Amendment 574 (Morgan 23) – Hartselle ad valorem tax.

Amendment 575 (Morgan 20) – Decatur ad valorem tax.

Amendment 591 (Macon 11) – Tuskegee electric utility.

Amendment 621 (Section 111.05) – Unfunded mandates on local governments.

Amendment 622 (Section 3.01) – Alabama Religious Freedom Amendment.

Amendment 623 (Section 228.01) – Trust funds for long-term benefit of Cities.

Amendment 627 (Baldwin 1) – Baldwin County annexations.

Amendment 642 (Lee 2) – Lee County and city of Opelika economic and industrial development.

Amendment 643 (Limestone 7) – Limits on planning and zoning in Limestone County.

Amendment 659 (Section 104.01) – Election of city board of education.

Amendment 664 (Calhoun 19) – Election on Anniston City Board of Education.

Amendment 665 (Section 104.02) – City board of education to be elected when population Exceeds 125,000.

Amendment 666 (Section 219.04) – County and Municipal Government Capital Improvement Trust Fund and Alabama Capital Improvement Trust Fund.

Amendment 668 (Section 219.05) – Income distribution to counties and municipalities from Alabama Trust Fund.

Amendment 674 (Lowndes 3) – Bingo in White Hall.

Amendment 677 (Calhoun 20) – Anniston Water and Sewer Board directors.

Amendment 732 (Lowndes 4) – Bingo in White Hall.

Amendment 738 (Talladega 13) – Talladega council-manager form of government.

Amendment 743 (Greene 1) – Bingo Games in Greene County.

Amendment 744 (Macon 1) – Bingo Games in Macon County.

Amendment 752 (Morgan 21) – Promotion of Commercial Development in City of Hartselle.

Amendment 769 (Macon 10) – Alabama Foreign Trade Investment Zone in City of Tuskegee.

Amendment 772 (Section 94.01) – Promotion of Economic and Industrial Development by County Commission.

Amendment 788 (Escambia 2.01) – Retirement for Mayors in Escambia County.

Amendment 797 (Mobile 37) – Prichard Foreign Trade Investment Zone.

Amendment 799 (Shelby 9) – Enforcement of traffic laws on certain private roads in gated communities in Shelby County.

Amendment 805 (Limestone 14) – Ad valorem tax for school or educational purposes.

Amendment 806 - Municipalities not located within the boundaries of Blount County may not annex any territory within Blount County without the approval of a majority vote of the qualified electors of Blount County.

Amendment 807 (Macon 11) – Utilities board in Tuskegee

Amendment 822 (Mobile 1.10) – Municipalities in Mobile County may establish a procedure to declare a dog dangerous and be humanely destroyed and impose criminal penalties on the owners of a dog declared to be dangerous.

Amendment 824 (Russell 9) – Sale of Phenix City water and sewer system by referendum.

Amendment 837 (Shelby 7.10) -- Portion of landfill revenues for certain county purposes.

Amendment 838 (DeKalb 10) — Inmates of Fort Payne city jail authorized to work on public and private property.

Amendment 847 (Amendment to Amendment 530) (Macon 4) -- Court costs increased for county jail.

Amendment 848 (Cullman 1.50) -- Occupational tax prohibited.

Amendment 850 (Randolph 2.50) -- Moneys paid into county capital improvement fund may be used for economic development.

Amendment 853 (Chambers 7.10) -- Ad valorem tax levied for public library purposes extended to 2033.

Amendment 854 (Calhoun 9.50) -- Municipal business license tax on rental of residential real estate based on per unit basis prohibited.

Amendment 855 (Hale 6) -- Excess ad valorem tax funds collected for new jail authorized for law enforcement purposes; continuance of tax; retroactive effect.

Amendment 857 (Montgomery 3.50) – County Board of Education members elected for terms of four years.

Amendment 858 (Baldwin 15.50) -- Occupational tax prohibited.; Additional sales and use tax levied for education.

Amendment 859 (Tuscaloosa 12) -- Occupational tax prohibited.

Amendment 861 (Baldwin 1.10) -- Stockton Landmark District boundaries established.

Amendment 862 (Madison 0.60) -- Procedure for humanely destroying or properly enclosing a dog declared dangerous, immunity for county officers, penalties.

Amendment 875 (Lawrence 5.50) -- Municipality located entirely outside of county prohibited from imposing ordinance, regulation, or tax in its police jurisdiction in Lawrence County.

Amendment 876 (Calhoun 5.50) -- County commission authorized to process absentee ballots.

Amendment 881 (Franklin 9.50) -- County license tax for school purposes, percentage allocated for matching funds from Alabama Transportation Rehabilitation and Improvement Program.

Amendment 885 (Escambia 1.50) -- Funds may be borrowed from county oil and gas severance trust fund for economic development, roads and bridges, and capital projects.

Amendment 882 (Mobile 34.51) -- Water Works and Sewer Board of the City of Prichard transferred to the Mobile Area Water and Sewer System.

Amendment 893 (Shelby 0.50) -- Sale of alcoholic beverages on Sunday authorized.

Amendment 900 (Baldwin 17) -- Municipal Planning Commission, additional members; eligibility terms, duties.

Amendment 901 (Monroe 5) -- Tax authorized on tobacco products; collection, distribution of proceeds.

Amendment 910 (Baldwin 8.05) -- Mayors of participating municipalities eligible to participate in employees' retirement system.

Amendment 914 (Calhoun 6.50) -- Unincorporated territory subject to police and planning jurisdictions of only those municipalities located wholly or partially within county.

Amendment 921 (Baldwin 15.70) -- Golf carts authorized, limited operation on streets and roads, restrictions for use.

Amendment 924 (Marion 4.50) -- Property tax increased for fire protection in the county.

Amendment 927 (Geneva 1.20) -- Judge, age at time of qualifying for election or appointment to office not to exceed 75 years.

Amendment 931 (Calhoun 1) (Amendment to Amendment 508) -- Bingo regulated.

Amendment 932 (Franklin 9.50) -- County license tax for school purposes, percentage allocated for costs associated with construction, maintenance, and repair of roads and bridges. Amendment to Amendment 881.

Amendment 934 (Madison 2.50) -- County commission authorized to adopt noise ordinance and enforce noise levels.

Amendment 935 (Calhoun 6.51) -- Unincorporated territory subject to police and planning jurisdictions of only those municipalities located entirely in county; Oxford excepted

Amendment 936 (Chilton 1.50) -- Legislature authorized to provide procedure to declare a dog dangerous.

Amendment 938 (Marengo 10.50) -- Golf carts authorized, limited operation streets and roads; restrictions for use.

Amendment 941 (Montgomery 6.71) -- Members of Montgomery County Commission authorized to participate in employees' retirement system.

Amendment 944 (Jackson 6.10) -- Cumberland Mountain Water and Fire Protection Authority authorized to provide natural gas service in the county within the service area of the authority.

Amendment 946 (Morgan 11.20) -- Compensation, annual salary provided for, other amounts received for feeding prisoners deposited in separate account and used only for feeding prisoners.

5. Duties of the Mayor and Council

One of the most misunderstood aspects of municipal government is the separation of powers between the mayor and the council. Like government on the state and federal levels, municipal government is divided into three separate but equal branches: executive, legislative and judicial. Each of these branches has distinct duties and powers and restrictions on how far it can intrude into the affairs of the other branches.

At the municipal level, the mayor serves as the head of the executive branch. As such, the mayor is responsible for overseeing the day-to-day operations of the municipality. He or she oversees municipal employees, makes sure that bills are paid on time, executes municipal contracts and, in general, performs many of the same functions as a CEO of a private corporation. Section 11-43-81, Code of Alabama 1975.

In municipalities of less than 12,000 inhabitants, the mayor also presides over council meetings and serves as a member of the council. In these cities and towns, the mayor may vote on any issue before the council, introduce measures and participate in debates to the same extent as members of the council. Section 11-43-42, Code of Alabama 1975.

In cities with populations of more than 12,000, the mayor is not a voting member of the council. While not a voting member of the council, he or she does have a veto over any permanent action taken by the council. The council can override the mayor's veto by a two-thirds vote. Section 11-43-42, Code of Alabama 1975.

The council is the legislative branch. The council has authority over the finances and property of the municipality. The council establishes policies, passes ordinances, sets tax levels, determines what sorts of services the municipality will offer and has authority over all other legislative aspects of municipal government. Section 11-43-56, Code of Alabama 1975.

Perhaps the best way to sum it up is that the mayor is the chief executive officer of the city and is charged with the duty of supervision of the affairs of the city under policies fixed by the council. AGO to Hon. A.J. Cooper, August 15, 1973.

Citizens and councilmembers must understand that individual councilmembers, acting alone, have no greater power or authority than any other citizen of the municipality. The council can only act as a body at a legally convened meeting. No official action may be taken by any individual council member. All official action must be taken by the council acting as the governing body. For instance, the Attorney General has ruled that individual councilmembers

cannot direct the activities of a municipal fire department, even pursuant to a properly enacted ordinance. AGO 1988-262. Other similar rulings include:

- Individual city councilmembers may not supervise and control municipal departments. The city council must approve expenditures of municipal funds. AGO 1991-147.
- A town council may not delegate its authority to appoint recreational board members to individual councilmembers. AGO 1991-402.

It is clear, then, that the primary factor in the success of a municipal government lies in the working relationship between the mayor and the city council. Elected city officials must recognize that they have dedicated themselves for the next four years to accomplishing a common goal – providing the city or town with the best municipal government possible. To achieve this goal, the mayor and the council must maintain a harmonious working relationship.

At times the mayor and the council will disagree over the best solution to a problem. Disagreement is not only inevitable; it can be healthy. Negotiating opposing viewpoints can often lead to unexpected solutions. City officials must learn that when an opposing view is taken by someone else in government, it is merely a different opinion on the best way to represent the citizens of the municipality.

The success of municipal government also depends upon the willingness of each individual councilmember to cooperate with other councilmembers in granting time, knowledge and experience toward representing the citizens of the municipality. Under the mayor-council form of government, the council is granted legislative powers to determine the policies that will be followed in the administration of the municipal government. In exercising these powers, the council determines the extent of the governmental and corporate functions of the municipal government.

Equally vital is the willingness of the mayor to properly administer the ordinances passed by the council. The mayor is charged with the general supervision and control of municipal departments, programs, and facilities. The advice, recommendations and viewpoints of the mayor generally reflect the thoughts of the voters who elected him or her and are worthy of careful consideration by the council.

The laws of Alabama necessitate a close working relationship between the council and the mayor. Without that spirit of cooperation, a municipal government will

not function properly. Open communications between the mayor and the council should be maintained at all times. Before acting on any proposal, the council should carefully consider the advice, views and recommendations of the mayor. Similarly, the mayor should also listen to council discussions in order to understand the reasoning behind council actions and the intent of the council as it passes ordinances and resolutions.

Powers of Appointment

In *Scott v. Coachman*, 73 So.3d 607 (Ala. 2011), the Supreme Court of Alabama held that the mayor has the authority to hire most municipal employees. The Court in *Coachman* interpreted Section 11-43-81, Code of Alabama 1975, which provides that the mayor has the “power to appoint all officers whose appointment is not otherwise provided for by law.” The Court ruled that the council cannot remove the mayor’s appointment authority under Section 11-43-81 by ordinance. Since at least 1957, the Attorney General had interpreted the phrase “otherwise provided by law” to mean that the council could pass an ordinance - a law - to assume the power to appoint employees and officers. *Coachman* overturned this interpretation and stated that unless a state statute authorized a different appointment method, the mayor had the power to appoint all officers and, presumably, employees.

In cities having a population of more than 6,000, there shall be elected by the council, at its first regular meeting or as soon thereafter as practicable, a city treasurer and a city clerk, who shall hold office until the next general election and until their successors are elected and qualified, and such council may elect an auditor, **and any officers whose election is required by ordinance**, and, except as otherwise provided, the council shall have authority to fix the terms of office, prescribe their duties and fix the salaries of the officers. Section 11-43-3, Code of Alabama 1975. This section specifically gives the council the authority in municipalities of over 6,000, to identify “officers” of the city by ordinance and provide for their election by ordinance.

In cities having a population of less than 6,000 and in towns, the council shall elect a clerk and fix the salary and term of office, **and may determine by ordinance the other officers of the city or town, their salary, the manner of their election and the terms of office**. The clerk and such other officers elected by the council shall serve until their successor or successors are elected and qualified. Section 11-43-4, Code of Alabama 1975. While worded differently than §11-43-3, this section also gives the council, in municipalities of under 6,000 population, the authority to identify officers of the city by ordinance and to elect those officers or provide for another “manner of appointment” by ordinance. The council may provide

for a tax assessor, tax collector, chief of police, and chief of the fire department and shall specifically prescribe their duties. The council shall designate the persons who shall administer oaths and issue warrants of arrest for violations of law and the ordinances of the city or town and the persons authorized to approve appearance bonds of persons arrested. This section identifies specific officers of a municipality and gives the council the authority to provide for these officers should it choose to.

In combination with Section 11-43-3 and Section 11-43-4 of the Code of Alabama 1975, the council, in providing for these “officers” could, by ordinance, provide for their manner of appointment, including appointment by the council rather than the mayor. In addition to the above listed code sections, Section 12-14-30 of the Code of Alabama 1975, specifically gives the council the authority to appoint, by vote of a majority of its members, the judges of the municipal court. Also, Section 11-43-20 of the Code of Alabama 1975, authorizes the city council to provide for, by ordinance, a city manager. The council is authorized to establish a police force under the general supervision of a police chief. Section 11-43-55, Code of Alabama 1975.

Where a municipality has created, *by ordinance*, the office of city attorney and the ordinance fails to designate the appointing authority, the Mayor is the appointing authority for the city attorney. AGO 2009-054. **NOTE:** Where a municipality contracts with an attorney to provide legal services for the municipality, the council must approve the contract and its terms.

The Attorney General, in Opinion 2012-039, held that the specific language of Sections 11-43-3 and 11-43-4 don’t limit the council’s appointment power only to listed “offices.” Instead, the Attorney General noted that “Section 11-43-3 authorizes a city council to elect any officer whose election is required by ordinance, to prescribe the duties, to fix salaries and to set the terms of office for these officers.” Therefore, the Attorney General concluded that the legislature has created a method for the council to appoint other positions than those listed above and designate them as “officers.” The Attorney General, though, stated that there are limitations on the council’s power to designate certain positions as officers. Using the definition in Black’s Law Dictionary, the Attorney General concluded that: “any office created by a city council must be assigned specific duties and hold a position of authority. Paramount to the authority of an officer is the ability to discharge some portion of the sovereign power. The Supreme Court of Alabama, in defining the term “office” stated the following: “We apprehend that the term “office” implies a delegation of a portion of the sovereign power, and the possession of it by the person filling the office; and the exercise of such power, within legal limits, constitutes the correct discharge

of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still, it is a legal power, which may be rightfully exercised, and, in its effects, will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment, merely, has none of these distinguishing features.” *State v. Stone*, 240 Ala. 677,680, 200 So. 756, 758 (1941). An employee, instead, is someone who “works within the service of another person (the employer) under an express or implied contract for hire (A)n officer must have responsibilities and hold a position that is superior to that of an employee ... Accordingly, an officer is limited to a person that exercises some level of authority, presumably over employees, and performs some discretionary, policy-making functions.”

In summary, according to *Coachman*, the mayor has the power to appoint anyone whose appointment “is not otherwise provided for by [state] law.” State law clearly provides that the council shall appoint certain positions, such as clerk and treasurer. State law also allows the council to create “offices” by ordinance and, therefore, fill those positions. Keep in mind that not every position within the municipality can be designated as an office. In order to hold an office, a person must exercise some “level of authority, presumably over employees” and perform discretionary, policy-making functions. If so, the council may pass an ordinance making these positions officers of the municipality.

Powers of Dismissal

Section 11-43-160, Code of Alabama 1975, states that any person appointed to an office in any city or town may, for cause, after a hearing, be removed by the officer making the appointment. Section 11-43-81, Code of Alabama 1975, states that the mayor may remove, for good cause, any non-elected officer appointed by him or her and permanently fill the vacancy. In *State v. Thompson*, 100 So. 756 (1924), however, the Alabama Supreme Court ruled that where the mayor has been given the power to make appointments solely on his or her own discretion and without the approval of the council, the mayor must grant a hearing to the appointee before the dismissal. Of course, the appointee may waive this right to a hearing.

The mayor may remove any officer for good cause, except those elected by the people, and permanently fill the vacancy if the officer was elected by the council or appointed with its consent. In either of these cases, the mayor must report the dismissal to the council and state the reasons for the action to the council at its next regular meeting. If the council sustains the mayor’s act by a majority vote of those elected to the council, the vacancy must be filled

as provided in Title 11 of the Code of Alabama. Again, Section 11-43-81 states that the appointee must be granted a hearing, which can be waived by the employee, before the dismissal becomes permanent. Section 11-43-160 of the Code of Alabama gives the city council the authority to remove any officer in the several departments, but not employees. The term “officer” includes all those positions specifically set forth in the Code of Alabama as “officers,” as well as any position created by the city council pursuant to ordinance. An officer is limited to a person that exercises some level of authority, presumably over employees, and performs some discretionary, policy-making functions. A city council is not authorized to fire an “employee” pursuant to section 11-43-160 of the Code. AGO 2012-039.

In municipalities having a population of less than 12,000 inhabitants, according to the last or any subsequent federal census, the mayor may vote on the removal of any person appointed to office in the municipality pursuant to this section and the mayor shall be considered as a member of the council in determining whether there is a two-thirds vote of the council for the removal of the officer. Section 11-43-81, Code of Alabama 1975. The mayor may not permanently remove the police chief or any other officials who were not appointed by him or her, but the mayor may temporarily remove such officials pending a hearing on the question by the council. The mayor may fill the vacancy temporarily by the appointment of an acting successor who is entitled to pay for services rendered. AGO to Hon. Robert S. Glasgow, July 19, 1956. The mayor of a city of 12,000 or more in population does not sit as a member of the council and, therefore, has no vote on questions of appointment or dismissal of officers or employees who come before the council. The mayor of a city of 12,000 or more in population does not have the power of veto over appointments made by the council.

The fact that the mayor, who voted and participated in a personnel hearing before the council concerning an officer’s dismissal, may have had prior and independent knowledge of the dispute would not, standing alone, be sufficient to support a finding that the officer was deprived of an opportunity for an impartial hearing. However, the Alabama Supreme Court has held if before the hearing, a mayor and a councilmember had decided to uphold the discharge of the officer before evidence was presented, participation of the mayor and councilmember in the council hearing denied the officer due process. *See, Chandler v. Lanett*, 424 So.2d 1307 (Ala. 1982); *see also, Guinn v. Eufaula*, 437 So.2d 516 (Ala. 1983); *Stallworth v. Evergreen*, 680 So.2d 229 (Ala. 1996).

Municipal Finances

Section 11-43-84, Code of Alabama 1975, requires

the mayor, as chief executive officer, to present a written statement to the council at least once every six months showing the financial condition of the municipality and the steps the mayor proposes to take for the protection of the city or town. This section also states that the mayor shall require any officer of the city or town to make a report at such times as the mayor or the council directs. This authority is intended to facilitate supervision of the various municipal departments and officials and to assist the mayor in making reports to the council.

Section 11-43-85, Code of Alabama 1975, requires the mayor to appoint an expert accountant to make a detailed examination of all books and accounts of the city and to make a full report in writing, under oath, to be submitted to the council at its first meeting after completion of the report. This report must be placed in the minutes of the council. Section 11-43-85 also authorizes the mayor to request the Examiners of Public Accounts to audit the municipality. AGO 1992-322.

The council does not have authority to appoint its own accountant in lieu of the mayor's appointment. Further, the mayor is authorized to fix the accountant's fee without the approval of the council and the council is legally obligated to pay a reasonable amount for these services. If the council is not satisfied with the audit provided by the mayor's accountant, the council may order an additional audit to be made by an auditor of its choice.

The council is required to appropriate the sums necessary for the expenditures of city departments, and for interest on indebtedness, not exceeding in the aggregate 10 percent of its estimated receipts. In addition, the council cannot appropriate in the aggregate an amount in excess of its annual legally authorized revenue. Section 11-43-57, Code of Alabama 1975.

While a city is not required to adopt a budget, most municipalities do so to ensure that citizens obtain maximum service for each tax dollar. As chief executive officer, the mayor is in the best position to determine the requirements of the various municipal departments. While the mayor does not draft the final budget, he or she compiles estimates of revenues and expenses and presents those figures to the council along with recommendations for appropriations and for revenue-raising procedures, if necessary. The municipal budget is not considered permanent and, therefore, is not subject to the mayor's veto. AGO 1991-180.

The mayor plays an important role in the disbursement of municipal funds. Warrants must be drawn by the clerk, approved by the mayor or such other person as the council designates and presented to the treasurer for payment. The Alabama Supreme Court held in *Edwards v. 1st National Bank of Brewton*, 377 So.2d 966 (1979), the council may, by ordinance, remove the mayor's authority to sign checks.

See, AGO 1990-284; see also, AGO 2001-260.

All expenditures of municipal funds must be specifically approved by the mayor or by some other person designated by the council. Section 11-43-120, Code of Alabama 1975. The council may, however, make a purchase over the objection of the mayor. AGO to Hon. Norman Plunkett, June 22, 1977.

Further, Section 11-43-120 provides that no warrant shall be drawn except by the authority of law or ordinance, and the treasurer shall allow no expenditure unless it is approved by ordinance or by the mayor. If the mayor questions the legality of an expenditure, the clerk and treasurer and, if necessary, the city attorney, should be consulted about the matter. The mayor may be held responsible for unauthorized expenditures made on the basis of his or her approval. See, *Altmayer v. Daphne*, 613 So.2d 366 (Ala. 1993). Additionally, the council should stress that only those with authority to authorize expenditures should do so, because in *Brannan and Guy, P.C. v. Montgomery*, 828 So.2d 914 (2002), the Alabama Supreme Court held where the authority to set the compensation rates of contract attorneys rests solely with the mayor, a discussion of rates between the city attorney and the contract attorney at the request of the mayor does not create a unilateral contract that binds the city.

While it is unnecessary for the council to validate each disbursement individually, Section 11-43-120 requires that all claims, requisitions and demands against a municipality for goods purchased or debts incurred be presented to the council for approval, unless already provided by ordinance or resolution.

Municipal Contracts

Unless otherwise directed by state law or ordinance, the mayor is authorized to enter into and execute all municipal contracts in the name of the city or town. However, the mayor cannot change the price fixed by the council without authority from the council to do so. *Albany v. Spragins*, 93 So. 803 (Ala. 1922). All obligations for the payment of money by the municipality, except for bonds and interest coupons, shall be attested by the clerk. Section 11-47-5, Code of Alabama 1975.

The mayor is required to see that all contracts with the municipality are faithfully performed or kept. The mayor is required to execute all deeds and contracts and bonds required in judicial proceedings for and on behalf of the city or town. No sureties shall be required on the bond. Section 11-43-83, Code of Alabama 1975.

The Alabama Supreme Court held that, absent authorization from the council, the mayor does not have the authority to enter into and execute a contract on behalf of the municipality. While the Court recognized that the

mayor is authorized to enter into and to execute contracts, it determined that the authority cannot be exercised without the direction and authorization of the council. *Town of Boligee v. Greene County Water & Sewer Auth.*, 77 So.3d 1166 (Ala. 2011). Accordingly, the general rule is that the only method by which an employee or official may expend funds or be given authority to bind the municipality to a contract is by an affirmative vote of the council reflected in the minutes. An exception is the mayor's authority to contract for an annual municipal audit pursuant to Section 11-43-85, Code of Alabama 1975.

Section 11-47-20 of the Code of Alabama, 1975 authorizes a municipality, by ordinance entered on the minutes of the council, to dispose of any real property not needed for public or municipal purposes. The council directs the mayor to make title thereto. The council may file a writ of mandamus against the mayor if the mayor refuses to execute a deed as required. AGO 1995-113. A conveyance made by the mayor in accordance with this ordinance invests the grantee with the title of the municipality. Section 11-47-21 requires a municipality to follow the same procedure when it wishes to lease any of its real property. No similar requirement is made for personal property. *See*, Section 11-43-56, Code of Alabama 1975. For further discussion on this topic, please see the article entitled "Sale of Lease of Unneeded Municipal Property" located in the *Selected Readings for the Municipal Official* (2016 ed.).

If a public official, public employee, member of the household of the public official or employee, or business with which that person is associated, enters into a contract to provide goods or services and payment, in whole or part, for the contract will come out of state, county or municipal funds, must be filed within the Ethics Commission within ten days after the contract has been entered into, regardless of the amount of the contract or whether or not the contract has obtained through competitive bid. AGO 2001-029.

Legislative and Judicial Powers of the Mayor

Section 11-45-1, Code of Alabama 1975, gives municipalities the power to adopt ordinances and resolutions to carry into effect the powers and duties conferred on it by statute and to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of the citizens of the municipality. The council, as the legislative body of the municipality, is responsible for enacting these ordinances.

In municipalities of less than 12,000 in population, the mayor sits with, presides over and is considered a member of the municipal council. This provision entitles the mayor to vote for or against the adoption of ordinances that the council considers. It is unnecessary that an ordinance

be approved by the mayor or authenticated by his or her signature. Section 11-43-2, Code of Alabama 1975.

In cities with populations of 12,000 or more, the mayor does not sit as a member of the council, unless the city has elected by ordinance to continue operating under the legislative functions of a city with a population less than 12,000. *See* Section 11-43-2, Code of Alabama 1975. Therefore, the clerk must transmit all ordinances and resolutions intended to be of a permanent nature to the mayor within 48 hours after passage by the council. If the mayor disapproves of an ordinance or resolution transmitted by the clerk, he or she must, within 10 days of its passage by the council, return it to the clerk with the written objections. The clerk is to report these objections to the council at its next regular meeting. If the mayor fails to return the ordinance within 10 days, the clerk shall publish the ordinance as though the mayor had signed his or her approval. *See*, Sections 11-45-4 and 11-45-5, Code of Alabama 1975. The mayor has no authority to veto an ordinance which merely disposes of an administrative matter. AGO to Hon. Carl H. Kilgore, July 8, 1975. Therefore, nonpermanent ordinances are not subject to the mayor's veto. AGO 1991-072.

The council has the power to pass an ordinance over the mayor's veto by two-thirds vote of the members elected to the council. The vote must be recorded on the minutes. Section 11-45-5, Code of Alabama 1975.

Under general law, in municipalities over 12,000 in population, Section 11-45-5 gives the mayor power to approve or veto in whole or in part all ordinances or resolutions fixing the salaries of officers and employees. At its next regular meeting, the council votes on whether it will override the mayor's veto. If it fails to override the veto, then it votes upon the approval of the ordinances as approved by the mayor. However, the mayor of a city or town that has elected, by ordinance, to continue operating under the legislative functions of a city with a population less than 12,000 may not exercise veto power and his or her signature as the mayor may not affect the validity of an ordinance or resolution passed by the council while the mayor is a voting member of the council. *See* Section 11-45-5, Code of Alabama 1975.

Section 12-14-15, Code of Alabama 1975, states that the mayor, under authority as chief executive officer, has the power to remit fines and costs imposed by the municipal judge or the court to which an appeal was taken for violation of a municipal ordinance. In addition, the mayor has the power to pardon those convicted and sentenced by the municipal judge for violations of municipal ordinances. In an opinion to the city council of East Brewton, however, the Attorney General ruled that a mayor has no authority to dismiss pending cases in municipal court. AGO to

City Council of East Brewton, August 8, 1974. Further, the Attorney General has determined that the mayor has no authority to remit forfeitures levied against sureties on appearance bonds by the municipal judge. AGO to Hon. Richmond McClintock, July 17, 1957. Likewise, the mayor has no authority to approve or order the approval of any appearance bonds. AGO 1991-374. Similarly, councilmembers may not sign as surety on bail bonds for persons arrested by municipal police officers. AGO 1990-282.

Section 12-14-15 also requires the mayor to make a written report to the council at its first regular meeting each month, listing the fines and costs remitted, sentences commuted, and pardons and paroles granted by the mayor during the preceding months and stating the reasons therefore.

The council may, by a properly-adopted ordinance, authorize the mayor to administer oaths on behalf of the municipality, pursuant to Section 11-43-5, Code of Alabama 1975. AGO 1988-397.

The mayor may serve as superintendent of the municipal utility system. The council has no authority to reduce the mayor's salary by the amount he or she receives for serving as superintendent. AGO 1989-070.

Similarly, the council may not require the mayor to devote full time to his or her duties as mayor. AGO to Hon. William Willis, January 20, 1960. However, the Legislature may, by local act, require the mayor to serve in a full-time capacity. AGO 1988-298. *See also*, AGO 2005-076.

Legislative Powers of the Council

The council as a body establishes municipal policy, and the mayor is charged with the duty of implementing that policy. For instance, in AGO 1989-243, the issue was whether the mayor or the council had authority to establish the working conditions of a police dispatcher. The Attorney General concluded that the mayor could require the dispatcher to work at city hall unless the council provided otherwise. The question of where the dispatcher performed her duties was a matter of policy, a decision for the council to resolve. Until the council acted, it was the mayor's decision. However, once the council acted, the mayor was required to implement that policy.

Another example of the legislative power of the council is found in AGO 1992-289. It concluded that the council is responsible for establishing policies which will be followed by municipal departments. Department heads may not set policies unless the council has delegated the authority to them. A council may delegate authority to set policy to the mayor, who may authorize department heads to determine policies which their departments will follow. Where the council has not acted, department heads may set informal procedures to be followed until the council acts.

Other examples of the legislative power of the council to draft city policy include AGO 1995-091, which concludes that the use of city-owned vehicles is under the control of the council, which should promulgate a policy regarding their use. This Opinion also makes clear that the council has the power to decide how much to reimburse an individual for the use of a personal vehicle on municipal business.

Subpoena Power

A municipal council or a committee authorized by the council may, by resolution, issue subpoenas pursuant to Section 11-43-163 of the Code of Alabama 1975. This does not require a permanent resolution. The council or committee may impose punishment pursuant to Section 11-43-163 for failure to comply with the subpoena. AGO 1999-076.

Council Committees

While no law requires a council to establish committees, most councils set up committees to study the needs of the various departments of municipal government and to make recommendations regarding the operating policy of each department. Council committees should confer with the mayor for his or her views on the policies and programs under consideration since, as the chief executive, the mayor will be responsible for carrying them out.

When questions about council committees arise, they usually involve the desire of councilmembers to directly control the functions of city employees. It must be remembered that council committees are not administrative bodies and have no authority to exercise any executive power over the administrative branch of the municipal government. This means that the council cannot direct and supervise the work of employees, even through the creation of a committee. AGO to Hon. Norman Plunkett, June 22, 1977; AGO 1988-262; and AGO 1991-147. Council committees are advisory only and cannot supervise or give directions to city employees. AGO 1985-156 (to Hon. H.T. Mathis, January 8, 1985).

The sole purpose of committees is to give detailed attention to the programs and policies concerning the departments entrusted to their study and to report their findings to the full council and the mayor so appropriate actions may be taken.

Generally, the presiding officer of the council makes appointments to the committees, which usually consist of three councilmembers each. In AGO 1981-409 (to Hon. Gwin Wells, June 4, 1981), however, the Attorney General stated that council committees may be appointed by the mayor, or by the mayor and the council, depending on the internal rules of procedure established by the council. The mayor of a municipality of under 12,000 in population is a

member of the municipal council and therefore may vote on and serve on these committees.

6. The Municipal Police Jurisdiction

Cities and towns continue to witness the development of subdivisions, shopping centers, and other business developments on the perimeters of communities. A substantial percentage of the population, now classified as “urban,” lives not within the municipality but on the fringes just beyond the corporate limits.

Regulating this growth, protecting this population, and servicing these areas are matters of importance to a municipality, the municipal citizen and the fringe dweller. In all likelihood, the municipality will annex these lands at some time in the future. Therefore, the areas must be developed in an orderly manner with lasting public improvements. Conditions of good order and sanitation in the fringe areas affect municipal citizens and their property, as well as the fringe dwellers.

Opposing views on extraterritorial powers have developed over the years. One theory is that municipalities have no such powers, even if it means that the fringe enjoys municipal benefits without paying the price. Alabama’s viewpoint favors such powers as necessary to protect the property, health, safety and welfare of municipal citizens and as the quid pro quo for services rendered. *Van Hook v. Selma*, 70 Ala. 361 (Ala. 1881).

The Alabama statute which extends municipal police, sanitary and business licensing powers to those residing in the police jurisdiction of a municipality, without permitting these residents to vote in municipal elections, has been upheld by the U.S. Supreme Court in the case of *Holt Civic Club v. Tuscaloosa*, 99 S. Ct. 383 (1978).

The case arose when the Holt Civic Club and certain individual residents of Holt, a small unincorporated community located within the police jurisdiction of the City of Tuscaloosa, brought a statewide class action suit challenging the constitutionality of the law which gives municipalities powers in the police jurisdiction. The court ruled that the statute was a rational legislative response to the problems faced by the state’s burgeoning cities and that the legislature had a legitimate interest in ensuring that residents of areas adjoining city borders are provided such basic municipal services as police, fire and health protection. The court held that it was not unreasonable for the legislature to require police jurisdiction residents to contribute to the expense of such services through license fees, on a reduced scale, under the statute.

Municipal authority in the police jurisdiction has come under fire in recent years and remains a hot button issue resulting in frequent attempts to further limit this authority legislatively. In 2015 the Legislature passed Act

2015-361 which made significant changes to and places additional burdens on municipalities who are exercising their police jurisdiction authority. In 2016 the Legislature passed Act 2016-391 amending Act 2015-361 to provide prospectively that the police jurisdiction of municipalities would not extend beyond the corporate boundaries of the municipality without an affirmative vote of the municipal governing body. See Section 11-40-10, Code of Alabama 1975. This article discusses that authority as well as the important changes that have taken place recently.

Alabama Laws

Alabama’s laws granting extraterritorial powers to cities and towns are probably the broadest of any state. See *McQuillin, Municipal Corporations*, 3rd Ed., Section 24.59. These laws fall into two groups: (1) The exercise of general extraterritorial police powers, which is based on grants of authority in Sections 11-40-10 and 11-51-91, Code of Alabama 1975, and (2) specific grants of particular powers which may be exercised “within and without,” “partially within and partially without,” “within the surrounding territory,” “within the county,” “within other municipalities” and “within ____ miles of the corporate limits.” The following paragraphs summarize these laws.

Police Jurisdiction Established by State Law

Section 11-40-10 of the Code of Alabama 1975, provides for the extraterritorial police jurisdiction of cities and towns. The police jurisdiction of cities having 6,000 population or more inhabitants extends for a distance of 3 miles beyond the corporate limits. In cities of less than 6,000, and in towns, the police jurisdiction extends for a distance of 1.5 miles beyond the corporate limits. The police jurisdiction of any municipality which pursuant to this section extends to include part of any island which has water immediately offshore adjacent to the boundary of the state of Florida, upon approval of the council of the municipality, shall extend to include the entire island including the water adjacent to the island extending to the existing police jurisdiction of the municipality and extending to the Florida state boundary where applicable.

Section 11-40-10 has been amended numerous times in the past decade. As a result of Act 2015-361, a municipality may only extend its police jurisdiction as a result of an annexation once a year, on January 1, and only for those annexations finalized on or before October 1 of the previous year. Further, municipalities must, on or before January 1, submit a map showing the boundaries of the municipal limits and the police jurisdiction to the Atlas Alabama

website at no cost to the municipality. It is very important to note that at the time of publication of this article, Atlas Alabama is not available for this purpose and the Alabama Department of Revenue is working on making an on-line alternative to Atlas Alabama available for posting notice and maps as required in Act 2015-361.

Act 2016-391 provides that any extension of the police jurisdiction of any municipality shall not be effective beyond the corporate boundaries of the municipality without an affirmative vote of the municipal governing body. Further, any municipality which has a three-mile police jurisdiction may reduce its police jurisdiction to a mile and a half by ordinance of the municipality, which shall take effect on the first day of January following its adoption on or before the preceding first day of October. Once a municipality has adopted an ordinance to reduce its police jurisdiction to a mile and one-half, that ordinance cannot be amended, altered or repealed except by local law.

The attorney general has ruled that the distance of the police jurisdiction boundary is computed on a straight line from the corporate limits marking a curvilinear police jurisdiction boundary opposite the corporate limits. AGO to Z. B. Skinner, July 9, 1962. A police jurisdiction is measured by drawing a straight line perpendicular from the municipal limits following standard land surveying practices. AGO 96-00218.

The fact that a municipality has no authority to enforce its police and sanitary regulations in an area designated as an industrial park has no effect on the territorial boundaries of the city's police jurisdiction and would not act to extend the territorial limits of the police jurisdiction beyond the outer borders of the industrial park. The area included in the industrial park is still used in calculating the territorial limits of the police jurisdiction. AGO 2007-005.

While the Attorney General has previously opined that a municipality cannot reduce the size of its police jurisdiction to an area less than that set by Section 11-40-10. AGO 87-00305 (to the Hon. Mac H. Langley, September 2, 1987), Section 11-40-10 was amended by Act 2015-361 to provide that a municipality may choose whether or not to exercise authority or levy taxes in the police jurisdiction surrounding non-contiguous territory regardless of the fact that the municipality exercises authority in the police jurisdiction of contiguous property. A police jurisdiction can only be changed by legislative act. AGO 93-00069. For example, Chapter 44B of Title 11 of the Code of Alabama 1975, establishes the procedures for Class 4 municipalities, organized under Chapter 44B of Title 11, to delete non-urban territory from its police jurisdiction or planning jurisdiction. A local act limiting the extent of the police jurisdiction supersedes the general law. AGO 98-00114. Within the police jurisdiction, the ordinances

of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations, have full force and effect. Section 11-40-10 also provides that such ordinances may be enforced on any property or rights-of-way belonging to the city or town. Based on this clause, it has been held that the police and sanitary ordinances of a municipality are enforceable on property owned by the city but located 30 miles from its corporate limits in another county. See *Birmingham v. Lake*, 10 So. 2d 24 (1942). Although a municipality has the authority to maintain health and cleanliness within its police jurisdiction, the authority to regulate solid waste extends only to the corporate limits and does not extend into the municipal police jurisdiction. *Disposal Solutions-Landfill v. Lowndesboro*, 837 So.2d 292 (Ala.Civ.App. 2002). A recent change to the law requires municipalities to file a 30 day notice before enforcing ordinances within the police jurisdiction. See Act 2015-361. The notice is to be submitted to Atlas Alabama at no cost to the municipality. As noted earlier, at the time of publication of this article, Atlas Alabama is not available for this purpose and the Alabama Department of Revenue is working on making an on-line alternative to Atlas Alabama available for posting notice and maps as required in Act 2015-361.

Section 32-5A-171 Code of Alabama 1975, provides an exception to the rule that a municipality may enforce ordinances in the police jurisdiction. This statute prohibits law enforcement officers of municipalities of less than 19,000 in population from enforcing speed limits on interstate highways. The law also prohibits municipal law enforcement officers in every municipality from enforcing speed limits on highways outside the corporate limits and in the police jurisdiction, unless the speed limit was set pursuant to Sections 32-5A-172 or 32-5A-173. AGO 96-00247. Municipal law enforcement officers may cite drivers in a municipal police jurisdiction for violating Section 32-5A-170 of the Code of Alabama 1975 ("Reasonable and Prudent Speed") but they must specify the hazardous conditions present in the "Facts Relating to the Offense" box on the Uniform Traffic Ticket and Complaint (UTTC) to distinguish the charge from the provisions specified in Section 32-5A-171 of the Code of Alabama 1975. AGO 2004-061.

Level of Police Jurisdiction Services

If a municipality exercises powers in the police jurisdiction, it does not have to provide all regulatory services, provided it spends as much or more in the area than is collected from residents and businesses in the area. AGO 95-00165. If a municipality provides services to any area of its police jurisdiction, however, it must provide the same services to all areas equally. AGO 87-00171. For

example, if a city has elected to provide fire protection services in its police jurisdiction, these services must be provided to all areas of the police jurisdiction. The only exception to this rule is the provision in Act 2015-361 authorizing a municipality to choose whether or not it will exercise its police jurisdiction around non-contiguous property. A city may contract with a rural volunteer fire department to provide fire protection in a certain portion of its police jurisdiction, provided that fire protection provided by the volunteer fire department is equal to that provided elsewhere in the police jurisdiction. There can be no charge for the fire protection in that area of the police jurisdiction unless all areas of the police jurisdiction are charged for fire protection. AGO 92-00260. In other words, a municipality which provides services to the police jurisdiction must provide them uniformly except, possibly, around non-contiguous portions of the corporate limits. It has been held that a city may not contract with businesses and individuals in the police jurisdiction without offering contracts to all businesses and individuals similarly situated. AGO 95-00081.

A municipality's authority over fire protection and rescue services in the police jurisdiction is not exclusive. E-911 boards, municipalities, and volunteer fire departments should work together to ensure the most efficient service to persons in their districts. A municipality may contract with an E-911 board and the municipality may contract with a volunteer fire department to provide service in a portion of the police jurisdiction, provided that the protection is equal to that provided elsewhere in the jurisdiction. AGO 2010-103. The attorney general held that a residence located in the police jurisdiction of a municipality in Tallapoosa County, but served by a county fire district, must continue to be served by the fire district until an election is held to abolish the district. AGO 99-0200. (This ruling only applies to Tallapoosa County)

Another possible exception to this rule is police protection. The Attorney General has ruled that although a municipality collects license taxes from businesses in the police jurisdiction, the police department is not required to answer all calls from persons within the police jurisdiction and is required only to patrol the area in the manner directed by the municipal governing body. AGO to Hon. Thomas H. Benton, March 6, 1975. Due to changes in the law, the League recommends that municipalities exercise caution in drafting such a policy.

Pertaining to the level of services that must be provided to residents of the police jurisdiction, the Alabama Supreme Court reversed an earlier decision about withdrawing services from the police jurisdiction. The Alabama Supreme Court held that equitable estoppel does not require the city to continue providing services in the police jurisdiction.

City of Prattville v. Joyner, 698 So.2d 122 (Ala. 1997) overruling *City of Prattville v. Joyner*, 661 So.2d 739 (Ala. 1995). Therefore, the city can now alter or withdraw those services from the area, even if the residents in the police jurisdiction come to "reasonably rely" upon the services because they have been provided for a number of years.

Termination of Police Jurisdiction Services

A municipality can terminate all services in the police jurisdiction provided it discontinues the collection of taxes in the area. Absent a contract, a city may terminate sanitary sewer services from residences and businesses that lie within its police jurisdiction, provided that the other services provided by the city in the police jurisdiction are based upon tax revenues collected by the city in the police jurisdiction, if any. AGO 2002-044.

There is no duty imposed on cities to provide municipal services to nonresidents when no taxes were collected in the police jurisdiction, and thus, a city could discontinue gratuitous sewer service in the city's police jurisdiction. Any municipal services being provided in a police jurisdiction without a formal contract or agreement may be prospectively altered in scope or terminated after appropriate prior public notice. *City of Attalla v. Dean Sausage Co., Inc.*, 889 So. 2d 559 (Ala. Civ. App. 2003); AGO 2007-044.

The attorney general ruled that a municipality has the authority to eliminate duplicative services in its police jurisdiction, but only a court can determine whether the city will incur any liability from such action. AGO 98-00100.

Overlapping Boundaries

Municipal authority is in no way affected by the fact that the police jurisdiction encompasses territory located in another county. *White v. City of Decatur*, 144 So. 872 (1932). An exception to this rule is noted for Baldwin, Choctaw, Coosa, Limestone, Shelby and Washington Counties where a municipality may not exercise police jurisdiction authority unless a part of its corporate limits also lies in the county. *Trailway Oil Co. v. Mobile*, 122 So. 2d 757 (1960), upholding Act No. 80, Acts of Alabama, 1965, p. 155, Baldwin County. See also Act No. 87-275, Coosa County; Act No. 336, p. 819, Acts 1963, Shelby County; Act No. 92-260, Choctaw County; Act No. 90-189, Washington County; and Act No. 88-306, Limestone County.

In *Town of Brilliant v. City of Winfield*, 752 So.2d 1192 (Ala 1999), the Alabama Supreme Court held that a provision that attempted to limit the extent of the police jurisdiction by local act was stricken as an unconstitutional variation from general law. The Court, though, held that the partial unconstitutionality of the act did not render the entire act invalid, when it struck the offending portion.

Amendment No. 531 to the Alabama Constitution states that no police jurisdiction, zoning or planning powers of municipalities in Madison County shall extend beyond the corporate limits of the municipality.

Based on the facts presented to the attorney general's office, the attorney general held that the town of Deatsville's corporate limits are not a barrier to the extension of the police jurisdiction of the city of Millbrook. AGO 99-00194.

Frequently, the police jurisdiction of a municipality overlaps with that of another municipality. The question then is which municipality has authority in the overlapping area. Here the distinction must be made between the exercise of criminal jurisdiction and the jurisdiction to levy and collect taxes.

Overlapping Criminal Jurisdictions

In the case of *Hammonds v. City of Tuscaloosa*, 107 So. 786 (1926), the Alabama Court of Appeals held that where the territorial police jurisdictions of two municipalities overlap, both municipalities may exercise criminal jurisdiction and make arrests within the overlapping area.

Relying on this case, the attorney general has ruled similarly on several occasions. See 88 Quarterly Report of the Attorney General 25. However, in a later case, one dealing with jurisdiction to license, the same court expressed doubt as to the soundness of the *Hammonds* rule, but expressly refused to rule on the question. *Town of Graysville v. Johnson*, 34 So. 2d 708 (1948).

At the present time the *Hammonds* case is still good law even though doubt has been cast on it. The Attorney General has ruled accordingly. 88 Quarterly Report of the Attorney General 25, above. Again, a statutory exception must be noted. By special local law, Walker County municipalities, with overlapping police jurisdictions, may exercise their criminal authority only to a point equidistant from their corporate limits. It seems that the exception proves the rule as stated in *Hammonds*, above. Section 15-10-1, Code of Alabama 1975, authorizes municipal police officers to make arrests within the limits of the county.

Municipal police officers are authorized to make arrests for misdemeanors throughout the county and into any adjacent county when the officer is in fresh pursuit of a person or persons to be arrested. Such authority extends throughout the state when the officer is in fresh pursuit of a person or person to be arrested for a felony. Section 15-10-74, Code of Alabama 1975.

Jurisdiction to License

By statute, only the municipality whose corporate limits are closest to a business located in two police jurisdictions can exercise its licensing power over the business. Section 11-51-91, Code of Alabama 1975; AGO 2007-023. Without

express authority, a municipality cannot exercise authority of any kind over territory within its police jurisdiction, which is also within the corporate limits of another municipality. *Homewood v. Wooford Oil Co.*, 169 So. 288 (1936).

In 1937, the Attorney General ruled that a municipality in a dry county cannot levy a license on a business located in a wet county within its police jurisdiction. Biennial Report of the Attorney General 1936-38, page 185. It was reasoned that Section 11-51-91 states that a police jurisdiction levy may not exceed one-half the amount of a similar levy within the corporate limits. Since no levy could be made within the corporate limits, it followed that no levy could be made within the police jurisdiction – one-half of nothing equals nothing.

While the logic is appealing, it is based on the premise that municipalities are dependent upon Section 11-51-91 for their powers in the police jurisdiction. However, 10 years before the adoption of that section, the Alabama Supreme Court recognized that municipalities were granted the power to levy police jurisdiction licenses by Section 11-40-10, Code of Alabama 1975. *Standard Chemical and Oil Co. v. City of Troy*, 77 So. 383 (1917). It is clear, therefore, that Section 11-51-91 did not grant a new power to cities and towns, but merely established an amount above which the power could not be exercised. See also *Alabama Gas Co. v. Montgomery*, 30 So. 2d 651 (1947); *Smith v. Notasulga*, 59 So. 2d 674 (1952).

Limitations on License Levies

Police jurisdiction license levies must be made under the police power for the protection of the health, safety and property of citizens in the area and to ensure good order, peace and quiet in the community. The Supreme Court has ruled that the Legislature intended for Section 11-51-91, Code of Alabama 1975, to be a regulatory and not a revenue statute. *City of Mountain Brook v. Beaty*, 349 So. 2d 1097 (1977).

Such levies in the police jurisdiction may not be made under the taxing power for general revenue purposes. Therefore, the amount of the license must bear a reasonable relation to the cost of the services rendered, and in no instance can it exceed one-half the amount levied for a similar business located within the corporate limits. *Alabama Power Co. v. Carbon Hill*, 175 So. 2d 289 (1937); *Hawkins v. Prichard*, 30 So. 659 (1947). A municipality's license fees or taxes on businesses within its police jurisdiction must do no more than allow the municipality to recoup the cost of extending municipal services to the inhabitants of the police jurisdiction, and the taxes may not be for the purpose of raising general revenue. *Dickson Campers, Inc. v. City of Mobile*, 37 So.3d 134 (Ala.Civ.App.2007). Further, the

Attorney General has determined that a municipal police department may provide only emergency services within its police jurisdiction if the revenue collected in the police jurisdiction “reflects reasonable compensation” to the town for the cost of the emergency services provided. The monies collected must do no more than recoup the costs of providing the emergency response services. AGO 2008-007.

Licenses imposed in the police jurisdiction which are pledged to purposes other than providing services to the police jurisdiction will be held void. It is not necessary to state that the revenues will be expended for regulation and for providing services to businesses, but it must not appear that the revenue will be used for other purposes. *Franks v. Jasper*, 68 So. 2d 306 (1953); *Birmingham v. Wilson*, 27 Ala. App. 288, 172 So. 292 (1936).

The Alabama Supreme Court has ruled that Section 11-51-91 allows a municipality to assess a license tax against businesses located outside the corporate limits but within the police jurisdiction in order to reasonably reimburse the city for supervision of the businesses so located, including police and fire protection. The Court further held that where no effort was made by a city to relate fees levied to the reasonable cost of supervision of particular businesses, the imposition of taxes on police jurisdiction businesses was for general revenue purposes and an impermissible course of municipal action. *See City of Hueytown v. Burge*, 342 So. 2d 339 (Ala. 1977) *overruled by State Department of Rev. v. Reynolds Metal*, 541 So.2d 524 (Ala 1988)(holding that a city’s levy of a license tax based upon gross receipts in the police jurisdiction was valid even though the city was unable to relate the taxes levied upon a particular business within the police jurisdiction to the costs of city supervision and services rendered to that particular business). In 1986, the Alabama Legislature amended Section 11-51-91 to specifically provide that the amount collected from the police jurisdiction cannot exceed the cost of providing services to the area as a whole and not any particular business or classification of businesses. (See Act 86-427). As a result of that amendment, the Alabama Supreme Court overruled *Hueytown v. Burge* and several other cases to the extent they required a municipality to relate license taxes collected in the police jurisdiction to the cost of providing services to a particular business rather than the cost of providing services to the entire police jurisdiction.

If the city does not levy and collect license fees in its police jurisdiction, it may seek to collect insurance proceeds from applicable policies held by individuals who reside there pursuant to the costs of fire, EMS, hazardous material, and rescue services rendered by the fire department. AGO 2019-012.

When a business located within the police jurisdiction is also part of a fire district a different standard applies. *In*

Ex Parte City of Tuscaloosa, 757 So.2d 1182 (Ala. 1999), the Alabama Supreme Court held that Section 11-51-91, Code of Alabama 1975, requires municipalities to relate their license fees to services provided to each business located in the police jurisdiction that is also located in a fire district (*see* Act 86-427).

Capital expenditures may be included when determining whether funds are being properly spent in providing services to the police jurisdiction. *See City of Prattville v. Joyner*, 698 So. 2d 122 (Ala. 1997). A city’s reliance on an audit conducted six years prior to its enactment of an ordinance imposing an annual business-license tax on every business located within its police jurisdiction was sufficient to satisfy the requirements of Section 11-51-91, Code of Alabama, and, thus, the city was not required to do a more extensive analysis to determine that it spent more on municipal services than it collected on license taxes. *Ex parte City of Mobile*, 37 So.3d 150 (Ala. 2009).

Act 2015-361 provides that municipalities must now file with the Office of Examiners of Public Accounts an annual report, within 90 days of the close of the fiscal year, which includes the following information:

1. The amount of all license revenues and taxes collected in the police jurisdiction, and
2. A list of service providers providing services within the police jurisdiction.

In addition to the new reporting requirements in Act 2015-361, and in view of Section 11-51-91 and the Court’s decision in *State Dept. of Rev. v. Reynolds Metal*, the League strongly recommends that all municipal governing bodies compare the amount of revenues collected from businesses in the police jurisdiction with the annual costs of supervision of the area. If the study reveals that more was spent by the city in regulating the area than was collected in revenues, the governing body should adopt a resolution stating this fact and reaffirming the police jurisdiction levy for the next license tax year. If the study reveals the city collected more revenue than was expended to provide services to the police jurisdiction, the amount of the license levy should be lowered accordingly.

Judicial Presumptions

In spite of these limitations, courts indulge a number of presumptions in favor of municipal ordinances in the police jurisdiction:

- Courts will presume that the levy was made as a valid exercise of the police power unless it affirmatively appears otherwise. *Hawkins v. Prichard*, 30 So. 2d 659 (1947).

- Courts will presume that the license was not levied under the revenue or taxing power.
- The action of a municipal governing body will be not be disturbed by a court unless it appears that there was a manifest abuse of its power.
- Courts will not scrutinize the amount of the fee too narrowly. *See Birmingham v. Wilson*, 172 So. 292 (1936).

Specific Extraterritorial Powers

Based on Sections 11-40-10 and 11-51-91, Code of Alabama 1975, the authority to exercise extraterritorial police powers does not confer authority to operate utilities and to exercise other municipal functions outside the corporate limits. In answer to this need, the Legislature has made specific grants of power for these various functions. As a reference to these extraterritorial grants of power, the following list is arranged alphabetically, showing the title and section of the Alabama Code where the authority may be found.

Advertising – Section 11-47-9 authorizes a municipality to advertise its functions and undertakings both within and outside the corporate limits.

Agricultural Products and Industries – Section 11-81-141 authorizes the acquisition and operation of such plants within and outside a municipality. Also, the Wallace Act, Section 11-54-20, et seq., authorizes a municipality to finance such industries within 15 miles of the municipal corporate limits.

Airports – Section 11-81-141 authorizes a municipality to acquire and operate airports within and outside the corporate limits. Section 4-4-2 also gives this power.

Alms Houses – Section 11-47-134 authorizes a municipality to aid, establish, set up and regulate alms houses anywhere within the county.

Armories – Section 11-81-141 authorizes a municipality to acquire and maintain armories both within and without the corporate limits.

Assessment for Improvements – Section 11-48-81, et seq., authorizes public improvement assessments for streets, sidewalks and sewer improvements within the police jurisdiction under certain conditions. Act No. 303 of the 1959 Legislature provides similar authority for municipalities under 6,000 in population.

Bridges – Section 11-81-141 authorizes a municipality to construct and maintain bridges within and outside the corporate limits.

Causeways – Section 11-81-141 grants authority to construct and maintain causeways within and without the corporate limits.

Cemeteries – Section 11-47-40 grants authority to

own, regulate and improve cemeteries within or without the town or city limits.

Cold Storage Plants – Section 11-81-141 grants authority to acquire and operate such plants within and without the corporate limits.

Crematories – Section 11-47-135 authorizes a municipality to establish and maintain crematories within or outside the corporate limits.

Dairies – Section 11-47-137 authorizes a municipality to inspect dairies, located anywhere in the county, which supply the municipality.

Electric Systems – Sections 11-81-161, 11-81-141, 11-50-2, 11-50-3, 11-50-314 authorize municipalities to own and operate, either directly or through separately-incorporated boards, electric systems beyond the corporate limits. This authority includes ownership and operation of systems in other municipalities.

Explosives – Section 11-43-60 authorizes a municipality to regulate explosives and magazines within the city and its police jurisdiction. Section 11-47-12 authorizes a municipality to provide a suitable fireproof building outside the corporate limits for the storage of explosives.

Fire Department – Section 11-43-141 authorizes a municipality to send its fire department beyond the police jurisdiction to fight fires and provides immunity from liability while performing such service.

Flood Damage Prevention – A municipality may enforce a flood damage prevention ordinance in its statutory police jurisdiction when the municipality adopts the ordinance as a building code under its general police powers and not as a part of its zoning code. AGO 2001-94.

Garbage Dumps – Section 11-47-135 authorizes a municipality to establish and maintain garbage dumps within or outside the corporate limits.

Gas Systems – Sections 11-81-161, 11-50-260, et seq., and 11-50-396, et seq., authorize a municipality to own and operate gas distribution systems within or outside the municipality, either directly or through a separately incorporated board, and to be a member of a district gas distribution system.

Golf Courses – Section 11-81-141 authorizes a municipality to own and operate golf courses within or outside the municipality.

Granaries – Section 11-81-141 authorizes a municipality to own and operate granaries within or without the municipality.

Heating Plants – Section 11-81-141 authorizes a municipality to own and operate heating plants within and outside the municipality.

Health and Sanitation – Section 11-47-130 authorizes a municipality to maintain health and cleanliness within the municipality and its police jurisdiction.

Hospitals – Sections 11-81-141 and 11-47-134 authorize the establishment of hospitals within and outside the municipality and its police jurisdiction.

Hotels – Section 11-54-142, Code of Alabama, 1975, as amended, gives municipalities the authority to construct hotels and motels within or outside the municipality as long as the project is located not more than 15 miles from the corporate limits.

Incinerator Plants – Sections 11-81-141 and 11-47-135 authorize the establishment and operation of incinerator plants within and without the corporate limits.

Industrial Projects – Section 11-54-20, et seq., the Wallace Act, authorizes a municipality to establish industrial development projects within 15 miles of the municipality.

Markets – Section 11-47-137 authorizes a municipality to regulate, inspect and establish markets within the police jurisdiction.

Parks – Section 11-81-141 authorizes a municipality to own and operate parks within and outside the municipality.

Parkways – Section 11-81-141 authorizes a municipality to own and operate parkways within and outside the corporate limits.

Piers – Section 11-81-141 authorizes a municipality to own and operate piers within and outside the corporate limits.

Police Services in Class 6 Cities – The governing body of a Class 6 municipality may enter into contracts which provide for the police department of the municipality to provide law enforcement services beyond the corporate limits of the municipality but within the police jurisdiction of the municipality and may prescribe the conditions under which the services may be rendered. The governing body of the municipality may enter into a contract or contracts with any county or county board, any property owner of a manufacturing or industrial concern, or any property owner within any residential or business area for its police department to render law enforcement services on the terms as may be agreed to by the governing body of a Class 6 municipality and the contracting party or parties. Notwithstanding the above, the governing body of the municipality may not enter into a contract or contracts with any county or county board, any property owner of a manufacturing or industrial concern, or any property owner within any residential or business area for its police department to render law enforcement services to enforce traffic regulations, including speeding and enforcement of speed zones. When the police department of a Class 6 municipality is operating pursuant to a contract or contracts pursuant to this section on any call beyond the corporate limits but within the police jurisdiction of the Class 6 municipality, the department shall be deemed to

be operating in a governmental capacity and subject to the same liability for injuries as the department would be if the department was otherwise operating within the corporate limits of the Class 6 municipality. Section 11-40-10.1, Code of Alabama 1975.

Public Markets – Section 11-81-141 authorizes a municipality to own and operate public markets within and outside the municipality.

Property, Municipal – Section 11-47-22 gives a municipality police power over all land acquired for hospitals, quarantine stations, poorhouses, pesthouses, workhouses, schoolhouses, sanitary and storm sewers, rights of way, cemeteries and parks. The laws and ordinances of the municipality apply over all lands so used or occupied and to the inhabitants thereof.

Public Buildings – Section 11-81-141 authorizes the ownership and maintenance of public buildings within and outside the corporate limits.

Quarantine – Section 11-47-131 authorizes a municipality to exercise quarantine powers within the police jurisdiction. (**Note:** This authority is subject to the superior power of the State Health Department on the topic.)

Railroads – Section 37-13-1, et seq., gives municipalities the authority to establish a railroad authority to operate railroads and railroad facilities within or outside the boundaries of the municipality.

Rights-of-Way (Water and Sewer) – Section 11-47-171 gives a municipality authority to procure rights-of-way for water and sewer lines inside or outside the municipality.

Riots – Section 11-43-82 gives a mayor the authority, in time of riot, to close businesses, in the vicinity of the municipality, which sell arms and ammunition.

River Terminals – Section 11-81-141 authorizes a municipality to own and operate river terminals within or outside the municipality.

Seaports – Section 11-81-141 authorizes a municipality to own and operate seaports within or outside the municipality.

Sewer Systems (Sanitary or Storm) – Sections 11-81-161 and 11-50-50, et seq., authorize the ownership and operation of sanitary and storm sewers within and outside the municipality and give the power to condemn land to extend such lines anywhere in the county. Section 11-50-53, Code of Alabama 1975. See **Assessments**, above.

Sidewalks – See **Assessments**, above.

Slaughterhouses – Section 11-47-138 authorizes a municipality to establish and control slaughterhouses inside and outside the corporate limits.

Stadiums – Section 11-81-141 authorizes a municipality to own and operate stadiums within and without the municipality.

Streets – See **Assessments**, above.

Subdivision Control – Section 11-52-30 gives a municipal planning commission the authority to control the subdivision of lands within five miles of the municipality. Provision is made for situations where there is an overlap of jurisdiction between two municipalities.

Swimming Pools – Section 11-81-141 authorizes a municipality to own and operate swimming pools within and outside the municipality.

Tennis Courts – Section 11-81-14 authorizes a municipality to own and operate tennis courts within and outside the municipality.

Tunnels – Section 11-81-141 authorizes a municipality to own and operate tunnels within and outside the municipality.

Viaducts – Section 11-81-141 gives a municipality authority to own and operate viaducts within and outside the municipality.

Waterworks – Sections 11-81-161, 11-50-5, 11-50-4, and 11-50-310, *et seq.*, authorize a municipality to own and operate water systems within and outside the corporate limits and in the surrounding territory, either directly or by incorporated board. The power of condemnation is included in this authority.

Wharves – Section 11-81-141 authorizes a municipality to own and operate wharves within and outside the corporate limits. Section 11-47-14 gives a municipality authority to condemn for wharves and landings within five miles of the municipality.

Water Courses – Sections 11-47-15 through 11-47-19 give a municipality the authority to alter water courses within the city and its police jurisdiction.

The foregoing list of powers and authorities indicates a very definite policy by the Legislature to give cities and towns control over the development of fringe areas. This fact accentuates the need for more realistic powers of annexation.

7. Council Meeting Procedure

Sir Winston Churchill once observed that a country which does not bother with legislative procedure is “an enigma wrapped in a mystery.” This observation is particularly applicable to any legislative assembly purporting to represent the people of a nation, state or a political subdivision. Only through established and known rules of legislative procedure can voters trust that their representatives will have the opportunity to express their ideas about items of business before the assembly.

From a practical and fundamental viewpoint, the rules of procedure followed by a legislative assembly are second in importance only to the constitution or charter under which the assembly is formed. Thus it is imperative that the people’s representatives assemble and proceed under rules known and available to all alike under similar circumstances. Otherwise the result is an assembly at the mercy of a few who claim to know the answer to a profound secret beyond human comprehension.

Cities and towns under the mayor-council form of government express themselves through the council, which is their legislative assembly. Rules of procedure are as necessary for a municipal council as they are for the state Legislature or the Congress of the United States. The only difference is the degree of confusion that would result without such rules.

There are not many procedural requirements mandated for mayor-council municipalities by the Legislature. Beyond these, the council is authorized to assemble, organize and adopt its own rules of procedure, keeping a journal (minutes) thereof. The following paragraphs list the statutory provisions bearing upon the procedure of municipal councils, cases which have been decided on procedural questions and recommendations for rules to be adopted by councils.

Council is Legislative Body

The legislative functions of a municipality under the mayor-council form of government are vested in the council by statute in Sections 11-43-2 and 11-43-40, Code of Alabama 1975. It has been ruled that the legislative authority vested in the council can only be exercised by the council as an organized body, and the members of the council acting individually can do nothing. Thus a petition carried to each member of the council individually and signed by each councilmember amounts to nothing. *Mobile v. Kiernan*, 170 Ala. 449, 54 So. 102 (Ala. 1910). A city council cannot conduct business by correspondence between council meetings. *City Council of Prichard v. Cooper*, 358 So.2d 440 (Ala. 1978). If the council does not

have a quorum present it cannot legally transact business. Informal agreements of the mayor and council which are not entered on the minutes are not legal or binding on the municipality.

A councilmember not present at a council meeting may not cast a vote for or against a measure being considered by the council over the telephone. *Penton v. Brown Crummer Inv. Co.*, 222 Ala. 155, 131 So. 14 (Ala. 1930). However, Section 36-25A-5.1 of the Code allows councils comprised of members from two or more counties to participate in meetings electronically, provided the equipment being used allows all persons participating in the meeting to hear each other at the same time.

Participation by electronic means, though, cannot be counted toward the establishment of a quorum. You must have a quorum of the members participating in any given meeting physically present to conduct any business or deliberation. Additionally, only those members who are physically present may participate in an executive session of the governmental body. Also, members cannot participate by electronic means in any a hearing which could result in loss of licensure or professional censure.

The law requires a record of the proceedings of the council so that those acting under it may have no occasion to look beyond the record. This avoids leaving such proceedings to be proved by parol or oral evidence and makes certain that rights arising under such proceedings shall not depend on the mere recollection of witnesses. *Alabama City G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91 (Ala. 1913).

The wisdom, propriety or expediency of a city ordinance is not a matter for review by the courts. Such matters are within the province of the lawmaking body (council). The courts will only look to the validity of the action of the council under the Constitution and laws of the state. *Estes v. Gadsden*, 266 Ala 166, 94 So.2d 744 (Ala. 1957).

Organization of Council

Members elected to the municipal council are required to assemble and organize the council on the first Monday in November after their election. Section 11-43-44, Code of Alabama 1975. In cities and towns of less than 12,000, the mayor is a member of the council and presides over its deliberations. Section 11-43-2, Code of Alabama 1975. As a member of the council, the mayor of municipalities of less than 12,000 in population is entitled to vote on any measure called to question by the council, provided he or she is not otherwise disqualified from voting. If the mayor fails to vote on an issue and the vote ends in a tie, the mayor

is **required** to cast the deciding vote. See Section 11-43-2, Code of Alabama 1975.

If the mayor votes and the vote ends in a tie, the mayor may not vote a second time to break the tie. A mayor cannot vote twice under any circumstance. *See, Jones v. Coosada*, 356 So.2d 168 (Ala. 1978) and AGO 1982-280 (to Hon. Gwin Wells, April 5, 1982). A tie vote leaves the matter being voted on undecided. AGO 1996-056.

In most cities of 12,000 or more in population, the council is presided over by the president of the council who is a member of the council and is entitled to vote upon questions before the council. *See*, Section 11-43-40, Code of Alabama 1975.

When the council organizes, it is required to establish the time and place to hold regular meetings. These meetings are required to be open to the public. When organizing, in cities and towns of less than 12,000, the council is directed to elect a temporary chairperson to serve when the mayor is absent. In cities of 12,000 or more, the council is required to elect a president pro tempore to act during the absence of the council president. Section 11-43-49, Code of Alabama 1975.

The council is required to hold at least two regular meetings each month. An exception is made for towns (under 2,000 in population) where only one regular meeting each month is required. Section 11-43-50, Code of Alabama 1975.

Section 11-43-51, Code of Alabama 1975, gives the council the power to compel the attendance of absent members in such manner and under such penalties as it may prescribe. While this statute authorizes the council to take action to compel attendance, the council cannot act unless a quorum is present. It is strongly advised that the council establish the manner in which members may be compelled to attend council meetings soon after organization while a quorum is present.

Sometimes councils become hamstrung when councilmembers refuse to come to meetings in order to defeat a quorum. The ordinance should specifically spell out the penalties for failure to attend. The council may not remove members who fail to attend meetings. Councilmembers may only be removed by impeachment proceedings in a court of competent jurisdiction. AGO to Hon. Al Tidwell, March 6, 1978. While the Attorney General has held that a council may compel attendance of its members by adopting an ordinance to this effect, and prosecute councilmembers in municipal court for violating the ordinance (AGO to Mrs. Melba Henry, February 11, 1974), a better practice is to base the members' salaries on attendance at meetings. AGO 1985-219 (to Hon. John Kellum, February 15, 1985).

However, municipal elected officials who fail to

attend all regular and special called council or commission meetings for 90 consecutive days, beginning on the date of any absence, shall be removed from office by operation of law. Section 11-40-25, Code of Alabama 1975. This Section requires the clerk to make a record of all elected municipal officials present or absent at all meetings, regardless of whether or not a quorum is present. If an elected municipal official fails to attend all meetings with 90 consecutive days, the removal is automatic. No vote to remove is required.

At the next council meeting following the date an elected municipal official was removed from office, the council may vote to reinstate an official who was removed pursuant to this Section. To reinstate an official pursuant to this Section, a majority of the remaining council (including the mayor if the mayor is a voting member of the council) must vote to reinstate the official for any mitigating or extenuating circumstances justifying the reinstatement. If the council does not reinstate the removed elected municipal official, the council or commission shall fill the vacancy as provided by law.

The council is required to elect a clerk and a treasurer in cities of 6,000 or more inhabitants. The offices may be combined by a two-thirds vote of the council and the consent of the mayor. The consent of the mayor is not required in cities with population of 12,000 to 25,000 that continues to operate as a city having a population less than 12,000 and the mayor is a voting member of the council. *See* Section 11-43-3, Code of Alabama 1975. Section 11-43-3, Code of Alabama 1975. Municipalities of less than 6,000 are required to elect a clerk. Section 11-43-4, Code of Alabama 1975. The council in all mayor-council municipalities is authorized to elect a municipal judge and such other officers as the council deems necessary to carry out the functions of the municipality. *See* Section 12-14-2 through Section 12-14-3, Code of Alabama 1975.

All elections of officers shall be made viva voce (roll call vote), and a concurrence of a majority of the members to the council shall be required, and all members of the council may vote any provision of law to the contrary notwithstanding. On the vote resulting in an election or appointment, the name of each member and for whom he or she voted shall be recorded. Section 11-43-45, Code of Alabama 1975. The Attorney General has ruled that when the council votes to fill a vacancy on the council this Code provision requires a majority of the remaining members on the council. AGO to Hon. E. B. Overton, April 23, 1957.

No legal business can be transacted by the council at a meeting where fewer than a quorum is present. A *quorum* of the council consists of a majority of the whole number of members to which the municipality is entitled to have on the council, including the mayor in municipalities of

less than 12,000 in population. Section 11-43-48, Code of Alabama 1975 and AGO 2004-054.

Section 11-45-2, Code of Alabama 1975, requires the affirmative vote of a majority of the whole number of members of the council, including the mayor, to pass an ordinance of permanent nature in cities and towns of less than 12,000. To pass such an ordinance in cities of 12,000 or more, a majority of the members elected to the council must vote in favor of the ordinance. Where a specific vote requirement is not set out by the Code, passage requires the affirmative vote of a majority of those voting on the issue, provided a quorum of the council is present.

The number of members required to make a quorum does not change when a council has vacancies. Council members who are present at a council meeting that have a conflict of interest on a particular issue can be counted for purposes of making a quorum even though they cannot vote on a particular issue and abstain.

Where a statute requires the affirmative action of a majority of the entire council or a majority of the members present, a refusal to vote (abstention) may result in the defeat of the proposition. A refusal to vote cannot be counted on the affirmative side. AGO 1991-020. The nature and effect of a blank ballot cast by a member of a city council at an election for an officer has been held to be a mere nullity which cannot be counted for or against either of the candidates voted upon. *Reese v. State*, 184 Ala. 36, 62 So. 847 (Ala. 1913).

Particular care should be taken by the council to see that the vote of the council is polled by the clerk for the election of officers and for the passage of ordinances and resolutions of a permanent nature. In such cases, the vote of each member should be recorded.

Section 11-45-2, Code of Alabama 1975, requires that no ordinance (or resolution) of a permanent nature shall be adopted at the meeting when it is first introduced unless the unanimous consent of all members present is given for the immediate consideration and passage of the ordinance. In such instances, the minutes must reveal that a roll call vote was made and that each member voted “aye” for immediate consideration. Here it is to be noted that the mayor of a city or town of less than 12,000 is a member of the council, and his or her consent should be revealed in the poll of members. This consent provision is mandatory. *Cooper v. Valley Head*, 212 Ala. 125, 101 So. 874 (Ala. 1924). If unanimous consent for consideration is given, the council then takes a second vote on whether or not to approve the measure. This vote does not have to be unanimous.

If unanimous consent is not obtained, the ordinance or resolution intended to be of permanent operation that is introduced at a regular council meeting may subsequently

be considered by the council at a future regular or properly called special meeting. AGO 2004-053.

If the issue being voted on is not an ordinance or resolution of permanent nature, only a majority of those members voting is required for passage, provided a quorum is present.

Council Minutes

The council is required to keep a journal of its proceedings which shall be open to the inspection and examination of all citizens and shall have the force and effect of a record. A copy of the journal, certified by the clerk, shall be prima facie evidence in any court or elsewhere. Section 11-43-52, Code of Alabama 1975. The clerk of the municipality is required to attend all meetings of the council and to keep the journal of its proceedings. Section 11-43-100, Code of Alabama 1975. In the absence of the clerk, the council has the duty to appoint some person to act in his or her stead to keep the journal for the meeting. The council may appoint one of its own members to perform this duty. While that councilmember is engaged in the performance of this duty, he or she is not deprived of voting upon questions coming before the council. *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725 (Ala. App. 1912).

In court, the record of council proceedings cannot be impeached by collateral attack. In order to force a council to change its minutes, it is necessary that the assailant bring action directly by mandamus petition in circuit court. *Penton v. Brown Crummer Inv. Co.*, 222 Ala. 155, 131 So. 14 (Ala. 1930). The council, though, retains control over the record of its proceedings at all times. It may amend them at any subsequent meeting to make them speak the truth. *Guntersville v. Walls*, 252 Ala. 266, 39 So.2d 567 (Ala. 1957); *Estes v. Gadsden*, 266 Ala. 166, 94 So.2d 744 (Ala. 1957).

The law contemplates that the record of council proceedings shall be permanent in nature and not susceptible to corruption or destruction. *Chenault v. Russellville*, 233 Ala. 60, 169 So. 706 (Ala. 1936).

Types of Council Meetings

Meetings of the municipal council may generally be classified as regular, adjourned, and special meetings. First, there is the **regular meeting**, the time and place of which is established by the council when it organizes. The council shall determine the time and place of holding its regular meetings, which at all times shall be open to the public. Section 11-43-49, Code of Alabama 1975. The council must hold at least two regular meetings each month. Towns (municipalities of less than 2,000 inhabitants) are only required to meet once per month but the town council can

adopt an ordinance to require two or more meetings per month. Section 11-43-50, Code of Alabama 1975.

Second, there is the **special meeting**. The presiding officer of the council (the mayor in cities of less than 12,000 inhabitants) shall call special meetings whenever in his or her opinion the public interest requires it. Also, whenever two councilmembers or the mayor request, in writing, a special meeting, the presiding officer has the duty to make the call. If the presiding officer fails or refuses to call such a meeting when requested, the two councilmembers making the request or the mayor have the right to call such a meeting. Section 11-43-50, Code of Alabama 1975. When a city council specifically requests that a special meeting be held on a specific date and at a specific time, Section 11-43-50, Code of Alabama 1975, requires the mayor to call for the meeting on the date and time requested by the council. AGO 2003-237.

For a special meeting to be valid, all members of the council must have been duly notified. This requirement is excused where all members are present at the meeting or where it is a practical impossibility to notify a particular member because of absence from the municipality. *Ryan v. Tuscaloosa*, 155 Ala. 429, 46 So. 638 (Ala. 1908). It is customary for the clerk to prepare waivers of notice for councilmembers to sign when special meetings are held. Waivers of notice signed by all councilmembers are generally appended to the minutes of special meetings.

Subjects not covered by the notice, other than routine business, may not be considered at a special meeting unless the councilmembers unanimously consent thereto. Since the Code of Alabama does not require written notice be given to governing body members, it is presumed that oral notice designating the subject in general terms is sufficient. It is a good practice for the journal of the council to stipulate, in the minutes of the special meeting, the type of notice given to councilmembers. Proceedings at a special meeting where all members were not notified may be validated by ratification at a subsequent meeting. Rhyne, *Municipal Law*, Section 5-5 (1957). If a notice calling a special meeting states that it is replacing a canceled regular meeting, the council may discuss business it would have discussed at the regular meeting and the introduction of new ordinances for consideration by the council would constitute regular business. AGO 2002-111.

Finally, there is the **adjourned meeting** where the council votes at the close of a legally held meeting to convene again at a particular time and place. Such meetings are regarded as a continuation of the meeting that was adjourned. No notice to the councilmembers of such a meeting is required. The council is authorized to consider any business which it might have entertained at the meeting

which was adjourned. *Culpepper v. Phenix City*, 216 Ala. 318, 113 So. 56 (Ala. 1927).

A meeting at which no minutes are kept is no meeting at all for all legal intents and purposes. Parol (oral) evidence cannot be received in court to show that a meeting of the mayor and council was held as required by statute when the record of the proceedings of the council does not show that such meeting was held. *Parker v. Doe*, 20 Ala. 251 (Ala. 1852).

In addition to regular, adjourned, or special meetings, municipal councils may hold committee meetings and conduct workshops before or after meetings. These informal meetings are held to enable the council to expedite official meetings. It is important to remember that these sessions are open to the public. AGO 1992-267.

Laws Governing Open Meetings

Meetings of most municipal entities, including municipal council meetings, committee meetings, work sessions and similar gatherings, are subject to the requirements of the Alabama Open Meetings Act (OMA). The OMA sets specific standards regarding how to notify the public of meetings, when an entity can hold an executive session, and many other requirements that must be followed.

Please refer to the article in the League's *Selected Readings for the Municipal Official* entitled "The Open Meeting Act" for a more complete discussion of the requirements of the OMA.

Council Rules

While the foregoing statutory rules govern in the circumstances where they apply, they fall far short of being a complete guide for the council in the conduct of its proceedings. The Legislature realized this when it provided that the council shall determine the rules of its own proceedings. Section 11-43-52, Code of Alabama 1975. If this has not been done, and for situations not covered by the council's rules of procedure, the city council usually follows *Robert's Rules of Order*. Under *Robert's Rules of Order*, if there is a motion to reconsider a previous vote on a matter before the council, the motion to reconsider must be made by a councilmember who voted with the prevailing side on the previous vote. Additionally, the motion to reconsider must be made at the same meeting in which the action being reconsidered took place, or in the next succeeding meeting of the council. AGO 2001-182.

Rules of procedure for the council may be compared to the rudder of a ship, for without them the assembly would wander aimlessly, wasting the valuable time of its members and dissipating the potential power of accomplishment which rests in its membership. Rules of procedure do not have to be complicated for a municipal governing body. The

main idea is to have a minimum set of rules for guidance to conduct routine business which could come before the assembly.

Each time a municipal council organizes, it is empowered to adopt its own rules of procedure. The same is true of the state Legislature and of Congress. In practice, each house of the Legislature and of Congress generally adopts the rules of the preceding Legislature or session of Congress with only slight modifications. The same might be followed by a municipal council.

If the preceding council established rules of council procedure, it is very likely that the new council will vote to adopt the rules of procedure already established. But that decision is strictly a matter for the new council to make. Each new councilmember-elect is advised to review the rules of procedure of the old council to determine if only a few changes or a whole new set of rules is needed. Of course, if the old council had no rules, new councilmembers should be prepared to introduce an ordinance establishing rules of procedure at the organizational session.

Sample Ordinance

The following sample ordinance might be used as a guide for the council to establish its rules of procedure.

An Ordinance

BE IT ORDAINED BY THE COUNCIL OF _____, ALABAMA, that the order of procedure in all instances for meetings of the council shall be as follows:

Section 1. That the rules or order of procedure herein contained shall govern deliberations and meetings of the council of _____, Alabama.

Section 2. Regular meetings of the council shall be held on the following dates: the first and third Tuesdays of each month. *[Note: The day of the week and weeks of the month on which regular council meetings will be held are left to the discretion of the council, provided that at least two council meetings are held each month. Only one meeting per month is required in municipalities of less than 2,000 population.]*

Section 3. Special meetings may be held at the call of the presiding officer by serving notice on each member of the council not less than 24 hours before the time set for such special meetings; or special meetings may be held as otherwise provided by Section 11-43-50, Code of Alabama 1975 or other law. Notice of all special meetings shall be posted on a bulletin board accessible to the public at least 24 hours prior to such meeting.

Section 4. A quorum shall be determined as provided by Section 11-43-48, Code of Alabama. The number of members required to make a quorum does not change when

a council has vacancies. Council members who are present at a council meeting that have a conflict of interest on a particular issue can be counted for purposes of making a quorum even though they cannot vote on a particular issue.

Section 5. All regular meetings shall convene at ____ o'clock ____ *[a.m. or p.m.]* at the city hall and all meetings, regular and special, shall be open to the public.

Section 6. The order of business shall be as follows:

1. A call to order
2. Roll call
3. Reading and approval of the minutes of the previous meeting
4. Reports of standing committees
5. Reports of special committees
6. Reports of officers
7. Reading of petitions, applications, complaints, appeals, communications, etc.
8. Auditing accounts
9. Resolutions, ordinances, orders and other business.
10. Public comments

Section 7. No member shall speak more than twice on the same subject without permission of the presiding officer.

Section 8. No person, not a member of the council, shall be allowed to address the same while in session without permission of the presiding officer.

Section 9. Every officer, whose duty it is to report at the regular meetings of the council, who shall be in default thereof, may be fined at the discretion of the council.

Section 10. Motions shall be reduced to writing when required by the presiding officer of the council or any member of the council. All resolutions and ordinances and any amendments thereto shall be in writing at the time of introduction.

Section 11. Motions to reconsider must be made by a member who voted with a prevailing side and at the same or next succeeding meeting of the council.

Section 12. Whenever it shall be required by one or more members, the “yeas” and “nays” shall be recorded and any member may call for a division on any question.

Section 13. All questions of order shall be decided by the presiding officer of the council with the right of appeal to the council by any member.

Section 14. The presiding officer of the council may, at his or her discretion, call any member to take the chair, allow him or her to address the council, make a motion or discuss any other matter at issue.

Section 15. Motions to lay any matter on the table shall be first in order; and on all questions, the last amendment,

the most distant day and the largest sum shall be first put.

Section 16. All meetings of the council shall be open to the public, except when the council meets in executive session as authorized by state law.

Section 17. The council may meet in executive session only for those purposes authorized by state law. When a councilmember makes a motion to go into executive session for an enumerated purpose, the presiding officer shall put the motion to a vote. If the majority of the council shall vote in favor of the motion to go into executive session, the body shall then move into executive session to discuss the matter for which the executive session was called. No action may be taken in an executive session. When the discussion has been completed, the council shall resume its deliberations in public.

Section 18. A motion for adjournment shall always be in order.

Section 19. The rules of the council may be amended in the same manner as any other ordinance of general and permanent operation.

Section 20. The rules of the council may be temporarily suspended by a vote of two-thirds of the members present.

Section 21. The chairman of each respective committee, or the councilmember acting for him or her, shall submit or make all reports to the council when so requested by the presiding officer or any member of the council.

Section 22. All ordinances, resolutions or propositions submitted to the council which require the expenditure of money shall lie over until the next meeting; provided, that such ordinances, resolutions, or propositions may be considered earlier by unanimous consent of the council; and provided further, that this rule shall not apply to the current expenses of, or contracts previously made with, or regular salaries of officers or wages of employees of the city.

Section 23. The clerk, engineer, attorney, chief of police and such other officers or employees of the City [or Town] of _____, shall, when requested, attend all meetings of the council and shall remain in the council room for such length of time as the council may direct.

Section 24. No ordinance or resolution of a permanent nature shall be adopted at the meeting at which it is introduced unless unanimous consent be obtained for the immediate consideration of such ordinance or resolution, such consent shall be by roll call and the vote thereon spread on the minutes.

Section 25. *Robert's Rules of Order* is hereby adopted as the rules of procedure for this council in those situations which cannot be resolved by the rules set out in this ordinance.

Section 26. This ordinance shall go into effect upon the passage and publication as required by law.

[Signatures of Councilmembers]

Approved this the ____ day of _____, 20__.

Mayor

Passed and approved this the ____ day of _____, 20__.

Clerk

The above is, of course, only a suggested ordinance and the council could revise it to meet any local circumstances. We strongly urge, however, the adoption of an ordinance governing council procedures if an adequate ordinance does not already exist.

This example is an ordinance of permanent operation and must be adopted and published in the manner prescribed by law for ordinances of permanent operation.

8. The Council and Public Participation

The Council Meeting – Public Participation

In AGO 1998-134, the Attorney General addressed the question of whether members of the public have a right to speak at meetings held pursuant to the Sunshine Law. The Attorney General stated that “A public body has the right to determine whether public comments will be allowed, except in those cases where the law requires a public hearing. While the law does not mention public participation at meetings of a public body, it is good public policy to allow citizens and taxpayers to express their views.”

The Sunshine Law was repealed when the legislature passed the Alabama Open Meetings Act (“OMA”). Nothing in the new OMA contradicts this Opinion, though, so it probably remains valid. Additionally, cases from other jurisdictions support this view. See, e.g., *Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995).

Certain types of action by the council require a public hearing, and in those cases, the public must be allowed to address the issue under consideration. And, most municipalities do set aside a portion of council meeting for public comment, even if a public hearing is not required. Public comments during a meeting remain subject to reasonable time, place and manner restrictions.

What type regulations are generally upheld? Some of these were cited in *Timmons v. Wood*, 2006 WL 2033903, “The council has an agenda to be addressed and dealt with . . . [government may stop a speaker] if the speaker becomes disruptive ‘by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies.’” Another court, in *Scroggins v. City of Topeka*, 2 F.Supp. 1362 (DC Kan. 1998), noted further that these actions disrupt a meeting “. . . because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.”

Additionally, government may restrict speech as to amount of time permitted and may limit the number of citizens allowed to participate at a particular meeting. A public body may also require prior notice from citizens wishing to be heard. These regulations must, of course, be enforced evenly as to all parties without regard to the content of their speech.

A public body may also prevent personal attacks that are unrelated to issues of public interest. Special care must be used here because when a matter becomes an issue of public interest and concern is often a subjective matter. In *Gault v. City of Battle Creek*, 73 F. Supp. 811 (W.D. Mich. 1999), a speaker was ruled out of order when his discussion of problems within the police department spilled over into

comments about the police chief’s affair with his wife. The presiding officer ruled this out of order as a personal attack and unrelated to his duties as police chief. The court disagreed, finding that:

Sexual affairs have caused government ministers to lose power, corporate presidents to resign, spouses to commit murder, not to mention dissension and disruption in offices and organizations. This type of behavior is of even greater public concern when it involves a paramilitary organization such as a police department. The allegation against [the police chief] could directly relate to the morale, leadership, and teamwork of the Battle Creek Police Department and its officers.

Care must be taken to ensure that when the public is granted the opportunity to address the council, that right is protected. In *Jocham v. Tuscaloosa County*, 289 F.Supp. 887 (E.D. Mich. 2003), a group of atheists appeared at the council meeting to protest placement of a nativity scene on public property. A council rule limited public comment to five minutes. During their five minutes, councilmembers repeatedly interrupted them, telling them that they had no rights because they weren’t Christian and making comments like “if you don’t like it, don’t look at it,” and ridiculing them for their position. Further, other groups at the same meeting were permitted to talk beyond the five-minute period. The court held that the council’s hostile nature presented a factual question as to whether they had enforced the rule selectively against this group due to the content of their speech.

The Council Meeting—Dealing with Disruptions

Courts are almost unanimous in their view that public comment cannot be permitted to disrupt the orderly conduct of business at a council meeting. When members of the public violate reasonable time, place and manner restrictions on their conduct or speech during meetings, clearly the presiding officer is within his or her authority to ask the person to stop the disrupting behavior. If this instruction is not heeded, the presiding officer may have the person removed from the meeting or even arrested.

In Alabama, Section 11-43-163, Code of Alabama 1975, provides that “During a session of the council or of a committee any person who is guilty of disorderly or contemptuous behavior in the presence of the council or the committee, may be punished by the council or committee by arrest and imprisonment not exceeding 24 hours. A

committee may require any officer of the police force or any patrolman to act as secretary of such committee.”

Although this provision has never been interpreted, it clearly allows for the removal—and jailing—of individuals for disruptive behavior during council and committee meetings. Courts in other states, though, have frequently been asked to address questions concerning the removal of persons from these meetings.

The presiding officers’ discretionary authority to remove spectators is not without limitation, however.

Courts have made clear that a presiding officer may not remove someone based solely on a disagreement with the content of the speech. For example, in *Dayton v. Esrati*, 125 Ohio App.3d 60, 707 N.E.2d 1140 (1997), the Ohio Court of Appeals found it improper for the presiding officer to remove an individual who donned a ninja mask in protest, but otherwise sat quietly in his seat because his action constituted protected First Amendment speech and did not disrupt the meeting.

The goal of removing someone, of course, should not be to prevent individuals with opposing viewpoints from expressing those views, but to allow the meeting to proceed in an orderly manner. Removal from a meeting is an extreme remedy that should generally only be employed as a last resort so that a meeting can proceed. But courts consistently affirm the right to take this action when it is necessary to allow the council or a committee to conduct the public’s business.

The Council Meeting – Public Hearings

While most council meetings are open to the public, it is important to understand the difference between a public meeting and a public hearing.

Public hearings are specifically set up to allow the public to comment and express opinions and concerns on matters related to the purpose of the hearing. Stated another way, a public hearing is an official proceeding during which the public is accorded the right to be heard on a specific issue.

Some public hearings are required by law. For example, Section 11-52-77, Code of Alabama 1975, requires that a public hearing be held before passing any zoning ordinance (or amendments to zoning ordinances, See Section 11-52-78, Code of Alabama 1975). Another example of a mandated public hearing relates to increases in ad valorem taxes. Subsection (f) of Section 217, as amended by Amendment 373 of the Alabama Constitution of 1901, provides that a municipality may, under certain conditions, increase ad valorem taxes after a public hearing.

There are circumstances, however, where even if the law does not require a public hearing, a governmental body may want to conduct a hearing to gauge public opinion on

a matter before it takes any formal action. For example, state law does not require a municipality to hold a public hearing before issuing an alcoholic beverage license, but it is certainly prudent for a municipality to hold a hearing and take steps to protect an applicant’s due process rights in the event of a denial of a license. In instances like this, the public input and testimony may help support the basis for the council’s decision.

Notice and Location

Consideration should be given as to the location for a hearing before giving notice to the public. Space, furnishings and equipment needs should be assessed as soon as possible keeping in mind the nature of the public hearing and expected attendance, to the extent that it can be ascertained, of people who are likely to provide comment.

Regardless of the reason for the public hearing, the public must be put on notice of the hearing. While particular statutory requirements may come into play in the case of a mandated public hearing, all notices should, at a minimum provide the date, time, and location of the hearing as well as a brief statement of the purpose of the hearing. Other considerations for the notice include:

- A name and contact information for additional information;
- Information on where copies of relevant documents can be reviewed or obtained;
- Information on how individuals or groups may testify during the hearing including any applicable rules for the public hearing if they are available.

Establishing “Ground Rules”

In order to run a smooth public hearing and cut down on disorder, it is advisable that the city council, or other governmental entity conducting the public hearing, establish some ground rules which balance the public’s right to be heard with the need to maintain order. These rules may be set up in writing and provided in advance of the public hearing or they may be done verbally at the beginning of the public hearing. Whether they are provided in advance or not, the rules should be publicly announced at the beginning of the public hearing and may need to be repeated during the course of the hearing if it is clear that they are not being followed or there appears to be some confusion. As with any rules, they are only effective if they are enforced consistently and fairly.

The rules must respect the public’s first amendment right to free speech given that a public hearing is considered a designated public forum. As such, any rules or restrictions should only apply to time, place, and manner of the speech as opposed to the content of the speech. In a public forum

the government may impose reasonable restrictions on the **time, place, or manner** of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

With this general principal in mind, following is a suggested framework, including some suggested ground rules, for conducting public hearings:

1. **Opening Comments.** The person responsible for conducting the public hearing, such as the chair of the planning commission for zoning public hearings, should welcome the public and state the purpose of the hearing. It might also be a good idea to acknowledge the manner in which notice was provided for the hearing and state that everyone wishing to speak on the subject at issue will be given the opportunity to speak. The procedures to be followed for the hearing should be stated clearly and the public should be put on notice that failure to follow the procedures or otherwise because disruption will lead to them being asked to leave the hearing immediately. For example, if there is a time limit on speaking or a limit on the number of people who may speak on either side of an issue, it should be made clear to attendees up front. This will help the public understand, and hopefully, follow the procedures established.
2. **Sign-up Sheets.** A common practice for any public hearing is to require individuals or groups to sign-up if they wish to speak. A sign-up sheet should be easily accessible to attendees at the public hearing and announcements should be made before and during the hearing that if people want to speak, they must sign-up to do so. Also, keep in mind that persons with disabilities must be accommodated with assistance in both signing up to speak and speaking if necessary.

In an effort to maintain fairness and efficiency, testimony and comments should be taken in the order listed on the sign-up sheet. This also helps avoid people bunching up or crowding at the podium where people are speaking. It is also recommended, unless the circumstances warrant otherwise, that people who wish to speak multiple times must wait until everyone has had their chance to speak initially. Whatever approach is taken, it should be enforced consistently and fairly.

3. **Limiting Subject Matter.** The prohibition against

regulating the “content” of speech doesn’t mean that the rules cannot limit speakers at the public forum to the subject matter of the public hearing. The 11th Circuit Court of Appeals has held that limiting testimony or remarks to a particular subject matter or topic does not violate the First Amendment to the United States Constitution. See *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989). Therefore, if a public hearing involves the potential rezoning of an area of land from residential to commercial, it would be proper to limit comments to this subject. It is important to note, however, that both positive and negative comments on the subject matter at hand must be permitted. See, e.g. *Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167 (1976) (prohibiting negative comments violates the First Amendment).

4. **Time Limits and Repetitive Comments.** Reasonable time limits on an individual’s comments during a public hearing may be imposed but there isn’t a one-size-fits-all as to the amount of time and this should be looked at carefully depending on the subject matter of the hearing. Limiting oral comments encourages witnesses to be focused and direct. While time limits of three to five minutes during public comment at a public *meeting* might be appropriate, when there are specific parties in interest at a public *hearing* (such as a land use applicant) time limits may need to be considerably longer. A party in interest is one whose property rights are directly affected by or at issue and limiting their time to speak at a public hearing should be imposed only if absolutely necessary. For those persons who are not a party in interest, three to five minutes may be more acceptable depending on the subject matter and nature of the hearing. Another option or consideration, if it appears that there will be a large number of people wishing to speak, is to limit the time for individuals to speak but allow for written comments to be submitted in addition to their oral comments.

What about limiting the number of times an individual may speak? Again, it is important to keep in mind that the purpose of a public hearing is to allow the public to speak and to gather input and comments from the public. Therefore, care should be taken before restricting the number of times an individual may address the body. What is reasonable will depend on the subject matter and whether the individual is simply repeating the same comments over and over rather than adding additional comments. Certainly, if an individual is making repetitive comments that are disruptive and are preventing the hearing from progressing in an

orderly fashion then that person may be interrupted and asked to stop.

5. **DISORDERLY PEOPLE.** Perhaps the most challenging aspect of a public hearing, especially if the issue is a contentious one, is dealing with disorderly people who refuse to cede the floor when asked or who interrupt and disturb other people who are providing comment. There are numerous ways a person may **disrupt** a public hearing. They may speak too long, be unduly repetitious, or get completely off the subject matter and start discussing irrelevancies. No one has the right to disrupt a public proceeding (meeting or hearing) and interfere with the business at hand. While an individual has a First Amendment right to free speech and expression, that right does not extend to disrupting proceedings in a manner that prevents a governmental entity from being able to proceed in an orderly manner. In fact, the governmental body may need to act to maintain order so that the rights of others, to speak on the matter at hand, are protected. *See generally White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990).

A good practice is for the person responsible for conducting the public hearing to be clear with anyone who interrupts, refuses to cede the floor, or insists on making irrelevant and/or repetitive comments that they must come to order or leave the hearing. If a person is asked to stop their behavior and refuses to do so, he or she should be directed to exit the hearing and if necessary be escorted out by a police officer.

6. **Recesses/Continuances.** Depending on the circumstances and subject matter of the public hearing, it may become necessary at some point during a public hearing to take a recess or even call for a continuation of the hearing at another date and time. In the case of a recess, it should be made clear to everyone in attendance at the public hearing the length of the recess and when it will reconvene. The hearing should not reconvene until the time announced.

If a public hearing has gone on longer than anticipated due to the volume of people who wish to be heard or the length of their comments, it may be necessary to continue the hearing to another date and time. It is rarely advisable to put an absolute time limit on a public hearing because this could frustrate the purpose of the hearing if people are prevented from being heard. It is certainly acceptable, however, to place a time limit at which a continuation will be called. Should a continuance be necessary, it should be announced to

those in attendance, before suspending the hearing, the date, time, and location of the continuation. While a second notice is not specifically required by law, it is always a good practice to formally re-notice the continuation of the public hearing in the same manner as the notice for the underlying hearing.

7. **Closing the Meeting.** A public hearing is concluded when all attendees who wish to comment have been given the opportunity to do so. Generally, there is not vote or action taken at the close of the hearing and the person responsible for conducting the hearing simply calls it to a close. If the public is going to be allowed to submit written comments, it should be announced how long those comments will be accepted and where they should be turned in. It is appropriate to thank the attendees for attending and providing comment and should explain the steps the governmental entity will take to use the information gathered.

Referenda

The League is often asked if a municipality can submit non-binding, or even binding, questions to the voters. The Attorney General has consistently ruled that a municipality may only call for an election if it authorized to do so by legislative authority. In numerous opinions, the Attorney General has said a municipality may not hold an advisory election in the absence of statutory or charter authority. The cost of holding these elections is not a proper expenditure of city funds. The Attorney General has also disapproved submitting questions to the voters at the general election so that the cost is negligible.

Essentially, these rulings mean that the council cannot agree to be bound by the vote of the people unless the election is allowed by statute, the constitution, or charter power. This would be in improper delegation of the council's legislative power.

A summary of the Opinions on this issue addresses most of the questions that arise in this area:

- A city may not allocate and spend funds in order to hold non-binding city-wide referendum on the question of a 1% sales tax increase. AGO 1982-198 (to Hon. George A. Monk, February 16, 1982).
- A city may not sponsor and hold a non-binding referendum using city employees and officials to work on the election, even if the cost of the referendum is paid for with private funds. AGO 1994-001.
- A private group may conduct a non-binding referendum for a municipality. The municipality may not participate other than as private citizens. The council cannot agree to be bound by the referendum. AGO 1997-257.

- A city may not sponsor and hold a non-binding referendum using city employees and officials to work on the election, even if the cost of the referendum is paid for with private funds. AGO 1994-001.
- A private group may conduct a non-binding referendum for a municipality. The municipality may not participate other than as private citizens. The council cannot agree to be bound by the referendum. AGO 1997-257.
- The probate judge has no authority to include a municipal advisory referendum on a primary election ballot. AGO 2006-075.
- A city council may not make zoning in a particular district subject to a referendum of the residents. AGO 1991-262.

Similarly, Section 212 of the Alabama Constitution, 1901 provides that, “The power to levy taxes shall not be delegated to individuals or private corporations or associations.” this would prohibit the council from making the levy of a tax subject to a referendum without specific authority from the legislature.

In *Opinion of the Justices*, 251 So.2d 739 (Ala. 1971), the Alabama Supreme Court interpreted this provision to mean that the public has created a legislative department for the exercise of the legislative power, including the power of taxation. The Court held that the legislature can’t relieve itself of the responsibility. In *Opinion of the Justices*, 251 So.2d 744 (Ala. 1971), the Court further held that this Section prevents holding public elections on tax issues, unless authorized by the Constitution.

Citizen Petitions

The First Amendment to the U.S. Constitution guarantees citizens the right to petition the government for a redress of grievances. But what is the legal effect of a petition brought by a citizen or citizens? While petitions certainly have a political effect and may at least lead to discussion of the issues, most do not require a city council to take any action or even debate the petition. A petition has legal effect only if a statute gives it some significance.

There are only a few instances where a petition will require the city to take legal action. Quite often the petition only brings the issue before the governing body, and the council may deny the petitioner’s request, or even refused to consider the petition at all.

If a statute allows citizen petitions, however, it is important to know how many signatures are required to compel the body to act, what action is required and that the signatures are properly verified.

In some cases, such as requesting a variance from a zoning ordinance, courts indicate that a petition by a

single property owner is sufficient to require the board of adjustment to act. See, *Fulmer v. Board of Zoning Adjustment of Hueytown*, 286 Ala. 667, 244 So.2d 797 (1971). Other situations, such as requesting a wet/dry referendum, require the filing of a petition signed by a specific number of individuals before the governing body can act. See, Section 28-2A-1, Code of Alabama 1975.

The action the governing body must take can vary from merely considering the petition to calling for a referendum. In some cases, the body must specifically act or the petition is granted. For example, Section 11-52-32(a) provides that upon the filing of a subdivision “plat,” essentially a petition for approval of a subdivision, “The planning commission shall approve or disapprove a plat within 30 days after the submission thereof to it; otherwise, such plat shall be deemed to have been approved. . . .” Thus, when a petition is filed, it is imperative that the governing body determine whether the petition legally requires it to act, and what form that action should take.

The verification process is crucial. Improper signatures should be rejected. Improper signatures may cause the petition to fail because there were not a sufficient number of signers to force (or allow) the governing body to act. If these signatures are not rejected, the petition is subject to legal challenge in court.

The goal, of course, is to meet statutory requirements. For example, if the Code requires signatures of a certain percentage of citizens, the citizenship of those signing must be verified. Unfortunately, there is very little guidance in Alabama on the verification process. Some guidance is available from court decisions and Attorney General’s Opinions:

General Rulings:

- When a petition must be filed within a fixed time, signatures to the petition cannot be withdrawn after the expiration of such time. AGO to Hon. Sam E. Loftin, January 8, 1985.
- Where a petition was submitted to a local body, but was not certified by that body, and where the original petition is over a year and a half old, it cannot be withdrawn and recirculated for additional signatures. The petition, though, is a public record. AGO 1998-036.
- A municipality is not required to hold an election to determine whether an Improvement Authority may proceed to acquire, establish, purchase, construct, maintain, lease, or operate a cable system if no petition is timely filed or if the petition filed is insufficient. However, when an election is required to be held, and there is no previously scheduled general or special municipal election, a municipality must designate a

special election date in accordance with sections 11-50B-8 and 11-46-21 of the Code of Alabama 1975. AGO 2003-006.

- Petitions for referendum elections do not require a petitioner to have actually voted in the last general election. Instead, the law requires that a petitioner be a qualified elector of the municipality and that the number of valid signatures must equal the specified percentage of the number of qualified voters who voted in the last general municipal election. AGO 2014-073.

Annexation Petitions:

- The probate judge in *Lett v. State*, 526 So. 2d 6 (Ala. 1988), improperly struck names from the annexation petition because they were not dated. The court held that there is no requirement that names on the petition be dated because annexation proceedings may continue for years. In addition, there is no requirement that all names listed on the petition own property that is contiguous, provided that the entire tract which is subject to the election is contiguous to the municipal limits.
- Where the annexation petition presented to the Probate Judge does not meet the statutory requirements, the city must start over with the adoption of a new resolution and must meet all of the Code requirements. AGO to Hon. O.D. Alsobrook, May 1, 1978.
- The State of Alabama is an owner of property within the meaning of the annexation statutes and may consent to the annexation of property it owns, even though the State is exempt from ad valorem taxation. The petition for annexation should be signed by the Governor. AGO 1998-009.
- In the case of separate and independent petitions for annexation, each parcel of land seeking to be annexed must be independently contiguous to the then existing city limits to permit the independent annexation of the parcel pursuant to Section 11-42-21 of the Code of Alabama 1975. However, separate parcels may join and file a single petition for annexation. Further, a city cannot annex separate parcels of property by adopting one ordinance if separate petitions for annexation have been filed unless the parcels are joined together by a single petition. AGO 2003-147. NOTE: The League disagrees with this opinion and knows of one circuit court that also disagrees with the conclusion in this opinion. See *City of Clay v. City of Trussville*, In the Circuit Court of Jefferson County, CV 02-0718ER.
- The area comprising public streets and rights-of-way should be included in the total property to be annexed for purposes of calculating whether the owners of 60

percent of the property to be annexed have joined in and consented to the petition for annexation as required by section 11-42-2(10) of the Code of Alabama. The owner of the acreage comprising the public streets and rights-of-way may consent to annexation. If the county is determined to be the owner, the commission chairman, upon approval of the county commission, may execute the appropriate consent. 2014-032.

- Town complied with zoning statutes relating to notice in its enactment of zoning code provision relating to rezoning of property proposed for a rock quarry as a special district. Further, the process of annexing property into town's corporate limits began with property owner's filing of an annexation petition, such that subsequent pre-zoning of the proposed annexed property complied with the exception to the statute prohibiting a municipality from zoning territory outside its corporate limits when property proposed for annexation. *Gibbons v. Town of Vincent*, 124 So.3d 723 (Ala. 2012).

Incorporation Petitions:

- A person may remove his name from an incorporation petition at any time prior to it being submitted to the Probate Judge. AGO to Hon. William B. Duncan, August 14, 1981.
- For incorporation purposes, a qualified elector is a person who is registered to vote in the county and precinct in which the area to be incorporated is located. AGO 1997-219.
- A person may not remove his name from an incorporation petition after the petition has been submitted to the probate judge. After the probate judge determines that the petitioners to incorporate an area are qualified electors, that the petition meets the statutory requirements, and sets an election, the petition is not invalidated by the presentation of new information alleging that a petitioner no longer resides on the property to be incorporated. AGO 2000-038.
- An incorporation petition should be treated as a judicial case. An original petition that has been withdrawn may be returned to the parties if the probate court finds that the motion is timely filed. Copies of the original documents should be preserved in a manner consistent with closed judicial cases. 2002-034.
- Because the statute is silent on the time a petition for the incorporation of a community must be filed or re-filed after the signatures have been obtained, a probate judge, in determining the validity of the petition, decides on a case-by-case basis regarding the passage

of time between the execution of the petition and the submission of the petition to the probate court for the requested election. A probate judge, in his or her judicial capacity, may conduct a hearing to determine the validity of a petition for the incorporation of a community. The election for incorporation must be held within thirty days after the filing of a valid petition. 2002-278.

- A person may remove his or her name from an incorporation petition at any time prior to submission of the petition to the probate judge. It is incumbent on any person who agrees to sign a petition for incorporation to initially contact the petition committee and not the probate judge when the person seeks to have his or her name removed from the petition. Whether a person's name should be removed from an incorporation petition in instances where the incorporation committee has not been notified is a decision best suited for a determination by the probate judge. AGO 2010-071.
- Section 11-41-1, Code of Alabama 1975, requires that valid incorporation petitions contain signatures from 15 percent of registered voters residing in the area, owners of 60 percent of the total land in the area, and 4 registered voters residing on each 40 acres of the unincorporated community. A petition for incorporation must fail when the petition lacks the requisite signatures as set forth in section 11-41-1 of the Code. The 60-percent-ownership requirement is in relation to the entire area to be incorporated. This figure should not be applied to each quarter of a quarter section of land in a proposed municipality. Invalid petitions may be amended by the petitioner. AGO 2011-099.

Wet/Dry Petitions:

- In verifying signatures on a wet-dry petition, the probate judge may include in the total all who are registered voters at the time of verification. AGO to Hon. John L. Beard, November 25, 1981.
- All valid names of voters in the county calling for a wet/dry referendum are to be counted regardless of when and where the heading is stamped on the petition. AGO 1986-279.
- A wet-dry petition which does not contain the proper number of names may be withdrawn and recirculated for additional names to be added. AGOs 1987-037 and Hon. Hal Kirby, January 27, 1984.
- Act 2228, 1971 Regular Session, allows annexation by unanimous consent of the property owners. If two small parcels of land included in the petition did not join in the petition, the first petition is null and void.

However, the council may adopt an ordinance accepting the petition as amended. AGO to Hon. James W. Grant, III, June 1, 1978.

- A municipal governing body may not call for a special election and have that special election considered the election next succeeding the filing of the wet/dry petition. A municipal wet/dry referendum must be held at the same time as one of the elections enumerated in Section 28-2A-1 of the Code of Alabama. Section 28-2A-1(f) of the Code of Alabama does not authorize a municipal governing body to set a special election for a wet/dry referendum. It only allows the municipal governing body to determine which election date next succeeding the filing of the wet/dry petition will be used for holding the wet/dry referendum. AGO 2009-089.
- Electronic signatures obtained online and/or on electronic signature pads, if printed and submitted with a wet-dry petition, are not valid signatures as required by Section 28-2-1 of the Code of Alabama 1975. AGO 2015-059.
- The Probate Judge is responsible for verifying that the individuals who sign a petition filed for a wet/dry referendum pursuant to Section 28-2-1 of the Code of Alabama are valid registered voters. AGO 2015-059.
- Zoning Petitions:
- Whether a petition presented to the planning commission in 1985 requesting that an area be rezoned may be resubmitted, must be decided by the planning commission. AGO 1991-340.

Dormant Municipal Reinstatement Petitions:

- The boundaries of a dormant municipality must be established by a court of competent jurisdiction before a probate court proceeds with the matter of a reinstatement petition for the dormant municipality. AGO 2001-125.
- Section 11-41-7 of the Code of Alabama 1975 does not authorize a probate judge to clear up errors or omissions in the legal description of the boundaries of a dormant municipality. A probate judge may not accept a plat and legal description from an original petition for incorporation of a dormant municipality, even if he or she also received a signed affidavit of a licensed land surveyor purporting to clear up scrivener's errors in the legal description. 2001-282.
- Towns or cities that have permitted their organization to become dormant and inefficient may petition the probate court for an order to reinstate the municipality pursuant to section 11-41-7 of the Code of Alabama.

Once a municipality has been dissolved the town or city may not be reinstated under section 11-41-7, but may be able to incorporate pursuant to sections 11-41-1 through 11-41-6 of the Code of Alabama if the population requirements are satisfied. A community with a population of less than 300 may not be incorporated pursuant to section 11-41-1 of the Code of Alabama. AGO 2008-039.

Form of Government Petitions:

- The qualified electors who sign petitions filed under Section 11-43A-2 of the Code of Alabama 1975, are not required to have actually voted in the last general municipal election. The number of signatures on the petition must equal at least 10 percent of the total number of qualified voters who voted in the last general municipal election held in the municipality. The total number of votes cast should be recorded in the minutes of the council meeting in which the results of the election were canvassed. 2004-034. NOTE: Section 11-43A-2 of the Code of Alabama 1975 provides for a petition for an election to change to the Council-Manager form of Government.
- The authority to adopt the mayor-council form of government under section 11-43C-2 of the Code of Alabama existed only in the year 1987 and expired before January 1, 1988, with the election of new officials under such a government first taking place in 1988. Thus, after receiving a petition, as set out in section 11-44E-201 of the Code of Alabama, from at least 25% of qualified voters to change its form of government, the City of Dothan was not required to call for the election to abandon the current form of government. 2007-051.

9. Basic Parliamentary Procedure

Parliamentary law is defined by Black's Law Dictionary as the general body of enacted rules and recognized usages which govern the procedure of legislative assemblies and other deliberative bodies. Sturgis' Standard Code of Parliamentary Procedure defines parliamentary law as the code of rules and ethics for working together in groups.

History

Parliamentary law has evolved through centuries from the experiences of individuals working together for a common purpose. The name, of course, is derived from the mother of parliaments, the forum of the House of Commons of Great Britain. Parliament is noted for its zealous regard to the right of free and fair debate, the right of the majority to decide and the right of the minority to protect and be protected.

Parliamentary procedure became uniform in 1876 when Henry M. Robert published his manual on parliamentary law. Today, there are several excellent books on parliamentary procedure including *Robert's Rules of Order Newly Revised* and *Mason's Manual of Legislative Procedure*.

Significance

Justice William O. Douglas once said that, "Procedure is more than formality. Procedure is, indeed, the great mainstay of substantive rights ... without procedural safeguards, liberty would rest on precarious grounds and substantive rights would be imperiled." In the case of *McNabb v. U.S.*, 318 U.S. 332 (1943), the court stated: "The history of liberty has largely been the history of observance of procedural safeguards."

Any great principle or right is only as strong as the procedures that support and enforce it. Unless parliamentary procedure is observed, the rights of free speech, free assembly and freedom to unite in organizations are useless and hollow rights; parliamentary procedure gives reality to these democratic concepts.

Rules

The rules of parliamentary procedure are found both in the common law and in statutory law. Common law has given us the principles, rules and usages which have developed from court decisions on parliamentary questions and is based on reason and long observance. These rules apply in all situations except where a statutory law governs.

The statutory law of procedure consists of statutes relating to procedures that have been enacted by federal, state or local legislative bodies. These rules apply only to

the particular organizations covered by the law.

Parliamentary procedure is essentially common sense and is simple to understand and easy to use. It works magic in meetings and enables members and organizations to present, consider, and carry out their ideas and transact business with efficiency and harmony. The rules can be used to destroy, as well as to construct, but only when a majority of the members are ignorant of their parliamentary rights.

Sources of Rules

There are four basic sources of rules, arranged here in order of rank:

1. **Law.** Statutes enacted by federal, state or local governments are the highest source.
2. **Charter.** The charter granted by government or an organization ranks second.
3. **Bylaws.** The bylaws, or the constitution and bylaws and other adopted rules, rank next.
4. **Rules.** Any book of rules duly adopted as the rules of procedure on procedural questions not covered by other sources are last in precedence.

Clearly, rules of one source may not conflict with the rules of a higher rank. In the event of conflict, the highest source must be observed.

Principles of Parliamentary Procedure

The primary principle of procedure is to facilitate the transaction of business and to promote cooperation and harmony. Procedure should not be used to entangle and confound the uninformed but rather to expedite business, to avoid confusion and unfair advantage and to protect the rights of members.

Several basic procedural rules have been developed to assure that the simplest and most direct procedure for accomplishing a purpose is observed.

First, motions have a fixed order or precedence and only one motion may be considered at a time.

Second, all members have equal rights, privileges and obligations. Presiding officers must be impartial and should use their authority to protect and preserve the equal rights of all members to propose motions, speak, ask questions, vote, etc.

Third, the ultimate authority in an organization is vested in the majority. A primary purpose of procedure is to determine the will of the majority and to carry it out. Once a question has been voted upon, the decision becomes that

of the organization. Each member should accept and abide by the result.

Fourth, the minority is entitled to the same consideration and respect as members who are in the majority. The protection of the rights of all, both majority and minority, should be the concern of each member.

Fifth, each member is entitled to full and free discussion. Each has the right to express his or her opinion fully and freely without interruption and interference within the framework of the rules.

Sixth, each member is entitled to know the meaning and effect of each question presented. The presiding officer should keep the pending motion clearly before the assembly at all times. Upon request, the presiding officer should explain any procedural motion and its effect so that every member may understand the proceedings.

Last, but equally important, is the principle that all meetings must be characterized by fairness and good faith. Trickery, dilatory tactics, dealing in personalities and railroading are, or should be, taboo. Fraud, unfairness or absence of good faith may be grounds for a court to invalidate any action taken.

Classes of Motions

A motion is the formal statement of a proposal or question to an assembly for consideration and action. Motions are classified into four groups – main motions, subsidiary motions, privileged motions and incidental motions.

A **main motion** is the foundation of the conduct of business. There are three main motions that have specific names and are governed by somewhat different rules. To distinguish them from the main motion, they are referred to as “specific main motions” and are motions to reconsider, to rescind, and to resume consideration (take from the table).

Subsidiary motions are alternative aids for changing, considering or disposing of the main motion and are therefore subsidiary to it. The most frequently used subsidiary motions are to postpone temporarily (lay on the table), to vote immediately (previous question), to limit debate, to postpone definitely, to refer to a committee, to amend and to postpone indefinitely.

Privileged motions have no connection with the main motion before the assembly. They are emergency motions and of such urgency that they are entitled to immediate consideration and are acted upon ahead of other motions. Privileged motions are adjournment, recess and question of privilege.

Incidental motions are merely incidental to the business of the assembly and usually relate to the conduct of the meeting and not to the main motion. They are offered at any time when needed. The most frequently used of this

class of motion are: appeal, suspend the rules, point of order, parliamentary inquiry and division of the question.

Classification of motions is usually based on the relation of that motion to the main motion. The main motion is the foundation that determines the classification of other motions. The presiding officer must be alert to the effect and purpose of a motion so as to properly classify it and rule accordingly.

Presentation of Motions

The presentation of a motion is made by addressing the chair, gaining recognition, proposing the motion and having it seconded, followed by the presiding officer stating the motion to the assembly. When the chair recognizes the speaker, he or she is said to “have the floor” and other members should permit him or her to present the motion or to speak. The motion is stated “I move that...” and is the only correct way. It gives notice to the chairperson or presiding officer and to the membership that the speaker is submitting a proposal for decision. Do not use such terms as “I move you,” “I so move,” “I propose,” or “I suggest.” Lengthy motions should be written and a copy handed to the clerk or secretary and the presiding officer.

Once the motion is made, most rules require a second. This is done by saying “I second the motion” or simply “Second the motion.” No recognition is required to second except that the minutes should show who made the motion. If no one seconds, the chair announces, “The motion is lost (or fails) for want of a second.” The presiding officer has the duty to state all properly-presented motions to the body and must do so correctly and clearly.

Usage has established proper phraseology for stated motions. This language should be learned and utilized. Subsidiary motions are generally stated as follows:

- Limit Debate: “I move that debate on the proposed assessment be limited to one hour.”
- Postpone Definitely: “I move that all reports of special committees be postponed until the next regular meeting.”
- Refer to Committee: “I move that we create a subcommittee to consider the motion and report at the next meeting.”
- Amend: “I move that the motion be amended by adding the words ... “

Privileged motions are simply stated: “I move we adjourn,” or “I move we adjourn promptly at 9:00 o’clock,” or “I move that we recess for five minutes,” or “I move we recess until 8:00 o’clock.”

On questions of privilege, the motion may be stated: “I

move that the city engineer be asked to report his findings on the seashore drainage project.”

Incidental motions may also be stated simply. “I move that we suspend the rules prohibiting speeches by guests during business meetings so that when we meet in the afternoon session the president of the chamber of commerce may speak on the plans for Clean-up Week.”

Basic Rules of Motions

Rules governing motions are definite and logical. If a member understands the purpose of a motion, he or she can usually reason out the rules governing it. The following questions should be asked about each motion: What is its precedence? Can the motion interrupt the speaker? Is a second required? Is it a debatable motion? Can it be amended? What are the requirements of votes for this particular motion? To what other (usually previous and pending) motion does this motion apply? What other motions (which could be proposed) can be applied to the motion?

Precedence

To avoid confusion each motion is assigned a definite rank. Each assembly may, and many do, establish a permanent and definite series of rules of precedence or rank to all types of motions. The customary ranks are as follows: (1) adjourn, (2) recess, (3) question of privilege, (4) postpone temporarily, (5) vote immediately, (6) limit debate, (7) postpone definitely, (8) refer to committee, (9) amend, (10) postpone indefinitely, (11) main motions. The first three, in the list above are privileged; numbers 4 to 10 are subsidiary; and number 11 deals with the main motion. In the latter case, there are a group of motions, known as specific main motions, which include reconsider, rescind and resume consideration.

There are two basic rules of precedence. First, when a particular motion is being considered, any motion of higher precedence may be proposed but no motion of lower precedence may be proposed. For example, when a main motion is pending, a member may move to refer to committee and another may move to recess.

Second, motions are considered and voted upon in reverse order to their proposal. The motion last proposed is considered and disposed of first. For example, if motions are proposed as cited above, they are considered in reverse order, i.e. to recess, to refer to committee and then main motion.

Interruption of Speaker

Two types of motions, because of their urgency, permit the speaker to be interrupted. The first type is those motions that must be proposed and decided within a specific time limit – reconsider, object to consideration, appeal and division of the assembly. Reconsider must be made during

the same meeting at which the vote to be reconsidered was taken. (Special rules of a continuing assembly may slightly alter this procedure, usually to permit reconsideration of a measure to be made at the next subsequent meeting as well. Entities should check their local rules to determine when a motion to reconsider is appropriate.) An objection to consideration must be made before progressing to consider the main motion and before any other motion has been applied to it. An appeal and a call for division of the assembly must be made before other business intervenes.

The second type of interruption relates to immediate rights and privileges of a member of the body – question (or point) of privilege, point of order, and parliamentary inquiry. To justify interrupting a speaker, a parliamentary inquiry must relate to the speaker, his speech, or some other matter that cannot be delayed until the completion of the speech. A point of privilege, to justify interruption, must involve the immediate comfort, convenience or rights of the assembly. Points of order must relate to mistakes, errors or a failure to comply with the rules. If it relates to the speaker or his speech, points of order must relate to some error that cannot wait until completion of the speech for its determination.

Seconds

All motions require seconds except in meetings of committees, boards or governmental bodies. For a motion to be worthy of consideration by an assembly, at least two members must be in support. Requests to the presiding officer do not require seconds. For example, point of order, inquiry and withdrawal of a motion or question of privilege do not require seconds. Seconds of motions may be required by local agreement or customs notwithstanding the general rule.

Debates

Some motions are open to full debate, others to restricted debate and some are undebatable. Main motions and procedures relating thereto (such as amendments, reconsideration, postponement, appeals) are fully debatable. These motions require the consideration and decision of the organization and, therefore, are entitled to a full discussion and explanation by the membership.

Three motions are open to restricted debates – recess, postpone definitely and refer to a committee. Such debates must deal with specific points, i.e., on motion to recess, a discussion of the desirability and duration of the recess; on motion of postponement as to the advisability and the time of postponement; and on motion to refer to committee as to the advisability, selection, duty and instructions to the committee.

All other motions are undebatable. For example, motion to adjourn, postpone temporarily, vote immediately, and certain incidental motions, such as suspension of rules and

requests to the chair, are not debatable. These motions deal with simple procedural issues.

The presiding officer must enforce the rules on debate since to deny or curtail debate on debatable motions tends to deprive members of their rights and could well result in unsound decisions. Permission to debate undebatable issues is likewise unfair and discriminatory and could unnecessarily bog down a meeting.

Amendments

Often a motion nearly approaches the consensus of thinking of an assembly but lacks the “finishing touch” to make it entirely acceptable to a majority of the members. An amendment may add just what is required to enable the members to vote approval of the idea or proposal.

A simple test determines whether a motion can be amended. If the motion can be stated in different words, it can be amended. The motion “I move we recess for 10 minutes” could as well be stated “I move we recess for 15 minutes.” Clearly, the latter is a valid amendment and may actually express the will of the majority, whereas 10 minutes might be considered a sheer waste of time. The motion to postpone indefinitely, for example, can be stated in only one way and, therefore, cannot be amended.

Some motions can be amended freely, some can be amended with restrictions and some cannot be amended, as noted above. Main motions and amendments can be amended freely. The motions to recess, limit debate or postpone definitely can only be amended as to time. A motion to refer to committee can only be amended as to details referable to the committee, i.e., selection, duties, instructions, etc.

Votes

Generally, all motions require a majority vote to pass. However, there are four motions which modify the rights of members to propose, discuss and decide proposals and, therefore, require a two-thirds vote. These four motions are to vote immediately, to limit debate, to suspend rules, and to object to consideration. All of these motions curb the basic right of free debate and full discussion and, therefore, require more than a simple majority.

Municipal governing bodies operate under statutory requirements in passing certain types of legislation, such as the passage of general and permanent ordinances and resolutions. Such statutes must be followed to validate the action taken.

Applications

When a motion is being considered, it is important to know if other motions can be applied to it.

1. Every motion can have the motion to “withdraw” applied to it. Such a motion is often used to save the

embarrassment of defeat or to “save face.” The speaker can be interrupted to propose it, no second is required, and it is not amendable or debatable.

2. All debatable motions can have the motions to “vote immediately” and “limit debate” applied to them. These motions require a second but are not debatable, although “limit debate” is subject to restrictive amendments.
3. All motions that can be worded or stated in more than one way can have the motion “to amend” applied to them.
4. The main motion can have all the subsidiary and specific main motions applied to it, as well as “object to consideration.” Specific main motions can have no other motions applied to them except that motions to “reconsider” and “rescind” may have “vote immediately” and “limit debate” applied to them.
5. Privileged motions and incidental motions can have no other motion applied to them, except that “recess” may be amended and an “appeal” may have “vote immediately” and “limit debate” applied to it.

To “renew a motion” means to propose again the same or substantially the same motion that has been voted on and lost. When a main motion has been voted on and lost, the same or substantially the same motion, though worded somewhat differently, cannot be renewed at the same meeting. It can, however, be reconsidered at the same meeting or proposed as a new main motion at a later meeting. All other motions may be renewed whenever, in the judgment of the presiding officer, the members might reasonably be expected to act or vote differently on the subject matter or issue.

The problem is for the presiding officer to make a reasonable judgment. The presiding officer is aided in arriving at this decision by action taken on intervening business, progress in debate or change in the parliamentary situation. It would be futile to permit renewal unless there is reason to believe that a different outcome will result on the second consideration. In any event, the decision of the presiding officer can be appealed, thus giving members an opportunity to express themselves a second time.

Changing Main Motions Already Voted Upon

Usually, when an assembly decides a main motion by taking a vote on it, the decision is final. An assembly, like an individual, may change its mind and, therefore, motions have been developed to permit the change. Such motions are reconsider, rescind and amend by a new main motion.

The motion to reconsider the vote on a main motion that either carried or lost can be proposed during the same meeting at which the main motion was voted on (again, local rules may alter this procedure as explained above under the

heading “Interruption of Speaker.”). Action to renew a main motion that was “lost” cannot be taken at the same meeting but may be taken at a later meeting. The motion to rescind and amend by a new main motion and the motion to repeal apply to motions that have been carried.

Before new motions are proposed, the minutes should be checked to ascertain if the new motion conflicts with previous action of the assembly since the effect of the new motion may conflict with prior actions and positions.

Conclusion

The League recommends that every member of an assembly, regardless of its function or purpose, study and master rules of parliamentary procedure. The assembly will operate more smoothly and each member will be aware of personal rights as well as the rights of other members. The rights and privileges of all members will be better protected and promoted if this is done. The rules are based on logic which everyone can learn and apply with a little bit of homework. The effort put on homework will be most rewarding to the individual as well as to his or her associates.

Municipal officials should likewise be aware of statutory requirements so their actions will be valid. Certain actions taken by municipal governing bodies are legal only upon compliance with such statutory provisions.

Chart

In addition to deciding the order in which motions can be considered, it is also important to know when motions can be made, whether a second is required, whether the motion is debatable, who determines the result of the motion (chair or membership and the vote required), and whether the motion can be reconsidered.

The following chart lists some of the more common motions and can help members determine which actions can be applied to various motions. Motions at the top of the chart generally must be dispensed with before motions lower on the chart can be considered.

In addition to the council, committees and other entities should determine the rules that they will followed in their meetings and, if necessary, any amendments to the rules that they wish to adopt. Armed with this knowledge, a member of any board can protect his or her rights to participate in the debate and know how and when to communicate their desires. Presiding officers can determine the will of the membership while protecting the rights of the minority.

This chart is based on *Robert's* and should be considered only as a general guideline. If the entity in question follows a different parliamentary procedure manual, the rules may be different. Additionally, local and state laws or ordinances may modify these rules.

Robert's Rules of Order Motions Chart
Based on *Robert's Rules of Order Newly Revised (11th Edition)*

Part 1, Main Motions. These motions are listed in order of precedence. A motion can be introduced if it is higher on the chart than the pending motion. § indicates the section from Robert's Rules.

§	PURPOSE:	YOU SAY:	INTERRUPT?	2ND?	DEBATE?	AMEND?	VOTE?
§21	Close meeting	I move to adjourn	No	Yes	No	No	Majority
§20	Take break	I move to recess for ...	No	Yes	No	Yes	Majority
§19	Register complaint	I rise to a question of privilege	Yes	No	No	No	None
§18	Make follow agenda	I call for the orders of the day	Yes	No	No	No	None
§17	Lay aside temporarily	I move to lay the question on the table	No	Yes	No	No	Majority
§16	Close debate	I move the previous question	No	Yes	No	No	2/3
§15	Limit or extend debate	I move that debate be limited to ...	No	Yes	No	Yes	2/3
§14	Postpone to a certain time	I move to postpone the motion to ...	No	Yes	Yes	Yes	Majority
§13	Refer to committee	I move to refer the motion to ...	No	Yes	Yes	Yes	Majority
§12	Modify wording of motion	I move to amend the motion by ...	No	Yes	Yes	Yes	Majority
§11	Kill main motion	I move that the motion be postponed indefinitely	No	Yes	Yes	No	Majority
§10	Bring business before assembly (a main motion)	I move that [or "to"] ...	No	Yes	Yes	Yes	Majority

Part 2, Incidental Motions. No order of precedence.
These motions arise incidentally and are decided immediately.

§	PURPOSE:	YOU SAY:	INTERRUPT?	2ND?	DEBATE?	AMEND?	VOTE?
§23	Enforce rules	Point of Order	Yes	No	No	No	None
§24	Submit matter to assembly	I appeal from the decision of the chair	Yes	Yes	Varies	No	Majority
§25	Suspend rules	I move to suspend the rules	No	Yes	No	No	2/3
§26	Avoid main motion altogether	I object to the consideration of the question	Yes	No	No	No	2/3
§27	Divide motion	I move to divide the question	No	Yes	No	Yes	Majority
§29	Demand a rising vote	I move for a rising vote	Yes	No	No	No	None
§33	Parliamentary law question	Parliamentary inquiry	Yes	No	No	No	None
§33	Request for information	Point of information	Yes	No	No	No	None

Part 3, Motions That Bring a Question Again Before the Assembly.
No order of precedence. Introduce only when nothing else is pending.

§	PURPOSE:	YOU SAY:	INTERRUPT?	2ND?	DEBATE?	AMEND?	VOTE?
§34	Take matter from table	I move to take from the table ...	No	Yes	No	No	Majority
§35	Cancel previous action	I move to rescind ...	No	Yes	Yes	Yes	2/3 or Majority with notice
§37	Reconsider motion	I move to reconsider ...	No	Yes	Varies	No	Majority

10. The Open Meetings Act

The Alabama Open Meetings Act (OMA), codified at Sections 36-25A-1 through 36-25A-11, Code of Alabama 1975, was originally passed in 2005 and was most recently amended by the Alabama Legislature in 2015. As originally passed, it replaced what was commonly known as the Sunshine Law, Section 13A-14-2, Code of Alabama 1975. Although the OMA specifically repealed the former Sunshine Law, all specific references in the Code of Alabama 1975 to Section 13A-14-2, are preserved and are now considered to refer to the OMA instead. The idea behind this is to preserve any exclusion or inclusion from the requirement to hold public meetings that existed prior to the change in the law.

This article summarizes the OMA and how it impacts the way municipalities conduct business.

Who is Covered?

Meetings of all “governmental bodies” are subject to the OMA. While there is no question that municipal governing bodies must conduct open meetings pursuant to the requirements of the OMA, what other municipal entities must hold open meetings? And which gatherings of these entities are subject to the new law? With regard to municipalities, the OMA defines governmental bodies to include the following:

1. All municipal “boards, bodies, and commissions” which “expend or appropriate public funds”; and,
2. All municipal “multimember governing bodies of departments, agencies, institutions, and instrumentalities “including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by” the municipality.

Thus, any municipal board or agency that has the power to expend or appropriate municipal funds must conduct open meetings pursuant to the requirements of the OMA. Additionally, the OMA applies to any instrumentality, including separate corporations, whose membership is composed of at least a majority of members who were appointed by the municipality. The term “governmental body” does not include “voluntary membership associations comprised of public employees, retirees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by Legislature or Governor.” Section 36-25A-2(4)(c), Code of Alabama 1975.

A volunteer fire department certified by the Alabama

Forestry Commission is subject to the OMA. AGO 2006-108. Further, the provisions of the OMA apply to community action agencies that are established by a county, a municipality, a combination thereof, or a private, nonprofit agency newly established by local ordinance. Such entities may either voluntarily or as a result of requirements placed on the agency by the Department of Economic and Community Affairs follow the requirements of the OMA. AGO 2007-039. A public hospital board created by municipal ordinance pursuant to Section 22-21-5, Code of Alabama 1975, is subject to the OMA. AGO 2015-043. The Greater Birmingham Convention and Visitors Bureau is subject to the Open Meetings Act. AGO 2015-043.

Section 36-25A-2(6), Code of Alabama 1975, defines a “meeting” as any of the following:

1. “The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body at a time and place which is set by law or operation of law”;
2. “The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the full governmental body, committee or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds”;
3. “The gathering, whether or not it was prearranged, of a quorum of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental at a later date” and
4. “The gathering, whether or not it was prearranged, of a quorum of a committee or subcommittee of a governmental body during which the members of the committee or subcommittee deliberate specific matters relating to the purpose of the committee or subcommittee that, at the time of the exchange, the participating members expect to come before the full governmental body, committee, or subcommittee at a later date.”

The term “meeting” does not include the following:

1. “Occasions when a quorum of a governmental body, committee, or subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events, association meetings and

events or gathers for on-site inspections or meetings with applicants for economic incentives or assistance from the governmental body, or otherwise gathers so long as the subcommittee, committee, or full governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full governmental body at a later date”;

2. “Occasions when a quorum of a subcommittee, committee, or full governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the subcommittee, committee, or full governmental body.”; and
3. “Occasions when a quorum of a subcommittee, committee, or full governmental body, including two members of a full governmental body having only three members, gathers to discuss an economic, industrial, or commercial prospect or incentive that does not include a conclusion as to recommendations, policy, decisions or final action on the terms of a request or an offer of public financial resources.”

In addition, the OMA specifically provides that two members of a governmental body may talk together, without deliberation and that nothing in the OMA prevents a mayor, who is not a voting member of the council, from talking or deliberating with a member of the municipal council. This provision, in the League’s opinion, would allow a mayor, in a municipality over 12,000 population, to discuss any municipal matters with individual council members even if he or she ultimately discusses the same matter with every individual council member. We would advise caution here, however, to make sure that the provisions of the OMA with regard to serial meetings are taken into account.

These definitions make it clear that there must be a quorum present for there to be a “meeting” under the OMA unless it is covered by the serial meeting provisions discussed below. The quorum requirement applies to both the governing body itself and all subcommittees and committees of the governing body. However, a quorum alone is not the full requirement for a meeting under the Act. A “meeting” under the OMA would include a quorum gathered at a “prearranged gathering” such as a regular or special called meeting. Under the definition, a meeting would also include any gathering, prearranged or otherwise, of a quorum where members engage in deliberations of actions that are expected to come before the subcommittee, committee or full governmental body at a later time.

Fortunately, the OMA also makes it clear that there are certain types of get-togethers that are not covered, even

if a quorum is present. This allows members to attend social events or conventions, or similar activities, together, provided that they do not deliberate matters that are expected to come before the body later.

With regard to serial meetings, the Alabama Supreme Court, in *Slagle v. Ross*, 125 So.3d 117 (Ala. 2012), narrowed the scope of the definition of a meeting by holding that a “meeting” occurs only if a committee or subcommittee meets for the purpose of deliberating on a matter that will come back before *that* particular committee or subcommittee. Further, the Court determined that a plain reading of Section 36-25A-2(6)(a)(3), Code of Alabama 1975, yielded the conclusion that a “meeting” occurs when a majority of the members of a governmental body come together at the same time. As such, the Court held that in the case of the back to back meetings as presented under the facts of the case, there was no gathering of a majority of the board so as to constitute a meeting of the board within the meaning of Section 36-25A-2(6)(a)(3) because there was not a quorum present “at the same time.” While this case has a fairly narrow holding, it ultimately resulted in the Legislature making changes to the OMA in 2015 with the passage of Act 2015-340. In fact, one of the primary motivations for the 2015 amendments to the OMA was to specifically prohibit “serial meetings”

Act 2015-340, codified at Section 36-25A-2(13), Code of Alabama 1975, defines a “serial meeting” as “any series of gatherings of two or more members of a governmental body, at which:

1. Less than a quorum is present at each individual gathering and each individual gathering is attended by at least one member who also attends one or more other gatherings in the series.
2. The total number of members attending two or more of the series of gatherings collectively constitutes a quorum.
3. There is no notice or opportunity to attend provided to the public in accordance with the Alabama Open Meetings Act.
4. The members participating in the gatherings deliberate specific matters that, at the time of the exchange, the participating members expect to come before the subcommittee, committee or full governmental body at a later date.
5. The series of gatherings was held for the purpose of circumventing the provisions of this chapter.
6. At least one of the meetings in the series occurs within seven calendar days of a vote on any of the matters deliberated.”

Four types of gatherings are specifically exempted from the definition of a “serial meeting.” Of interest to municipal government, the following do not constitute a serial meeting:

1. Gatherings, including a gathering of two members of a full governmental body having only three members, at which no deliberations were conducted or the sole purpose was to exchange background and education information with members on specific issues...;
2. A series of gatherings related to a search to fill a position required to file a statement of economic interests with the Alabama Ethics Commission pursuant to Section 36-25-14 until the search has been narrowed to three or fewer persons under consideration.
3. A gathering or series of gatherings involving only a single member of a governmental body.

The Attorney General has opined that a quorum of a governing body may attend a committee meeting, where notice was properly given for the committee meeting under the OMA, without also providing notice of a meeting of the governing body, as long as the governing body does not deliberate matters at the committee meeting that it expects to come before the governing body at a later date. If a quorum of the governing body has prearranged a meeting to occur in conjunction with the committee meeting, the governing body must provide notice of this meeting under the OMA. A quorum of the governing body may not hold an impromptu meeting at the committee meeting, at which it deliberates specific matters expected to come before the governing body at a later date, without violating the OMA. AGO 2011-014

To be counted towards establishing a quorum, members of a governing body covered by the OMA are required to be physically present. There is no provision for obtaining a quorum by telephone conference. AGO 2006-071. Further, even if a quorum is physically present, additional members of a governmental body that are not present may not participate or vote in meetings through electronic means. A member of the governmental body may, however, listen to a meeting through electronic means. AGO 2010-070. A limited exception to the requirement for physical presence was added by Act 2015-526. This Act provides that members of a governmental body as defined in Section 36-25A-2, Code of Alabama 1975, that is comprised of members from two or more counties, may participate in a meeting of that governmental body by means of telephone conference, or other similar communications equipment which allows all persons participating in the meeting to hear each other at the same time. Participation by such means shall constitute presence in person at the meeting for all purposes, except for the establishment of a quorum. Only those members

physically present may participate in an executive session of that governmental body. An e-mail sent by one member of a governing body to other members expressing an opinion on a matter before the body does not, in and of itself constitute a meeting under the OMA so long as there is no “deliberation.” If an e-mail is a unilateral declaration of a member’s idea or opinion, then it is not a “deliberation” and without deliberation there is no meeting under the OMA. *Lambert v. McPherson*, 98 So.3d 30 (Ala.Civ.App. 2012).

Meeting Notice

The public must be provided notice of meetings which are subject to the OMA. See Section 36-25A-3, Code of Alabama 1975. Municipal governing bodies provide notice of regular meetings by posting notice on a public bulletin board at city hall at least seven days prior to the date of the regular meeting. A separate corporation where a majority of the membership is appointed by the municipality which has an office at a location other than city hall may instead provide notice on a public bulletin board in the principal office of the corporation. All other governmental bodies must post notice of each meeting in a location that is reasonably accessible by the public, or in some other method that is convenient to the public.

It should be pointed out that there is a small ambiguity in the notice requirements under Section 36-25A-3(a)(3). Separate corporations are permitted to post notice at their principal office, if they have one separate from the city hall. The notice provision then states that the public bulletin board must be at the office of the corporation or other instrumentality. It is unclear what other instrumentalities are covered. The League recommends that unless the entity in question is a separate corporation with an office at a location other than city hall, notice should be posted on a public bulletin board at city hall. Note that any entity may satisfy the notice requirement by posting at city hall. Additional notice may also be provided if desired.

Any change of the location or method for posting notices must be approved by the members of the governmental body at an open meeting and announced to the public at an open meeting. Section 36-25A-3(a)(5). Note that this is a two-step process. Both steps, though, can be performed at the same open meeting.

Section 36-25A-3(b), Code of Alabama 1975, sets out notice requirements for meetings other than regular meetings. For special called meetings, notice must be posted as soon as practicable after a meeting is called. The notice must be posted no less than 24 hours before the scheduled start of the meeting, unless:

1. Notice cannot be given due to emergency circumstances requiring immediate action to avoid physical injury to persons or damage to property; or
2. The notice relates to a meeting to be held solely to accept the resignation of a public official or employee.

In these instances, notice must be given as soon as practical, but in no case less than one hour before the meeting is to begin.

The Attorney General has ruled that at least seven days' notice is required by the OMA, for a regularly scheduled meeting of the city council or standing committee of the city when a meeting is established by organizational ordinance or resolution. As to meetings of the city council or standing committee that do not have regularly scheduled meetings set by ordinance or resolution, as well as meetings that are called pursuant to Section 11-43-50 of the Code of Alabama 1975, notice is to be posted as soon as practicable after the meeting is called, but in no event less than 24 hours before the meeting is scheduled to begin. AGO 2006-027.

Section 36-25A-3(c) provides that the notice must include the time, date and place of the meeting. If a preliminary agenda is created, the agenda must be posted as soon as practicable in the same location or manner as the notice. AGO 2006-027. If a preliminary agenda is not available, the posted notice shall include a general description of the nature and purpose of the meeting. Please note, though, that the OMA specifically provides that the governing body may still discuss at a meeting additional matters not included in the preliminary agenda. The Alabama Supreme Court has held that a governmental body did not violate the OMA by considering and voting on, at a special meeting, a resolution that was not on the agenda. *Underwood v. Alabama State University*, 51 So.3d 1010 (Ala.2010)

The posting by a municipal governing body of its organizational ordinance or resolution specifically stating the place, date, and time of regular council meetings and standing committee meetings, and a general description of the nature and purpose of those meetings is sufficient to meet the notice requirements of the OMA.

If practicable, the governing body must also provide direct notification of a meeting to any member of the public or news media who has registered to receive notification of meetings. Section 36-25A-3(a)(6), Code of Alabama 1975. The municipality may require the person requesting notice to pay the actual cost of issuing notices, if there is one, in advance. Direct notice to persons who have registered shall, at a minimum, contain the time, date, and place of the meeting. This notice must be given at the same time the general notice is provided.

The governing body may promulgate reasonable rules and regulations necessary for the uniform registration and payment for direct notice and for the distribution of the notices. The governmental body has the authority to choose the method of providing direct notice. This may include using electronic mail, telephone, facsimile, the United States Postal Service, or any other method reasonably likely to provide the requested notice.

Minutes

The Act requires all entities subject to the OMA to keep accurate records (minutes) of all meetings. Section 36-25A-4, Code of Alabama 1975. The minutes shall include the date, time, place of the meeting, which members were present or absent, and any action taken at the meeting. The minutes must be maintained as a public record and be made available to the public as soon as practicable after approval. Minutes are not required for executive sessions. It is important to note here that under the OMA, most "work sessions" or similar "pre-council" gatherings meet the definition of a "meeting" as discussed above. As such, there should be a record of work sessions and pre-council meetings.

Conducting Meetings

All covered entities must adopt rules of parliamentary procedure and follow them during the meeting. Section 36-25A-5, Code of Alabama 1975. Unless specifically allowed by statute, votes shall not be taken during an executive session, nor may the body vote by secret ballot. All votes on matters before a governmental body, including, but not limited to, votes to appropriate or to authorize an employee to spend public funds without further authorization of the governmental body, to levy taxes or fees, to forgive debts to the governmental body, or to grant tax abatements, shall be made during the open or public portion of a meeting for which notice has been provided pursuant to this act. Voice votes are allowed.

Recording Meetings

The League has frequently been asked whether members of the public may make audio or video recordings of a meeting. Section 36-25A-6 specifically allows any person in attendance at a meeting to make a recording provided the recording does not disrupt the conduct of the meeting. AGO 2018-022. This does not apply to executive sessions. The governmental body may adopt reasonable rules for the implementation of this provision.

Executive Sessions

The OMA specifically states that executive sessions are not required for any reason. Section 36-25A-7(a). It does,

however, permit the body to enter into executive sessions for certain specified reasons. Unlike the Sunshine Law, the OMA provides a number of exceptions. These exceptions, as set forth in Section 36-25A-7(a), Code of Alabama 1975, include the following:

1. To discuss the general reputation and character, physical condition, professional competence or mental health of individuals, or to discuss the job performance of certain public employees. The entity may not go into executive session to discuss the job performance of an elected or appointed public official, an appointed member of a state or local board or commission, or any public employee who must file a Statement of Economic Interests with the Alabama Ethics Commission pursuant to Section 36-25-14, Code of Alabama 1975. The salary, compensation, and job benefits of specific public officials or specific public employees may not be discussed in executive session.

The Attorney General has ruled that this exception permits governmental boards to convene an executive session to interview current public employees in connection with promoting these employees to fill vacant positions when those positions do not require the interviewee to file a Statement of Economic Interests with the Alabama Ethics Commission. Only the portions of the meeting that involve the general reputation and character, physical condition, professional competence, mental health, and job performance of the employee may be discussed in executive session. The professional competence of a person may be discussed in executive session only when that person's position qualifies as a profession as specified in Section 36-25A-2(8) of the Code of Alabama. AGO 2006-088. Further, the AG found that the OMA permits the Alabama Aviation Hall of Fame Board to convene an executive session to discuss the general reputation and character of nominees for induction into the Hall of Fame and only those portions of the meeting that involve general reputation and character may be discussed in executive session. AGO 2010-011

2. To consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body, if an executive session is expressly allowed by federal law or state law.
3. To discuss with the attorney the legal ramifications of and legal options for:

- a. Pending litigation;
- b. Controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action; or
- c. To meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body.

Prior to voting to convene an executive session under this exception, an attorney licensed in Alabama must provide a written or oral statement reflected in the minutes that this exception applies to the planned discussion. This declaration does not constitute a waiver of attorney/client privilege. However, any deliberation between the members regarding what action to take relating to pending or threatened litigation based upon the advice of counsel must be conducted in the open portion of the meeting.

4. To discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, the public disclosure of which could reasonably be expected to be detrimental to public safety or welfare. If the discussion involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure must be given notice and an opportunity to attend the session.
5. To discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person, other than a public official, who is alleged or charged with specific criminal misconduct allegations or against whom charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint.

Prior to entering executive session for any of these purposes, the entity must obtain a written or oral declaration entered on the minutes that the discussions would imperil effective law enforcement if disclosed outside of an executive session from a law enforcement officer with authority to make an arrest or a district or assistant district attorney or the Attorney General or an assistant Attorney General.

6. To discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. However, the material terms of the contract must be disclosed in the public portion of a meeting

prior to the execution of the contract. Only persons representing the interests of the governmental body in the transaction may be present during an executive session held pursuant to this exception. The entity cannot hold an executive session for this purpose if:

Any member of the entity involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property; or

A condemnation action has been filed to acquire the real property involved in the discussion.

7. To discuss preliminary negotiations involving matters of trade or commerce in which the entity is in competition with private individuals or entities or other governmental bodies in Alabama or other states or foreign nations, or to discuss matters or information defined or described in the Alabama Trade Secrets Act.

Prior to holding an executive session pursuant to this exception, a person involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve matters or information defined or described in the Alabama Trade Secrets Act must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the competitive position of a party to the negotiations or upon the location, retention, expansion, or upgrading of a public employee or business entity in the area served by the governmental body if disclosed outside of an executive session, or would disclose information protected by the Alabama Trade Secrets Act.

8. To discuss strategy in preparation for negotiations between the governmental body and a group of public employees. Prior to holding an executive session pursuant to this exception, a person representing the interests of a governmental body involved in the negotiations must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session.
9. To deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer, an administrative board, court, or other body which has the authority to

conduct a hearing or appeal of the matter which is open to the public.

Deliberations by a regional planning commission concerning credit and financial records of applicants for revolving fund loans must be conducted in an open public meeting under the OMA. There is no specific exemption under the act or under federal law that allows commissions to enter into executive session to discuss the credit and financial records of applicants. AGO 2006-068.

The OMA also spells out a specific procedure for entering into an executive session, other than one held for a quasi-judicial or contested case hearing. The procedure pursuant to Section 36-25A-7(b), Code of Alabama 1975 is as follows:

1. A quorum of governmental body must first convene a meeting as defined in the OMA.
2. A majority of the members of the governmental body present must adopt, by recorded vote, a motion calling for the executive session. The motion must state the reason for the executive session. If the stated reason requires an oral or written declaration to justify the executive session as set out above, the oral or written declaration must be made prior to the vote.
3. The vote of each member, as well as the written or oral declaration, shall be recorded in the minutes.
4. Prior to calling the executive session to order, the presiding officer shall state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

A general statement in the minutes of unanimous consent of board members on a roll call vote to enter executive session satisfies the requirement in Section 36-25A-7(b) of the Code of Alabama that the vote of each member be recorded if the minutes reflect the names of the members in attendance and that each voted yes. AGO 2018-014.

Immunity

The OMA specifically states that members of the covered entity and any of its employees participating in a meeting complying with the law have an absolute privilege and immunity from suit for any statement made during the meeting which relates to a pending action. This immunity is in addition to all others that may apply. Section 36-25A-8, Code of Alabama 1975.

Enforcement

The process for enforcing the OMA is significantly different from that followed for enforcing the former Sunshine Law. The Sunshine Law was part of the Alabama

criminal statutes, and violations were enforced as criminal offenses, specifically misdemeanors. Instead, the new OMA is enforced as a civil violation as provided in Section 36-25A-9, Code of Alabama 1975.

The civil action must be brought in the county where the governmental body's primary office is located. Suit may be brought by any media organization, any Alabama citizen impacted by the alleged violation to an extent which is greater than the impact on the public at large, the Attorney General, or the district attorney for the circuit in which the governmental body is located. However, no member of a governmental body may serve as a plaintiff in an action brought against another member of the same governmental body for an alleged violation. If an action is filed by an Alabama citizen, the complaint shall state specifically how the person is or will be impacted by the alleged violation to an extent which is greater than the impact on the public at large.

An action alleging a violation of the OMA must be brought within 60 days of the date that the plaintiff knew or should have known of the alleged violation. In any event, though, any action under the OMA must be brought within two years of the alleged violation. The complaint must be verified and name in their official capacity all members of the governmental body who remained in attendance at the alleged meeting. The complaint must also specifically state one or more of the following the reasons for the complaint:

1. That the defendants disregarded the notice requirements for holding the meeting, as spelled out above.
2. That the defendants disregarded the provisions of the OMA during a meeting, other than during an executive session.
3. That after voting to go into executive session, the defendants discussed during the executive session matters other than those subjects included in the motion.
4. That the defendants intentionally violated some other provision of the OMA.

Members of a governmental body who are named as defendants must serve an initial response to the complaint within seven business days of receiving personal service of the complaint. A preliminary hearing on the complaint must be held no later than 10 business days after the date of the filing of the defendants' initial response to the complaint or, if no response is filed, no later than 17 business days after the filing of the complaint, or on the nearest day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties.

In the preliminary hearing on the complaint, the plaintiff must establish by a preponderance of the evidence that a

meeting of the governmental body occurred and that each defendant attended the meeting. Additionally, to establish a *prima facie* case the plaintiff must present substantial evidence proving the alleged violation.

If the court finds that the plaintiff has met its initial burden of proof, the court shall establish a schedule for discovery and set the matter for a hearing on the merits. If, at the preliminary hearing, the plaintiff establishes a *prima facie* case that the defendants discussed matters during the executive session other than those included in the motion to go into the executive session, the burden of proof at the hearing on the merits shifts. The defendants must then prove by a preponderance of the evidence that the discussions during the executive session were limited to matters related to the subjects included in the motion.

During a proceeding involving claims alleging that matters beyond the motion were discussed, the court shall conduct an in camera (a private hearing) proceeding or adopt another procedure as necessary to protect the confidentiality of the matters discussed. If there is a determination that the executive session was proper, items discussed during the executive session shall not be disclosed or utilized in any other legal proceeding by any individual or attorney who attends the in camera portion of the proceedings.

Upon proof by a preponderance of the evidence of a violation, the circuit court shall issue an appropriate final order including, if appropriate, a declaratory judgment or injunction. Prior to a final determination of the merits, temporary restraining orders or preliminary injunctions may be issued upon proper motion and proof as provided and required in the Alabama Rules of Civil Procedure. The court must issue a final order on the merits within 60 days after the preliminary hearing unless all parties and the court consent to allow a longer period.

The court may invalidate any action taken during a meeting held in violation of the OMA, provided that:

1. The complaint is filed within 21 days of the date when the action is made public,
2. The violation was not the result of mistake, inadvertence, or excusable neglect, and
3. Invalidating the action taken will not unduly prejudice third parties who have changed their position or acted in good faith reliance upon the challenged action of the governmental body.

No action taken at an open meeting conducted in a manner consistent with the OMA shall be invalidated because of a violation that took place prior to the meeting. A final order issued against a defendant shall state specifically upon which claim or claims the ruling is based. For each meeting proven to be held in violation of the OMA, the court must impose a civil penalty, up to one thousand dollars

(\$1,000) or one half of the defendant's monthly salary for serving on the governmental body, whichever is less. The minimum penalty shall be one dollar (\$1). If the claim relates to improper discussions during executive sessions, monetary penalties may only be assessed against members of the governmental body who voted to go into the executive session and who remained in the executive session during the improper discussion. See Section 36-25A-9(g), Code of Alabama 1975.

Penalties imposed against a member of a governmental body found to have acted in violation of this act shall not be paid by nor reimbursed to the member by the governmental body he or she serves. If more than one cause of action is filed pursuant to this chapter, all causes of action based on or arising out of the same alleged violation or violations shall be consolidated into the action that was first filed and any party may intervene into the consolidated action pursuant to the Alabama rules of Civil Procedure, and no member found to have acted in violation of this chapter by a final court order and assessed a penalty as authorized shall be subject to further liability or penalty to the same or different plaintiffs in separate causes of action for the same violation or violations. And finally, a governmental body is authorized to pay for or provide for the legal expenses of present or former members of the body named as defendants in any action alleging a violation of the OMA. Section 36-25A-9(h), Code of Alabama 1975.

The Alabama Supreme Court held that a bill allegedly passed by the Legislature in violation of the OMA was not ripe for adjudication. The bill had not been signed by the Governor and had not become law. *Marsh v. Pettway*, 109 So. 3d 1118 (Ala.2013). In another decision, the Court ruled that former directors of a public television station lacked standing to bring an action under the OMA against the public television commission because the directors did not allege any "continuing or imminent violation" of the OMA. *Ex parte Alabama Educ. Television Com'n.*, 151 So.3d 283 (Ala.2013).

11. Keeping the Journal

Complete and accurate minutes must be kept of meetings of city councils. AGO 90-00045. The following citations reflect the vital importance of keeping an accurate journal of the proceedings of the municipal governing body. In addition, a governing body frequently must follow statutory procedure to effectively accomplish certain acts. Each member of the governing body must realize the importance of keeping the journal and never neglect this duty just because it seems routine. While the greatest responsibility for the minutes rests with the clerk, each member of the governing body has a duty to see that meetings are held regularly and that procedural requirements are met.

- The law contemplates that a permanent record should be made of the proceedings of a municipal governing body, and papers evidencing their actions should not be simply pasted in some book susceptible to easy spoilage or destruction. *Chenault v. Russellville*, 169 So.2d 706 (Ala.1936). Records of the meetings of municipal governing bodies are required to the end that those who may be called to act under them may have no occasion to look beyond such records; the record avoids the mischief of leaving municipal corporate action to be proven by parol evidence. *AL. City G. & A. Ry. v. Gadsden*, 64 So. 91 (Ala.1913).
- The record of the municipal governing body must show all proceedings. Omissions from the record cannot be supplied by parol evidence in whole or in part. *Jones v. McAlpine*, 64 AL 511, 1879 WL 1136 (Ala.1879).
- So long as minutes remain as minutes of the governing body, they cannot be impeached or varied in a collateral proceeding by parol evidence. *Anniston v. Davis*, 13 So. 331 (Ala.1893).
- If the council fails to amend the record upon proper petition, direct action for amendment must be taken – usually by mandamus to compel correction – in order to properly challenge the record of a municipal governing body’s proceedings *Penton v. Brown Cumber Inv. Co.*, 131 So. 14 (Ala.1930).
- When the ordinance book and journal of a municipality are in conflict, the journal takes precedence and is controlling. AGO 88-00091.

The following paragraphs explain basic statutory requirements for the holding of valid meetings of municipal governing bodies and for the recording of proceedings.

Statutory Requirements

Records of council meetings are required by Section 11-43-52, Code of Alabama 1975, which provides that “The council shall determine the rules of its own proceedings and keep a journal thereof, which shall be open to the inspection and examination of all citizens and shall have the force and effect of a record, and a copy thereof, certified by the clerk, shall be prima facie evidence in any court or elsewhere.”

The journal is recognized as a public record and the Legislature has deemed it wise to make it acceptable in courts and elsewhere when properly certified by the clerk. No requirements are made as to the type of book which should be used, nor does this section make any provision for the approval of the minutes or what shall be recorded therein. In the cases noted above, it is apparent the courts expect that a permanent record book will be kept in such a manner that it is not subject to easy spoilage or destruction and that the record must show all action taken by the governing body. The record must be of such completeness that it can stand alone, without explanation.

In a mayor-council city or town, ordinances are required to be recorded in a separate permanent ordinance book. Section 11-45-8, Code of Alabama 1975. Therefore, it is permissible to refer to ordinances introduced and passed by the council by number and title rather than setting them out in full in the minutes. Unless a mayor-council municipality keeps a separate permanent resolution book, resolutions adopted by the council should be set out in full in the minutes.

Clerk’s Duty

The clerk of all cities and towns shall attend the meetings of the council and shall keep a record of its proceedings. The clerk shall have custody of the rules, ordinances and resolutions of the council and shall keep a record of them when adopted by the council. During the absence of the clerk, the council may appoint some person to perform those duties. Section 11-43-100, Code of Alabama 1975. The Legislature has squarely placed with the clerk the burden of keeping the minutes.

When the clerk is absent, the council may appoint some person from outside the council to perform the clerk’s duties or it may appoint one of its own members to do the job. When one of the members of the governing body is appointed to keep the record of proceedings at a meeting, that member does not lose the right to vote on issues coming before the council at the meeting. *Clark v. Uniontown*, 58 So. 725, 726 (Ala. 1912).

Types of Meetings

Alabama's Open Meetings Act (OMA) defines a "meeting" as a prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body either at a time set by law or to exercise the powers which it possesses or to approve the expenditure of public funds. A meeting would also include a gathering, whether or not prearranged during which the members deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee, or subcommittee at a later date. The term "meeting" would not include occasions when a quorum attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers so long as the governmental body does not deliberate specific matters that the participating members expect to come before the body at a later date. Section 36-25A-2, Code of Alabama 1975. For a discussion of "serial meetings" as defined by Section 36-25A-2(13), see the article in this publication titled *The Open Meetings Act*.

There are three basic types of council meetings – regular, adjourned and special called meetings. The council is required to hold at least two regular meetings each month. A town is only required to hold one council meeting per month. Section 11-43-50, Code of Alabama 1975. The council determines the date, time and place of regular meetings at its organizational session. Section 11-43-49, Code of Alabama 1975.

Meetings of the municipal council held pursuant to adjournment of a regular meeting are legal, and no special notice to the councilmembers is required. *Culpepper v. Phenix City*, 113 So. 56, 58 (1927). Such meetings are not special meetings but are regarded as a continuation of a regular meetings. 4 McQuillin Mun. Corp. § 13:59 (3d ed.) Adjournments are presumed to be regular when nothing to the contrary appears in the record. However, notice to the public may be required under the OMA if the body will reconvene on a different day. Section 36-25A-3, Code of Alabama 1975. Here it is quite important to accurately record whether the council adjourned *sine die* (thereby ending the meeting entirely) or until a particular time.

The presiding officer of the council may call a special meeting of the council whenever, in his or her opinion, the public interest may require it or whenever two councilmembers or the mayor request the presiding officer, in writing, to call a special meeting. If the presiding officer fails or refuses to call such a meeting, the two councilmembers or the mayor making the request shall have the right to call a special meeting. Section 11-43-50, Code of Alabama 1975.

Usually the call of a special meeting is handled through

the clerk. When a special meeting is held, the clerk generally prepares a waiver of notice for each councilmember to sign. The waivers must be incorporated into the minutes of the meeting. A waiver might be in substantially the following form. Words in brackets indicate optional language: "We, the undersigned members of the City [Town] Council of the City [Town] of _____, Alabama, hereby waive notice of the calling of a special meeting of the City [Town] Council of the City [Town] of _____ [for the purpose of _____ and such other business that may be brought before the Council] and do consent that said meeting [for said purposes] be held at the City [Town] Hall in the City [Town] of _____, Alabama, at _____ o'clock a.m. [p.m.] on the _____ day of _____, 20__."

The signature of each member should be secured before the meeting begins. It is desirable for the waiver to be typed onto the page of the minutes preceding the record of the meeting. Note that the statute does not require that notice of the purpose of the meeting be included in the notice. However, some municipalities might desire to include an explanation. *Ryan v. Tuscaloosa*, 46 So. 638 (Ala.1908); Section 11-43-50, Code of Alabama 1975.

In the *Ryan* case, the court held that a meeting of the council, not held on a regular meeting date, at which all councilmembers and the mayor were present, was a valid "called meeting," despite the fact that the required notice may not have been given. While this case is comforting, it is strongly recommended that the minutes include the waiver of notice and recite that the waiver was signed by all members of the council prior to the holding of the meeting.

It must be remembered that in municipalities of less than 12,000, or those who have grown over 12,000 but are less than 25,000 that have elected to continue as provided in Section 11-43-2, the mayor is a voting member of the council. Section 11-43-2, Code of Alabama 1975. Whenever the giving of notice or recording of votes is required for all members of the council, the mayor must be included. Likewise, in a city of 12,000 or more, the council president is a member of the council and must be treated as other members in the giving of notice and the recording of votes. Section 11-43-40, Code of Alabama 1975.

Open Meetings - Executive Sessions

The OMA grants citizens the right to be present at public meetings but does not grant them an absolute right to express their views at the meeting. A public body may establish reasonable guidelines governing public participation in the meeting. AGO 98-00134. A meeting of a governmental body, except while in executive session, may be openly recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic,

or video reproduction provided the recording does not disrupt the conduct of the meeting. Section 36-25A-6, Code of Alabama 1975.

No minutes should be taken at portions of board meetings which are held in executive session. AGO 97-00013 and AGO 2002-163. The League recommends that the clerk note in the minutes of the public meeting from which the individuals have gone into executive session, the names of those individuals going into executive session so that there is a record of who was in attendance at an executive session. For further information on this topic see the article in this publication entitled *The Open Meetings Act*.

Form and Content

First and foremost, it is essential for the minutes to reveal that the council has complied with the jurisdictional requirements for holding a legal meeting. In the *Penton* case cited previously, it was pointed out that the minutes of the council could not be attacked collaterally, but when offered in evidence, if the minutes show on their face that the council failed to meet the requirements of a legal meeting, then such proceedings are void. To avoid this pitfall, the clerk should be careful to record the following facts:

- The date, hour and place of the meeting;
- Whether the meeting is a regular, adjourned or special meeting;
- That proper notice was given to each member in the event it is a special meeting; and
- The names of the members of the council in attendance.
- The member's time of arrival or departure with respect to the order of proceedings of the council.

The minutes are a written summary of what happened in a meeting. The minutes should record the items considered by the council and the action taken. A verbatim transcript of the proceedings is not required. AGO 99-00153. Further, minutes **should not include** lengthy reports of the discussion and comments which took place unless a member requests that his or her remarks be made a part of the record. Basically, the record should show satisfactory evidence of the subject matter of decisions made by the council and evidence that these decisions were adopted in accordance with the law governing the council in its deliberations on the subject.

The council must be familiar with the statutory procedural requirements relating to the making of its decisions. The clerk should not be expected to tailor the minutes to fit these requirements. This illustrates the importance of preparing the agenda of the council prior to the meeting so members may review the statutory

requirements for particular items of business before the meeting.

Approval of Minutes

Alabama has no statutory requirement relating to the approval of the minutes of the municipal council. Generally, the rules of procedure adopted by the council include a provision covering this subject. It is universal custom that one of the first orders of business is the reading and approval of the minutes of the last preceding meeting.

Many cities have adopted the practice of having the clerk distribute copies of the minutes to councilmembers several days before the meeting to dispense with the time-consuming procedure of reading the minutes. In such a case, the minutes should note that the minutes of the prior meeting were distributed to each member and that the presiding officer called for any corrections. If corrections are noted, the action taken should be carefully recorded. If no corrections are noted, then the presiding officer announces that no corrections were offered and that the minutes stand approved as written.

Correction of Minutes

The municipal governing body is authorized to correct its minutes so that they correctly recite what took place, despite the fact that they may have been incomplete or erroneous as first written. *Harris v. East Brewton*, 191 So. 216 (Ala.1936).

Minutes adopted by a city council may be amended to correctly state that which took place at such meeting. Corrective amendments may be made at any time but they cannot prejudice intervening rights of third persons which have arisen subsequent to the meeting of the council or commission. *Guntersville v. Walls*, 39 So. 2d 567 (Ala.1949).

Minutes may be amended to correctly record what happened at a meeting after an action has been filed against the municipality challenging an ordinance adopted at such meeting. *Estes v. Gadsden*, 94 So. 2d 744 (Ala.1957).

Where minutes are corrected, they speak as of the original date, notwithstanding at the time the act controlled by the minutes was done, the minutes were incomplete and erroneous. *Harris v. East Brewton*, 191 So. 216 (Ala.1939).

No one member may add to or delete the record unless he shall procure the consent of a majority of the council. AGO to Hon. Venia P. Hutchinson, October 15, 1973.

With regard to the correction and adoption of the minutes, *Roberts Rules of Order, Newly Revised 11th Ed.*, states that "Corrections, if any, and approval of the minutes are normally done by unanimous consent. The chair calls for the reading of the minutes, asks for any corrections, then declares the minutes approved." Section 48, page 474.

Further, if “the existence of an error or material omission in the minutes becomes reasonably established after their approval – even many years later – the minutes can then be corrected by means of the motion to *Amend Something Previously Adopted*, (§35) which requires a two-thirds vote, or a majority vote with notice, or the vote of a majority of the entire membership, or unanimous consent.” Section 38, page 475. See also Section 41, pages 354-355 regarding amendment of minutes. Since most Alabama municipalities have adopted *Roberts Rules of Order* as a procedural guide in all cases not specifically provided for otherwise by ordinance, it is suggested that these provisions be followed when amendments to the minutes are necessary.

The truth or sufficiency of the public record may be challenged by a petition for writ of mandamus filed in the Circuit Court pursuant to Section 6-6-640 of the Code of Alabama 1975.

Election of Officers

All elections of officers shall be made by roll call of the council, and a concurrence of a majority of the whole number of elected members of the council shall be required. On the vote resulting in an election or appointment, **the name of each member and for whom he or she voted shall be recorded.** Section 11-43-45, Code of Alabama 1975. Secret ballots are not allowed. AGO 81-00200. This section is mandatory, and the clerk should be certain that the council follows the proper procedure in such actions. This section has been construed to require a majority of the remaining members elected to the council. For example, if the council is composed of eight councilmembers and the council president, for a total of nine members, and if there is one vacancy on the council, this leaves eight elected members on the council. To elect a person to fill the vacancy would require five affirmative votes. *Reese v. State*, 62 So. 847 (Ala.1913).

Voting Requirements

To pass ordinances and resolutions of a general and permanent nature in cities of less than 12,000 and in towns, there must be the affirmative vote of a majority of the whole number of members of the council, including the mayor. Section 11-45-2(b), Code of Alabama 1975. For example, if the city has five councilmembers and a mayor, it takes four votes to pass an ordinance of general and permanent operation. This number is not lessened when you have a vacancy on the council or when a councilmember is absent from a meeting.

In cities of 12,000 or more, there must be an affirmative vote of a majority of the members elected to the council. Section 11-45-2(b), Code of Alabama 1975.

Before such an ordinance or resolution can be adopted at the meeting when it is first introduced, unanimous consent of the members present at the meeting must be given for the immediate consideration of such ordinance or resolution. Section 11-45-2(b), Code of Alabama 1975. Alabama courts have been strict in requiring that the minutes reveal unanimous consent for passage of an ordinance at the first meeting at which it is introduced. The yea and nay vote must be shown on the record. *Thompson v. Wingard*, 34 So. 2d 606 (Ala.1948). These provisions of the statute are mandatory. *Cooper v. Town of Valley Head*, 101 So. 874 (1924).

To pass an ordinance over the mayor’s veto in cities of 12,000 or more requires the affirmative vote of two-thirds of the members elected to the council. However, the mayor of a city with a population of 12,000 to 25,000 that continues to operate as a city having a population less than 12,000 as provided in 11-43-2 may not exercise veto power and his or her signature as the mayor may not affect the validity of an ordinance or resolution passed by the council while the mayor is a voting member of the council. Sections 11-45-4 and 11-45-5, Code of Alabama 1975.

To change the size of the council requires a two-thirds vote of the council in cities of 12,000 or more. Section 11-43-40, Code of Alabama 1975.

To combine the duties of two offices requires a vote of two-thirds of the members elected to the council in cities of 6,000 or more and the consent of the mayor. The consent of the mayor is not required in cities with population of 12,000 to 25,000 that continues to operate as a city having a population less than 12,000 and the mayor is a voting member of the council. Section 11-43-3, Code of Alabama 1975.

To remove any officer in the several departments for incompetency, malfeasance, misfeasance, or nonfeasance in office and for conduct detrimental to good order or discipline, including habitual neglect of duty requires a two-thirds vote of all the members elected to the council. Section 11-43-160, Code of Alabama 1975; AGO 2012-039.

Unless the required vote is otherwise specified, a majority vote of those voting, provided a quorum is present, is sufficient to adopt a measure by the council. **A quorum consists of a majority of the whole number of members which the municipality is entitled to have on the council.** Section 11-43-48, Code of Alabama 1975. This includes the mayor in cities of less than 12,000 and in towns, and it includes the council president in cities of 12,000 or more. Except as noted above, the clerk must always treat the mayor as a member of the council in municipalities of less than 12,000. His or her consent for the suspension of the rules for immediate consideration of an ordinance or resolution of a permanent nature should always be recorded along with the other members of the council.

The failure of a councilmember to vote on a particular question should be recorded as an abstention. It is a nullity and cannot be counted as a concurrence with the majority of the members voting on a ballot in order to make a required majority. AGO 91-00020. Where a statute requires the affirmative action of a majority of the entire board or a majority of the members present, a refusal to vote may result in a defeat of the proposition because in such cases affirmative action is required, and those who refuse to vote cannot be counted in the affirmative majority required by statute. *Reese v. State*, 62 So. 847 (Ala.1913); AGO 97-00059; See AGO 85-00139 (opining two affirmative votes were sufficient to make appointment to City Board of Education by City Council when three councilmen abstained from voting). Unless a specific vote requirement is set out by state legislation, a three-to-two vote, with one abstention, is sufficient to elect a person to serve on a utility board. AGO 97-00059

The clerk should cultivate the habit of calling the roll for a vote on any question. While a vote may be taken on routine business by a show of hands or by voicing the ayes and nays by group call, issues which require a specific vote by roll call are usually the most important. It is easy to fall into the bad habit of recording that a particular question passed by unanimous vote of the members. This might satisfy most of the business transacted, but it is not adequate for the few very important items listed above. Therefore, it is a good idea to insist on a roll call to avoid mistakes on routine matters and to meet statutory requirements on others.

The Municipal Audit

As a general rule, the clerk does not set out full reports of committees and department heads in the minutes. These reports should be required in writing, and the minutes should reveal that a report was made on a particular subject by a particular person or committee. If council action was taken on the report, such action should be recorded. The reason for not recording a full report is that the original is the best evidence. II Charles W. Gamble and Robert J. Goodwin, *McElroy's Alabama Evidence* § 212.01(1) (6th ed. 2009). Special report files should be maintained for the separate preservation of reports.

There is an exception to this rule. Section 11-43-85, Code of Alabama 1975, requires that the annual audit report be spread upon the minutes of the council.

Public Hearings

The council is required by law to hold public hearings before taking action on certain matters such as the adoption of public improvement assessment ordinances the establishment of an improvement assessment roll, the adoption of zoning ordinances, and the adoption of

ordinances in pamphlet form by reference. It is absolutely essential for the minutes to show these public hearings were held, for these requirements are mandatory and go to the jurisdiction of the council to perform these functions. It is not necessary for discussions and arguments to be included in the minutes. But the record should show all definite questions put to the council at such hearings and the final action taken by roll call vote.

Motions and Seconds

The record should reveal the names of councilmembers who make motions or introduce measures to be voted on by the council. The record should also show the name of the member who seconded a motion put to the council. No second is required for nominations or for adjournment, unless the rules of the council require a second in such cases.

Adjournment

The record should show how the council adjourned, whether *sine die* or to a specific time prior to the next regular meeting. Where the meeting is adjourned until a particular hour of the same day, it is best to show on the record the time of adjournment. The record of adjournment evidences termination of the meeting and that the minutes thereof are all contained in the foregoing record.

Signing the Minutes

While no requirement exists for mayor-council cities and towns, it is customary for the clerk to sign the minutes. The clerk's signature shows that the minutes were taken and prepared by the officer charged with that responsibility. Also, it is customary for the presiding officer of the council to sign approval of the minutes to show that they were adopted and approved by the council.

Marginal References

The minutes of a municipality become more and more voluminous with the passage of time. Consequently, it becomes harder and harder to find a particular action which the council took on a measure presented sometime in the past. Many clerks use extra wide margins on the left side of the minutes and enter brief captions covering the subject matter in the adjacent minutes. Others caption paragraphs in bold underscored letters. While captions are not regarded as a part of the minutes, the references help immeasurably in finding a particular council action without reading through the entire minutes.

Conclusion

A close working relationship between the clerk and the presiding officer of the municipal governing body is essential to keeping a good journal. The agenda of the

meeting should be worked out well in advance of the meeting so that each officer knows the issues to be presented and considered. Care should be taken to ensure that all jurisdictional requirements are followed and that they are recorded in the journal. Ordinances and resolutions should be presented in writing. Finally, it should be remembered that when a statute uses the word “**shall**,” the action required is **mandatory**. *Prince v. Hunter*, 388 So. 2d 546 (Ala. 1980). The validity of the proceedings depends upon strict compliance with such requirements.

12. Municipal Ordinances

Alabama's municipalities have broad authority under Alabama law to pass ordinances regulating people and businesses so long as they do not conflict with state law. Section 11-45-1, Code of Alabama 1975, states: "Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances." Mere differences in detail between a state statute and a municipal ordinance do not create a conflict with state law, and no conflict with state law exists merely because the state law is silent where an ordinance speaks. *Alabama Recycling Ass'n, Inc. v. City of Montgomery*, 24 So.3d 1085 (Ala. 2009).

General and Permanent Nature

Any discussion concerning the adoption of ordinances must begin with a discussion of ordinances of "permanent operation" and ordinances of a "local or special character." This distinction is important with respect to the procedure of adoption of the ordinances, whether the ordinance is subject to a mayor's veto (in cities having a population of 12,000 or more), and whether the ordinance requires publication in order to be effective.

An ordinance (or resolution) of permanent operation is one which will continue in force until repealed. *Michael v. State*, 438, 50 So. 929, 933 (1909); *City of Pritchard v. Moulton*, 168 So. 2d. 602 (Ala. 1964); AGO to Hon. A.J. Cooper, Jr., October 25, 1974. An ordinance of a local or special character is one which, after its end is accomplished, is merely historical and evidentiary. *Pierce v. City of Huntsville*, 64 So. 301, 304 (1913). For example, personnel policies are usually adopted as either a resolution or an ordinance of local or special character. It is not an ordinance of a general and permanent nature since it does not affect the general public. Further, ordinances that constitute municipal legislative acts are considered to be of a general and permanent nature, as distinguished from an enactment dealing with a particular piece of the administrative business of the municipality. *Pierce v. City of Huntsville*, 185 Ala. 490, 490, 61 So. 391 (1913); Quarterly Reports of the Attorney General, Vol. 110, p. 44.

This distinction is important in determining the procedures that must be followed to enact ordinances. For

instance, under the provisions of Section 11-45-2, Code of Alabama 1975, an ordinance (or resolution) of general and permanent operation may not be passed at the same meeting it is introduced unless unanimous consent of those present is given for its immediate consideration and then only if, on final passage, the ordinance receives the affirmative votes necessary for passage. See AGO 2008-022.

Note that passage of a general and permanent ordinance or resolution at the first meeting it is introduced requires two votes – a roll call vote for immediate consideration that must be unanimous, followed by another vote on the ordinance itself. In cities of 12,000 or more, general and permanent measures must be approved by a majority of the members elected to the council, not merely a majority of a quorum or a majority of those voting. Section 11-45-2, Code of Alabama 1975. The measure is then sent to the mayor who may either veto the ordinance or approve it according to law. Section 11-45-3, Code of Alabama 1975. The mayor may generally only veto general and permanent measures, not administrative matters.

In cities and towns of less than 12,000, an affirmative vote of a majority of the whole number of members of the council to which the municipality is entitled, including the mayor, is required to enact any ordinance of permanent operation. This consent should be shown by a yea-and-nay vote and entered on the minutes of the municipality. Section 11-45-2, Code of Alabama 1975; *See Bush v. Greyhound Corporation*, 208 F. 2d 540 (5th Cir. 1953). General and permanent ordinances must then be published or posted according to law to become effective. Section 11-45-3, Code of Alabama 1975.

If the council fails to obtain unanimous consent from all members present at the meeting a permanent action is introduced, the council may vote on passage at any subsequent meeting, including a properly called special meeting. AGO 2004-053. At any subsequent meeting, it would not be necessary to obtain unanimous consent for consideration. Other voting requirements, though, still apply to final passage of the ordinance or resolution. It is mandatory that a governing body follow the procedures for the passage of a mandatory action. *Cooper v. Town of Valley Head*, 101 So. 874 (1924).

In determining whether an action of the council is permanent or not, it is important to remember that what the council calls the action does not matter. For example, a legislative action of the council is an ordinance of permanent operation even though a termination date is placed in the ordinance. AGO to Hon. Charles E. McConnell, February 6, 1957. The important factor is what does the action do? If

it has an effect on the general public and is permanent, then it must be enacted following the procedures set out above. Enactment of nonpermanent ordinances or resolutions or other administrative actions such as motions, generally require only approval of a majority of those voting, assuming a quorum is present. AGO 81-00072.

Following proper procedures for passage of a permanent action is mandatory. Failure to follow these procedures means that the ordinance is invalid and cannot be enforced. *Cooper v. Town of Valley Head*, 101 So. 874 (Ala. 1924).

In *Pierce v. Huntsville*, 64 So. 301 (Ala. 1913), the court held that ordinances adopting and accepting bids and fixing assessments for benefits are not of a general and permanent nature. In *Newberry v. City of Andalusia*, 57 So. 2d 629 (Ala. 1952), the court quoted McQuillin, with approval, to the effect that ordinances of a general and permanent nature are “those constituting municipal legislative acts.” In that case, the court held that a resolution, which authorized the issuance of bonds and was not published, was not an action of the city that required publication since it was not of a general or permanent nature.

The Attorney General has ruled that:

- a salary ordinance setting the salary of the mayor and council is of permanent operation. AGO to Hon. Norman K. Brown, January 29, 1968;
- a resolution authorizing the purchase of a specific tract of land by a city is not a resolution of general and permanent operation. AGO to Mrs. Rayvonne W. Thornton, April 21, 1977;
- the election of an individual to fill a vacancy on the council is not done by enacting an ordinance or resolution of a permanent nature. AGO to Atty. Al Tidwell, March 6, 1978;
- the establishment of sewer charges by a municipal council must be an ordinance. AGO to Hon. George W. Roy, July, 12 1978.
- a zoning ordinance is an ordinance of general and permanent operation. AGO 80-00477;
- the method of approval of retail liquor licenses may be established by the City Council. In the absence of an established procedure, adoption of an ordinance of permanent duration a retail liquor license may be approved by a majority of the quorum present. AGO No. 81-00436;
- a resolution appointing or electing person to city office are not “of permanent operation”, but mayor may veto salary portion of resolution. AGO 82-00059;
- an ordinance or resolution appropriating funds to the

medical clinic board is not of general and permanent operation. AGO 82-00070;

- business license and occupational tax ordinances are permanent in nature, despite containing an expiration date. AGO 88-00214;
- an ordinance establishing a retirement plan for the employees of a town is one of permanent operation. AGO 89-00214;
- an example of an ordinance or resolution not of permanent operation is one accepting bids and fixing assessments for the paving of streets AGO 91-00072;
- an ordinance providing for the creation of city offices such as treasurer, tax collector, or clerk, is an example of an ordinance of a permanent nature.” AGO 91-00072;
- the municipal budget is not an ordinance of permanent operation. AGO 91-00180;
- A resolution authorizing the issuance of subpoenas is not a resolution of permanent operation. AGO 99-00076;
- Ordinances adopted pursuant to sections 11-47-20 or 11-47-21, which authorize the disposal or leasing of real property, should be considered ordinances “intended to be of a permanent nature.” AGO 2011-069;

Publication of Ordinances

Section 11-45-8, Code of Alabama 1975, requires the publication of all ordinances of a general or permanent nature. Ordinances in municipalities of less than 2,000 in population according to the 1950 census may be published by posting in three public places in the municipality, one of which shall be the post office or the mayor’s office. See AGO 2011-005. In municipalities of 2,000 and above in population, publication must be by newspaper if a newspaper is published in the municipality. If no newspaper is published in the municipality, then publication may be by posting in three public places, as described above, or by publication in a newspaper which has general circulation in the municipality. Section 11-45-8, Code of Alabama 1975. A newspaper is published where it is entered into the post office and where it is first put into circulation. AGO 1995-127.

Ordinances that are published in a newspaper are effective at the time of publication. Ordinances that are posted become effective after they have been posted for five days. When an ordinance is published by posting, the municipality shall take reasonable steps to maintain the posting for not less than 30 days. In addition, if the municipality maintains an Internet website, the municipality, at a minimum, shall include a copy of the

ordinance or notice of the substance of an ordinance on its website for 30 days. Section 11-45-8(b)(3), Code of Alabama 1975

All ordinances of a general and permanent nature relating to planning or zoning or the licensing or franchising of businesses may be published in a synopsis form in some newspaper of general circulation published in the municipality provided that the synopsis, at a minimum, includes the following information:

- a. A summary of the purpose and effect of the ordinance.
- b. If the ordinance relates to planning or zoning, a general description of the property or properties affected by the ordinance including the common name by which the property or properties are known and the substance of the ordinance.
- c. If the ordinance relates to the licensing of businesses or the granting of a franchise, the categories of businesses affected by the ordinance and the substance of the ordinance.
- d. The date upon which the ordinance was passed and, if different from the date of publication, the effective date of the ordinance.
- e. A statement that a copy of the full ordinance may be obtained from the office of the city or town clerk during normal business hours. Section 11-45-8 (b)(2), Code of Alabama 1975.

Types of Ordinances

Ordinances are normally classified under four general types: **(1) Police ordinances are enacted by virtue of the police power and prescribe penalties for specific commissions and omissions.** This class of ordinances will be treated generally in this article, although many of the comments referring to this type of ordinance are equally applicable to other types; **(2) Franchise or contract ordinances** grant franchises or special privileges; **(3) Public improvement ordinances** provide for public works; and **(4) Administrative ordinances** guide and regulate municipal officers and businesses.

General ordinances have an obligatory force on the entire community and upon the administration of the municipal government. Ordinances are special ordinances when they grant special privileges, provide for public works or improvements or authorize officials to do certain acts on behalf of the city.

Ordinances are further classified as penal or non-penal. A penal ordinance imposes a fine or imprisonment for violation. An example of a non-penal ordinance is one providing for the construction of public improvements.

Adoption by Reference

Section 11-45-8(c), Code of Alabama 1975, provides that certain types of codes which have been published in book or pamphlet form may be adopted by reference. Examples of the types of codes which may be adopted by reference are the standard code for elimination and repair of unsafe buildings, fire codes, standard building codes and plumbing, electrical and gas codes. The other types of codes which may be adopted in this manner are set forth in Section 11-45-8. A special article on adopting municipal standard codes and ordinances by reference can be found elsewhere in this publication.

Municipalities may also adopt a general and permanent ordinance making the violation of any state misdemeanors a violation of the municipal ordinance. A special article on adopting state offenses by reference can be found elsewhere in this publication.

Effect of Ordinances

A valid ordinance of a municipal corporation is as binding on the inhabitants as the general laws of the state upon the citizens at large. Members of the governing body, duly assembled for the purpose of their legislative functions, when acting within their authority, constitute a miniature general assembly and the ordinances passed under such circumstances have the same binding force, within the sphere of their operation, as any other law. *City of Decatur v. Mohns*, 180 So. 297 (Ala. 1938).

Many municipal ordinances, especially those enacted pursuant to the police power discussed below, may also be made effective in the police jurisdiction of a municipality. For more on this, see the article on the municipal police jurisdiction elsewhere in this publication.

Police Power

Ordinances passed under the police power are those enacted to preserve and further public peace, order, health, morality and welfare within the municipality. In *City of Homewood v. Wofford Oil Co.*, 169 So. 288 (Ala. 1936), the court said:

“The police powers of a city are among its major governmental functions. Broadly speaking, they extend to all appropriate ordinances for the protection of the peace, safety, health, and good morals of the people affected thereby. The general ‘welfare’ is a generic term often employed in this connection.”

A large percentage of ordinances relate to these broad categories and cover a great variety of subjects. Police ordinances are enacted to preserve public peace, to safeguard public order and tranquility and to protect the public against offenses in violation of public morality and decency. Health measures regulate sanitation in its

various aspects, including disposal of garbage and waste and protecting the purity of food and drugs. This power is also exercised when protecting the public from the civil effects of industry, commerce, trade and occupation. These ordinances may relate to zoning or control of air or stream pollution, noises, etc. Fire protection and prevention are a common exercise of the police power, as is the regulation of traffic on public streets. The list is virtually endless but the examples above demonstrate the wide range of ordinances of this nature.

Enforcement of Ordinances

To enforce obedience to most ordinances, a municipality has the authority to provide penalties by fine not exceeding \$500 and by imprisonment or hard labor not exceeding six months, one or both. However, there are several exceptions to this authority provided by state law. Section 11-45-9, Code of Alabama 1975.

Section 11-45-9(d)-(f) Code of Alabama, 1975 states:

In the enforcement of the penalties prescribed in Section 32-5A-191, the fine shall not exceed five thousand dollars (\$5,000) and the sentence of imprisonment or hard labor shall not exceed one year.

Notwithstanding any other provision of law, the maximum fine for every person either convicted for violating any of the following misdemeanor offenses adopted as a municipal ordinance violation or adjudicated as a youthful offender shall be one thousand dollars (\$1,000):

1. Criminal mischief in the second degree, Section 13A-7-22.
2. Criminal mischief in the third degree, Section 13A-7-23.
3. Theft of property in the third degree, Section 13A-8-5.
4. Theft of lost property in the third degree, Section 13A-8-9.
5. Theft of services in the third degree, Section 13A-8-10.3.
6. Receiving stolen property in the third degree, Section 13A-8-19.
7. Tampering with availability of gas, electricity, or water, Section 13A-8-23.
8. Possession of traffic sign; notification; destruction, defacement, etc., of traffic sign or traffic control device; defacement of public building or property, Section 13A-8-71 and Section 13A-8-72.
9. Offenses against intellectual property, Section 13A-8-102.
10. Theft by fraudulent leasing or rental, Section 13A-8-140 through Section 13A-8-144.

11. Charitable fraud in the third degree, Section 13A-9-75.

12. Illegal possession of food stamps in the third degree, Section 13A-9-91.

The penalty imposed upon a corporation shall consist of the fine only, plus costs of court.

In the enforcement of a Class A misdemeanor, including a domestic violence offense, the fine may not exceed five thousand dollars (\$5,000) and the sentence of imprisonment may not exceed one year.

Requisites of Ordinances

The general requisites of a valid municipal ordinance, one legally binding on all upon whom it is designed to operate, may be summarized as follows:

- the ordinance must be adopted by a legally existing municipal corporation and must emanate by virtue of power in the corporation and must relate to a subject within the scope of the corporation;
- it must be in harmony with the Constitution and laws of the United States, the laws of the state, the municipal charter and the general principles of the common law in force in the state;
- it must be reasonable in its terms and must be adopted by the authorized governing body, legally convened;
- it must be in legal form, precise, definite and certain;
- it must be passed in the manner prescribed, enacted in good faith, in the public interest alone and designed to enable the municipality to perform its true functions as the local government agency.

These elements must all be present to ensure the validity of an ordinance.

Constitutionality

Ordinances must not be inconsistent with or repugnant to the federal Constitution. The test of constitutionality is determined by the substance and not the form of the ordinance. It is also tested not only by what has been done but also by what may be done under the provisions of the ordinance. Ordinances should be substantially uniform in application to all citizens and afford equal protection to all alike. If rights are granted, the ordinances must provide for the enjoyment of those rights to all upon substantially the same terms and conditions; they cannot penalize one person and, for the same act done under similar circumstances impose no penalty on others. In other words, ordinances may not discriminate in favor of one person or class of persons over others. Ordinances must operate equally upon all persons, for their equal benefit and equal protection. Ordinances do not have to affect every man, woman and

child exactly alike in order to avoid the constitutional prohibition of denying equal protection of the laws. Such a requirement would be impossible to obtain. The Equal Protection Clause does not forbid discrimination in ordinances with respect to things which are different.

Some constitutional issues will arise when an ordinance creates classifications. Classifications, made in municipal ordinances, must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the legislation. *Jefferson Cty. v. Richards*, 805 So. 2d 690, 701 (Ala. 2001). Classifications must be based on some substantial difference between the situation of a class and other individuals or classes to which it does not apply.

Mr. Justice Sayre, in *Bd. of Comm'rs of City of Mobile v. Orr*, 61 So. 920, 922 (1913), stated:

“Classification, or discrimination between classes, is allowed if founded upon distinctions reasonable in principle and having just relation to the object sought to be accomplished.”

Courts have allowed great latitude in exercising the discretionary power of classification and, as long as the choice is rational, it is competent for the city to make a choice. Sometimes choices are necessary to protect the public. Under the police power, it is sometimes necessary to restrict certain business operations while leaving other types of businesses free of restrictions.

State Constitution and Laws

Section 89 of the Alabama Constitution, 1901 states: “The Legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state.”

Thus, a municipality cannot license, establish or authorize a business which is forbidden by the general laws, nor can the legislature authorize it to do so. Although this section is not intended to limit the police power, **a city cannot make lawful that which state law has rendered unlawful.** *Ex parte Rowe*, 59 So. 69, 71 (Ala. Ct. App. 1912). Further, in many cases an ordinance may enlarge upon the provisions of a statute by requiring more restrictions than the statute itself requires. This does not create a conflict unless the state statute preempts municipal regulation. *City of Birmingham v. West*, 183 So. 421 (Ala. 1938).

Conformity to Public Policy

Ordinances must conform with and not be inconsistent with the public policy of the state. Ordinances may not prohibit what public policy permits. Public policy is often expressed through enactments of the Legislature; and a municipality, by ordinance, may not prohibit or contravene that expression of public policy. See *Town of Livingston v. Scruggs*, 93 So. 224 (Ala. 1922).

“Public” in Nature

McQuillin states: “The primary object of municipal ordinances is public and not private, and their violation is redressed by the local penalties.”

Municipalities are strictly political institutions and all of their objectives are public. The public interest, which will be served by an ordinance, means the interest of all or part of the public to whom it is intended to apply. A municipality may not legally exercise or delegate its powers for the benefit of private individuals. Ordinances must be enacted in good faith and in the interest of the general public while still enabling a municipality to meet its obligations as the local governmental body. 5 McQuillin Mun. Corp. § 15:15 (3d ed. 2016)

Reasonableness

Authorities agree that a municipal ordinance must be reasonable to be constitutional. To attain reasonableness, an ordinance must be fair, general and impartial in operation, not in conflict with common rights and not unduly oppressive. An ordinance passed under authority of an express or specific legislative grant is regarded as entitled to all presumptions in favor of its validity. However, if the legislature does not prescribe the details of the grant of authority, care must be exercised in drafting an ordinance so as not to exceed the overall purpose of the authorization. Courts condemn ordinances even though the reasonableness of the statute is not subject to question if the ordinance passed is arbitrary, oppressive or partial. Such ordinances may be set aside under the theory that the Legislature never intended to confer the extent of the power exercised and that the manner of exercising the authority plainly abuses the general grant.

Certainty and Definiteness

An ordinance must be definite and certain. *Rochelle v. Lide*, 180 So. 257, 258 (1938). An average person should be able to read an ordinance, with due care and be able to understand and ascertain whether he or she will incur a penalty for a particular act, or acts or course of conduct. There is no hard and fast rule for determining whether any given ordinance is void because of indefiniteness but the rule of reason is generally applied. The article “Tips for Drafting Ordinances” in this publication provides practical guidelines for drafting ordinances.

In *Conner v. City of Birmingham*, 60 So. 2d 474 (Ala. 1952), the court stated:

“A state (municipality) must so write its penal statute so as to be not so vague and indefinite as to permit the punishment of innocent acts and conduct which are a part of the right of every citizen to pursue, as well as acts evil in nature and effected with the public interest.”

In *City of Mobile v. Weinacker*, 720 So.2d 953 (Ala. Civ. App. 1998), the Court of Civil Appeals held that Mobile's sign ordinance was unconstitutional because it was vague and ambiguous and provided review boards with unbridled discretion.

Under this rule, courts constantly affirm that ordinances should be certain in their application and operation and their execution not left to the caprice of those whose duty it is to enforce them. Courts will not correct, by construction, a vague and uncertain ordinance.

Vesting Discretion in Administrative Officials

Ordinances often vest in officials or employees of the municipality certain discretion in the enforcement of their provisions. Ordinances have been condemned which vest arbitrary discretion in public officials without prescribing a uniform course of conduct or standard of rules to guide officials. If no standards are imposed to control the officials, the ordinance is suspect. This is true in cases where the ordinance refers to the rights of persons, rights of dominion over property or the business of individuals.

Ordinances may not make the absolute enjoyment of property dependent upon the arbitrary will of municipal authorities. Cases on this type of ordinance are largely decided according to the facts and, therefore, decisions may vary in application from court to court. But the courts agree that such ordinances should lay down tests and rules to guide the enforcing officials.

Some ordinances, out of necessity, place discretion in municipal officials, where it is difficult or impracticable to lay down comprehensive rules. Such ordinances may be upheld on administrative grounds if the ordinance is essential to protect public safety, health and welfare. The discretion placed in enforcement should relate to the ministerial, rather than the legislative, duties of the official.

Ordinances have been struck down even though fair on their face and impartial in appearance because of the method of enforcement. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the U.S. Supreme Court held that although a law appeared to be fair on its face, if it is administered by public authority with an evil eye and an unequal hand so as to make illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. A special article on the First Amendment, titled "Municipalities and the First Amendment" can be found elsewhere in this publication.

Amendment of Ordinances

Ordinances are sometimes rendered invalid because of improper attempts to amend them. Section 11-45-6, Code of Alabama 1975, reads as follows:

"No ordinance shall be amended after its passage by

providing that designated words be stricken out or that designated words be inserted, or that designated words be stricken out and other words inserted in lieu thereof, but the ordinance or section or subdivision thereof amended shall be set forth in full as amended."

A similar rule is used by the legislature to amend existing laws. In other words, if an existing ordinance requires an amendment, the section or subdivision affected can be amended rather than amending the entire ordinance. The same procedures that apply to the initial passage of an ordinance also apply to the passage of any amendments.

Summary

All cities and towns have wide latitude and discretion in passing ordinances designed to protect the public welfare. Legally enacted ordinances are binding on the inhabitants of the community. Statutory requirements must be carefully observed to adopt or amend an ordinance.

An ordinance passed must be in the general public interest and must be reasonable, impartial and fair to all persons affected. The language employed should be precise and definite. The ordinance must not conflict with the federal or state constitutions or with the general laws or public policies of the state.

13. Tips for Drafting Ordinances

Like state and federal laws, city ordinances are intended not only to set out the legal rights and duties of those persons who are subject to the ordinance, but also to communicate information. Because an ordinance is an instrument of communication, it is important that it be drafted in a style that is as understandable and unambiguous as possible.

A typical ordinance tells people how to act, either with respect to their relationship to the city or in their relationships with each other. If the average citizen cannot understand what a particular ordinance requires, then the ordinance and its drafter have failed their primary mission. Drafting in a clear and precise style can be critical in resolving differences of opinion that arise concerning the way the ordinance should be interpreted and applied.

Drafting ordinances so that they are understandable to the average citizen does not mean sacrificing precise legal language. A city must always bear in mind that courts will invalidate laws they find to be unintelligible. As one court said, a law “must be capable of construction and interpretation; otherwise, it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligent meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply one, to make one ... There must be a competent and efficient expression of the legislative will.” *State v. Parlow*, 91 N.C. 550 (1884).

The United States Supreme Court has also stated that “a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law.” *Yu Chong Eng. v. Trinidad*, 271 U.S. 500 (1926).

This article is intended to provide some common sense guidance for local officials who find themselves charged with the responsibility of drafting ordinances. This article does not intend to discuss the legal niceties of ordinance drafting (for example, ordaining clauses, “one-subject” rules, etc.). Rather, it focuses on advice about the development and use of a writing style that is conducive to producing clear and concise ordinance language.

Use of sample ordinances

Sample ordinances may be a good starting point for drafting an ordinance, but always remember that research and revisions may be necessary before adopting an ordinance that was enacted by another Alabama municipality. Be very careful when using sample ordinances that are more

than a few years old as they may be outdated due to new laws or court decisions that have been passed or decided since the ordinance was originally passed. Likewise, be cautious when using sample ordinances from other states because they may be based on laws that are different from Alabama law.

It is also important to be cautious of “model ordinances” promoted by special interest groups other than municipal organizations such as Municipal leagues, the National League of Cities and the International Municipal Lawyers Association. Other than these municipal organizations, many of the special interest groups do not have the municipality’s best regulatory interests in mind when drafting their model ordinances.

Seek advice of city or town attorney

The League recommends that municipalities have their city or town attorney directly involved in the process of preparing and passing ordinances. It is vital that this be done *before* adopting an ordinance. A legal review is important because of potential legal and constitutional issues an ordinance may present. For example, zoning and nuisance ordinances impact individual property rights and parade and sign ordinances impact individual free-speech rights. Paying the municipal attorney to review proposed ordinances or assist in drafting them up front is far less expensive than defending a lawsuit that could have been avoided.

Tips for Drafting Ordinances

Start by thinking. Before committing words to paper, the ordinance drafter should look for the purpose and policy behind the proposed ordinance. As the ordinance is drafted, one should continually refer to that purpose and policy to ensure that when completed and adopted, the law will actually achieve what is desired.

Know the reader. When drafting an ordinance, keep in mind who will be subject to its provisions. Will it be addressed toward technical people such as electricians, home builders or public works contractors? Or will it apply to all members of the public? If those who are subject to the ordinance are likely to be a varied group, it is probably better to draft the ordinance for the citizen who will have the least knowledge of any technical matters covered in it. Generally, the broader the audience, the plainer the ordinance language should be.

Avoid lengthy, run-on sentences. Simply put, the shorter the sentence, the better. The shorter the sentence, the easier it is to understand and remember. It has been said

that the colon, semicolon and the comma are the three worst enemies of understandable sentences. If at all possible, the ordinance drafter should keep the sentence length to a 25-word maximum.

The following example falls somewhat short of this rule: "It is hereby made the duty of the chief of police of said city to notify any person, company or corporation, who may build, erect or construct within said fire limits, any building or addition to any building in violation of the provisions of this ordinance, to remove the same forthwith, beyond said fire limits, and to notify any person, company or corporation who shall attempt to build, erect or construct any building in violation of the provisions of this ordinance, to desist therefrom and ..." This language, taken from an ordinance adopted by a small Kansas city, goes on for 415 words before a period is encountered. Some 46 commas are put to the task to help perpetuate this monstrosity.

Use sections. Each section of an ordinance should contain a single idea. As is true with sentences, the shorter the section, the better. A heading for each section will also assist the reader. This briefly tells the reader the content of the section and helps him or her locate a desired topic within the law and to see, at a glance, the overall organization and scope of the ordinance.

Use the active voice. The drafter should use active rather than passive voice whenever possible. While the active voice focuses on the subject of the sentence, a passive voice sentence focuses on the object of the action. Passive voice writing style makes it difficult for the reader to identify with the law. People then have a hard time deciding who is responsible to do what for whom. For example, why write "No nuisance shall be created or maintained by any person ..." when one can write "No person shall create or maintain any nuisance ..."

Word selection. Choice of words can go a long way toward assisting the reader in understanding the ordinance. Conversely, the wrong choice of words can make an ordinance sound like indecipherable, bureaucratic verbiage. The simplest language which still makes an accurate statement is the best language to use. With the following word pairs, consider using the second word as a substitute for the first: commence - begin; furnish - give; prior to - before; procure - get; provided that - if; retain - keep; and terminate - end. Some other words and phrases should be avoided altogether: aforesaid, henceforth, hereby, herein, hereinafter referred to, hereinbefore, in so far as, whereas, wherein as, and for sure.

Eliminate superfluous material. Keep the ordinance to the bare bones. When trying to draft language which makes certain actions unlawful, do not attempt to list all possible conditions or circumstances under which the prohibited actions may occur. Give the reader enough detail

to clearly understand what the ordinance requires, permits or prohibits, and then stop.

Finally the drafter should listen to the completed ordinance to determine if it will be completely understood by the reader, or, as the following example illustrates, if the drafted language could be subject to a second, unwanted interpretation "... that any person within the city owning, keeping or harboring a dog, male or female, over the age of six weeks, shall register such dog with the city clerk, giving sex, name and any other description which the clerk may require."

In summary, plain English can become the rule rather than the exception for city ordinances if the ordinance drafter focuses on using simple English, rather than legalisms and keeps sentences and sections as short as possible. The extra effort involved in making ordinance language understandable to a reader also will force the drafter to think more clearly about its preparation.

Adherence to these simple rules should help avoid adoption of ordinances like the following one, which is an indecipherable and hopeless combination of poor wording and punctuation:

"Should any person or persons allow or permit snow to remain on any sidewalk or a tree, shrub or bush to grow out over so as to obstruct or prevent the full use of the entire width of any sidewalk, street or alley along or adjoining any premises or property they occupy, own or have control of the city council may have such snow or part of tree, bush or shrub causing such obstruction removed at the expense of the city and the costs of removing same together with the penalty given by law shall be taxed against said lot or tract of ground and collected the same as other taxes."

14. Presumptions

A presumption is a rule of law that says courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. See, *Black's Law Dictionary*, 1185 (Sixth Ed. 1990). This article points out certain presumptions that should prove helpful to municipal officials in their day-to-day dealings with constituents.

Citizens sometimes think that a certain practice or ordinance being followed or enforced at city hall is wrong and should be changed or repealed. Frequently, these condemned practices or ordinances have the presumptive color of legality and, in the absence of proof to the contrary, are entirely valid. In many instances, the official who realizes the presumptive validity of a city practice can avoid being defensive when complaints are made.

Presumption of Validity

Perhaps the presumption most helpful to city officials is the presumption that ordinances are constitutional. *Storer Cable Commc'ns v. City of Montgomery*, 806 F. Supp. 1518, 1549 (M.D. Ala. 1992). In *Burnham v. Mobile*, 174 So.2d 301 (Ala. 1965), the court stated: "Municipal ordinances are presumed to be validly and properly enacted and unless invalid on its face the burden is upon the person attacking one to show its invalidity." While certain types of ordinances are subject to heightened degrees of scrutiny in order to be ruled valid, ordinances are presumed valid and constitutional. The court held in *Rose v. Andalusia*, 31 So.2d 66 (Ala. 1947): "When a city passes an ordinance, the presumption applies that it did what was necessary to make that ordinance valid ..." A statute or ordinance is presumed to be constitutional, and the burden is on the party asserting its unconstitutionality to show that it is not constitutional. *Handley v. City of Montgomery*, 401 So.2d 171 (Ala.Cr.App.1981).

McQuillin, Municipal Corporations, section 19.06 states: "A municipal ordinance duly enacted under ample grant of power is presumably constitutional and binding, except an ordinance imposing a restraint on freedom of speech or press, which has been said to come into court bearing a heavy presumption against its constitutionality. Indeed, in accordance with the rule that the constitutionality of an ordinance is favored, every presumption is in favor of the constitutionality of an ordinance, if any rational consideration supports its enactment, and a party presenting a challenge to the ordinance bears the task of demonstrating beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective. The

presumption is that the local legislative body intended not to violate the constitution, but to enact a valid ordinance within the scope of its constitutional powers. ... It has been declared that the presumption attaches to a municipal ordinance as strongly as it does to a legislative enactment. ... No ordinance or law will be declared unconstitutional unless clearly so, and every reasonable intendment will be made to sustain it. ... The presumption of the constitutionality of an ordinance continues unless and until it is judicially determined to be unconstitutional. If the constitutional questions raised are fairly debatable, the court must declare the ordinance constitutional, as the court cannot and must not substitute its judgment for that of the local legislative body." In view of this presumption, municipal officials need never be defensive about ordinances of the city. Further, they can take comfort in the knowledge that courts generally presume that the municipality is operating in a completely legal manner in enforcing its ordinances.

Despite the presumption of constitutionality in favor of ordinances, a municipality's authority is not absolute and is not to be exercised capriciously. *City of Mobile v. Madison*, 122 So. 2d 540, 541 (Ala. Ct. App. 1960); *Hurvich v. City of Birmingham*, 35 Ala.App. 341, 46 So.2d 577

Exercise of Authority

It is always presumed that a municipality exercises its authority in a proper and legal manner. *Chadwick v. Hammondville*, 120 So.2d 899 (Ala. 1960), stands for the proposition: "Presumptions are indulged in favor of the legal exercise of the authority of municipal corporations." The court stated: "It has been determined that when a city passes an ordinance, the presumption applies that the city did what was necessary to make that ordinance valid and when a city ordinance is not invalid on its face, the burden of alleging and proving facts to support the claims of invalidity is on the party so asserting."

The court, in *Decatur v. Robinson*, 36 So.2d 673 (Ala. 1948), considered the validity of the city's parking meter ordinance and held: "The ordinance shows upon its face that it is to regulate traffic and keep the traffic as liquid as it is reasonably possible. True, the city may not use the exercise of the police power as a revenue measure. But the ordinance here in question discloses that whatever revenue is derived therefrom is to be devoted to the cost of necessary inspection, police surveillance and incidental expenses that are likely to be imposed upon the public in consequence of this parking privilege. Nor should the court seek to avoid an ordinance by nice calculation of the expense of enforcing police regulation."

Wisdom or Propriety of Ordinance

Closely akin to a citizen's reasons for questioning ordinances is the assertion that the council acted unwisely in enacting a particular ordinance. The courts do not inquire into the propriety or wisdom of the council's actions. In *Estes v. Gadsden*, 94 So.2d 744 (Ala. 1957), the court said: "It should be clearly understood at the outset that the wisdom, propriety or expedience of the ordinance is not a matter for review by this court. That is the province of the lawmaking body of the city. The court's duty is to consider the constitutionality and the validity of the ordinance under the constitution and laws of the state of Alabama."

A statement of similar import is found in *Prichard v. Moulton*, 168 So.2d 602 (Ala. 1964), to-wit: "This being so, a valid enforceable agreement between the appellee and the city of Prichard existed. Counsel for the appellant argues the wisdom and advisability of the contract. This is a matter committed by law to the governing body of the city. The courts cannot and will not interfere with this discretion vested in the governing body of a municipality but deal only with the question of the legality of the acts of the governing body."

Records

Although a municipal record may be incomplete in certain respects, if it appears that the proceedings were regular and in substantial compliance with statutory requirements, presumptions will be indulged in favor of its sufficiency and validity. *McQuillin*, Section 14.03. *See also, Jones & Co. v. McAlpine*, 64 Ala. 511, 1879 WL 1136 (Ala. 1879).

Minutes of a municipality impart veracity, and records made by proper officers are presumptively conclusive on the facts stated therein. *See* Section 11-43-52, Code of Alabama 1975. If the records are in existence and can be produced, they are the only competent evidence of the acts of the municipal corporation. *See State ex rel. v. Mobile*, 28 So.2d 177 (Ala. 1946).

In *Penton v. Brown-Crummer Investment Co.*, 131 So.14 (Ala. 1930), the court stated: "And such record (clerk's record of council meeting) is the only evidence of the acts of council ... So long as the minutes of the meeting remain as the minutes of the council, they cannot be impeached or varied in a collateral proceeding by parol testimony." This case cites, with approval, *McQuillin*: "Records imperatively required by law, made by the proper officers, are conclusive of the facts therein stated, not only upon the corporation, but upon all the world as long as they stand as records."

For records, the presumption of correctness is very strong. If, however, the record does not speak the truth, it should be made to do so. The council may correct the record at a subsequent meeting. In connection with the minutes

of a municipality, see the decision in *Estes v. Gadsden*, 94 So.2d 744 (Ala. 1957).

Licenses and Permits

Ordinances requiring a license or permit are presumptively valid. Further, a license tax or permit is presumed to be reasonable in amount. In *Albertville v. Scott*, 104 So.2d 921 (Ala. 1958), the city appealed an adverse decision of the trial court holding that a gasoline tax ordinance was invalid. The court pointed out "...our cases hold that when the question as to the reasonableness of a municipal ordinance is raised and the ordinance has reference to a subject matter within the corporate jurisdiction, it will be presumed to be reasonable unless the contrary appears on the face of the law itself or it is established by proper evidence."

In *State Department of Revenue v. Reynolds Metals Company*, 541 So.2d. 524 (Ala. 1988) the court held that license fee ordinances shall be presumed to be reasonable, and the burden shall be upon the business challenging the license fee charged to it to prove that such license fee is unreasonable or that the ordinance was illegally adopted or is violative of the statutory or fundamental law of the United States or of the State of Alabama..

In *Ex parte Berryville Central, Inc.*, 526 So.2d 21 (Ala. 1988), the court stated "It is important to note here that when the unreasonableness vel non of an ordinance or by-law is asserted or urged, the question thus made is to be decided by the court, and not by the jury." In *Al Means, Inc. v. Montgomery*, 104 So.2d 816 (Ala. 1958), a case involving Montgomery's sales tax, the Court held: "This court will presume in favor of the constitutionality of a law until the contrary appears, and the burden is upon one asserting unconstitutionality ... Appellant's next serious attack upon the ordinance is that it is confiscatory ... But the appellants have not set out any facts as to the confiscatory nature of the tax." These cases show that the presumption of validity applies strongly to ordinances levying taxes on permit fees.

Appeals

In view of the authority noted above, a municipality may assume that it will receive the benefit of any enumerated presumptions in the appellate courts. *McQuillin*, Section 37.267, in discussing appeals on assessments for public improvements, cites several cases to support the following: "The usual presumptions of regularity and legality are indulged on appeal." Alabama courts recognize the presumption of validity. In *Stovall v. Jasper*, 118 So.467 (Ala. 1928), a sentence of the decision reads: "That is to say, the prima facie presumption of correctness inherent in the final assessment and apportionment of such cost of street pavement may be controverted by the evidence on the

appeal, under the statutes and constitution ... On appeal to the circuit court, the owner has the burden of overcoming by his evidence the presumption of verity and correctness that the statute places upon him.”

Appeals involving municipalities as parties are governed by the general law and the established rules relating to appeals. Among these rules are the presumptions indulged on appeal.

Specific Cases

A number of specific types of appeals carry the presumption in favor of the judgment, order or decrees of court. The usual presumptions in favor of such judgments are indulged in an eminent domain appeal. The validity of changes in municipal boundaries is presumed and this is particularly true after acquiescence for a considerable period of time. *McQuillin*, section 7.44.

Municipal corporations are created for the public good, and after long continued use of corporate powers and public acquiescence the courts will indulge in presumptions in favor of legal existence. This rule was stated in *State v. Gadsden*, 113 So. 6 (Ala. 1927): “Municipal corporations are important instrumentalities of government, and some presumptions are due to be indulged in favor of their legal existence.” See also, *State v. Pell City*, 47 So. 246 (Ala. 1908).

In mandamus actions, it is presumed that municipal authorities acted legally and were influenced by proper motives. Therefore, as a general rule, the burden is on the applicant to show that the writ should issue. See, *McQuillin*, Section 51.69, and authorities cited. In the absence of proof to the contrary, actions taken by the council in its legislative capacity will be presumed to have been in conformity with its own rules or parliamentary usage.

The presumptions of reasonableness, validity and constitutionality are fully applicable to measures enacted under the police powers. In *Allinder v. Homewood*, 49 So.2d 108 (Ala. 1950), the plaintiff attacked an ordinance relating to the operation of tourist courts, and the court stated “The city authorities are responsible for determining the propriety of such regulations within the scope of the police power and the courts cannot invade such field ... The attack made on the various features of the ordinance in question ... is that each such aspect is unreasonably arbitrary and oppressive ... To justify annulling it or some features of it on such ground, it must be demonstratively shown that it is unreasonable.”

Rates established by a municipality are presumed to be reasonable in the absence of any showing to the contrary and the burden of proof is on the party asserting unreasonableness. See, *Knoxville v. Knoxville Water Co.*, 212 U.S. 1 (1909); *Railroad Commission of Louisiana v.*

Cumberland Telephone & Telegraph Co., 212 U.S. 414 (1909).

Methods

Governing bodies of municipal corporations must exercise powers conferred upon them in a reasonable, lawful and constitutional manner. They may select from alternative methods of execution of powers if more than one method is available.

Where the law confers a power but is silent as to the mode of exercising it, the authorities may determine the manner of execution. When a method has been selected, the general presumption obtains that what was done was proper and valid. In other words, the general rule is that unless restrained by law a municipal corporation may, in its discretion, determine for itself the means and methods of exercising its powers, subject of course, to the test of reasonableness. See, *McQuillin*, Section 10.29.

Conclusion

The acts of the governing bodies of towns and cities are presumptively valid. This presumption attends acts under attack in trial courts, before administrative agencies and on appeals. It is presumed that the exercise of authority was done in a proper and legal manner and, further, it is presumed that the method and manner selected in exercising powers was likewise proper. Claims of invalidity must be alleged and proved by those attacking acts of municipalities.

Attorney General’s Opinions on Presumptions

- The Attorney General has no authority to rule on the constitutionality of any ordinance or statute but merely to give advisory opinions. All statutes and ordinances are presumed valid until overturned by a court of competent jurisdiction. AGO to Hon. J.C. Davis, Jr., January 9, 1967.
- Municipal court costs are set by ordinance and presumed valid. AGO to Hon. David M. Enslen, July 13, 1970.
- Garbage ordinance of the Town of Eclectic establishing a garbage service and requiring all water customers within the corporate limits and police jurisdiction to use the service and prescribing penalties for failure to use the service, are presumed valid. AGO 1986-331.
- A person registering to vote in Alabama creates a rebuttable presumption of domicile in Alabama. AGO 1989-247. Various local constitutional amendments which have previously been ratified under Amendment 425 are presumed to be valid. 94-00128.
- It is only when two laws are so repugnant to or in

conflict with each other, that it must be presumed that the legislative body intended that the latter should repeal the former. AGO 2009-019

- Legislative acts are presumed valid and constitutional unless declared otherwise by a court of law. AGO 96-00299.
- A local act is presumed to be valid and constitutional unless determined otherwise by a court of competent jurisdiction. See, generally, AGO. 2002-042.
- Resolutions are presumed by the courts to be valid and enforceable, unless they are found to be unreasonable, arbitrary, or capricious. AGO. 2014-071(citing. *Wheat v. Ramsey*, 284 Ala. 295 (Ala. 1969))
- Municipal ordinances are presumed to be valid unless or until they are declared invalid by a court of law. *Storer Cable Commc'ns v. City of Montgomery*, 806 F. Supp. 1518, 1549 (M.D. Ala. 1992); *Hurvich v. City of Birmingham*, 35 Ala. App. 341, 343, 46 So. 2d 577, 579 (1950). The municipal governing body of the city may amend or repeal the ordinance, but members of the council may not ignore an ordinance that is presumed to be valid. AGO 2014-069
- Validly enacted acts of the Legislature are presumed constitutional until they are determined to be otherwise by a court of competent jurisdiction. *State Bd. of Health v. Greater Birmingham Ass'n of Homebuilders, Inc.*, 384 So. 2d 1058, 1061 (Ala. 1980).

15. Public Records

One of the most challenging public policy issues of our time is the juggling act between access to public records, personal privacy, and limited personnel and resources in local government administration.

In the case of *Randolph v. State ex rel. Collier, Pinckard and Gruber*, 2 So. 714 (Ala. 1887), the Alabama Supreme Court stated, “The right of free examination is the rule, and the inhibition of such privilege, when the purpose is speculative, or from idle curiosity, is the exception.” With that in mind, this article discusses access to public records and the exceptions to the privilege of a citizen to view those records.

Additionally, this article contains material discussing the very important case of *Blankenship v. Hoover*, 590 So.2d 245 (Ala.1991). *Blankenship* concerns the rights of citizens to obtain public records maintained by municipalities. This article explores this subject in depth and explains how the holding in *Blankenship* affects municipal rights to grant access to records. The article also explores the issue of allowing attorney’s fees in public records disputes.

Access to Public Records

It is probably best to assume as a starting point that all records the city keeps are public. Sections 36-12-40 and 36-12-41, Code of Alabama 1975, guarantee every citizen the right to inspect and make copies of all public writings, unless otherwise expressly provided by statute.

These sections do not state which records are considered public writings. Generally, the term “record” is given an expansive meaning, such as the definition found in Section 41-13-1, Code of Alabama 1975. There, public records are defined to include all “written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business.” The Alabama Supreme Court has held that the terms “public record” and “public writing” are synonymous. These sections are broad and provide little guidance for city clerks who must determine whether to release a particular record. In addition, this list is not all-inclusive, and each record must be examined individually to determine whether the public is entitled to access, looking to case law and Attorney General’s opinions for help.

In *Stone v. Consolidated Publishing Co.*, 404 So.2d 678 (Ala. 1981), the Alabama Supreme Court held that public writings as defined by Section 36-12-40 are those records which are reasonably necessary to record the business and activities of public officers “so that the status and

condition of such business and activities can be known by our citizens.”

The key element in this statement is that the record be “reasonably necessary.” It is clear that the right of access goes far beyond those records that the law requires a public official to keep. The fact that a record is not required does not mean that if a record is kept it is not a public record.

A letter or any other written, typed, or printed document received by a public official in pursuance of law is a public record. The final document generated in response to the taking of notes, if any, is a public record, but the notes themselves are not public records. AGO 2007-031.

Excise Commission of Citronelle v. State, 60 So. 812 (Ala. 1912), the Alabama Supreme Court held that a person has the right of inspection as the representative of one with an interest. Thus, an attorney may inspect a record for a client, even if a lawsuit has not been filed. And a newspaper may request access to records necessary to keep the public informed. See, *Miglionico v. Birmingham News Co.*, 378 So.2d 677 (Ala. 1979).

Section 36-12-40, Code of Alabama 1975, may be read to limit access of public records in Alabama to Alabama citizens. The United States Supreme Court upheld Virginia’s access to open records to citizens of Virginia. *McBurney v. Young*, 133 S.Ct. 1709 (U.S.2013).

In *Chambers v. Birmingham News*, 552 So.2d 854 (Ala. 1989), the Alabama Supreme Court held that there is a presumption in favor of a record being public, except in narrowly construed cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will be unduly affected. The court also held that the party refusing to make a disclosure bears the burden of proving the records should be withheld from public scrutiny.

Of course, the right to inspect and copy records is not absolute. Personnel records often contain information that reflects negatively upon an employee’s character and, if released, may subject the city to liability for defamation. Licensing information can be used by competitors to gain an unfair business advantage. If confidential police records become public, ongoing investigations may be ruined and lives endangered. For example, the uniform incident/offense report is a public record, although portions of it may be withheld from public disclosure to protect police investigations, witnesses, innocent persons and the right of the accused to a fair trial.

As the Eleventh Circuit Court of Appeals pointed out in *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), when the right to inspect and copy records interferes with the

administration of justice, it may have to be curtailed. The law has seen fit to permit access to many records, while at the same time protecting individual rights to privacy and protecting the orderly operation of municipal government.

In *Clerk of the Municipal Court of Cordova v. Lynn*, 702 So.2d 166 (Ala. Civ. App. 1997), the Alabama Court of Civil Appeals held that a citizen did not have the right to inspect unedited court dockets involving youthful offenders. However, the Attorney General held that if a juvenile court, after a hearing, determines that a housing authority has a legitimate interest in obtaining a juvenile record, then the court may authorize a local police department to furnish the information to the authority. AGO 1997-016.

The Alabama Supreme Court applied a test in *Stone v. Consolidated Publishing Co.*, 404 So.2d 678, 681 (Ala. 1981), to aid in determining whether a record should be released to the public. There, the court stated that “Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.”

This is the same test that all custodians of records must use to determine whether to release a record. If the right to access unduly interferes with government business, then the custodian is justified in restricting access. If not, then the record is public, unless some other restriction on access applies.

Generally, municipal officials and employees have no greater rights to inspect records than do members of the public. Only those officials and employees who must view a record that is not public should be allowed access. While the council, acting as a whole, has the right to request to see certain documents, individual councilmembers must demonstrate their interest in order to review records, just like private citizens. The Attorney General’s office held that the mayor may review all documents of the business of the town necessary for him or her to carry out his duties as mayor and manage the affairs of the town. However, the review of documents must be for a legitimate purpose and the integrity of the record must be maintained. AGO 2000-053.

In an AGO to Hon. Cooper Green, January 8, 1975, the Attorney General ruled that information in a county computer system is a matter of public record and access to the public is mandatory. This opinion would apply to municipalities as well.

In *Bedingfield v. The Birmingham News Co.*, 595 So.2d 1379 (Ala. 1992), the Alabama Supreme Court held that an internal audit conducted by the city of Birmingham was a public record.

The criminal complaint supporting an unexecuted arrest

warrant is not subject to disclosure under the Open Records Law. Section 36-12-40, Code of Alabama 1975. Once the warrant has been executed, the complaint supporting the same becomes public record. A custodian of public records may recoup reasonable costs incurred in providing documents to a citizen including, where necessary, costs for retrieving and preparing the records and the actual cost of copying the records. AGO 2008-030 and AGO 2013-040.

A common question is whether tape recordings made at council meetings are considered public records. The answer to this question probably depends on the nature of the tape recording. If a municipality maintains the recording at city hall and uses it as an official document, it should be treated as a public record. If the tape is used merely to aid the clerk in typing the minutes, there is no need for this to be considered a public record. The typed minutes are the official record of what transpired at the meeting.

The Local Records Retention Schedule adopted by the Local Government Records Commission supports this conclusion. The schedule considers tapes of meetings that are kept merely as an aid to the creation of minutes as “temporary records,” stating:

Audio or video recordings provide a verbatim account of debate and public input at meetings of the municipal council and municipal boards, commissions, or similar bodies. While offering a verbatim account of proceedings in case of controversy at a council meeting, or an appeal following a board’s decision, they are normally used only as an aid in preparing the minutes. Therefore, their retention (revised in conformity with other RDAs) is required only until the minutes are approved.

Municipalities can obtain the most recent copy of the Records Retention Schedule from the League, the Department of Archives, or on-line at:

https://www.archives.alabama.gov/officials/Local_Agencies.html.

Limitations and Restrictions on Access

There are sound policy reasons for restricting access to those records that are not public. There are liability issues to contend with if private information becomes public. Businesses are entitled to confidentiality concerning information that might give an unfair business advantage. Further, confidentiality encourages honest reporting for sales tax and licensing purposes, and, statutory provisions, such as Section 40-2A-10 of the Code dealing with sales and use tax return information, limit access to certain records.

The most common judicially created limitation on access is that the records custodian may require the person

seeking access to show that he or she has a direct, legitimate interest in the document sought. *See, Brewer v. Watson*, 71 Ala. 299 (Ala. 1882). There is no right of inspection when it is sought to satisfy a whim or to create scandal or for any other improper or useless purpose. No one has the right to demand to see every record maintained by the municipality without showing why he or she is interested.

Also, a municipality may set reasonable restrictions on the time and place of inspection, generally at city hall and during regular business hours. However, the limitation must be reasonable.

Also, a municipality has the right to charge a reasonable fee for making copies of the record. While the custodian may allow the person to make a copy, the better practice is for the custodian to make the copy. The Attorney General's office held that a public entity may recoup reasonable costs incurred in providing public documents, including staff research, preparation and time, but not costs for an attorney's time in reviewing potentially confidential documents. What constitutes "reasonable costs" is a factual determination that must be made by the governing body. AGO 2008-073.

When a person appears before the records custodian at the proper time and place and gives a legitimate reason, the custodian cannot assume that the person is seeking the record for some other illegitimate purpose and deny access. *See*, Section 36-12-41, Code of Alabama 1975 and *Excise Commission of Citronelle v. State*, 60 So.812, 814 (Ala. 1912). Of course, the custodian may still deny access to records if disclosure would be detrimental to the public interest. Access to public records cannot be restricted on the grounds that the individual plans to use the records for personal gain. A private person may use public records on the internet, unless the records are protected by copyright laws. AGO 1998-157.

Additionally, access cannot be denied because the person requesting access has been guilty of some past impropriety or that the information will be used in litigation against the municipality or a municipal official. *Brewer v. Watson*, 71 Ala. 299, 306 (Ala. 1882).

Section 36-12-40, Code of Alabama 1975 does not authorize a citizen to shift to the custodian the tasks of inspecting them and identifying the ones to be copied or the expense of copying those and does not require the custodian to undertake the burden and expense of mailing or otherwise delivering the copies. *See Ex parte Gill*, 841 So.2d 1231 (Ala. 2002). Under no circumstances, however, should the individual be allowed to remove the original document from city hall. This is a good rule to follow regardless of who is inspecting the record.

In *Stone v. Consolidated Publishing Co.*, 404 So.2d 678, 681 (Ala. 1981), the Alabama Supreme Court discussed

the types of records where the harm done by disclosure outweighs the right to access: "Recorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations and records the disclosure of which would be detrimental to the best interests of the public."

Time sheets of employees are public records. Certain sensitive information, however, that may be contained in those records is not public record. The custodian of records should redact sensitive personnel information. The custodian of records must make the records available for copy and inspection during the normal business hours, within a reasonable period of time that the request was made, and may do so in such a manner as to "prohibit work disruption." AGO 2008-073.

Under the Homeland Security Act of 2002, all state Sunshine Laws are preempted; therefore, Alabama's state disclosure, open records or freedom of information laws are preempted to the extent they require access to a record that the Department of Homeland Security considers to be "critical infrastructure information." *See*, 6 USCA, Section 131(3). Additionally, state courts do not have the power to require the release of that data. *See*, 6 USCA, Section 133. Similarly, Alabama law prevents access to records, information or discussions relating to security plans, procedures or other security related information from public access. Section 36-12-40, Code of Alabama 1975.

Clearly, it would be impossible to lay down a hard and fast rule that applies in all situations. The custodian must review each request individually and determine whether access should be permitted. Where a record contains both confidential and public material, the custodian, if possible, should delete the private information and release only the information that is public.

Tampering with the Public Record

Each public official or employee who handles governmental records should be aware that certain actions concerning the public record have been made criminal offenses by the legislature. Such actions include falsifying entries or falsely altering any governmental record. Intentionally destroying, mutilating, concealing, removing or otherwise substantially impairing the truthfulness or availability of any governmental record is also an offense. Additionally, it is unlawful for any person who does not have the authority to have possession of a governmental record to knowingly refuse to return the record upon proper request of a person lawfully entitled to receive the record for examination or other purposes. Section 13A-10-12, Code of Alabama 1975. In all cases in which it is not otherwise expressly provided by law, when any office is vacated, except by the death of the incumbent, all books, papers,

property and money belonging or appertaining to such office must, on demand, be delivered over to the qualified successor. Section 36-12-20, Code of Alabama 1975.

The Records Custodian

The official in charge of a record acts as a trustee, representing the interests of those with the right of access to the records. In *Brewer v. Watson*, 71 Ala. 299 (Ala.1882), the court pointed out that it is the custodian's duty to preserve records against all impertinent intrusion and allow access to those who can claim that access will promote or protect a legitimate interest. Public records must be kept in the office where the records were created or in a depository approved by the Local Government Records Commission. AGO 1991-249. If an off-site depository has been approved, the transferring official who follows the guidelines set by the commission will not be liable for any loss or damage to records stored in the off-site facility. AGO 1998-062.

The duty of the records custodian was the key issue in *Blankenship*. In this case, the city of Hoover adopted a policy requiring anyone requesting access to public records to make this request in writing.

The city provided forms for this purpose. The form required the person making the request to give his or her name, to include the date the request was filed, to list the records sought, and to give a reason for asking to view the records. The bottom of the form – set aside for official use – provided space for the records custodian to check whether the request was granted or denied. In the event of a denial, the custodian had to list reasons for denying the request.

The city of Hoover developed its policy after an experience in late July 1990. At that time, plaintiffs came to the financial department and requested numerous records. These records were provided, and plaintiffs were given space to review them. Plaintiffs made approximately 180 copies on Hoover's copy machine. Hoover did not charge for making these copies. Hoover's finance director testified that while the records were being copied, plaintiffs tore pages from the books and left the books in a damaged condition. One of the plaintiffs, while denying doing any damage, admitted that several pages came loose while they were making copies and that the plaintiffs folded and replaced them.

Later, the plaintiffs made an additional request for records from the city and refused to give any reason for their request. Among the records requested were all W-2 and 1099 forms showing the salaries and reportable payments by the city of Hoover since January 1, 1988. The city stated that it would provide the records, with the possible exception of the W-2 and 1099 forms, if the plaintiffs would fill out the city's form. The plaintiffs refused and sued, seeking the

requested records and an injunction that would permit them access to the records without stating a reason.

The trial court ruled in favor of Hoover, finding the policy reasonable. The court stated: "Hoover may [require persons requesting public records to fill out a form in the nature of the one offered in evidence in this case] asking why a person is seeking public records so long as the question is not intended to dissuade people from seeking the records and is not used in the ordinary course as a means to prevent people from having access to such records ..." "Hoover may establish a reasonable policy which limits the number of persons reviewing records at any one time as such limits may be required by its physical facilities and may limit the records reviewed at one time so as not to unduly interfere with the normal operation of city government."

The trial court also found that Hoover did not have to produce its W-2 forms because the forms disclosed "whether or not an individual employee has elected to participate in income-deferral plans, insurance plans, or similar benefits which are more personal than public in nature." However, the court found that the 1099 forms did not contain any personal information and should be provided. The court stated that, the rate of pay, even the gross pay of individual employees, must be made available upon request.

The Alabama Supreme Court affirmed. The court was impressed with the fact that Hoover did not apply its policy to prevent access to records, nor did the policy discourage requests. The court held that the policy merely permitted Hoover to ensure that inspections were performed by those with a legitimate interest in the requested records and that the integrity of the records was maintained without undue interference.

Attorney's Fees

Several questions have been raised regarding the liability for attorney's fees in public records court cases. As a general rule, the prevailing party in a lawsuit is not entitled to have his or her attorney's fees paid by the opposing party absent a contractual or statutory requirement. However, Alabama courts have recognized that attorney's fees may be awarded in cases where justified by the equities of the case.

In *Bell v. The Birmingham News Co.*, 576 So.2d 669 (Ala. Civ. App. 1991), the Alabama Court of Civil Appeals considered the question of whether attorney's fees should be awarded in a case brought to enjoin the city of Birmingham from holding closed sessions to elect the council president and the president pro tempore.

The court began by noting the general rule that awards of attorney's fees are disfavored. However, the court then pointed out that in *Brown v. State*, 565 So.2d 585 (Ala. 1990), the Alabama Supreme Court held that attorney's fees may be justified in a case where the actions of a plaintiff

benefit the public at large. In *Brown*, the issue was the lack of verification of traffic tickets before a judicial officer. The court held that the plaintiffs were not entitled to have their convictions overturned. However, because they revealed a serious flaw in the administration of justice in the state, the court held that the plaintiffs were entitled to have their attorney's fees paid. The court stated that their actions conferred a "common benefit" on the public at large.

In applying this "common benefit rule" in *Bell*, the Court of Civil Appeals stated that the citizens of the city of Birmingham benefited by the suit brought by *The Birmingham News*, and, therefore, the newspaper was entitled to have its attorney's fees paid by the city of Birmingham. The court, quoting *Bell*, stated, "It is unquestionable that [*The News*] attorney rendered a public service by bringing an end to an improper practice."

In *Advertiser Co. v. Auburn University*, 579 So.2d 645 (Ala. Civ. App. 1991), *The Montgomery Advertiser* sued to obtain a copy of a report maintained by Auburn University. The trial court held that the report was a public record; however, the trial court refused to grant plaintiff's request for attorney's fees. The Court of Civil Appeals affirmed, holding that the decision as to whether to grant attorney's fees was within the discretion of the trial judge. The court held that the trial court did not abuse this discretion by refusing to award attorney's fees because there was ample evidence that Auburn University acted in good faith when it refused to turn over the report.

Microfilming of Records

Sections 41-13-40 through 41-13-44, Code of Alabama 1975, provide for the photographing or micro photographing of public records and for the admissibility in evidence of photographed or micro photographed copies of records required to be kept by public officers. Municipalities seeking to microfilm or photograph their records should refer to the statutes for guidance.

Permanent Municipal Records

Certain records of a municipality must be kept permanently. Permanent records include the journal, ordinance books, resolutions, journals of independent agencies and boards of the municipality, general ledgers, cash books, bonds and interest ledgers and records of bonds and coupons destroyed, tax and assessment records, deeds and title papers, records of tax liens, records of securities, budgets and audit reports. Records in addition to those listed above may have local significance as permanent records and should be preserved also.

Disposal or Destruction of Public Records in General

Certain other records may have semi-permanent

significance and must be preserved until the reason for their retention has ceased to exist. Official correspondence should be retained at least until the item to which it relates has been acted upon and is no longer of interest or concern. If the correspondence relates to real property of the municipality, then it should be kept permanently.

Knowledge of the statutes of limitations imposed by the Code of Alabama is imperative before public records are disposed of or destroyed. A number of statutes of limitations of actions are found in Sections 6-2-1 through 6-2-41, Code of Alabama 1975. Some of these statutes are more applicable to municipal records than are others, but all should be studied prior to the disposal or destruction of any records. Likewise, statutes of limitations in other sections are of concern to municipal officials.

The law governing the manner of disposing of public records is set out in Sections 41-13-1, 41-13-4 and 41-13-5, and Sections 41-13-22 through 41-13-25, Code of Alabama 1975.

Local Government Records Commission

"Public records" are defined at Section 41-13-1, Code of Alabama 1975. This definition has been included earlier in this article. Section 41-13-5 simply states that "any public records, books, papers, newspapers, files, printed books, manuscripts or other public records which have no significance, importance, or value..." may be eligible for disposal.

Sections 41-13-5 and 41-13-22 through 41-13-25, Code of Alabama 1975, provide a method for disposing of public records which no longer have any significance or value.

Sections 41-13-22 through 41-13-25, Code of Alabama 1975, establish a Local Government Records Commission with the responsibility of determining which county, municipal and other local government records must be permanently maintained and which records may be destroyed after being microfilmed.

Section 41-13-23, Code of Alabama 1975, states that no local government official may dispose of any public record without first obtaining the approval of the Local Government Records Commission.

The Local Government Records Commission consists of 12 members: the Director of the Department of Archives and History, who chairs the Commission; the chief examiner of the Department of Public Accounts; the Attorney General; the secretary of state; one member from The University of Alabama and one member from Auburn University, both of whom are appointed by the head of the Department of History; one probate judge who is not a chairman of a county commission; two chairmen of county commissions who are not also probate judges; one county tax assessor and two city clerks, both appointed by the governor.

Members of the commission receive no salary, but expenses incurred in the performance of their duties may be reimbursed pursuant to Sections 36-7-20 through 36-7-22, Code of Alabama 1975. The commission meets in January, April, July and October of each year and meets upon the call of the chairman.

The Local Government Records Commission is authorized to issue regulations classifying public records and to prescribe a period for which records in each class must be maintained. Further, the code states that any public record, book, paper, newspaper, file, manuscript or tape which is determined to have no significance or value may be destroyed or disposed of upon the recommendation of the custodian and the consent and advice of the Local Government Records Commission.

Local Government Records Commission Records Disposition Schedule for Municipalities

For assistance or to obtain a copy of the records disposition requirements established by the Records Disposition Authority and approved by the Local Government Records Commission, please check the League's website. Additionally, the Alabama Department of Archives and History Government Records Division website has extensive information available at www.archives.state.al.us or you may contact the department via phone at (334) 242-4435.

Attorney General's Opinions and Court Opinions

The Attorney General and the Courts have issued a number of opinions discussing public records. They are listed below.

- Reports and orders prepared by housing code inspectors are public records. AGO to Mayor Earl D. James, under date of June 12, 1969.
- A traffic accident report is a public record. AGO 1979-073.
- Information contained on the front of the Uniform Incident/Offense Report should be available to the public for inspection. AGO 2000-004.
- The news media has no greater access to police records than that accorded the general public. A police agency may form whatever policy it deems advisable with regard to making its reports available to persons outside the agency, as long as the policy is uniformly applied. Strong policy considerations support a policy of keeping official investigation reports confidential. AGO to Hon. Frank Roberts, under date of August 9, 1976.
- Transcripts of disciplinary hearings held at board meetings not closed to the public are public records. AGO 1986-095.
- Unless otherwise ordered, court records and contents are public records. AGO 1986-197.
- Arrest warrants are public records. AGO 1987-297.
- Building permits filed at city hall are public records. AGO 1987-333.
- Information concerning names, titles and compensation of county employees is open to inspection by the public. AGO 1988-117.
- A citizen's right to city's beer tax records should be limited to the amount of tax paid while deleting information obtained by audits or other sensitive internal business information that could be used by competitors to gain an unfair business advantage. AGO 1988-190.
- Records of a municipal water department are public records. AGO 1988-389.
- Lists of teachers or other personnel employed by a local board of education are public records. However, the board may refuse to furnish the home addresses of employees on the list. AGO 1988-390.
- A municipal water works board may provide a list of the names and addresses of its customers to individuals, businesses and organizations and charge a reasonable fee. AGO 1988-407.
- Contracts of the Huntsville Utilities with municipalities and subdivisions of Madison County are public records. AGO 1997-254.
- Records concerning criminal investigations may be withheld from scrutiny when the disclosure of the records would compromise pending criminal investigations. AGO 1989-193.
- Search and arrest warrants become public only after they are executed. AGO 1990-067.
- Resumes of applicants for the position of county administrator are public unless the resume, contains sensitive material which would cause undue harm or embarrassment to the applicant. AGO 1991-032.
- Pistol permits kept in the sheriff's office are public records. AGO 1991-225.
- Records of an E911 district are public. However, information in the database as to names, numbers and addresses should not be disclosed if it will result in undue harm or embarrassment or adversely affect public interests. AGO 1991-287.
- Records of fire districts are public records. AGO 1992-351.
- The names and addresses of the victims of crimes

maintained by the Department of Corrections are not public records. AGO 1992-268.

- Fire district records maintained as a computer database are public record. AGO 1992-274.
- The names, titles and compensation of county employees is a matter of public record. AGO 1992-321.
- A personnel study of county employees authorized by the county commission is a public record. AGO 1992-321.
- The records of the tax assessor's office are public records which may be accessed during regular business hours. The integrity of the original documents must be maintained without limiting public access. AGO 1992-335.
- Because of the confidentiality provision of Section 40-9B-6(c), Code of Alabama 1975, members of the Legislature may not view tax abatement agreements filed with the Department of Revenue unless access is granted by the private party involved. AGO 1998-119.
- The requirement of reasonable access to public records means access during regular business hours where records are kept. AGO 1992-336.
- A court may place reasonable limitations upon the public's access to records so as not to unduly interfere with the operation of the court clerk's office. The clerk has no duty to notify an attorney when certain types of cases are filed even though the attorney has requested notification. AGO 1992-154.
- Absent extraordinary circumstances, inspection of municipal tax records, even by the council as a whole, is limited to the amount of the tax paid and only when sought in order to advance the public good. AGO 1994-184.
- The list of absentee voters filed with the probate judge is a public record. AGO 1992-263.
- Records of an E911 board are public, except in the case of confidential material which would unduly embarrass or harm an individual or the public interest. AGO 1995-250.
- Electronically-stored public records must be made available to the public. The custodian may charge a reasonable fee for accessing the information. AGO 1995-266.
- A municipality may charge a reasonable search fee for the time its personnel spend gathering public information to fill a citizen's request. AGO 1995-268.
- The inactive voters list must be published in a newspaper which meets the requirements of Section 6-8-60, Code of Alabama 1975. AGO 1995-301.
- Despite a presumption that records kept by public entities are open to public inspection, sensitive personnel records should be kept confidential. Employees which are the subject of an internal investigation must be afforded all due process protection rights. Where employees have consented, a public agency may sell directories containing addresses and telephone numbers of employees to the public. AGO 1996-003.
- Any voter information, other than Social Security numbers, on file in the office of voter registration, is available for a fee to anyone requesting the information. AGO 1996-038.
- Applications for bingo permits and annual financial statements filed with the sheriff of Jefferson County pursuant to Act 80-609 are public records. AGO 1997-169.
- Resumes of applicants for public jobs must be open to the public. Confidential information on the applications which would harm or embarrass an applicant may be kept confidential, but the organization bears the burden of proving the information should be kept from the public. AGO 1996-105.
- Individual documents reflecting the opinions of school board members, which are used to compile the board's evaluation of its superintendent, are not public records. AGO 1996-126.
- Police radio logs are not subject to public disclosure. AGO 1996-128.
- A public agency may put public records on the internet. The agency may be selective in the records it places on the internet. The agency may sell its digital records, but may only charge a reasonable price based upon its costs in providing the information to the public. The agency may not restrict purchases from reselling public records. AGO 1998-158.
- Performance evaluations of public employees are public records, but they may only be released if they do not contain sensitive personnel matters. AGO 1999-258.
- Records of a public waterworks and sewer board or authority are public records as defined in section 41-13-1 of the Alabama Code. Therefore, the water and sewer board of the city of Gadsden may provide its customer list to the board of registrars of Etowah County; however, the water and sewer board is not required to disclose sensitive or confidential information and may regulate the manner in which the list is disclosed. AGO 2000-102.
- Information contained on the front side of the Uniform

Incident/Offense Report is a public record, therefore, should be available for inspection and copying by any member of the public, including investigative reports involving victims of domestic violence to Legal Services Corporation and/or Turning Point. AGO 2000-197.

- A probate judge may charge a reasonable fee for supplying electronically stored information. AGO 2000-196.
- Information gathered about a victim who is also a witness to a crime is protected from disclosure under a well-recognized exception to the general rule that the information recorded on the front side of an Incident/Offense Report is public information. No portion of the back side of the Report is a public record because it is considered the officers' work product. AGO 2000-203.
- When a juvenile is both a witness to and the victim of a crime, he or she is entitled to the same confidentiality protections as an adult victim/witness. Because of their status as juveniles, additional information may be withheld. AGO 2000-225.
- The records of the emergency management communications district are public records and should be made accessible to the public for inspection and copying except in those instances when specific records or portions thereof can be demonstrated by the district to fall within recognized exceptions to the Open Records Act. *See*, Sections 11-98-1 to 11-98-11 of the Alabama Code. AGO 2001-086.
- Upon proper inquiry, a police department must release to a person in possession of a repaired automobile or towed automobile the most recent address in its files for the owner or lien holder of the automobile in order that notice might be given to the owner or lien holder of a proposed sale at public auction. AGO 2001-071.
- Personnel files of former employees of a municipal board of education are public records, unless the board can prove that the records are sensitive and should not be disclosed. AGO 2001-269.
- The federal law relating to the confidentiality of drug defendant records applies only to those alcohol and drug education/treatment providers that maintain such records for the purpose of treatment, diagnosis, and referral of patients and does not restrict a jailer from recording identifying information regarding the defendant or the defendant's arrest in a jail logbook, the contents of which is public information. AGO 2003-048.
- The gross receipts tax or privilege tax paid by a cable company is not the type of sensitive proprietary

information that Alabama law protects. Therefore, a city may divulge the amount of privilege or license tax paid to a city by a cable company. AGO 2003-052.

- Section 41-13-23 requires that public records should be kept in the office where the records were created or in a depository approved by the Local Government Records Commission. Before transferring public records to a different location, the Local Government Records Commission should be consulted. AGO 2003-064.
- A mugshot in a computer database is a public record and must be provided to bail bonding companies under the Open Records Law unless it falls within a recognized exception. AGO 2004-108.
- Records maintained by a separately incorporated utility board organized under Section 11-50-310 et seq., Code of Alabama 1975, are public records. ***Water Works and Sewer Bd. of City of Talladega v. Consolidated Pub.***, 892 So.2d 859 (Ala. 2004). This case is significant because the Court held that, at least for purposes of the Open Records Laws, employees of separately incorporated utility boards are considered municipal employees. For more discussion of this case, see the article on boards, elsewhere in this publication.
- National Fire Incident Reporting System forms are public records except when specific records or portions thereof can be demonstrated by a municipal fire department to fall within a recognized exception. AGO 2006-134.
- Judicial records have historically been considered public records. *Mobile Press Register, Inc. v. Lackey*, 938 So.2d 398 (Ala. 2006).
- Because a state agency may regulate the manner in which public records are produced, inspected and copied, a state agency, to be in compliance with §36-12-40 and §36-12-41, is not required to distribute public records in the manner that a requestor specifies. AGO 2007-001.
- A Water, Sewer and Fire Protection District must follow the procedures of the Local Government Records Commission established pursuant to section 41-13-23 of the Code of Alabama, regarding the destruction of any of its records, including the length of time that the records must be kept. AGO 2007-016.
- A letter or any other written, typed, or printed document received by a public official in pursuance of law is a public record. The final document generated in response to the taking of notes, if any, is a public record, but the notes themselves are not public records. AGO 2007-031.

- Arrest information including the jailer's logbook is public record. A mugshot is a public record. Under section 41-9-625 of the Code of Alabama, a criminal justice agency is required to expunge identification information, including the booking photograph, on a defendant who is released without charge or is cleared of an offense and such disposition shall be reported by all state, county and municipal criminal justice agencies to ACJIC within 30 days of such action, and all such information shall be eliminated and removed. AGO 2007-052.
- The criminal complaint supporting an unexecuted arrest warrant is not subject to disclosure under the Open Records Act. Once the warrant has been executed, the complaint supporting the same becomes public record. A custodian of public records may recoup reasonable costs incurred in providing documents to a citizen including, where necessary, costs for retrieving and preparing the records and the actual cost of copying the records. AGO 2008-030.
- Time sheets of employees in the Revenue Commissioner's Office are public records. Certain sensitive information, however, that may be contained in those records is not public record. The custodian of records should redact sensitive personnel information. The custodian of records may recover the reasonable cost involved in providing the requested records to a citizen. The custodian of records may recover the reasonable cost involved in providing the requested records to a citizen. The custodian of records must make the records available for copy and inspection during the normal business hours, within a reasonable period of time that the request was made and may do so in such a manner as to prohibit work disruption. AGO 2008-073.
- The regular copy fee may not be assessed if individuals use personal cameras or other electronic devices to make a copy of a public record. The public official does not have the authority to refuse the use of personal cameras or other electronic devices for receiving copies or retrieving information from public records unless the camera or other electronic device unduly interferes with the operation of the government office. AGO 2009-076.
- The Secretary of State's written order in a complaint file removing a registrar is subject to disclosure under the Open Records Law. The open complaint file, closed complaint file when no cause is found to proceed with removal, and internal recommendations as to how to proceed, but not constituting the final order, may be withheld from public inspection. AGO 2010-050.
- The city council, city manager, or a person authorized by the council or manager, including an authorized individual council member, may only obtain the front side of an Alabama Uniform Incident/Offense Report, even after the case is closed, under section 45-8A-23.262 of the Code of Alabama. The city manager may obtain a full report from the city's police department, if necessary, as part of the normal supervisory functions of the manager's office. The manager should not make the back side of the report available for inspection. AGO 2012-009.
- The supervision and maintenance of personnel files is the responsibility of the executive officer or superintendent of the Board of Education. The school board may establish policies governing the contents of personnel files. The mechanism for storing and disposing of personnel files is an administrative issue that would best be handled by policies and procedures implemented by the Board of Education. Retention practices should be consistent with the procedures established by the Local Government Records Commission. AGO 2012-019.
- A municipality should, under the Public Records Act, allow members of the general public to inspect and obtain copies of completed Alabama Uniform Traffic Accident Reports. A municipality should redact a person's home address and telephone number from an accident report. A person's date of birth is public and may not be redacted from any Uniform Traffic Accident Report that the municipality produces. AGO 2012-045.
- The federal Health Insurance Portability and Accountability Act (HIPAA) preempts a state law that requires nursing homes, upon request, to release the medical records of deceased residents to their spouses and attorneys-in-fact. *OPIS Management Resources, LLC v. Secretary, Florida Agency for Health Care Administration*, --- F.3d ----, 2013 WL 1405035 (11th Cir.2013).
- A state may limit access to its public records to residents of that state without running afoul of either the Privileges and Immunities Clause or the Dormant Commerce Clause. *McBurney v. Young*, 133 S.Ct. 1709 (U.S.2013); See also AGO 2001-107.
- A public entity may charge a reasonable fee for extensive research required to comply with a public records' request. AGO 2013-040.
- Although email addresses of the citizens of a municipality are public records pursuant to section 36-12-40 of the Code of Alabama, they are exempt from disclosure. The municipal clerk, as the custodian of records for the municipality, is authorized to determine which public records are subject to disclosure, subject

to limitations established by the governing body of the municipality. Each request for public records' disclosure must be considered on its own merits, with public policy generally favoring disclosure. The question of whether a disclosure would result in undue harm or embarrassment to an individual, or adversely affect the public interest, is a factual question. The party refusing disclosure has the burden of proving that the writings or records sought are within the exception. AGO 2013-046.

- Training profiles, standard operating procedures, use-of-force policies, discharge-of-firearm policies, and reporting-of-incidents policies are public writings as contemplated by section 36-12-40 of the Code of Alabama. Although training profiles, standard operating procedures, use-of-force policies, discharge-of-firearm policies, and reporting-of-incidents policies are public writings, some information therein may be exempt from disclosure and redacted if the municipality determines that disclosure thereof could reasonably be expected to be detrimental to the public safety or welfare or otherwise be detrimental to the best interests of the public. AGO 2014-068.
- A sub-list of the statewide voter registration list that is created by the Alabama Secretary of State, which has been modified by the Alabama Department of Public Safety, is a product of a commingling of information housed within two different agencies, and should not be considered a public record or writing that is subject to disclosure. AGO 2014-087.
- A city board of education is required to disclose, by name, the compensation of employees under the Open Records Law. AGO 2015-037.
- The Alabama Uniform Arrest Report is subject to disclosure under the Open Records Law, except when specific records or portions thereof can be demonstrated by the city police department to fall within a recognized exception. The home address, telephone number, social security number, driver's license number, occupation, employer, and business address and telephone number of the arrestee on the front side of the report may be withheld from public inspection. The full address of the location of arrest, if the same as the home address, on the front side of the report may be withheld. The block number or street name is public record. The "SID" and "FBI" numbers on the front side of the report should not be released. The "Juvenile" section and the name of a juvenile arrestee on the front side of the report should be withheld. No portion of the back side of the report is public record. If the release of information from any other sections of the form would compromise

a pending criminal investigation, that information may be withheld. AGO 2015-057.

- Letters from the Alabama Department of Human Resources in the district attorney's investigative file, referring complaints about mistreatment of students in church preschools to the district attorney for investigation, are not subject to disclosure under the Open Records Law. No portion of the letter is subject to disclosure. AGO 2016-019. The best interests of the state outweighed the presumption for disclosure of records regarding the functioning of a cell phone tracking device used by a city police department. Thus, the records were exempt from disclosure under the Arizona public records law. The city described the device as a "surveillance technology device" that could assist in abduction or kidnapping investigations. *Hodai v. City of Tucson*, 365 P.3d 959 (Ariz.App.Div.2 2016).
- The checking account numbers on checks are not subject to disclosure under the Open Records Law and should be redacted. AGO 2016-049.
- A check made out to the town for the park is subject to disclosure under the Open Records Law, even if the donor intended an anonymous donation, except checking account numbers should be redacted. AGO 2017-007.
- Draft documents, such as versions of proposed administrative rules and legislation, used internally by the Alabama Department of Revenue, are not subject to disclosure under the Open Records Law. Draft documents shared externally, as well as internal and external correspondence, such as emails, on possible actions to be taken by Revenue, are also not subject to disclosure. AGO 2017-036.
- Records of constables are subject to the provisions of the Open Records Law. Generally, access to public records is limited to Alabama citizens. AGO 2018-030.

16. Municipal Boards in Alabama

The state legislature has authorized Alabama cities and towns to place the administration of certain detailed municipal activities under the supervision and control of appointed boards. Some of these boards are incorporated while others are not. Incorporated boards are entities separate and independent from the municipalities they serve. An incorporated board can exercise only the power conferred upon it by the charter of the corporation and by the statutes under which it is organized. Unincorporated boards are agencies of the municipality and are subject to the legislative power of the municipality.

All municipal officials should know the types of boards their municipality has created or has the authority to create. This knowledge will assist municipal officials in coordinating activities of the boards with those of the municipal departments under their direct control and supervision. However, generally speaking, other than the appointment of board members, a municipality has no control over the activities of a separately incorporated board unless otherwise provided by law.

This article is a capsule summary of the various types of municipal boards authorized, both incorporated and unincorporated. The article will also assist an incoming administration in learning which board positions will become vacant during its administration. Due to space limitations, the powers of each board will not be explained in detail. However, citations to the statutory provisions governing the boards are included.

Additionally, some municipalities have boards that are authorized by local laws adopted by the Legislature. The statutory authority for your board should be located in the board's articles of incorporation, the by-laws or the adopting ordinance. If there is no statutory authority in these documents, you may have an advisory board, which cannot exercise any administrative powers. See the article on Working with Municipal Boards, found elsewhere in this publication.

The boards described in this article are numbered. For convenience, a brief index of boards is included.

Boards Authorized by General Statewide Laws

1. Waterworks and Sewer Boards

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-50-230 through 11-50-291, Code of Alabama 1975.
- c. Composition: Three, five or seven members. Not all options are available to all municipalities.

- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: Different compensation alternatives are provided by Sections 11-50-234 and 11-50-15 of the Code of Alabama 1975. **Note:** A councilmember appointed to serve on a board created pursuant to these code sections *cannot* receive a fee for serving on the city's water works board even if the board elects to pay its members under Section 11-50-15 of the Code. A councilmember may receive reimbursement for actual expenses incurred as allowed by Section 11-50-234(a) and an expense allowance as provided by Section 11-50-234.1. AGO 2000-027.
- g. Municipal officials: If the board has three members, two may be members of the municipal governing body. If the board has five or seven members, three may be members of the municipal governing body. These provisions are permissive, not mandatory. If the articles of incorporation prohibit municipal officers, they are not eligible to serve on the board. *Buffalow v. State*, 281 Ala. 132, 199 So.2d 672 (Ala. 1967). Members of the municipal governing body who serve on this board may not be compensated for serving.
- h. Powers: The board has the authority to operate the municipal water and sewer system with additional authority granted by Section 11-50-260 through 11-50-273 of the Code to operate gas plants and gas systems, and by Sections 11-50-290 and 11-50-291 of the Code to operate and manage the sanitary sewer systems of the municipality.
- i. Other: New corporations cannot be organized under these sections. However, existing corporations formed pursuant to these statutes may continue to exist and function. A certificate of incorporation that prohibits a councilmember from serving on the board is not automatically amended by virtue of the fact that Section 11-50-234(a) was amended to allow council members to serve on the board. *Water Works & Sewer Bd. of Wetumpka v. Wetumpka*, 773 So.2d 466 (Ala. 2000). Non-residents and non-registered voters may be appointed to serve on the board. AGO 2001-085.

2. Boards to Operate Water, Sewer, Gas and Electric Systems

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-50-310 through 11-50-324, Code of Alabama 1975.

- c. Composition: three, five or seven members. Not all options are available to all municipalities.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: Numerous compensation alternatives are provided by Sections 11-50-15 and 11-50-313, Code of Alabama 1975, as amended.
- g. Municipal officials: If the board has three members, two may be members of the municipal governing body. If the board has five or seven members, three may be members of the municipal governing body. In order for elected officials to serve on the board, the articles of incorporation of the board must contain a provision stating that they are eligible. AGO 1996-267. Members of the board who also serve as members of the municipal governing body may receive compensation for their services on the board, if approved by the board. The certificate of incorporation or an amendment to the certificate may restrict or prohibit service on the board of directors by officers of the municipality. **Note:** A municipal official serving on a board created pursuant to these code sections *may* receive a fee for his or her services under either Section 11-50-313 or 11-50-15, but not both. AGO 2001-128.
- h. Powers: These boards have the authority to operate municipal water, sewer, gas and electric systems as well as cable and telecommunications systems.
- i. Other: A municipal governing body may not increase the size of the utility board without the consent of the utility board. AGO 1996-174.

3. Board of Water and Sewer Commissioners

- a. Nature: unincorporated.
- b. Statutory authority: Sections 11-50-340 through 11-50-358, Code of Alabama 1975.
- c. Composition: three or five members.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: fixed by the governing body.
- g. Municipal officials: If the board has five members, three may be members of the municipal governing body. If the board has three members, two may be members of the municipal governing body. No municipal officers shall receive compensation for their services as board members.
- h. Powers: These boards operate municipal water and sewer systems.

4. Gas Districts

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-50-390 through 11-50-417, Code of Alabama 1975.
- c. Composition: Not less than three members with at least one member from each municipality in the district.
- d. Terms: concurrent with that of the mayor of the appointing municipality.
- e. Appointing authority: municipal governing body.
- f. Compensation: None, unless the board in its discretion decides to pay each member a director's fee of not more than \$450 (\$500 for chairman) per meeting attended, but not to exceed one meeting each calendar month.
- g. Municipal officials: mayors may be board members.
- h. Powers: To secure, distribute and sell gas or gas services in member municipalities.
- i. Other: Members hold office until their successors are appointed and qualify. Members may be removed by the appointing authority within the term for which he or she is appointed after giving the member a copy of the charges against him or her and an opportunity to be heard in his or her defense. The removal action of the appointing authority shall be final and non-reviewable.

5. Waterworks Utility Boards

- a. Nature: unincorporated.
- b. Statutory authority: Sections 11-50-430 through 11-50-445, Code of Alabama 1975.
- c. Composition: three members.
- d. Terms: staggered three-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: each board member shall be paid a monthly fee fixed by the municipal governing body from the proceeds of the municipal waterworks plant and municipal waterworks system.
- g. Municipal officials: municipal officials cannot be members of this board.
- h. Powers: these boards have complete control of the municipal waterworks system and waterworks plants.
- i. Other: Board members must be qualified electors of the municipality and may not be officers or employees of the municipality. Any person whose term on the municipal governing body has expired within the last six months may not become a member of the board.

6. Gas Utility Boards

- a. Nature: unincorporated.
- b. Statutory authority: Sections 11-50-460 through 11-50-475, Code of Alabama 1975.
- c. Composition: three members.
- d. Terms: staggered three-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: monthly fee fixed by the municipal governing body from the money received from the operation of the municipal gas distribution system.
- g. Municipal officials: municipal officials cannot be members of these boards.
- h. Powers: these boards have complete control of municipal gas distribution systems.
- i. Other: Board members must be qualified electors of the municipality and may not be officers or employees of the municipality. Any person whose term on the municipal governing body has expired within the last six months may not become a member of the board.

7. Electric Utility Boards

- a. Nature: unincorporated.
- b. Statutory authority: Sections 11-50-490 through 11-50-506, Code of Alabama 1975.
- c. Composition: three members.
- d. Terms: staggered three-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: monthly fee fixed by the municipal governing body from the money received from the operation of the municipal electric distribution system.
- g. Municipal Officials: Municipal officials cannot be members of these boards.
- h. Powers: These boards have complete control of the municipal electric distribution system as well as the authority to operate cable and telecommunications systems.
- i. Other: Board members must be qualified electors of the municipality and may not be officers or employees of the municipality. Any person whose term on the municipal governing body has expired within the last six months may not become a member of the board.

8. District Electric Corporations

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-50-520 through 11-50-533, Code of Alabama 1975.
- c. Composition: not less than three members with

one director from each municipality located in the power district having a population of 1,000 or more inhabitants.

- d. Terms: one-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: \$10 for each day the member attends board meeting or is on board business not to exceed \$500 per year.
- g. Municipal officials: no director shall be an elected officer of the municipality.
- h. Powers: to generate, purchase, sell and deliver electric power service.
- i. Other: Each director must be a resident of and an elector and property owner in the municipality by whose governing body he was elected.

9. Municipal Electric Authority

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-50A-1 through 11-50A-33, Code of Alabama 1975, as amended.
- c. Composition: nine members.
- d. Terms: staggered three-year terms.
- e. Appointing authority: committee of representatives from member municipalities.
- f. Compensation: none.
- g. Municipal officials: municipal officials may serve as members.
- h. Powers: to make available an adequate, dependable, and economical alternative supply of bulk electric power and energy and related services for wholesale to municipalities which may desire such supply.
- i. Other: Members of the election committee shall not be eligible for membership on the board.

10. Recreation Authorities Formed by Two or More Municipalities

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-47-210 through 11-47-221, Code of Alabama 1975.
- c. Composition: an odd number not less than three members.
- d. Terms: no more than six years.
- e. Appointing authority: municipal governing body or county governing body or a combination thereof.
- f. Compensation: none.
- g. Municipal officials: no provision.

- h. Powers: to operate parks, playgrounds, etc.

11. Recreation Boards

- a. Nature: unincorporated
- b. Statutory authority: Sections 11-86-1 through 11-86-6, Code of Alabama 1975.
- c. Composition: five to nine members.
- d. Terms: staggered five-year terms.
- e. Appointing authority: county or municipal governing body.
- f. Compensation: none.
- g. Municipal officials: municipal officials may be board members.
- h. Powers: direct, supervise and promote recreation programs for the municipality.
- i. Other: boards of this type can be created by any county and all municipalities of 100,000 or less inhabitants. Board members must be residents of the county or municipality creating them and have a recognized interest in recreational activities.

12. Public Park and Recreation Boards

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-60-1 through 11-60-20, Code of Alabama 1975.
- c. Composition: not less than three.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.
- g. Municipal officials: municipal officials and employees may not be members of the board.
- h. Powers: to promote public interest and participation in sports, athletics and recreational activities.
- i. Other: board members must be duly qualified electors and taxpayers of the municipality.

13. Public Athletic Boards

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-59-1 through 11-59-17, Code of Alabama 1975.
- c. Composition: any number not less than three.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: the directors receive no compensation, but the board, in its discretion, may pay its members \$5 per meeting with a limit of one meeting per month.

- g. Municipal Officials: no director shall be an officer or employee of the municipality.

- h. Powers: to own and operate recreational facilities.

- i. Other: board members must be duly qualified electors and taxpayers of the municipality.

14. Public Building Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-56-1 through 11-56-22, Code of Alabama 1975.
- c. Composition: three or a multiple of three.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.
- g. Municipal officials: no municipal official or state official shall be a member of the board.
- h. Powers: the board has the authority to construct certain public buildings and lease them to the municipality.
- i. Other: members must be residents of the municipality.

15. Educational Building Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 16-17-1 through 16-17-19 and Sections 16-18-1 through 16-18-21, Code of Alabama 1975, as amended.
- c. Composition: three.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.
- g. Municipal officials: no officer of the state, county or municipality may serve on the board while in office.
- h. Powers: to develop “ancillary improvements” for lease or sale to educational institutions.
- i. Other: each member must be a qualified elector of the municipality and own real property therein.

16. Public Hospital Associations

- a. Nature: incorporated.
- b. Statutory authority: Sections 22-21-50 through 22-21-57, Code of Alabama 1975.
- c. Composition: one member from each precinct or ward falling within the jurisdiction of the municipality.
- d. Terms: five years.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.

- g. Municipal officials: municipal officials may serve on these boards.
- h. Powers: to coordinate activities relating to hospitals.

17. Municipal Hospital Building Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 22-21-130 through 22-21-156, Code of Alabama 1975.
- c. Composition: at least three members.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.
- g. Municipal Officials: no officer of the state or of the municipality may be a board member.
- h. Powers: to build hospitals for lease to the municipality.
- i. Other: board members must be residents of the municipality.

18. Medical Clinic Boards

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-58-1 through 11-58-15, Code of Alabama 1975, as amended.
- c. Composition: three members.
- d. Terms: staggered six-year terms.
- e. Appointing authority: county or municipal governing body.
- f. Compensation: none, unless the board decides to pay its members no more than \$10 per meeting not to exceed \$120 per year as a director's fee.
- g. Municipal Officials: no board member may be an officer of the municipality or the county.
- h. Purpose: to construct and administer medical clinics and facilities for the housing and care of elderly persons.

19. Regional Mental Health Programs and Facilities

- a. Nature: incorporated.
- b. Statutory authority: Sections 22-51-1 through 22-51-14, Code of Alabama 1975.
- c. Composition: nine or more members.
- d. Terms: staggered six-year terms.
- e. Appointing authority: three directors are appointed by each governing body authorizing the incorporation or if the facility is to serve an area governed by only one governing body, that governing body elects the entire board. If the board was formed by only two municipalities, then each shall appoint at least five board members.

- f. Compensation: none.
- g. Municipal officials: municipal officials may serve on these boards.
- h. Powers: to construct and operate mental health facilities.
- i. Other: board members must be residents of the area they represent and which is to be served by the board.

20. Municipal Health Care Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 22-21-310 through 22-21-344, Code of Alabama 1975.
- c. Composition: not less than three.
- d. Terms: the chairman and vice chairman serve three-year terms. The other board members serve six-year terms.
- e. Appointing authority: county or municipal governing body and/or the board itself. A majority of the board members shall be elected by the municipal governing body.
- f. Compensation: none.
- g. Municipal officials: municipal officials may serve as directors.
- h. Powers: to acquire, operate, lease and manage hospitals and other types of health care facilities.

21. Municipal Special Health Care Facility Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-62-1 through 11-62-21, Code of Alabama 1975, as amended.
- c. Composition: not less than three.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.
- g. Municipal officials: state, county or municipal officers may not serve as directors.
- h. Powers: to acquire facilities for lease or sale to not-for-profit health care organizations and to make loans to not-for-profit organizations to finance both capital and operating costs.
- i. Other: each director must be a qualified elector and the owner of real property in the determining municipality.

22. Public Hospitals

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-95-1 through 11-95-21, Code of Alabama 1975, as amended.
- c. Composition: five.

- d. Terms: staggered six-year terms.
- e. Appointing Authority: some by the county and some by the municipality.
- f. Compensation: none but expenses.
- g. Municipal Officials: municipal officials may not serve as directors.
- h. Powers: to acquire, construct, equip, and operate hospital facilities within the county.
- i. Other: no state or county officer shall be eligible to serve as a director. Each director must be an eligible voter of the subdivision that elects him. The alternating director must be a licensed physician in the state.

23. Zoning Commission

- a. Nature: unincorporated.
- b. Statutory Authority: Section 11-52-79, Code of Alabama 1975.
- c. Composition: no provision.
- d. Terms: no provision.
- e. Appointing Authority: municipal governing body.
- f. Compensation: no provision.
- g. Municipal Officials: no provision.
- h. Powers: to prepare initial zoning regulations of a municipality.

24. Planning Commission

- a. Nature: unincorporated.
- b. Statutory authority: Sections 11-52-1, et seq., Code of Alabama 1975.
- c. Composition: nine members (Class 1 cities have 16 members and 3 supernumerary members; cities between 175,000 - 275,000 in population have 9 members plus 2 supernumerary members to serve in the absence of regular members).
- d. Terms: municipal officials serve until their terms of office expire. The other appointed members serve staggered six-year terms. The statute provides different terms for certain members in Class 1 cities and in cities with a population of 175,000 - 275,000.
- e. Appointing authority: In municipalities allowed nine board members, one member is the mayor or his designee, one member is an administrative official of the municipality chosen by the mayor, one member is a member of the council chosen by the council. The other six appointments are made by the mayor. A different law relating to the appointment of board members applies in Class 1 cities, cities with a population of 175,000 - 275,000, and Class 6 cities with a council manager form of government.

- f. Compensation: none, except in Class 1 cities.
- g. Municipal officials: municipal officials may serve only as designated above.
- h. Powers: to provide planning, zoning and subdivision controls for the municipality.
- i. Other: Appointed members shall hold no other municipal office, except one member of the planning commission may also serve on the zoning board of adjustment in cities less than 175,000 or greater than 275,000 in population. In cities between 175,000 and 275,000 populations, no member of the planning commission can serve on the zoning board of adjustment.

25. Zoning Boards of Adjustment

- a. Nature: unincorporated.
- b. Statutory authority: Section 11-52-80, Code of Alabama 1975.
- c. Composition: five members plus two supernumerary members who serve on call of the chairman in the absence of regular members.
- d. Terms: staggered three-year terms.
- e. Appointing authority: appointments to this board are made by the municipal governing body unless the municipal governing body delegates the power to make the appointments to the mayor or to the mayor with the consent of the governing body.
- f. Compensation: no provision.
- g. Municipal Officials: a councilmember may not serve on the Zoning Board of Adjustment. AGO to Hon. John Nisbet, February 24, 1970.
- h. Powers: to hear appeals from decisions of municipal administrative officers relating to the application of municipal zoning regulations, to grant variances and to authorize uses permitted on appeal.
- i. Others: Members of these boards in cities of between 175,000 and 275,000 populations must be bona fide residents and qualified electors of the municipality.

26. Industrial Development Boards (Cater Act)

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-54-80 through 11-54-101, Code of Alabama 1975.
- c. Composition: not less than seven members.
- d. Terms: staggered six-year terms.
- e. Appointing Authority: municipal governing body.
- f. Compensation: if the articles of incorporation so provide, each member shall receive an amount not exceeding \$20 per month.

- g. Municipal officials: no member shall be a member of the governing body of the state, county or any municipality or an employee of the municipality.
 - h. Powers: to construct buildings for lease to new industries.
 - i. Other: board members must be qualified electors and taxpayers of the municipality. Under certain conditions, members must be chosen from the local chamber of commerce. *See*, Section 11-54-86, Code of Alabama 1975.
- 27. Municipal Housing Authorities**
- a. Nature: incorporated.
 - b. Statutory authority: Sections 24-1-20 through 24-1-45, Code of Alabama 1975.
 - c. Composition: five members.
 - d. Terms: staggered five-year terms.
 - e. Appointing authority: mayor. Montgomery Housing Authority members are appointed by the Montgomery City Council pursuant to Act 73-618. AGO 1995-198.
 - f. Compensation: none. Commissioners in a Class 7 municipality may receive compensation as fixed by the council.
 - g. Municipal Officials: municipal officials may not be board members.
 - h. Powers: to deal with municipal housing problems.
- 28. Airport Authorities**
- a. Nature: incorporated.
 - b. Statutory authority: Sections 4-3-1 through 4-3-24, Code of Alabama 1975, as amended.
 - c. Composition: three or more. The city council authorizing the establishment of an airport authority may, by ordinance, set residency requirements for the board of directors of the airport authority. AGO 2005-143.
 - d. Terms: staggered as set out in the articles of incorporation.
 - e. Appointing authority: county or municipal governing body.
 - f. Compensation: if authorized by the articles of incorporation, each board member shall receive not more than \$20 per month provided that he or she receives no more than \$10 per meeting attended.
 - g. Municipal Officials: no director shall be an official of the state, any county or any municipality.
 - h. Powers: to deal with airport facilities and problems.
- 29. Airport Authorities — Alternate Procedures**
- a. Nature: incorporated.
- b. Statutory authority: Sections 4-3-40 through 4-3-62, Code of Alabama 1975, as amended. Any existing public airport authority may reincorporate under these sections.
 - c. Composition: three, five or seven members.
 - d. Terms: staggered six-year terms.
 - e. Appointing authority: county or municipal governing body.
 - f. Compensation: as authorized by by-laws and city or county governing body.
 - g. Municipal Officials: members of the county or municipal governing body may serve if authorized by articles of incorporation.
 - h. Powers: to deal with airport facilities and problems.
- 30. Improvement Authorities**
- a. Nature: incorporated.
 - b. Statutory authority: Sections 39-7-1 through 39-7-34, Code of Alabama 1975.
 - c. Composition: Up to five members.
 - d. Terms: staggered three-year terms.
 - e. Appointing authority: municipal governing body.
 - f. Compensation: fixed by the board. No limit on amount.
 - g. Municipal Officials: no municipal officials may be board members.
 - h. Powers: to provide certain municipal services as well as the authority to operate cable and telecommunications systems.
 - i. Other: members must be qualified electors of the area served.
- 31. Free Public Libraries**
- a. Nature: unincorporated.
 - b. Statutory authority: Sections 11-90-1 through 11-90-4, Code of Alabama 1975.
 - c. Composition: five members.
 - d. Terms: staggered four-year terms.
 - e. Appointing Authority: municipal or county governing body.
 - f. Compensation: none.
 - g. Municipal officials: no provision.
 - h. Powers: to operate public libraries.
- 32. Public Library Authorities**
- a. Nature: incorporated.
 - b. Statutory authority: Sections 11-57-1 through 11-57-26, Code of Alabama 1975.

- c. Composition: three or a multiple of three members.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.
- g. Municipal officials: no board member shall be an officer of the state or of the municipality.
- h. Powers: to acquire public library facilities for lease to and by the municipality.
- i. Other: board members must be residents of the municipality.

33. City Boards of Education

- a. Nature: unincorporated.
- b. Statutory authority: Sections 16-11-1 through 16-11-27, Code of Alabama 1975, as amended.
- c. Composition: five members.
- d. Terms: staggered five-year terms.
- e. Appointing authority: General law provides for the appointment of board members by the municipal governing body. However, the state constitution provides that the Legislature, by local law, may provide for the election of board members. Constitutional Amendment 659, Alabama Constitution, 1901. Local legislation of this type has been passed for some municipalities.
- f. Compensation: Members of city and county school boards are authorized to receive reasonable compensation for their services, not to exceed \$600 per month, unless set at a higher figure by a local act, upon approval by a majority vote of the members at the board's annual meeting. Compensation shall be in addition to actual traveling and other necessary expenses incurred in attending meetings and transacting business of the board. The compensation, actual traveling expenses and other necessary expenses incurred shall be paid as other ordinary and necessary expenses of the board. Any individual school board member, at his or her option, may refuse to accept all or any portion of the approved compensation. Section 16-1-26, Code of Alabama 1975.
- g. Municipal officials: municipal officials may not be members of this board.
- h. Powers: to operate the free public schools within the municipality.
- i. Other: Board members must be residents of the municipality and certain population classifications have limitations on the number of classroom teachers that may be on the board. The act only applies to cities of

more than 5,000 population according to the last Census. The board in a Class 4 municipality which has adopted the mayor-council form of government pursuant to Chapter 43B, Title 11, Code of Alabama 1975, may be composed of seven members. The governing body of any Class 5 municipality may, by resolution, provide for the appointment of school board members from districts corresponding to the city governing body districts and the manner of appointment, for the appointment of one member from the city at-large by the mayor, and for the length of terms of the board members. Section 16-11-3.1, Code of Alabama 1975.

34. Regional Planning Commission

- a. Nature: unincorporated.
- b. Statutory authority: Sections 11-85-50 through 11-85-59, Code of Alabama 1975.
- c. Composition: All governmental units within the boundaries of a region which are parties to the agreement for the establishment of a regional planning and development commission shall be represented on the commission. The agreement may provide formulas and procedures under which smaller governmental units may select a common representative and larger units may select more than one representative but there shall be at least one representative for each county and each city over 10,000 in population. A majority of the board members shall be elected public officials of the participating governmental units.
- d. Terms: the terms of members shall be specified in the agreement. Terms of representatives who are not elected officials shall be arranged to provide overlapping periods of service while the terms of elected representatives shall expire upon their leaving office.
- e. Appointing authority: governing body.
- f. Compensation: no provision.
- g. Powers: to assist governmental units in regional planning and development.

35. Water, Sewer, Solid Waste Disposal and Fire Protection Districts

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-89-1 through 11-89-19, Code of Alabama 1975, as amended.
- c. Composition: The number of directors shall be at least equal to the total number of counties and municipalities with the governing bodies of which such application for incorporation was filed, but in no event less than five.

- d. Terms: four years.
- e. Appointing authority: at least one director shall be appointed by each governing body involved.
- f. Compensation: If the certificate of incorporation so provides, each director shall be compensated in an amount set by the county commission. The chairman may receive an additional amount if the certificate of incorporation so provides.
- g. Municipal officials: No state, county or municipal officers may be board members.
- h. Powers: to acquire, equip and operate water, sewer, solid waste disposal and fire protection systems.
- i. Other: Each director must be a duly qualified elector of the county or municipality which elects him or her.

36. Solid Waste Disposal Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-89A-1 through 11-89A-25, Code of Alabama 1975, as amended.
- c. Composition: as provided in the articles of incorporation. Not less than three.
- d. Terms: not more than six years.
- e. Appointing authority: municipal governing body.
- f. Compensation: none.
- g. Municipal officials: municipal officials may serve as board members.
- h. Powers: to acquire, construct, lease and improve facilities for the efficient collection and utilization of solid wastes.

37. Governmental Utility Services Corporation

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-97-1 through 11-97-27, Code of Alabama 1975.
- c. Composition: three directors.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal or county governing body.
- f. Compensation: nothing but expense reimbursement.
- g. Municipal officials: one director may be a member of the governing body of the authorizing subdivision.
- h. Powers: to provide methods of providing certain utility services.
- i. Other: directors must be qualified voters of the municipality.

38. Port Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-94-1 through 11-94-25, Code of Alabama 1975, as amended.
- c. Composition: five members.
- d. Terms: staggered five-year terms.
- e. Appointing authority: county and municipal governing body.
- f. Compensation: none.
- g. Municipal officials: municipal officials may not serve as authority members.
- h. Powers: to develop waterfront property.

39. Historical Preservation Authorities

- a. Nature: incorporated after approval of governor's office.
- b. Statutory authority: Sections 41-10-135 through 41-10-154, Code of Alabama 1975, as amended.
- c. Composition: not less than three members.
- d. Terms: staggered six-year terms.
- e. Appointing authority: If the operation of the authority is wholly within a single municipality, the municipal governing body shall appoint the directors. If the authority operates wholly within a single county, the county governing body shall appoint the directors. Otherwise, the directors shall be appointed by the governor from names nominated by the Alabama Historical Commission.
- f. Compensation: none.
- g. Municipal Officials: municipal officials may serve on the board.
- h. Powers: to undertake studies and surveys and to restore, acquire and operate public or private property within the state listed in the National Register of Historic Places.

40. Historic Preservation Commissions and Architectural Review Boards

- a. Nature: unincorporated.
- b. Statutory authority: Section 11-68-1 through 11-68-15, Code of Alabama 1975.
- c. Composition: not less than seven.
- d. Terms: staggered three-year terms
- e. Appointing authority: nominated by chief executive officer of the municipality and appointed by the governing body.
- f. Compensation: none.

- g. Municipal officials: not more than one-fifth of the members shall be public officials.
- h. Powers: to provide for the creation, protection and enhancement of historic properties or historic districts.
- i. Other: Members must have demonstrated training or experience in the fields of history, architecture, architectural history, urban planning, archaeology or law or shall be residents of the historic district designated pursuant to ordinance.

41. Railroad Authorities

- j. Nature: incorporated.
- k. Statutory authority: Sections 37-13-1 through 37-13-21, Code of Alabama 1975.
- l. Composition: not less than three members.
- m. Terms: not more than five years.
- n. Appointing authority: If there is only one authorizing subdivision, then all directors shall be appointed by the governing body of that subdivision. If there is more than one authorizing subdivision, then each shall appoint an equal number of directors. One director shall be appointed jointly by the authorizing subdivisions.
- o. Compensation: none.
- p. Municipal officials: no state, county or municipal officer shall be a director.
- q. Powers: to acquire, construct and operate railroads and railroad facilities.

42. E911 Communications Districts

- a. Nature: unincorporated.
- b. Statutory authority: Sections 11-98-1 through 11-98-11, Code of Alabama 1975.
- c. Composition: seven members
- d. Terms: staggered four-year terms.
- e. Appointing authority: county or municipal governing body.
- f. Compensation: no provision.
- g. Municipal officials: no provision other than municipal governing body may serve as the board. *See*, Section 11-98-4(e), Code of Alabama 1975.
- h. Powers: to establish local emergency telephone service.
- i. Other: board members must be qualified electors of the district.

43. Downtown Development Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-54A-1 through 11-54A-24, Code of Alabama 1975.

- c. Composition: at least three members.
- d. Terms: staggered six-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none except reimbursement of expenses.
- g. Municipal officials: municipal officials may serve on the board.
- h. Powers: to revitalize and redevelop the central business district of any city.
- i. Other: board members must be qualified electors of the city.

44. Federal Building Authorities

- a. Nature: incorporated
- b. Statutory authority: Sections 11-101-1 through 11-101-27, Code of Alabama 1975.
- c. Composition: a number set out in the certificate of incorporation.
- d. Terms: as set out in the certificate of incorporation.
- e. Appointing authority: as set out in the certificate of incorporation. Municipal directors shall be nominated by the mayor and confirmed by the municipal governing body. County directors shall be nominated by the chair of the county commission and confirmed by the county commission.
- f. Compensation: none.
- g. Municipal officials: no elected official may serve as a director.
- h. Powers: to provide buildings, facilities and other property for lease to the federal government.
- i. Other: no fewer than a majority of the directors shall be appointed by other than the governing body of an authorizing subdivision.

45. Public Corporation for Storm Water Discharges

- a. Nature: incorporated
- b. Statutory authority: Sections 11-89C-1 through 11-89C-14, Code of Alabama 1975.
- c. Composition: one representative from each member governing body. If the governing body is a municipality, the member shall be the mayor. If the governing body is a county commission, the member must be a county commissioner.
- d. Terms: no provision.
- e. Appointing authority: state law.
- f. Compensation: none but reimbursement for expenses.
- g. Municipal officials: mayors and county commissioners may serve.

- h. Powers: to implement the storm water laws affecting participating jurisdictions.
- i. Other: no provision.

46. Commercial Development Authorities

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-54-170 through 11-54-192, Code of Alabama 1975.
- c. Composition: five directors.
- d. Terms: staggered four-year terms.
- e. Appointing authority: municipal governing body.
- f. Compensation: none except reimbursement of expenses.
- g. Municipal Officials: no state, county, or municipal officials may serve as board members.
- h. Powers: to acquire, own, and lease projects for the purpose of promoting trade and commerce by inducing commercial enterprises to locate new facilities or expand existing facilities in any municipality.
- i. Other: Directors must be qualified electors of the municipality. Commercial Development Authorities are exempt from Alabama's competitive bid laws. *See*, Section 11-54-186, Code of Alabama 1975.

47. Class 1 City Public Transportation Authority

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-49B-1 through 11-49B-23, Code of Alabama 1975.
- c. Composition: 10 to 15 Directors.
- d. Terms: staggered four-year terms.
- e. Appointing Authority: three members appointed by the president of the county commission subject to county commission confirmation; three members appointed by the mayor subject to city council confirmation; three members appointed by the president of the mayors association of the county where the authority is organized; and one member who is the president of the area regional transportation authority citizens advisory committee in the Class 1 municipality. If counties adjoining Jefferson County join the authority, the president of the county commission of such additional county or counties shall appoint one member to the board.
- f. Compensation: none.
- g. Municipal and county officials: One of the county appointees shall be an elected county official; one of the mayor's appointees shall be an elected city official; and one of the appointees of the mayors association shall be a member of the association.

- h. Powers: to provide public transportation service within the authorizing county or in any part of the county upon any reasonable terms and for any reasonable rates and consideration as the board may prescribe.
- i. Other: The authority has limited tax authority subject to voter approval. Section 11-49B-22, Code of Alabama 1975.

48. Municipal Improvement Districts

- a. Nature: incorporated.
- b. Statutory authority: Sections 11-99A-1 through 11-99A-51, Code of Alabama 1975.
- c. Composition: three to 11 Directors.
- d. Terms: staggered three-year terms.
- e. Appointing authority: the municipal or county government that created the district.
- f. Compensation: no provision.
- g. Municipal and county officials: no provision.
- h. Powers: to provide for certain public improvements as set out in Section 11-99A-6, Code of Alabama 1975.
- i. Other: Members of the board need not be owners, residents, electors or taxpayers of the appointing government or the state.

49. Regional Jail Authority

- a. Nature: incorporated.
- b. Statutory authority: Sections 14-6A-30 through 14-6A-39, Code of Alabama 1975.
- c. Composition: Depends on the number of municipalities forming the corporation. *See*, Section 14-6A-32, Code of Alabama 1975.
- d. Terms: Except for mayors serving on the board, board members serve at the pleasure of the governing body appointing them.
- e. Appointing authority: the municipalities creating the authority.
- f. Compensation: no provision.
- g. Municipal and county officials: The mayor of each municipality creating the authority serves on the board and up to one councilmember from each municipality may serve.
- h. Powers: to construct, maintain and operate a regional jail for the purpose of housing municipal inmates.
- i. Other: Once constructed, the jail shall be operated by a superintendent selected by the mayor members of the board of directors.

Municipal Telecommunication Services

Section 11-50B-1 et seq., Code of Alabama 1975,

provides additional powers and authority for those boards created under Article 9 of Chapter 50 of Title 11, Article 15 of Chapter 50 of Title 11, Chapter 7 of Title 39, of the Code of Alabama 1975, and any local act authorizing the creation of a public corporation appointed by a municipal governing body to furnish electric service to consumers. The additional powers provided to these boards includes the authority to acquire, establish, purchase, construct, maintain, enlarge, extend, lease, improve and operate cable systems, telecommunications equipment and telecommunications systems and furnish cable service, interactive computer service, internet access, other internet services and advanced telecommunications service, or any combination thereof.

Boards Created Under Limited Statutes

In addition to the boards authorized by general statewide statutes, many municipalities have local boards created pursuant to local laws passed by the state legislature. Many municipal personnel boards were established in this manner. In addition, there are state laws pertaining to boards located within certain classes of municipalities. *See*, Section 11-40-21, Code of Alabama 1975.

Conclusion

All municipal officials should obtain copies of the articles of incorporation and any amendments thereto for all incorporated boards in their municipality. This information will be needed to answer questions concerning the operation of municipal boards.

17. Working with Municipal Boards

As municipalities grow to serve the needs of their residents, it becomes difficult, if not impossible, for a municipal official to stay abreast of developments affecting all municipal departments and agencies. Some municipalities have created council committees which function as an arm of the council. Council committees, usually composed of members of the council, observe the work of the various municipal departments and report back to the council regarding implementation of needed changes. The formation of committees enables council members to split the workload and concentrate their efforts toward improving specific areas.

Often, though, a service becomes so complicated that the council no longer feels qualified to deal with it themselves. The solution is often the creation of a separate board.

What is a Board?

Black's Law Dictionary, Eleventh Edition, defines a board as "[A] committee of persons organized under authority of law in order to exercise certain authorities, have oversight or control of certain matters, or discharge certain functions of a magisterial, representative, or fiduciary character." In other words, a board functions in a representative capacity. The council may elect to delegate its power over a municipal function to a board which is created for a single purpose.

Municipalities in Alabama have the authority to create numerous types of boards. Some of the more common types include utility boards (water, sewer, electric and gas), library boards, industrial development boards, zoning boards and planning commissions. These boards exercise only the authority granted them by the legislature.

Categories of Boards

It is important to remember that Alabama municipalities operate under the Dillon Rule, which provides that municipalities, being creations of the state legislature, can exercise only the powers the legislature chooses to delegate to them. So, in order to create a board and vest it with specific powers and duties, there must be legislative authority for the board. Under Alabama law, all municipal boards fall into one of three distinct categories, depending upon legislative authority and the means of creation. There are incorporated boards, unincorporated boards and advisory boards.

Alabama law specifically provides for the creation of incorporated boards and unincorporated boards. An incorporated board is a totally separate entity from the municipality. Once it is created, an incorporated board has

plenary power to act within its sphere of power, unfettered by the municipal governing body. Board members cannot be removed by the council. Generally speaking, board members serving on separately incorporated boards can only be removed by impeachment. AGO 1997-276.

Incorporated boards generally cannot be dissolved by the municipality except as provided for by law. For example, with regard to a water works board organized pursuant to Section 11-50-310 of the Code of Alabama 1975, the city council of the municipality which authorized the incorporation of the board may offer to pay the debt of the corporation, which if accepted by the board, would result in either the dissolution of the corporation or the corporation's dissolution by a resolution of the board, but only if it does not have outstanding bonded debt. AGO 2002-104; see also *Water Works Bd. Town of Bear Creek v. Town of Bear Creek*, 70 So.3d 1186 (Ala. 2011).

Unincorporated boards are less autonomous. They still have the power to act without interference from the governing body and the positions of the board members are secure. They cannot be removed other than according to the statutes governing them. However, unless otherwise provided by law, the council has the power to dissolve an unincorporated board and assume its duties or create a new board to perform those functions. AGO 1985-264 (to Hon. Anthony Miele, March 18, 1985).

Municipal boards may only exercise powers authorized by law. Unincorporated boards and incorporated boards are both created pursuant to statutory authority. The powers of these boards are outlined in the statutes under which they are created. Therefore, in order to determine who is eligible to serve on a board, whether they can be paid or what powers the board has, it is crucial to know the board's statutory authority.

The statutory authority for an incorporated board will be found in the board's articles of incorporation or in the ordinance the council adopted authorizing the incorporation of the board. The code sections which govern an unincorporated board will be found in the ordinance the council adopted creating the board. Often, the statutory authorization for a board can also be found in the board's bylaws or other controlling documents. Once the statutory authority for the board is determined, it is a simple matter of checking the Code of Alabama to learn the board's powers and duties.

What if the articles of incorporation and bylaws are silent regarding the statutory authority for the creation of the board? This probably means that the board falls into the third category mentioned above and it is an advisory board.

Nothing in Alabama law specifically allows municipalities to create advisory boards. A municipality wishing to create a board for which no statutory authority exists should exercise caution in granting powers to the board. Legislative powers, or those exercised by the council as a public agency, cannot be delegated. *McQuillin, Municipal Corporations*, 3rd Ed., Section 12.38. Where the legislature has granted exclusive authority to the council to act, the council cannot delegate that power to a board. However, advisory boards, while they cannot act for the council, provide several benefits.

Like council committees, an advisory board enables the council to stay informed about the multiple activities of the city or town. The board can process information submitted by citizens to ensure that the council receives only pertinent data for decision making. Advisory boards are like subcommittees. They are responsible for seeing that the council is fully informed on matters within their authority.

Also, an advisory board can buffer the council's actions. Rather than the council acting alone, they are somewhat insulated by recommendations made by a board which was able to devote much of its time to the full study of an issue.

Because the Code is silent about advisory boards, the council can decide for itself who is eligible to serve. Membership requirements and an appointment procedure should be stated clearly in the ordinance creating the board. Many councils want a councilmember or the mayor to serve on all boards. As long as the board is advisory (and not created pursuant to statute), nothing prohibits elected officials from serving. Council members, however, may remain liable for the actions of advisory boards. Therefore, it is crucial that the council not exceed its authority to empower the board and board members fully understand the nature and limitations of their roles.

Why Create a Board?

The simple answer to this question is that the municipal council may feel that the public is better served by the creation of an entity solely devoted to the performance of a single function. But the board may also have broader powers than the municipality itself, which allows them to do certain things the city is unable to do.

For example, municipalities are subject to Sections 68 and 94 of the Alabama Constitution, 1901. Section 68 states that no municipal employee may be paid for work which he or she has already performed. That is, retroactive raises are prohibited. Section 94 prohibits municipalities from giving anything of value to any private individual or group. Separately incorporated boards are not restricted by these sections of the constitution. In *Opinion of the Justices, No. 120*, 49 So.2d 175 (Ala. 1950), Gov. Jim Folsom requested

an opinion on the authority of incorporated industrial development boards to spend funds to promote private industry. The court determined that these expenditures did not violate Section 94, holding that it is "clear that (the act authorizing the creation of industrial development boards) involves no expenditure of public money and the incurring of no liability that must or can be taken care of by taxation."

The court reaffirmed this holding in *Alabama Hospital Association v. Dillard*, 388 So.2d 903 (Ala. 1980). In this case, the Department of Examiners of Public Accounts had determined that several expenditures by hospital boards, including flowers for hospitalized employees and for special events, payment of awards for employees and Christmas bonuses, violated Sections 68 and 94 of the Alabama Constitution. The department contended that hospital boards, although separately incorporated, remain political subdivisions of the county or municipality which created them. The Alabama Supreme Court disagreed, ruling that "a public corporation is a separate entity from the state and from any local political subdivision, including a city or county within which it is organized." The only limitation on expenditures by these boards, according to the court, is that funds may only be spent to further legitimate powers of the board.

Bear in mind this does not authorize the council to use an incorporated board to accomplish things the municipality cannot do itself. For instance, funds the municipality gives to a board, generally speaking, remain subject to Sections 68 and 94. Additionally, a municipality gives up its right to control a function by creating a board. As the court pointed out in *Opinion of the Justices* cited above, the only connections between an industrial development board and the municipality which created it are: 1) approval of the formation of the corporation; 2) approval of amendments to the certificate of incorporation; 3) appointment of board members; and 4) absorption of the board's property upon dissolution of the board. Other incorporated boards are similarly protected from interference by elected municipal officials.

While the extent of council participation in the activities of a separate board varies depending on the statutes, as a general rule the council is completely excluded from the board's decision-making process. This can become frustrating for municipal officials who want to see the board take some particular action.

In *Water Works Board of the City of Leeds. v. Huffstutler*, 299 So.2d 268 (Ala. 1974), the City of Leeds sought to unilaterally increase the number of members serving on its water board from three to five, despite a contrary provision in the board's articles of incorporation. The statutes governing the board were silent regarding the means for amending the articles. The court rejected

this attempt, holding that a legislative amendment which authorized the increase could only be implemented “if the directors of the water board and the governing body of the city agree that more effective representation of the community interest will result from such an increase.” The court felt this was necessary to protect the independence of incorporated boards. *See also*, AGO 1996-174 and *Water Works of Wetumpka v. Wetumpka*, 773 So.2d 466 (Ala. 2000).

At least one court has held a separately incorporated utility board was acting merely as an agent of the municipality rather than as an autonomous body, thus making the board subject to restrictions that ordinarily would not apply. In *Wetumpka v. Central Elmore Water Authority*, 703 So.2d 907 (1997), the Alabama Supreme Court held that in this instance, a separately incorporated utility board was actually acting as an agent of the municipality, and therefore, was restricted by Section 11-88-19, Code of Alabama 1975, from duplicating the lines of an existing rural water authority. The court also held that 7 U.S.C. Section 1926(b) protected the rural water authority from encroachment by the municipal water board.

In addition, in *The Water Works & Sewer Bd. of Talladega v. Consolidated Publishing, Inc.* 892 So.2d 859 (2004), the Alabama Supreme Court held that because the separately incorporated water board had the qualities of an agency of the city of Talladega, its employees are public officers and servants of the city for purposes of the Open Records Act. This case has far reaching implications for both cities and separately incorporated boards. As a result, in 2006, the Alabama Legislature, at the request of the League, passed Act 2006-548, now codified as Section 11-40-24, Code of Alabama 1975, which specifically provides that employees of a separately incorporated public corporation are not employees of the municipality which authorized the creation of the public corporation.

Limitations on Board Power

It is always important to remember that incorporated boards are created for specifically enumerated purposes. Although in many cases the powers of these boards are broad and these boards are frequently not subject to many of the constitutional restrictions applicable to cities and towns, the Attorney General has held that boards may expend funds only within their corporate powers and to further the purposes for which the board was created. *See, e.g.*, AGO 2001-238. Expenditures by separately incorporated municipal boards must be necessary, appropriate and consistent with the purpose for which the board was created. AGO 1998-018.

Open Meetings Law

The Alabama Supreme Court, in 2002, issued a decision

indicating that the Alabama Sunshine Law did not apply to a public corporation organized under Sections 11-50-310 of the Code of Alabama 1975. *See, Water Works & Sewer Bd. Of Selma v. Randolph*, 833 So.2d 604 (2002). However, in 2005, the Alabama Legislature repealed the Sunshine Law and passed the Alabama Open Meetings Law which is codified at Section 36-25A-1, *et seq.* of the Code of Alabama 1975. The Open Meetings Law specifically applies to “all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties or municipalities ...”. Section 36-25A-2, Code of Alabama 1975. All boards, whether incorporated or otherwise, are required to comply with the Open Meetings Law.

For more information on the Open Meetings Law, please see the article in this publication titled “*The Open Meetings Law*.”

Conclusion

Municipalities desiring to delegate the responsibility and duties of overseeing municipal functions to a board should first be sure of their statutory authority. This authority should be clearly spelled out in the ordinance which created the board.

If no statutory authority exists and the council does not want to seek legislative authority, the only type of board which can be created is an advisory board. In this case, the council must clearly spell out the board’s powers and limitations in the creating ordinance. Also, the ordinance should specify who is eligible to be a member of the board and how members are appointed. Once appointed, board members must fully understand the nature of their position.

Opinions and Court Decisions Affecting Boards

- Municipalities may appropriate funds to certain recreation boards. AGO to Hon. Cecil White, April 30, 1965.
- Cities and towns may contribute to state and county planning boards. 70 Quarterly Report of the Attorney General 18.
- Where there is no county library, cities may appropriate to city library boards in the county. AGO to Hon. Patrick Tate, October 21, 1975.
- For adequate consideration, a municipality may transfer real property to an industrial development board and the board may develop the property for any purpose related to industrial development. AGO 1979-225 (to Hon. Clarence Rhea, June 11, 1979). Note: If the consideration for the transfer is nominal, the League

recommends that each municipality obtain an opinion addressing each situation.

- A public library board created pursuant to Sections 11-90-1 through 11-90-4, Code of Alabama 1975, can be dissolved by the governing body which created it. However, as long as the board exists, members who are appointed for a term cannot be removed except for cause until the expiration of their term. AGO 1985-264 (to Hon. Anthony Miele, March 18, 1985).
- A municipality may donate property or funds to its medical clinic board. AGO to Hon. William Gullahorn, Jr., February 21, 1975. Note: Care should be taken to ensure that constitutional provisions governing expenditures are not violated.
- The office of practicing licensed psychologist falls within the definition of a medical clinic in Section 11-58-1(a), of the Code. AGO 1983-420 (to Hon. Richard Roberts, August 2, 1983).
- A medical clinic board may not issue bonds to finance the construction of an addition to a privately-owned nursing home. AGO 1983-394 (to Hon. Roy F. Bragg, July 18, 1983).
- A municipality may establish a museum board and may donate funds to the board. The board cannot donate funds to a private museum but may contract with a private museum for valuable consideration. AGO 1983-118 (to Hon. J.D. Falkner, December 22, 1982).
- Incorporated boards are not subject to the control of the municipal governing body in exercising statutorily designated powers and in performing statutorily designated duties. AGO 1981-537 (to Hon. Leonard Allen, Jr. August 25, 1981).
- A governing body has no power to call a meeting of the board of directors of a separately incorporated board. AGO 1991-130.
- A municipality may remove funds given to an advisory committee and re-designate those funds to be spent on industrial development. AGO 1990-334.
- An unincorporated library board created pursuant to Section 11-90-1, et seq., Code of Alabama 1975, has the authority to spend funds appropriated to it. Employees of the board are subject to municipal personnel policies. AGO 1991-307.
- A municipal council may not delegate its authority to appoint recreational board members to individual council members. AGO 1991-402.
- A municipal council may not increase the number of members serving on boards organized under Section 11-50-310, Code of Alabama 1975, without approval of the board. AGO 1995-324.
- An incorporated municipal gas board organized pursuant to Sections 11-50-310 through 11-50-324 of the Code may give property to the municipality which authorized its creation, if the municipal council consents by ordinance. AGO 1998-058.
- A councilmember may sell gasoline to a separately incorporated board. He or she may sell to the municipality only pursuant to Section 11-43-12.1, Code of Alabama 1975. AGO 1997-015.
- Unless a specific vote requirement is set out by state legislation, a three-to-two vote with one abstention, is sufficient to elect a person to serve on a utility board. AGO 1997-059.
- A mayor may serve as superintendent of utilities even if the public corporation holds a franchise with the municipality. The mayor may not vote on matters affecting the board. The mayor may not serve as both superintendent and a board member. AGO 1997-076.
- Where municipal funds are transferred to a publicly incorporated parks and recreation board, Section 11-43-12 of the Code of Alabama prohibits a municipal law enforcement officer from contracting with the Board to provide security work. AGO 2000-191.
- Section 11-51-90, Code of Alabama 1975, allows, but does not require, a city to impose a license tax on a utility corporation. A municipal utilities board is not exempt from the business license imposed by another municipality upon gas and water distributions in that municipality unless specifically exempt in the ordinance levying the license. The municipality must have a validly enacted ordinance imposing a license tax, and it must be applied uniformly. AGO 2002-200. Note: Statutes creating certain boards exempt them from paying any license fees.
- Because Section 4-3-45 of the Code of Alabama 1975, is silent with respect to residency requirements, a city council authorizing the establishment of an airport authority may, by ordinance, set residency requirements for the board of directors of the authority. AGO 2005-143.
- The title to the assets of a town water works board, which was a public corporation, vested in the town upon retirement of the board's water revenue bonds, with the board thereupon dissolved by operation of law. A water-purchase agreement between the board, as purchaser, and a regional water, sewer, and fire protection district, as seller, was not tantamount to bonded indebtedness of

the board, as would preclude title to the board's assets from vesting in the town, and dissolution of the board. *Water Works Bd. of Town of Bear Creek v. Town of Bear Creek*, 70 So.3d 1186 (Ala.2011).

- A public park and recreation board cannot sell or close a recreational facility for which it does not hold legal title. Although the Council may have the authority to reassign property that it owns, a municipality may not compel an independent public park and recreation board to operate its facilities at or during certain hours or certain times. Section 11-60-8 of the Code of Alabama authorizes a park and recreation board to maintain and/or manage the programs or projects of the board. AGO 2012-035.
- A public park and recreation board, created pursuant to sections 11-60-1 through 11-60-20 of the Code of Alabama, is a public corporation, and as such, the Board may only be removed by impeachment. The provisions of section 11-43-160 of the Code of Alabama do not apply to members of an incorporated public park and recreation board. AGO 2012-035
- The supervision and maintenance of personnel files is the responsibility of the executive officer or superintendent of the Board of Education. The school board may establish policies governing the contents of personnel files. The mechanism for storing and disposing of personnel files is an administrative issue that would best be handled by policies and procedures implemented by the Board of Education. Retention practices should be consistent with the procedures established by the Local Government Records Commission. AGO 2012-019.
- The city council's resolution authorizing a fee increase for the members of the municipal waterworks and sewer board pursuant to Section 11-50-313(a) of the Code of Alabama took effect for all members on proper passage. Prior to the municipal officer who is also a member of the board receiving a fee increase, the board must pass a resolution approving the increase for that member, which may not be retroactive. AGO 2017-018.
- The Legislature has not authorized the city to adopt an ordinance requiring the appointment of city board of education members from districts corresponding to the city's council districts. A city council authorized by Alabama law to appoint members of a city school board would not be bound by the policies adopted by the board that purport to set requirements for being appointed to and serving on the board to the extent those policies conflict with an act of Legislature. AGO 2017-019.
- The city and city pension board were separate entities,

and thus judgement against the city for pension benefits not paid by the board was improper. *City of Birmingham v. Thomas*, 220 So.3d (Ala.Civ.App.2016).

- Nothing in the current law prohibits a municipality from establishing its own emergency communication district ("ECD"), even though a countywide ECD is already in existence. The Statewide 911 Board ("Board") is not required to provide funding to a newly created ECD. The Board may, however, at its discretion, provide a hardship operational grant to a newly created ECD. Further, a newly created ECD may receive funds from other entities pursuant to section 11-98-6(b) of the Code of Alabama. AGO 2017-038.
- The State Superintendent of Education or the State Superintendent's chief administrative officer have exclusive authority to implement an educational intervention of a city or county board of education under Section 16-6E-4 of the Code of Alabama. AGO 2017-041.
- The Commercial Development Authority (CDA) may take actions and expend funds related to the acquiring, owning, and/or leasing of projects to induce new commercial enterprises to locate in the city and to expand existing facilities. The CDA may make improvements to property acquired as projects. The CDA may sell or donate such property to businesses or structure leases with beneficial terms related to a project. The CDA may not award financial grants to businesses. The city may make improvements to its property unrelated to a project through the net earnings of the CDA remaining after the payment of all expenses. The CDA may provide financial assistance to its board members attending conferences, seminars, and workshops related to the promotion of commerce and trade. The CDA may hire employees. While it may not hire them to work for other agencies, it may enter into an employee-sharing agreement with another agency so long as each compensates the employee in proportion to the work performed for that agency. The CDA may share its conference room if used for business related to the purposes in section 11-54-170. AGO 2018-051.
- City water board was an independent public corporation and was not required to comply with city resolutions directing the board to fluoridate the city's water supply. *Water Works Bd. of City of Arab v. City of Arab*, 231 So.3d 265 (Ala. 2016).
- An industrial development board is not authorized to provide financial assistance through loans or grants to a nonprofit corporation that will create an entrepreneurial collaborative business service center for shared

workspace because the business does not meet the definition of a project. AGO 2018-026.

Contracts

- Construction of buildings by medical clinic boards is not subject to the competitive bid law. AGO 1980-095 (to Hon. John Adams, November 21, 1979).
- The competitive bid law applies to all purchases by utility boards, unless the purchase is for equipment, supplies or materials needed, used and consumed in the normal and routine operation of the system. AGO 1981-424 (to Hon. Hoyt Vaughn, June 16, 1981).
- Corporations organized pursuant to Section 11-60-1, et seq., Code of Alabama 1975, (recreation boards), are not subject to the competitive bid law. AGO 1985-054 (to Hon. Norman Gale, Jr., November 1, 1984).
- A medical clinic board may contract to make a grant or loan to a medical student in return for an obligation by the student to practice in the municipality upon graduation. It is essential that the contract be worded to ensure that the municipality will be assured of receiving adequate consideration in the form of a binding promise for future services. AGO to Hon. Gene Hughes, July 13, 1977.
- Pursuant to section 41-16-60 of the Code of Alabama, a member of a city or county board of education may contract with the board of education for personal property or personal services if: (1) the contemplated contract was in existence before a person was elected or appointed to the board, or (2) the individual does not participate in the deliberation or vote on the proposed contract. Section 41-16- 60 is not applicable to contracts subject to the Public Works Law. Members of city and county boards of education may be subject to the Ethics Law and should submit these questions directly to the Ethics Commission. AGO 2012-017 and AGO 2012-018
- A water authority and sewer authority may enter into an agreement whereby the water authority manages the accounts of the sewer and discontinues water service for parties with delinquent sewer accounts. Because the authority to discontinue service is based on statutory authority set out in section 11-88-7 of the Code of Alabama, neither the water authority nor the sewer authority is required to have independent written agreements with customers prior to being able to disconnect service. AGO 2014-023.
- A city board of education, as an agency of the State, was absolutely immune from a suit on a contractor's claims for breach of contract and quantum meruit related to

the construction of school facility. *Ex parte Phenix City Bd. of Educ.* 109 So.3d 631 (Ala.2012).

- The municipal water works board may not divide the installation of new water meters into multiple contracts for payments of less than \$50,000 to evade the Public Works Law. If the Board can demonstrate, based on several specified factors, that it is not evading the Public Works Law by spreading out its meter purchases over several years as funds become available, then it will not violate Section 39-2-2(a), Code of Alabama 1975. AGO 2017-010.
- Statute providing for a cap on damages recoverable against government entities is not applicable to individual capacity claims. *Wright v. Cleburne County Hosp. Board, Inc.*, 255 So.3d 186 (Ala. 2017).
- Proper venue for declaratory judgment action against city water and sewer board was the county in which the board's principal place of business was located. *Ex parte Bd. of Water and Sewer Com'rs of City of Mobile*, 272 So.3d 635 (Ala. 2018).

Board Members

- A councilmember may not receive compensation for serving on a utility board. AGO to Mrs. Sara Green, February 2, 1973. Note: This is allowed on certain boards but depends on the statutes.
- The superintendent of an incorporated utility board may be employed by the municipality as a street superintendent. AGO to Hon. N.L. Plunkett, January 30, 1978.
- Employees of separately incorporated utility boards may serve as council members unless other factors are present. AGO 1988-445.
- A councilmember may not serve as projects director of the municipality's medical clinic board. AGO to Hon. Kevin Lanier, June 16, 1977.
- Members of separately incorporated utility boards may be removed from office by impeachment. AGO to Hon. R.S. Limbaugh, November 2, 1972.
- The terms of municipal officers serving on utility boards created pursuant to Section 11-50-310, et seq., Code of Alabama 1975, expire at the end of their terms as elected officials. AGO to Hon. Fred Gray, September 28, 1972.
- Members of utility boards are not officers of the municipality, so no specified number of votes is required to elect board members. AGO to Hon. Elwood Rutledge, January 9, 1973.

- Utility board members may not receive health and dental insurance benefits if the benefits increase their compensation beyond the maximum set by statute. AGO 1981-168 (to Hon. Eustus Johnson, January 6, 1981).
- The appointment of a board member to a municipal board for a shorter term than that prescribed by statute does not void an otherwise valid appointment; instead, the appointment is simply construed to be for the statutorily prescribed length of time. The fact that a city council member died between the time the council made an appointment to a gas board and the time the council should have made the appointment did not render the appointment invalid where the council member died prior to the expiration of his term. Though the vacancy in the office of the council member existed by reason of his death, it had no effect on the term of office so, in effect, prospective appointments were made and took effect before the expiration of the appointing powers' terms. *Gilbert v. Wells*, 473 So.2d 1042 (Ala. 1985).
- By agreement, a gas board established pursuant to Section 11-50-310, et seq., Code of Alabama 1975, and the municipal governing body, may number places on the board to facilitate orderly appointment of board members. AGO 1989-257.
- A person appointed to a water works board created pursuant to Section 11-50-313, Code of Alabama 1975, serves the full term of the appointment even if that person later becomes a member of the city council. AGO 1992-252.
- Nothing prohibits an employee of an incorporated utility board from running for the municipal council. However, if elected he or she will have to refrain from voting on matters in which the board has an interest. AGO 1996-077.
- An employee with the municipal board in this opinion may run for city council and serve if elected, provided that he does not vote on matters affecting his position with the board and that other provisions of the Ethics Law are met. The employee must serve as councilmember on his own time. AO NO. 1996-23.
- An unincorporated library board organized under Sections 11-90-1 through 11-90-4, Code of Alabama 1975, may employ its own personnel. Where the municipality has been functioning as the employer, present employees are subject to the current conditions of employment. AGO 1996-110.
- A municipal governing body may not increase the size of a utility board organized pursuant to Section 11-50-310, et seq., Code of Alabama 1975, without the permission of the utility board. The board may only be dissolved as provided in Section 11-50-316(b). AGO 1996-174.
- A separate utility board incorporated under Sections 11-50-310, et seq., Code of Alabama 1975, is not exempt from a municipal license fee imposed on water works companies. AGO 1996-209.
- Where the articles of incorporation of a board incorporated pursuant to Section 11-50-313, Code of Alabama 1975, do not permit elected officials to serve as board members, municipal officials may serve only if the articles are amended. AGO 1996-267.
- Appointed members of municipal boards and commissions are not required to file a statement of economic interests with the Ethics Commission unless they earn \$50,000 or more annually from their public position. AO NO. 1996-35.
- A director of a water authority organized pursuant to Section 11-88-1, et seq., of the Code may only be removed by impeachment. AGO 1997-276.
- A public board may not provide in its bylaws for the removal of officers in a manner that conflicts with the Code of Alabama 1975. AGO 1999-009.
- A person appointed to fill a vacancy created by the resignation of a councilmember from a board organized pursuant to Section 11-50-310, et seq., of the Code, serves the remainder of the councilmember's term on the board. AGO 1999-149.
- A municipal employee is not prohibited from serving on the board of directors of a water supply district created pursuant to Section 11-89-1, et seq., of the Code of Alabama 1975. AGO 2001-095.
- A teacher employed by a city's board of education may not, while subject to the authority of the board, serve as a member of that city's board of education. AGO 2000-189.
- The city council may appoint a nonresident or a non-registered voter to a utilities board incorporated under Section 11-50-230 of the Code of Alabama 1975. Section 11-50-234 of the Code of Alabama does not mandate that board members be residents or electors of the city in which they serve. The utilities board may amend its bylaws without approval or consent of the city council so long as the amendments are not inconsistent with the board's certificate of incorporation or state law. AGO 2001-085

- Section 11-50-313 of the Code of Alabama provides that any officer of the municipality appointed to a utilities board organized under Section 11-50-310, et seq., of the Code may receive a fee for his or her services under Sections 11-50-313 or 11-50-15, but not both. Therefore, the board may opt to provide director's fees set in Section 11-50-15. AGO 2001-128. A board organized under Section 11-5-313, may not use the provisions of Section 11-50-230 to provide an expense allowance but may reimburse directors for actual expenses incurred in and about the performance of their duties pursuant to this article because directors are not entitled to a reasonable meeting allowance. If a board member is also on the city council, they may only be reimbursed for actual expenses. AGO 2001-128.

18. Municipal Contracts

Municipalities, like most independent entities, have the capacity to enter into binding contracts. This power is not without limitation, however, since municipalities derive their power totally from the state Legislature. To enter into a contract with another entity or an individual, a municipality must have some legislative authorization, either expressed or implied, allowing the agreement in question.

Despite this fact, municipalities in Alabama have broad discretion in the types of contracts they may enter. Generally, municipalities may contract for any service which they themselves have the power to offer. Similarly, separately incorporated municipal boards have the authority to enter into contracts that further the purposes for which they were created.

However, municipalities may not exceed the scope of their authority as public entities. This article is intended only as an overview of contract law. Municipal officials with questions concerning specific contracts are advised to contact their municipal attorneys.

What is a Contract?

Black's Law Dictionary, Eleventh Edition, defines a contract as "an agreement, based on sufficient consideration, to do or not do a particular thing."

All contracts have three essential elements. First, there must be an offer either to do or to refrain from doing something that the person has a legal right to do. Second, the offer must be accepted. Third, the agreement must be based on sufficient consideration.

Consideration is simply what both parties receive from each other for entering the contract. For instance, a municipality may pay someone to perform a service. Contracts for which there is no consideration are invalid. A contract to which a municipality is a party is invalid if there is a lack of consideration or if the consideration fails. *Gadsden v. Jones*, 227 Ala. 395, 150 So. 359 (Ala. 1933). Courts generally do not inquire deeply into the sufficiency of consideration in municipal contracts. Instead, the determination of the value to the municipality is generally left to the council. For example, the Attorney General has ruled that a city may pay to have buildings demolished on land owned by a nonprofit entity in exchange for a land swap if the city determines that there is a benefit flowing to both parties and a public purpose is served. Such an arrangement should be memorialized in a contract or some other written agreement. AGO 2012-041.

Section 11-47-5, Code of Alabama 1975 states that all municipal contracts must be in writing, signed and executed

by the officers authorized to make the contract. Unless some other provision is made, contracts must be executed by the mayor in the name of the municipality and attested to by the clerk. This section does not apply to purchases for the ordinary needs of the municipality.

Despite this section, oral contracts may be enforceable against a municipality if evidence shows that the municipality benefited from the contract and the contract was within the corporate powers of the municipality. *See, Bethune v. Mountain Brook*, 293 Ala. 89, 300 So.2d 350 (Ala. 1974), appeal after remand, 336 So.2d 148 (Ala. 1976).

Authority of Municipal Officials

One of the most common questions about municipal contracts concerns who has the authority to bind the municipality. Is this the responsibility of the mayor, as chief administrator of the municipality, or does the council decide which contracts to enter?

Generally, this power is vested in the municipal council by virtue of Section 11-43-43, Code of Alabama 1975. This section states that municipal councils are to exercise all legislative powers. In *Prichard v. Moulton*, 277 Ala. 231, 168 So.2d 602 (1964), the Alabama Supreme Court held that this section gives the council authority to enter into contracts for the city.

Further, Section 11-43-56, Code of Alabama 1975 confers control over all municipal finances and property on the council. Since most municipal contracts will impact in some way the property or finances of a municipality, the decision to enter into a contract must be made by the council.

The Alabama Supreme Court held that, absent authorization from the council, the mayor does not have the authority to enter into and execute a contract on behalf of the municipality. While the Court recognized that the mayor is authorized to enter into and to execute contracts, it determined that the authority cannot be exercised without the direction and authorization of the council. *Town of Boligee v. Greene County Water & Sewer Auth.*, 77 So.3d 1166 (Ala. 2011). Accordingly, the general rule is that the only method by which an employee or official may expend funds or be given authority to bind the municipality to a contract is by an affirmative vote of the council reflected in the minutes. An exception is the mayor's authority to contract for an annual municipal audit pursuant to Section 11-43-85, Code of Alabama 1975.

While the council has the authority to authorize contracts, the mayor has certain vital functions to perform in the contracting process. A contract must be executed by the proper municipal official in order to be valid. Section

11-43-83, Code of Alabama 1975 confers on the mayor the responsibility of executing all contracts.

Thus, municipal contracting is a two-step procedure requiring cooperation between the mayor and the council. Ordinarily, the council must decide whether the municipality should enter into the contract. After the council votes to accept a contract, the mayor must then execute the contract for the municipality.

A municipal corporation normally accepts an offer by an acceptance signed by the mayor and the clerk who have been authorized to enter into the agreement and bind the municipality. This authority to the mayor and clerk is given by an ordinance or a resolution passed by the governing body, specifically authorizing and directing them to sign the agreement on behalf of the city. In *Van Antwerp, et al. v. Board of Commissioners of Mobile, et al.*, 217 Ala. 201, 115 So. 239 (Ala. 1928), the court stated:

“Unless statutes require contracts to be authorized by ordinance, a proper resolution of the governing body identifying, approving and directing the execution of the contract is sufficient authorization.”

A city council president has the authority to execute contracts and deeds where a municipal ordinance specifically requires such acts. Further, a municipal city clerk’s duties of attesting documents are ministerial in nature and as such, the clerk has no discretion in carrying out such duties. AGO 2001-090.

If the other party to a contract is an individual, that fact should be indicated; if a co-partnership, that fact should be shown and a partner should execute the agreement for the partnership; and if a corporation, generally the president (or other authorized executive officer) should sign and the signature should be attested by the secretary of the corporation. In some instances, it may be desirable to have a corporate party provide the resolution setting forth the authority of the officers to execute the agreement for and on behalf of the corporation.

Mutuality

Courts often mention that a contract must contain mutuality in order to be enforceable. Textbook authorities state:

“If by mutuality of obligation is meant, as some courts have suggested, that there must be an understanding on one side and a consideration on the other, the necessity for its (mutuality) existence cannot be questioned. The doctrine of mutuality of obligation appears, therefore, to be merely another mode of stating the rule of consideration that where there is no other consideration for a contract, the mutual promises must be binding on both parties, for the reason that only a binding promise is sufficient consideration for the promise of the other party.” 12 Am. Jur. 13.

For a case in which the court found a lack of mutuality, see, *Tilley v. Chicago, et al.*, 103 U.S. 155 (1880). The Court held that the city was not bound by the alleged contract due to a lack of mutuality.

Validity

Apart from the general principles of contract law in determining the validity of a municipal contract, three matters should be considered.

First, does the municipal corporation have the expressed, implied or inherent power to enter into the particular contract or is it beyond the scope of power or expressly prohibited by statute? Title 11 specifies many expressed powers of Alabama municipalities; contracts designed to further these powers are within the authority of the municipality.

Regarding implied powers, Alabama courts have, from time to time, referred to the Dillon Rule. In *State Ex rel. Radcliffe v. Mobile, et al.*, 229 Ala. 93, 155 So. 872 (Ala. 1934), the court stated:

“It may be stated broadly that municipal corporations have and can exercise only such powers as are expressly granted in their charters and such as may be necessary and proper to carry such express or direct powers into effect; but these powers include those which are indispensably necessary to the declared objects and germane to the governmental purpose for which such corporations may be organized ... It would follow naturally from the foregoing statement of law that the agents, officers or the city council of a municipal corporation are without authority to enter into agreement, contract or undertaking which is beyond the scope of the charter powers of such municipality, no matter what the objects may be, or how pressing the necessity, or what are the benefits, real or supposed, which may flow to the city, if such objects are not within the charter powers, the city and its authorities must refrain from usurping such powers.”

It is difficult, in some instances, to ascertain if a municipality has the implied power to enter into a specific contract. The facts of each case are determinative where such implied powers are questioned

Second, if a contract is within the corporate powers, it must be entered into with the proper municipal officer or agent. In *Garner v. State*, 158 So. 546 (Ala. 1934), the court observed:

“A contract with the city must be executed and authorized as directed by law to be legal. If not thus done, it is *non est factum* (A legal defense that permits a person to avoid having to honor a contract that she or he signed because of certain reasons such as a mistake as to the kind of contract).”

Persons contracting with municipal corporations are

charged with notice of the extent of its powers and of the powers of the municipal officers and agents. A corporation – municipal or private – is not bound by agreements executed by an unauthorized officer or agent.

Third, the contract must have been entered into as specified by statute. If the contract was one which the municipality has power to make and it was entered into by the proper officer, it may be invalid nevertheless because certain conditions precedent were not observed or because there was no ordinance or resolution authorizing it. The rule is that if the applicable statute requires certain steps to be taken before making the contract, and it is mandatory in terms, a contract not made in conformity therewith is invalid. For example, the statutory requirements in connection with expenditures of \$15,000 or more, under the competitive bid law are prerequisites to a valid contract. Or, as another example, Section 11-47-20, Code of Alabama 1975, authorizes cities and towns to dispose of real property not needed for public or municipal purposes by ordinance. Thus, a validly adopted ordinance would be required to enter into a contract to dispose of real property.

Notice

The general rule, discussed above, is well settled that one who makes a contract with a municipal corporation is bound to take notice of limitations on its power to contract. In *Enterprise v. Rawls*, 204, Ala. 528, 86 So. 374 (Ala. 1920), the court stated:

“Persons dealing with municipal governments or their officers or agents are bound to take notice of the powers and their limits conferred upon or exercisable by such governmental agencies and their administrators.”

In *Alford v. Gadsden*, 349 So.2d 1132 (1977), the Alabama Supreme Court held that a city may be estopped from denying a contract made by one of its commissioners. This case overruled *Mobile v. Mobile Electric Co.*, 203 Ala. 574, 84 So. 816 (Ala. 1919).

A municipal corporation cannot bind itself by any contract which is beyond the scope of its powers, is forbidden by law or is against public policy. Restrictions on the power to contract are designed to protect the public rather than those who contract with the municipality.

Length of Contracts

Although the terms of municipal contracts are largely a matter within the discretion of the council, the length of certain contracts is limited by state law. For instance, Sections 11-47-1 and 11-47-2, Code of Alabama 1975, set limits on the length of time municipalities can borrow money.

Certain other contracts are limited by the competitive bid law. Section 41-16-57 of the Code states that contracts

for personal property or services that are subject to the bid law must be performed within three years. This section also states that lease-purchase agreements subject to the bid law cannot extend longer than 10 years. However, contracts that are not under the competitive bid law are not limited by this section. AGO to Hon. J. M. Breckenridge, January 5, 1968; AGO 2005-192. **Note:** The original opinion stated the limit on lease-purchase contracts was five years. The five-year limit has been changed by the legislature to ten years.

Section 94

Section 94, Alabama Constitution, 1901, restricts municipalities from lending credit or anything of value to private individuals or companies. Section 94 also prohibits municipalities from performing any work on private property.

This section does not bar municipalities from contracting with private persons for services. Thus, while municipalities may not give money to the chamber of commerce, they can contract to pay the chamber for adequate services which the chamber performs. AGO to Hon. T. M. Brantley, June 20, 1973; AGO 2004-067. A city may join with nonprofit organizations to finance a community center if a public purpose is served. The city should enter into a contract with these organizations setting out the benefits to be conferred on the citizens. AGO 2009-061.

So, rather than give funds to private agencies, many municipalities contract with these agencies for services. It is important to remember, however, that the services which are performed must be adequate consideration and that they must be the type of services the municipality could itself provide, if it wished to do so.

For more information on Section 94, please see the article in this publication titled “*The Public Purpose Doctrine*.”

Competitive Bid Law

Although it is outside the scope of this article, it must be mentioned that municipal contracts involving expenditures of \$15,000 or more are subject to the competitive bid law, found at Sections 41-16-50 through 41-16-63, Code of Alabama 1975. Municipalities with contracts that are subject to the bid law should read these sections or contact their municipal attorneys.

For more information on the competitive bid law, please see the article in this publication titled “*The Competitive Bid Law*.”

Conflicts

Municipal officers and agents are held by the courts to a strict accountability in their dealings with or on behalf of the municipal corporation they serve. In acting for the

corporation, officials are required to exercise a high degree of fidelity, care and caution in the public interest. It is well established that a municipal officer cannot be interested in a contract with the municipality he or she represents. Section 11-43-12 of the Code of Alabama 1975, prohibits a city from contracting with a close corporation in which a city employee or the employee's spouse owns stock. AGO 2001-042.

Section 11-43-12 of the Code of Alabama 1975, prohibits a city from contracting with an unincorporated company that a city employee or the employee's spouse owns, even if the contract was bid and the company is the lowest bidder. AGO 2001-040. A Class 7 or 8 municipality may enter into a contract with a business owned by the mayor if the provisions of Section 11-43-12.1 of the Code of Alabama 1975 are complied with requiring that such contracts be bid pursuant to the Competitive Bid Law. AGO 2006-109.

For more information on conflicts, please see the article in this publication titled "*Conflicting Offices and Interests.*"

Binding Successors to Contracts

With respect to the binding effect of contracts which extend beyond the terms of officers acting for the municipality, the courts make a clear distinction between governmental or proprietary powers. The hands of successors cannot be tied by contracts relating to governmental matters. McQuillin states the rule:

"In a case holding that a municipality has no authority to bind itself to levy a certain fixed annual tax in perpetuity for the use of a water company which agrees to supply the city with water, the following language is used: 'A contract to pay a definite sum for a specified period is binding on the successors of the municipal officials who made the contract. Such a contract is not entered into in virtue of the governmental or legislative functions of the city ... whereas the power to levy a tax belongs to the class of legislative and governmental powers. In the one case successors may be bound, in the other they cannot be.'"

In this connection, see *Birmingham v. Holt*, 239 Ala. 9, 194 So. 538 (Ala. 1940), and *Willett and Willett v. Calhoun County*, 217 Ala. 687, 117 So. 311 (Ala. 1928).

Alabama Governmental Leasing Act

The Legislature enacted the Alabama Governmental Leasing Act, found at Sections 41-16A-1 through 41-16A-11, Code of Alabama 1975, to give state and local governments and their instrumentalities the flexibility to finance the acquisition, installation, equipping and/or improvement of any eligible property that such governmental entity otherwise is legally authorized to acquire through the use of lease, lease-purchase and/or

installment-purchase financing.

The term "eligible property" means "any tangible personal property or any interest therein, including without limitation any goods, supplies, materials, appliances, equipment, furnishings and/or machinery, whether or not such items constitute fixtures." An "alternative financing contract" is defined to mean "a lease, lease-purchase, lease with option to purchase, installment-sale agreement or arrangement or other similar agreement or arrangement."

Section 41-16A-5 sets out the contract provisions that are allowed under the Alabama Governmental Leasing Act. Sections 41-16A-7 and 41-16A-9 discuss the impact of other state laws on contracts executed pursuant to this act. Such contracts are legal and authorized investments for banks, savings and loan associations, insurance companies, fiduciaries and trustees.

Contracts for the Joint Exercise of Power

Sections 11-102-1 through 11-102-4 of the Code of Alabama 1975, authorize counties and municipalities to enter into contracts for the joint exercise of power or services. Basically, a municipality may enter into a written contract with any other city or county for the joint exercise of any power or service that state or local law authorizes each of the contracting entities to exercise individually. It is sufficient if each of the contracting entities has the authority to exercise or perform the power or service contracted for regardless of the manner in which the power or service is to be exercised, provided, however, that at least one of the contracting parties must have the authority to exercise the power in the manner agreed upon by contract. A joint contract under this statute may be exercised by one or more entities on behalf of the others or jointly by all contracting entities.

The Attorney General has held that Section 11-102-1, *et seq.*, Code of Alabama 1975, authorizes counties, with the consent of the sheriffs and with the sheriffs as parties, to enter into agreements whereby the sheriffs will assist each other's offices with law enforcement services across county lines. AGO 2013-106. The sheriffs and county commissions of both counties must consent and be parties to the agreement. AGO 2012-034. Both the county commission and the sheriff should be parties to any contract to house federal prisoners in the county jail. AGO 2011-020. The county sheriff and his or her deputies may enforce municipal ordinances of the town provided the contract between the town and sheriff provides for such enforcement. AGO 2016-005.

A municipality may also contract with another municipality for the performance of policing duties within its jurisdiction. The contract must comply with the specifications set forth in section 11-102-1, *et seq.*, Code

of Alabama. Each municipality must adopt an ordinance approving the contract, and each municipality should adopt all ordinances, resolutions, and policies necessary to authorize law enforcement officers of one municipality to carry out policing duties within the jurisdiction of the other municipality or municipalities. AGO 2013-041.

Counties and municipalities may enter into an agreement to maintain roads in the jurisdiction of another county or municipality if the contract is executed as provided for in Sections 11-102-2 and 11-102-3 of the Code of Alabama. AGO 2008-125.

As a side note to joint contracts among municipalities, cities should be aware of Section 11-47-7.1 of the Code of Alabama 1975. This statute authorizes municipalities to contract with each other for the creation of joint municipal correctional facilities.

Summary

The validity of municipal contracts is frequently a subject of judicial determination. As stated above, to be valid and enforceable, the contract must be within the scope of municipal powers, it must be made by officers or agents duly empowered and authorized to act, and it must be made as prescribed by applicable laws. Municipal contracts, like other contracts, must be based on an offer and acceptance; must be mutual and supported by a consideration; must be reasonable, definite and certain; and must be for a legal object and not against public policy. A contract forbidden by statute is void since all persons who contract with a municipal corporation are bound to know the limitations of the municipal corporation. Further, a city is not required to restore status quo or to compensate for benefits received under a void agreement.

Opinions and Court Decisions Involving Municipal Contracts

- A municipality may enter into an agreement with a county for the collection and disposal of solid waste, and receive a percentage of the revenue generated, even if the municipality does not participate in the collection or disposal. The funds received must be used for solid waste disposal. AGO 2016-051.
- City employees could not be held liable for tortious interference with a city contract. *Allied Co. of Wiregrass, Inc. v. City of Dothan*, 191 So.3d 804 (Ala. Civ.App. 2015).
- A city may enter into an agreement with the YMCA of a county for the YMCA to provide services to its citizens in exchange for the use of city property. Whether the property has been dedicated as a public park is a factual determination to be made by the city. AGO 2017-024.

- A city may contract with private companies to advertise the city itself and its resources. AGO 2018-024.
- City may contract with the Etowah County Mayor's Association to facilitate an agreement with a corporation for the provision of emergency air medical transport to the municipality's residents. AGO 2019-008.

19. State Regulated Professions and Licensing Requirements

The Alabama Legislature has adopted numerous statutes which regulate various professions in the state. The various laws require many professionals to obtain certification from the state before they are eligible to work in Alabama. These certifications serve several purposes. They protect the public from poor workmanship by making sure that certified professionals have the ability to do the jobs they promote themselves for. This, in turn, helps encourage accountability by creating a register of professionals and by establishing boards to oversee that work is done properly and by the proper people.

One of the key components in furthering these goals is accomplished by municipal clerks and revenue officials. These officials are often in the best position to know when a person is working in a particular field since they can know what jobs are being done locally. Also, they will want to make sure the professional has complied with local licensing requirements. When a competitor sees someone working without a license, he or she is more likely to lodge a complaint with the local clerk or licensing officials.

The Department of Revenue is required pursuant to Section 11-51-193, Code of Alabama 1975, to annually produce a list of all state boards and agencies that regulate the licensing of businesses and occupations under their jurisdiction. This list is to be provided to municipalities, and more information and a copy of the list can be found on the Department of Revenues website here: <https://revenue.alabama.gov/business-license/business-licensing/municipal-business-license-information/>.

Prior to issuing a business license to a taxpayer who is subject to the jurisdiction of a particular state licensing board, a municipality is required to attempt to confirm from the board or agency that the taxpayer is duly licensed by and in good standing with the board or agency. Failure of the municipality to receive such confirmation due to a good faith error or other reasonable cause shall absolve the municipality and its employees or agents from any civil liability or criminal penalty that would otherwise arise or accrue if it is determined that the taxpayer was not in good standing at the time of obtaining a business license from the municipality.

In addition to the above requirements, many statutory schemes for certifying professionals specifically require municipal revenue officers to obtain proof that a person has been certified by the state before issuing a municipal license and provide for criminal penalties for failure to confirm licensing by the state. Knowing which professions require

municipal verification of state certification places a large burden on local officials, as does knowing what types of work require a professional to obtain a state license.

State Licensed Professions *Specifically* Requiring Proof Before Issuing a Municipal License

General Contractors

Chapter 8 of Title 34, Code of Alabama 1975, provides for the licensing and regulation of general contractors to protect the public against incompetent contractors and to better assure that properly-constructed structures are free from defects and dangers to the public. *Cooper v. Johnston*, 219 So.2d 392 (Ala. 1969).

Section 34-8-1, Code of Alabama 1975, defines a general contractor as: “one who, for a fixed price, commission, fee or wage undertakes to construct or superintend or engage in the construction, alteration, maintenance, repair, rehabilitation, remediation, reclamation or demolition of any building, highway, sewer, structure, site work, grading, paving or project or any improvement in the state of Alabama where the cost of the undertaking is \$50,000 or more, shall be deemed and held to have engaged in the business of general contracting in the state of Alabama.”

Section 34-8-1(b) covers the construction, renovation and repair of any swimming pool in the state by requiring a person acting as a general contractor and receiving a fixed price, commission, fee or wage greater than \$5,000 be licensed under the general contractor code provisions.

Section 34-8-20, Code of Alabama 1975, provides for the establishment of a State Licensing Board for General Contractors to examine and determine the qualifications of persons desiring to engage in the business of general contracting.

The secretary-treasurer of the board is required to keep records of the board and a register of all applicants for a license together with a roster showing the names and addresses of all general contractors. This roster is mailed to the clerk of each incorporated municipality and the probate judge of each county. Section 34-8-26, Code of Alabama 1975.

Any person desiring to be licensed or desiring to renew an existing license as a general contractor shall be a citizen of the United States or, if not a citizen of the United States, a person who is legally present in the United States with appropriate documentation from the federal government, and shall make and file with the board, not less than 30 days

prior to any regular meeting thereof, a written application on the form prescribed by the board. The appropriate fee must accompany the application. In addition, when applying for the license, the applicant must state in the application the type or types of contracts which he or she wishes to perform and shall provide proof of liability insurance.

The board classifies contractors according to types of contracts on which they perform, within maximum bid limits, on the following basis: the applicant's request; his or her last financial statement prepared by a CPA or independent licensed public accountant approved by the board; his or her previous experience and equipment; and the facts in each case.

If the application is satisfactory, the board may require the applicant to take an examination. If the examination results are satisfactory, the board issues a certificate to the applicant allowing him or her to engage in general contracting in the state of Alabama, stipulating in each license issued the types of work the contractor is permitted to bid on or to perform under his license. The certificate sets out a letter symbol indicating the maximum limits on which he or she is permitted to bid or to perform in a single contract. The maximum bid limits are set by the formula of not more than 10 times either the net worth or working capital, whichever is less, as shown by the applicant's latest financial statement and designated in the classification set out herein that is the closest to this amount.

- A – Not to exceed \$100,000
- B – Not to exceed \$250,000
- C – Not to exceed \$500,000
- D – Not to exceed \$1,000,000
- E – Not to exceed \$3,000,000
- U – Unlimited

The certification of authority to engage in general contracting shall expire 12 months following issuance or renewal and shall become invalid on that date unless renewed. Section 34-8-2(b), Code of Alabama 1975.

The roster maintained by the secretary-treasurer of the board shows the name of the contractor, the address, the license number and bid limit. It also shows the type of work which the contractor is qualified person. No one shall be permitted to engage in the business of general contracting without a valid license. Violation of this law is a misdemeanor. Section 34-8-6, Code of Alabama 1975.

Section 34-8-7, Code of Alabama 1975, allows the following exemptions from the provisions of the law: the practice of general contracting, as defined in Section 34-8-1, by an authorized representative or representatives of the United States government, state of Alabama, incorporated

municipality, or county in this state under the supervision of a licensed architect or engineer. Any work contracted out by the representative shall comply with the provisions of this chapter for general contractor; the construction of any residence or private dwelling; a person, firm, or corporation constructing a building or other improvements on his, her, or its own property provided that any of the work contracted out complies with the definition in this chapter for "general contractor;" the installation, repair, maintenance or removal of facilities, equipment, or systems used in or substantially related to the generation, transmission or distribution of electric power, natural gas, or telecommunications in an emergency by a utility regulated by the Public Service Commission, or any entity engaged in the generation, transmission, or distribution of electric power, natural gas, or telecommunications, or any of their respective general contractors or subcontractors, provided the work is performed under the supervision of a licensed architect or engineer; the repair, maintenance, replacement, reinstallation, or removal of facilities, equipment or systems used in or substantially related to the generation, transmission, or distribution of electric power, natural gas or telecommunications on a routine, regular, or recurring basis by a utility regulated by the Public Service Commission or any entity engaged in the generation, transmission, or distribution of electric power, natural gas or telecommunications or any of their respective general contractors or subcontractors, provided the work is performed under the supervision of a licensed architect or engineer; and routine or regular maintenance, repair, replacement, reinstallation or removal of equipment, specialized technological processes or equipment facility systems as determined by the board with regard to scope, frequency and specialty of the work to be performed.

The exemptions listed above shall not include a swimming pool contractor. However, a person, firm or corporation constructing a swimming pool on his or her own property shall be exempted from the provisions of the contractor law.

All owners, architects, engineers, construction managers, and private awarding authorities preparing plans and specifications for work to be contracted in Alabama must include in their invitations to bidders and their specifications a copy of this law or applicable portions. Section 34-8-8, Code of Alabama 1975.

Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated municipality charged with the duty of issuing building or other permits for the construction, alteration, maintenance, repair, rehabilitation, remediation, reclamation or demolition of any building, highway, sewer, grading or any improvement or structure, where the cost

thereof is to be \$50,000 or more, shall, before he or she shall be entitled to the issuance of such permits, furnish satisfactory proof to such inspector or authority that he or she is duly licensed under the general contractors law. Section 34-8-9, Code of Alabama 1975.

It is illegal for any building inspector or authority to issue a permit unless the applicant has furnished evidence that he is either exempt from the license requirement or is duly licensed to perform or superintend the work for which a permit is requested. Any building inspector or other authority violating the terms of this law shall be guilty of a Class C misdemeanor and shall, for each offense of which he or she is convicted, be punished in accordance with Sections 13A-5-7 and Sections 13A-5-12, Code of Alabama 1975. Section 34-8-9, Code of Alabama 1975.

Section 34-8-7(c) of the Code states that subcontractors, as defined in Section 34-8-1(c), must comply with all provisions that cover general contractors. This would appear to require municipalities to verify certification of subcontractors as well. One relevant exception to this rule is Section 34-8-7(c)(5), which provides that subcontractors do not have to be certified at the time a project is bid but must be certified by the state contractor's board before beginning work.

All municipal contracts for the construction of any building, highway, sewer, grading or any improvement or structure, the cost of which is \$20,000 (the amount has since changed to \$50,000 – See Section 34-8-1, Code of Alabama 1975)) or more, shall be awarded to licensed general contractors unless the work is being done by employees of the municipality under the supervision of a licensed architect or engineer. The word “cost” refers to the aggregate amount which the contractor is to receive for his or her work. Consequently, the law cannot be circumvented by dividing the work of a single construction project into two separate contracts of less than \$20,000 (now \$50,000) each. *Cochran v. Ozark Country Club, Inc.*, 339 So.2d 1023 (Ala. 1976).

The Attorney General's office held that where a municipality acts as its own contractor, pursuant to Section 34-8-7, Code of Alabama 1975, the municipality must use licensed subcontractors if the project will cost \$20,000 (now \$50,000 – See Section 34-8-1, Code of Alabama 1975) or more. If the municipality elects to use a general contractor to oversee the project, subcontractors do not have to be licensed. In either case, subcontractors whose work does not exceed \$20,000 (now \$50,000) are exempt from the licensing requirements. AGO 1997-053.

Additionally, the Attorney General's office has held a company that provides and installs permanent sound systems in businesses, the cost of which is \$50,000 or more, must be a licensed general contractor. If the sound system

is not a permanent improvement, a license is not required. AGO 1999-233.

Section 39-2-14, Code of Alabama 1975, requires every nonresident contractor to register with the Department of Revenue prior to engaging in the performance of a contract in this state. At the time of registration, the contractor shall deposit with the Department of Revenue five percent (5%) of the amount the contractor is to receive for the performance of the contract. This deposit shall be held within a Contractors Use Tax Fund pending the completion of the contract, the determination of the taxes due the state and other governmental bodies and the payment of those taxes. In lieu of such deposit, the contractor may provide a corporate surety bond to be approved by the commissioner of revenue as to form, sufficiency, value, amount, stability and other features necessary to provide a guarantee of payment of the taxes due the state and other governmental bodies.

Also, within 30 days after registration, the contractor shall file a statement with the Department of Revenue itemizing the machinery, materials, supplies and equipment that he or she has or will have on hand at the time he or she begins the fulfillment of the contract, where such tangible personal property has been brought, shipped or transported from outside the state of Alabama, upon which neither the use taxes or ad valorem taxes have been paid. The contractor shall pay the tax due at the time of filing, and then report and pay the tax as required by the commissioner of revenue. Upon payment of the taxes due, the deposit or the surety bond required shall be returned to the out-of-state contractor. Section 39-2-14, Code of Alabama 1975.

Further information may be obtained from the Alabama Licensing Board for General Contractors, 2525 Fairland Drive, Montgomery, Alabama 36116, (334) 272-5030.

Architects

The state Legislature adopted Sections 34-2-30 through 34-2-42, Code of Alabama 1975, to regulate the practice of architecture within the state of Alabama. The law states that no person shall practice architecture in the state or use the title “architect” or any title, sign, card or device to indicate that the person is practicing architecture, unless the person has complied with the state laws regulating the profession. The law established a six-member board for the registration of architects to make and adopt bylaws, rules and regulations to govern the members of the profession. This board has the responsibility of maintaining a register of qualified architects and of determining who shall be certified as an architect. Section 34-2-38, Code of Alabama 1975.

Section 34-2-32(c), Code of Alabama 1975, states that the services of a registered architect shall be required on all

buildings, except those exempted by state law. No official of the state or of any city, town or county charged with the enforcement of laws, ordinances or regulations relating to the construction or alteration of buildings shall accept or approve any plans or specifications that are not so prepared. The Code may place criminal sanctions on officials who ignore this requirement. Section 34-2-36 provides that any person who knowingly, willfully or intentionally violates any provision of the law shall be guilty of a Class A misdemeanor. Each day of violation constitutes a separate offense.

NOTE – Section 34-8-8 provides that all owners, architects, engineers, construction managers, and private awarding authorities preparing plans and specifications for work to be contracted in Alabama must include in their invitations to bidders and their specifications a copy of this law or applicable portions as well as whether he or she is a resident of Alabama and whether a license has been issued to him or her. Additionally, all owners, architects and engineers receiving bids pursuant to Title 34, Chapter 8, must require the person, firm or corporation to include his or her current license number on the bid. Bids that do not comply with this section must be rejected. Violators of these provisions are subject to criminal penalties.

No person shall be required to register as an architect in order to make plans and specifications for or administer the erection, enlargement or alteration of any of the following buildings: the buildings upon any farm for the use of any farmer, regardless of the cost of such building; any single family residence building; the utility works, structures or buildings (provided that the person performing such architectural works is employed by an electric, gas or telephone public utility regulated pursuant to the laws of Alabama or by a corporation affiliated with such utility); or any other type building(s), which has a total area of less than 2,500 square feet, and is not intended for assembly occupancy. However, schools, churches, auditoriums or other buildings intended for the assembly occupancy of people requires a registered architect to make the plans. Section 34-2-32 (b), Code of Alabama 1975.

The law does not prevent employees of registered architects from acting under the instructions, control or supervision of their employers or the employment of superintendents of the construction or alteration of buildings. Nothing in the law shall prevent registered professional engineers or the employees or subordinates under their supervision or control from performing architectural services incidental to their engineering practice. Nothing in the law shall prevent registered architects or the employees or subordinates under their supervision or control from performing engineering

services incidental to their architectural practice. Section 34-2-32, Code of Alabama 1975.

Any person who knowingly, willfully or intentionally violates any provision of the law shall be guilty of a misdemeanor. Each day of such violation shall constitute a distinct and separate offense. Section 34-2-36, Code of Alabama 1975.

The Attorney General has advised that a city building official is not prohibited from approving plans for a church, school or place of assembly if the plans bear a registered professional engineer's seal but not a registered architect's seal. AGO 1982-444 (to Hon. George E. Little, July 15, 1982).

The Attorney General has further advised that final acceptance and approval of plans for schools, churches, auditoriums, buildings intended for the mass assemblage of people, and other non-farm buildings whose total cost is \$50,000 or more can only be given by the municipal building official after review for compliance with applicable codes and ordinances. However, before such plans can receive consideration, they must, under state law, bear the seal of a registered architect or engineer. AGO 1983-149 (to Hon. Steve Means, January 27, 1983).

The Attorney General ruled in 2003-009 that licensed professional engineers may perform architectural services incidental to their engineering practice and registered architects may perform engineering services incidental to their architectural practice.

Further information may be obtained from the Alabama Board for Registration of Architects, 100 North Union Street, Suite 390, Montgomery, Alabama 36130, (334) 242-4179, <http://www.boa.alabama.gov>.

Engineers and Land Surveyors

Alabama law regulating the practice of engineering and land surveying is found in Sections 34-11-1 through 34-11-37, Code of Alabama 1975. The law establishes a State Board of Licensure for Professional Engineers and Land Surveyors to implement the provisions of the law, under Section 34-11-30, Code of Alabama 1975. The board maintains a roster showing the names and addresses of all licensed professional engineers, all professional land surveyors, and all who possess current certifications as engineers-in-training or land surveyor interns. This roster, which is prepared at intervals established by the board, is made available to each person so registered or certified, placed on file with the Secretary of State, and may be distributed or sold to the public upon request. All licensed or certification is handled by the board. Section 34-11-3, Code of Alabama 1975.

Section 11-6-21, Code of Alabama 1975, specifies that any person appointed to the position of engineer trainee

shall be a graduate engineer and a certified engineer intern as provided in Chapter 11 of Title 34, in the state of Alabama and in good standing.

Section 34-11-2, Code of Alabama 1975, provides that no persons in public or private capacity shall practice or offer to practice engineering or land surveying, unless he or she shall first have submitted evidence that he or she is qualified to practice under, Section 34-11-4, and shall be licensed by the board, or unless he or she is specifically exempt from licensure under the provisions of Section 34-11-14, Code of Alabama 1975.

Section 34-11-10, Code of Alabama 1975, further states: it shall be unlawful for the state or any of its departments, boards or agencies or any county, municipality or political subdivision or any department, board or agency of any county, municipality or political subdivision to engage in the construction of any public work involving the practice of engineering, unless the engineering drawings, plans, specifications and estimates have been prepared by and the construction executed under the direct supervision of a professional engineer; provided, nothing in the law shall be held to apply to any public work, wherein the expenditure for the complete project of which the work is a part does not exceed \$20,000 (**NOTE** – This provision was not amended when the public works bid law amount was raised to \$50,000; however, this was probably an oversight.).

Certificates of authorization are required under Section 34-11-9, Code of Alabama 1975, for corporations, partnership or firms that practice engineering and land surveying as defined in Section 34-11-1, which allows their agents to act on their behalf. However, nothing in this section should be construed to mean that a certificate of licensure to practice engineering or land surveying shall be held by a corporation, partnership or firm. Furthermore, no corporation, firm, or partnership shall be relieved of responsibility for the conduct or acts of its agents.

The board shall have the power to discipline any licensee or certified engineer intern or land surveyor intern or corporation, partnership or firm which violates any part of Section 34-11-11. If after a hearing, a majority of members of the board find the accused guilty, the board shall impose a fine not to exceed \$5,000 for each count or written offense. Section 34-11-11.2, Code of Alabama 1975.

Again, there may be criminal sanctions for violations. Any person, corporation, partnership or firm which violates any part of this law shall be guilty of a Class A misdemeanor and may upon conviction be punished as provided by law. Each day of the violation shall constitute a separate offense. Section 34-11-15, Code of Alabama 1975.

In addition to or in lieu of the sanctions provided, the board may issue an order to any individual or firm engaged in any activity, conduct, or practice constituting a violation

of this chapter, directing the individual or firm to cease and desist from the activity, conduct, or practice, or the performance of any work done or about to be commenced. If there is a refusal, the board shall issue a writ of injunction in any court of competent jurisdiction. In the suit for an injunction, the board may demand of the defendant a civil penalty of up to \$5,000 plus costs and attorney fees for each offense. Section 34-11-15, Code of Alabama 1975.

The Attorney General ruled in AGO 2003-009 that licensed professional engineers may perform architectural services incidental to their engineering practice and registered architects may perform engineering services incidental to their architectural practice.

Further information may be obtained from the Engineers and Land Surveyors Board of Registration, RSA Union Bldg. Suite 382, 100 North Union Street, Montgomery, Alabama 36104, (334) 242-5568, <http://www.bels.alabama.gov>.

Heating, Air Conditioning and Refrigeration Contractors

Sections 34-31-18 through 34-31-35, Code of Alabama 1975 regulate persons engaged in the installation of heating, air conditioning and refrigeration systems. A board of heating, air conditioning and refrigeration contractors has been created to govern the members of the profession.

No individual, partnership or corporation shall advertise, solicit, bid, obtain a permit from, do business or perform the function of a certified heating and air conditioning contractor unless the person or persons responsible and in charge are certified operators approved by the board. Section 34-31-24, Code of Alabama 1975.

No official charged with the duty of issuing licenses to any individual, partnership or corporation to operate a business as a certified heating, air conditioning, and refrigeration contractor shall issue such license unless he or she presents, for inspection, a certificate of qualification issued by the board to the individual or to some person responsible and in charge of the partnership or corporation. Section 34-31-24, Code of Alabama 1975. Further, every heating, air conditioning and refrigeration contractor shall display the contractor's certification number and the company name on any and all documentation, forms of advertising, and on all service and installation vehicles used in conjunction with heating, air conditioning, and refrigeration contracting.

The board may annually publish a list of names and addresses of all individuals and the name of their employer, if applicable, who are registered and certified by the board. The board shall also mail, upon request, a list to all qualified individuals so certified and may charge for providing the list. Section 34-31-31, Code of Alabama 1975.

Municipal license officials should ensure that they

sell heating, air conditioning, and refrigeration contractor licenses only to properly certified contractors whose names appear in the book published by the Board or who can produce a certificate issued by the board. Contractors that purchase licenses as general contractors, plumbers, steam fitters, tin shop contractors, service and repair contractors, and electrical contractors should be informed by the license official if they perform any heating or air conditioning application of design, installation, service or repair on central HVAC systems, they are probably subject to certification.

Further information may be obtained by contacting the Alabama Board of Heating, Air Conditioning & Refrigeration Contractors, 100 North Union Street, Suite 986, Montgomery, Alabama 36104, (334) 242-5550, <http://www.hacr.alabama.gov>.

Fire Protection Sprinkler Contractor

Sections 34-33-1 through 34-33-14, Code of Alabama 1975, authorize the state fire marshal to issue permits to persons qualified to be fire protection sprinkler contractors.

It shall be unlawful for any individual, partnership, corporation, association or joint venture (except local building officials, fire inspectors, or insurance inspectors when acting in their official capacity) to engage in the installation, repair, alteration, addition, maintenance or inspection of a fire protection sprinkler system in the state, except in conformity with the provisions of the law regulating such professions. However, the law should not be construed to apply to fire protection sprinkler system owners who employ registered professional fire protection engineers and skilled workers who regularly and routinely design, install, repair, alter, add to, maintain and inspect sprinkler systems on and within the premises of their employer, provided such systems are for the owner's use only. Section 34-33-3, Code of Alabama 1975.

If a certified fire protection sprinkler contractor desires to do business in any part of the state, he shall deliver to the local building official a copy of his permit issued by the state fire marshal. The local building official shall require a copy of the state fire marshal's permit before issuing a license or building permit. The certified fire protection sprinkler contractor shall be required to pay any municipal license fees, but the local official shall impose no other requirements on the contractor to prove competency, other than proper evidence of a valid state fire marshal's permit. Section 34-33-8, Code of Alabama 1975.

Nothing in the law limits the power of a municipality to regulate the quality and character of work performed by a fire protection sprinkler contractor I or II through a system of fees, permits and inspections, which are designed

to ensure compliance with state and local building laws. Section 34-33-9, Code of Alabama 1975.

Nothing in the law limits the power of a municipality to adopt any system of permits requiring submission to and approval by the municipality of plans and specifications for work to be performed by a fire protection sprinkler contractor I or II before commencement of the work. If plans for a fire protection sprinkler system are required to be submitted to and approved by any municipality, the plans must bear the permit number of the certified fire protection sprinkler contractor or proof that the person, firm or corporation that designed such system is an exempt owner under Section 34-33-3, Code of Alabama 1975, as amended. Section 34-33-9, Code of Alabama 1975.

The law also applies to any fire protection sprinkler contractor I or II performing work for any county, municipality or the state. Officials of a municipality, county or the state are required to determine compliance with this law before awarding any contracts for the installation, repair, alteration, addition, or inspection of a fire protection sprinkler system. Bids for such work shall be accompanied by a copy of a valid permit from the state fire marshal. Section 34-33-10, Code of Alabama 1975.

Further information may be obtained from the Alabama State Fire Marshal, 201 Monroe Street, Montgomery # 1790, Alabama 36130, (334) 241-4166, <http://www.firemarshal.alabama.gov>.

Homebuilders

Section 34-14A-1 to Section 34-14A-20, Code of Alabama 1975, establishes a nine-member Home Builders Licensure Board to examine and license persons in the home building industry. Section 34-14A-2(12) defines a "residential home builder" as: "A person who constructs a residence or structure for sale or who, for a fixed price, commission, fee, or wage, undertakes or offers to undertake the construction or superintending of the construction, or who manages, supervises, assists, or provides consultation to a homeowner regarding the construction or superintending of the construction, of any residence or structure which is not over three floors in height and that does not have more than four residential units, or the repair, improvement, or re-improvement thereof, to be used by another as a residence when the cost of the undertaking exceeds ten thousand dollars (\$10,000). The term includes a residential roofer when the cost of the undertaking exceeds two thousand five hundred dollars (\$2,500)."

The law provides that nothing shall prevent any person from performing these acts on his or her own residence or on his or her other real estate holdings. Anyone who engages or offers to engage in such undertaking through advertising or otherwise, in the state shall be deemed to have engaged

in the business of residential home building. Section 34-14A-2(10), Code of Alabama 1975.

All residential home builders shall be required to be licensed by the Home Builders Licensure Board annually. The board may issue more than one type of license. The board may issue licenses that vary in scope of work authorized, including, but not limited to, licenses without limitation and with limitation. The board may issue licenses that vary in requirements for licensure, including, but not limited to, evidence of experience and ability and financial responsibility, as determined by the cost of the undertaking. The board may charge varying fees for licenses. Section 34-14A-5, Code of Alabama 1975. This law does **not** apply to:

1. Any employee of a licensee who does not hold himself or herself out for hire or engage in residential home building, except as such employee of a licensee.
2. An authorized employee of the United States, the State of Alabama, or any municipality, county, or other political subdivision, if the employee does not hold himself or herself out for hire or otherwise engage in residential home building except in accordance with his or her employment.
3. General contractors holding a current and valid license, issued prior to January 1, 1992, under Chapter 8 of this title.
4. Real estate licensees, licensed engineers, and licensed architects operating within the scope of their respective licenses on behalf of clients.
5.
 - a. Owners of property when acting as their own contractor and providing all material supervision themselves, when building or improving one-family or two-family residences on such property for the occupancy or use of such owners and not offered for sale. This exception may not be transferred to any other person, including, but not limited to, an agent through a power of attorney.
 - b. In any action brought under this chapter, proof of the sale or offering for sale of such structure by the owners of property, as provided in this subdivision, within one year after completion of same is presumptive evidence that the construction was undertaken for the purpose of sale.
6. Mobile homes or any structure that is installed, inspected, or regulated by the Alabama Manufactured Housing Commission or the repair, improvement, or re-improvement of any such structure, and shall not in any way change or interfere with the duties, responsibilities, and operations of the Alabama Manufactured Housing Commission as defined in Sections 24-4A-1 through 24-6-4. Section 34-14A-6, Code of Alabama 1975.

A complete roster of licensees shall be prepared and published annually by the board. Section 34-14A-9, Code of Alabama 1975.

County commissions are authorized to adopt building codes to apply to unincorporated areas of the county. These building laws and codes shall not apply within any municipal police jurisdiction where that municipality is exercising its building laws or codes, without the express consent of the governing body of that municipality. The county building laws and code may apply in the corporate limits of a municipality with the express consent of the governing body of a municipality. Section 34-14A-12, Code of Alabama 1975.

County commissions, municipalities and other public entities are authorized to enter into mutual agreements, compacts and contracts for the administration and enforcement of their respective building laws and codes. Section 34-14A-12, Code of Alabama 1975.

It is the duty of a municipal building official, or other person given the authority to issue building and other permits and to refuse to issue a permit for any undertaking which would require a license from the Home Builder Licensure Board unless the applicant has furnished evidence that he or she is either licensed as required by the law or is exempt from the requirements of the law. The building official is required to notify the board of suspected violators. Section 34-14A-13, Code of Alabama 1975.

In reference to building permits, Section 34-14A-13, Code of Alabama 1975, requires building officials who issue building permits and certificates of occupancy to do so without requiring the payment of license fees for subcontractors who will be or were involved in the construction. This law also requires a builder to submit to the municipality a listing of all subcontractors involved in the construction project within 15 days of the issuance of the building permit by jurisdiction requiring building permits. If subcontractors are added, the builder must submit the name, address and phone number of the subcontractor(s) to the municipality within three days of hiring. In addition, an updated list of subcontractors is to be furnished by the builder before the issuance of a certificate of occupancy by the municipality, where certificates of occupancy are required.

Further information may be obtained from the Alabama Home Builders Licensure Board, 445 Herron Street, Montgomery, AL 36130, (334) 242-2230, <http://www.hblb.alabama.gov>.

Private Auditors

Section 40-12-43.1, Code of Alabama 1975, requires private examining or collecting firms as defined in Section 40-2A-3(17) to obtain a license from the state before

entering into any contract for the collection of local sales, use, rental, lodgings or other taxes or license fees. No private examining or collecting firm may receive a license unless it has complied with the provisions of Title 40, Chapter 2A (the Taxpayer Bill of Rights), and Section 40-12-43.1.

Further information may be obtained from the Alabama Department of Revenue, 4112 Gordon Persons Bldg., 50 N. Ripley Street, Montgomery AL 36104, (334) 242-1170, <https://revenue.alabama.gov/>

Other State Licensing Requirements of Interest

While the above listed professions place more specific responsibility on municipal officials to obtain proof of licensure, many other professions licensed by the state deserve special consideration by municipal officials.

Private Investigators

Sections 34-25B-1 through 34-25B-29, Code of Alabama 1975, establishes an eight-member, quasi-judicial board to regulate and prohibit persons from acting as a private investigator without a license.

The Alabama Private Investigation Board is given authority to promulgate rules, establish canons of ethics and hire personnel necessary to implement the Alabama Private Investigation Regulatory Act. Section 34-25B-8, Code of Alabama 1975.

A Division of Investigation is created within the board to serve as the board's official investigative agency. The board or an executive director of the board may subpoena those persons or documents necessary to any investigation undertaken under the Alabama Private Investigation Regulatory Act. Section 34-25B-25, Code of Alabama 1975. The Attorney General shall provide legal services to the board and board employees in connection with official duties and actions of the board. Section 34-25B-8, Code of Alabama 1975.

Three members are appointed by the Governor, two of whom shall be private investigators in Alabama and one of whom shall be a consumer who will represent the public at large. The Lieutenant Governor, Speaker of the House of Representatives, Attorney General and Alabama Private Investigators Association each appoint a member who must be a private investigator. The Alabama State Bar Association also appoints a member who must be a good member in standing with the State Bar. Section 34-25B-4, Code of Alabama 1975.

Electrical Contractors

Sections 34-36-1 through 34-36-18, Code of Alabama 1975 establish a state licensing board known as the Alabama Board of Electrical Contractors for the purpose of testing

and licensing electrical contractors. Electrical contracting is defined by the law to mean "any job or project in the state of Alabama wherein the electrical contractor proposes to bid, install, maintain, alter or repair any electric wiring devices or equipment." Section 34-36-3, Code of Alabama 1975.

Section 34-16-13, Code of Alabama 1975, provides that no person shall engage in the electrical contracting business, unless such person shall have received a license from the board or from the county or municipality where the contract work is being performed. Exemptions to this requirement can be found in Section 34-36-13, Code of Alabama 1975. Prior to 2010, the law with regard to electrical contractors provided that a state license for an electrical contractor was not required if the contractor was licensed by a local governing authority and engaged in electrical contracting only in that jurisdiction. In 2010, the Legislature passed Act 2010-540 which amended many of the provisions relating to electrical contractors including requiring that any person engaged in electrical contracting be licensed by the state. See Section 34-36-16(b), Code of Alabama 1975. However, Section 34-36-13 remained unchanged. The Attorney General has determined that Section 34-36-16(b) of the Code of Alabama 1975 (as amended in 2010) prevails over Section 34-36-13 and therefore, every electrical contractor operating in Alabama must obtain a state license from the Board of Electrical Contractors before engaging in the business of electrical contracting except as provided for in Section 34-36-16(c). AGO 2010-046.

The board shall examine applicants at least once every three months according to the method deemed to be the most appropriate to test the qualifications of applicants. Any national standardized examination which the board shall approve may be administered to all applicants in lieu of or in conjunction with any other examination which the board shall give to test the qualifications of applicants. The board shall also have the right to establish such norms of achievement as shall be required for a passing grade. The board may recognize a license issued by any other state that, in the opinion of the board, has standards of practice or licensure equal to or higher than those required by the board. No license shall be issued except in compliance with this chapter and none shall be issued except to a person or a person in a firm, partnership, association or corporation. A firm, partnership, association or corporation, as such, shall not be licensed. Section 34-36-7, Code of Alabama 1975.

Further information may be obtained from the Alabama Electrical Contractors Board, 2777 Zelda Road, Montgomery, AL 36106, www.aecb.state.al.us, (334) 420-7232.

Plumbers and Gas Fitters

Sections 34-37-1 through 34-37-18, Code of Alabama 1975, were adopted by the Legislature to regulate plumbers and gas fitters. The State of Alabama Plumbers and Gas Fitters Examining Board is given authority to examine, license and regulate plumbers and gas fitters on a statewide basis. Section 34-37-2, Code of Alabama 1975.

It shall be unlawful for any person or other legal entity to contract, engage in, offer to engage, or convey the impression that he or she is certified in plumbing, gas fitting, or medical gas piping within the State of Alabama unless the person has first registered or received a certificate of competency and unless such certificate is in force and effect at the time the plumbing, gas fitting, or medical gas piping is offered, performed, directed or superintended. Section 34-37-6, Code of Alabama 1975. This law does not apply to the following acts: work and conduct, which may be performed by anyone, without registration or certificate, provided all work and services herein named or referred to shall be subject to inspection and approval in accordance with the terms of all state laws and applicable municipal ordinances:

- plumbing work done by anyone who is regularly employed or acting as a maintenance person incidental to and in connection with the business in which he or she is , provided the plumbing work is done on the premises of the employer and who does not engage in the occupation of a plumber for the general public;
- plumbing work done upon the premises or equipment of a railroad other businesses or industry, by an employee thereof who does not engage in the occupation of a plumber for the general public;
- plumbing or gas fitting work done, not on private property, with the exception of easements by persons engaged by any public utility company in the laying, maintenance and operation of its service mains or lines and the installation, alteration, adjustment, repair, removal and renovation of all types of appurtenances, and equipment, provided such work does not alter gas piping on the consumer side of the meter;
- Any person engaged solely in the testing of backflow devices;
- Plumbing work performed by a property owner in or about a building owned or occupied by the owner;
- any person may install washing machines to existing piping installation or waste lines provided such plumbing work does not necessitate tying into water or sewer lines on the outlet side of the trap. Section 34-37-15, Code of Alabama 1975.

Further, the law does not apply to any plumbing work

done by a property owner in or about a building owned or occupied by him or her, or plumbing work done by anyone who is regularly employed by the property owner to provide maintenance or other repair services if the work is incidental to and in connection with the property for which he or she is employed and engaged and is done on the premises of the employer. Section 34-37-15, Code of Alabama 1975.

No license issued by the board can be sold or transferred. Any license which is misused may be revoked by the board. Section 34-37-16, Code of Alabama 1975.

The board has the authority to levy civil fines or penalties to any registered apprentice, certificate holder, or legal entity registered by the board for a violation of any provision of this chapter regulating plumbers, gas fitters, or medical gas pipe fitters up to two thousand dollars (\$2,000) per violation and actual hearing cost. In addition to or in lieu of the criminal penalties and administrative sanctions provided in this chapter, the board may issue an order to any person or legal entity engaged in any activity, conduct, or practice constituting a violation of this chapter, directing the person or legal entity to forthwith cease and desist from the activity, conduct, practice, or performance of any work then being performed or about to be commenced. Any person convicted of violating the law shall be punished as a Class A misdemeanor. Section 34-37-17, Code of Alabama 1975.

Further information may be obtained from the Alabama Plumbers and Gas Fitters Examining Board, 216 Aquarius Drive, Homewood, AL 35209, (205) 945-4857, <http://pgfb.state.al.us>.

Elevator Inspectors

The Elevator Safety Act is codified at Sections 25-13-1 through 25-13-25, Code of Alabama 1975. The Act does preempt municipal authority over inspection or regulation of the devices and the Act places the inspections under the jurisdiction of the Elevator Safety Review Board. Section 25-13-6, Code of Alabama 1975.

Devices controlled by this board include elevators, dumbwaiters, escalators, moving sidewalks, platform lifts, stairway chairlifts and automated people movers. Section 25-13-3, Code of Alabama 1975. The board has the authority to control the design, construction, operation, inspection, testing, maintenance, alteration and repair of these devices. Section 25-13-6, Code of Alabama 1975. There are certain exceptions to these definitions, which are listed in Section 25-13-3, Code of Alabama 1975.

The Act provides that anyone wishing to perform any work on any of the covered devices or who wishes to inspect work done on any of these devices, must first obtain a license from the board. Section 25-13-4, Code of Alabama 1975. The Act spells out the type of training and examinations these individuals must pass. Sections 25-

13-8 through 25-13-11, Code of Alabama 1975. Further, the Act mandates annual inspections of elevators in public access buildings and the inspection of all buildings under construction to make sure elevators are properly installed and maintained. Subsequent to inspection, the licensed elevator inspector shall supply the property owner or lessee and the administrator with a written inspection report describing any and all violations. Property owners shall have 30 days from the date of the published inspection report to be in full compliance with correcting the violations. Section 25-13-24, Code of Alabama 1975.

Further information may be obtained from the Alabama Department of Labor, Elevator Safety, (334) 956-7404, https://labor.alabama.gov/Inspections/contacts_boilers_elevators.aspx.

Onsite Wastewater Systems

Section 34-21A-1, Code of Alabama 1975, allows the Alabama Onsite Wastewater Board to license persons engaged in the manufacture, installation or servicing of onsite wastewater systems in Alabama. There are six types of licenses under Section 34-21A-12 based on the qualifications of the applicant and type of service the applicant performs:

1. A basic level installer license.
2. An advanced level I installer license.
3. An advanced level II installer license.
4. A manufacturer's license.
5. A pumper license.
6. A portable toilet license.

The basic level license is for the installation, cleaning, servicing, repairing or maintenance of an alternative onsite wastewater system; this must be obtained first before obtaining the advanced level license. An advanced level license is for the installation, cleaning, servicing, repairing, or maintenance of an alternative onsite wastewater system. A manufacturer's license may be obtained for those involved in the manufacture of onsite wastewater septic tanks and receptacles. Section 34-21A-12, Code of Alabama 1975.

License as Proof of Ability

Although the Code does not require municipal officials to obtain proof of state certification of electrical contractors, Section 34-36-13, Code of Alabama 1975, provides that any person who holds a valid statewide license shall be deemed qualified and, upon satisfactory proof of said license, shall be allowed to perform electrical work in any county or municipality under the terms and conditions set forth in the law without further testing, provided the proper

county or municipal building permit and business licenses have been acquired. All persons performing work under a license issued by the board must abide by all state and local laws and ordinances.

Similar rules apply to alarm system installers, Section 34-1A-8(a), Code of Alabama 1975; liquid petroleum gas servicemen, Section 9-17-105(i), Code of Alabama 1975; boiler, pressure vessel installation permit, Section 25-12-5, Code of Alabama 1975; plumbers and gas fitters, Section 34-37-8(b), Code of Alabama 1975; elevator mechanic license, Section 25-13-4, Code of Alabama 1975; and operators of commercial motor vehicles, Section 32-9A-2, Code of Alabama 1975.

Additionally, Section 40-12-135, Code of Alabama 1975, provides that an oculist, optometrist or optician who has procured a license in the municipality where his or her principal office is located may practice the profession in any other place without having to pay a license.

Where Proof of Certification Not Specifically Required

Although not required by the Code, many professions are licensed and certified by the state. Long lists of these occupations appear in Title 40, Chapter 12, and in Title 34 of the Code of Alabama 1975. In the case of certification programs, many professions have boards and agencies which test persons before certifying them. Even though municipal licensing officials are not required to obtain proof that persons wishing to work in these jobs are properly certified by the state, demanding evidence of certification may help protect the public by ensuring that only state-approved individuals are working in the municipality.

The municipality should also require proof of a valid, current state license. Of course, in many instances, the state requires only a license rather than certification. In these cases, it seems prudent to request proof of state licensure prior to issuing a municipal license. The fact that the state license has not been revoked or cancelled is at least some indication that few, if any, complaints have been lodged against those individuals. Again, this helps ensure the quality of the work in areas that aren't certified by the state.

Beyond a moral desire to protect municipal citizens, there is also the possibility of municipal liability for allowing unlicensed or uncertified professionals to work in the municipal limits. This prospect may be remote, unless the municipality takes active steps toward endorsing the work of an individual or company. Substantive immunity probably bars municipal liability in these cases. *Hilliard v. Huntsville*, 585 So.2d 889 (Ala. 1991). Even without substantive immunity, since there is no mandatory duty to check for a license, municipal liability is remote. *See also, Foley v. McLeod*, 709 So.2d 471 (1998), where the Alabama Supreme Court held that the failure to enforce a municipal

zoning ordinance did not prohibit the municipality from enforcing the ordinance in the future, provided that the municipality gave the public notice of its intent. Still, it appears better to take a pro-active role in guarding against faulty work by unqualified individuals by requiring proof of state licensing and/or certification.

Selected Attorney General's Opinions and Court Decisions

NOTE: In reviewing these cases and opinions, the \$20,000 requirement for obtaining state certification has been raised to \$50,000. Persons with questions should verify the proper amount. These summaries are not intended as a substitute for reading the opinion or decision itself.

- The Alabama Supreme Court has held that a successful bidder for carpet replacement need not be a licensed general contractor as required by Section 34-8-1, Code of Alabama 1975. *McCord Contract Floors, Inc. v. Dothan*, 492 So.2d 996 (1986).
- Title 46, 34-8-6, Section 77, prohibits persons from receiving or considering a bid for certain construction projects from anyone not properly licensed as a general contractor. However, the fact that a general contractor is not properly licensed at the time bids are opened does not appear to be significant if the contractor is properly licensed when the contract work is awarded and performed. AGO to Hon. Dennis A. Moore, March 25, 1977.
- The term “construct” is not the same as the term “repair” and repair jobs need not be given to a general licensed contractor. AGO to Hon. T.E. Martin, February 6, 1970.
- A city may award a contract for roofing repair to a bidder who otherwise qualifies whether or not such bidder is a licensed general contractor. AGO 1982-145 (to Hon. Billy L. Carter, January 19, 1982).
- When a contractor who has never constructed a building in the city buys property and begins to construct a funeral home thereon under an agreement whereby the contractor will resell the property to the original owner following completion of the construction project, said contractor is subject to the law which requires contractors to buy business licenses. AGO to Hon. David W. Lang, July 11, 1975.
- A contractor need not be licensed by the state in order to do repair work in excess of \$20,000. AGO 1980-273 (to Howard v. Adair, March 18, 1980).
- A person or firm bidding on a re-roofing job in excess of \$20,000 does not have to be licensed as a general

contractor by the state board, even when the job consists not only of re-roofing but also repairs which are structural in nature. AGO 1980-254 (to Hon. Sara G. Crumpton, March 18, 1980).

- The Alabama Supreme Court held in *Louisiana Well Service v. Metfuel*, 614 So.2d 1039 (1993), that contractors engaged in oil and gas well drilling do not fall within the definition of “general contractor” in the licensing statute.
- An owner is exempt from licensure as a general contractor if the owner is himself or herself constructing a building or other improvement on his own property. AGO 1994-057.
- Where a municipality acts as its own contractor pursuant to Section 34-8-7, Code of Alabama 1975, the municipality must use licensed subcontractors if the project will cost \$20,000 or more. If the municipality elects to use a general contractor to oversee the project, subcontractors do not have to be licensed. In either case, subcontractors whose work does not exceed \$20,000 are exempt from the licensing requirements. AGO 1997-053.
- The city’s superintendent of construction, working under the supervision of a licensed architect or engineer, is exempt from obtaining a license under Section 34-8-1. Under the facts represented here, the city may use either the services of an architect or a civil engineer, or both, in the design and construction of a 5,500 square-foot building which will house an auditorium, office space and a workshop. AGO 1988-205.
- Local officials may not issue a building permit for the construction of apartments unless the plans have been approved by either a registered architect or a licensed professional engineer. AGO 1992-211.
- A municipality is not required to use the services of a licensed engineer to resurface roads. AGO 1988-289.
- The Alabama Supreme Court held that the Water Works and Sewer Board of the City of Prichard was not entitled to a summary judgment in a contract action after the board attempted to void a contract with an engineering firm on the basis that the person executing the contract for the firm was not a licensed engineer. *Water Works and Sewer Board of Prichard v. Polyengineering*, 555 So.2d 1050 (1990).
- Full-time employees of a city housing authority do not have to be licensed as plumbers in order to perform routine maintenance repair work on projects owned by the housing authority, unless they engage in the

occupation of plumber for the general public. AGO 1992-202.

- Persons, firms or corporations “installing piping, fittings and system components used with LP-gas” are required to obtain a permit under Section 9-17-105, Code of Alabama 1975. Proper privilege licenses must also be acquired. AGO 1983-485 (to Hon. Leonard Pakruda, September 22, 1983).
- A corporation doing repair work on condominiums is not required to obtain a general contractor’s license; however, the installation of new electrical service and new HVAC does require such a license. AGO 1986-068 (to Hon. Beth Marietta, December 2, 1985).
- Contractors involved in the installation of roofing on residential structures, and on buildings where commercial activity takes place are exempt from the requirements of law dealing with the licensing of heating, air conditioning, roofing and sheet metal contractors. AGO 1982-023 (to Mr. Richard Simmons, October 20, 1981). A town may issue building permits, perform inspections and enforce building codes in the police jurisdiction. AGO 1982-252 (to Dr. Thomas B. Norton, March 22, 1982).
- Cities may issue licenses to air conditioning and heating contractors who have not been board certified until such time as the new certification requirements of 34-31-18, et seq., have been met. AGO 1983-092 (to Hon. W.F. Dykes, Jr., December 7, 1982).
- The Heating and Air Conditioning Contractors Board has no discretion to “grandfather” a person who has not complied with Code of Alabama 1975, Section 34-31-28(b). AGO 1986-026 (to Hon. Richard Simmons, October 25, 1985).
- Individuals employed by gas districts to install heating and air conditioning systems must be certified. AGO 1986-194 (to Hon. Seth Hammett, March 24, 1986).
- The fact that a person or business which does heating and air conditioning work for which certification is required obtains a license under Section 40-12-84 does not relieve him of the obligation to meet the requirement for certification under Section 34-31-18, et seq. AGO 1987-059.
- The Attorney General has advised that a city building official is not prohibited from approving plans for a church, school or place of assembly if the plans bear a registered professional engineer’s seal but not a registered architect’s seal. AGO 1982-444 (to Hon. George E. Little, July 15, 1982).
- The Attorney General has further advised that final acceptance and approval of plans for schools, churches, auditoriums and buildings intended for the mass assemblage of people, and other non-farm buildings whose total cost is \$50,000 or more can only be given by the municipal building official after review for compliance with applicable codes and ordinances. However, before such plans can receive consideration, they must, under state law, bear the seal of a registered architect or engineer. AGO 1983-149 (to Hon. Steve Means, January 27, 1983).
- A municipality may not impose a business license fee on an auctioneer or an auction company licensed by the state. AGO 1998-035
- Licenses professional engineers may perform architectural services incidental to their engineering practice and registered architects may perform engineering services incidental to their architectural practice. AGO 2003-009.
- Residential home builder who performed residential remodeling at the request of a homeowner was not exempt from the licensing requirements under the licensure laws which exempt from licensing owners or property under certain conditions. This exemption does not extend to those who might perform work at the owner’s direction. *Hooks v. Pickens*, 940 So.2d 1029 (Ala. Civ. App. 2006).
- Licensed electrical contractors who install conduit, wire, and fire alarm associated equipment, but do not design, program, certify, inspect, or test fire alarm systems in this state are not subject to the licensing requirements for certified fire alarm contractors. AGO 2010-042.
- A City that was located within a county that had elected to be covered by the home remodeling regulation statutes (Section 34-14A-1 et seq., Code of Alabama 1975), which allowed homeowners to seek compensation from the Homeowner’s Recovery Fund for damages sustained as a direct result of the conduct of licensed contractors, was subject to the statute even absent its express consent to come under the law. A homeowner was thus entitled to assert a negligence claim against the City for its failure to confirm contractor’s licensure status before issuing a building permit, which in turn prevented the homeowner from seeking relief from said Fund. *Murry v. City of Abbeville*, 997 So.2d 299 (Ala.2008).
- City housing authority’s application for general contractor’s license was not denied by operation of law when it was not granted by Licensing Board for General Contractors within one year of the original

application date, and thus Board retained power to issue written decision on the application as required by Alabama Administrative Procedure Act (AAPA). *Huntsville Housing Authority v. State of Alabama Licensing Bd. for General Contractors*, 179 So.3d 146 (Ala.Civ.App.2014).

- Section 34-36-16(b) of the Code of Alabama prevails over section 34-36-13(a), and therefore, every electrical contractor operating in Alabama must obtain a state license from the Board of Electrical Contractors before engaging in the business of electrical contracting, except as provided in section 34-36-16(c). AGO 2012-046.
- A municipality may require a business engaged in “Truck Transportation” to pay a license fee based on all of the gross receipts of the business from whatever source derived when the business is not required to purchase a business license from any other municipality and the only physical location for that business is located within the municipal limits or its police jurisdiction. AGO 2012-054.
- Because there are no licensure exemptions for official court reporters pursuant to state law, official court reporters are required to be licensed by the Alabama Board of Court Reporting. AGO 2012-064.
- Montgomery County Circuit Court was the only proper venue for a foreign corporation’s appeal from the denial of a refund petition by a Jefferson County municipality, where the corporation had no principal place of business in Alabama. *Ex parte Tellabs Operations, Inc.* 84 So.3d 53 (Ala.2011).
- A municipality’s policy of automatically denying permits for new applicants and automatically renewing permits for existing permit holders violated the dormant Commerce Clause. *Florida Transp. Services, Inc. v. Miami-Dade County*, 703 F.3d 1230, (11th Cir.2012).
- A city, by ordinance, may cease requiring building permits for construction. A county commission may require permits in the corporate limits if the city council consents for the county to apply its building codes. AGO 2019-023.

20. Economic and Industrial Development

What legal authority does my city have to promote economic and industrial development in our area? That question is often asked by municipal officials who are interested in attracting industries to their cities and towns. The first advice to municipal officials is to study the constitutional provisions and statutes relating to economic and industrial development. Officials should know what cities and towns can and cannot do to stimulate industrial and commercial growth. This article summarizes applicable law and outlines the assistance cities and towns can offer industrial prospects.

Federal Restrictions

Before reviewing state constitutional and statutory authority regarding industrial development, it is important to note that the Internal Revenue Code of 1986, as amended (the “Code”), imposes significant conditions to the issuance of tax-exempt bonds. Under the Code, municipally-issued bonds are classified as either governmental bonds or private activity bonds. Private activity bonds are subject to more stringent restrictions than are governmental bonds in order to qualify for tax-exempt treatment under the Code, and for this reason are often issued as taxable bonds. Generally, a private activity bond is one where more than 10 percent (5 percent in some instances) of the bond proceeds are used in the trade or business of a non-governmental person, and the payment of principal or interest on the bonds equaling more than 10 percent (5 percent in some instances) of the issue is secured by or derived from a nongovernmental person. A bond may also be a private activity bond if 5% of the proceeds of the bond (or \$5,000,000, if lesser) is used to make or finance loans to persons other than governmental entities.

Industrial development bonds, which are a form of private activity bonds, can qualify for tax-exempt treatment but only if they can be classified as “qualified” private activity bonds. Qualified private activity bonds consist of mortgage bonds of various types, certain small issue bonds (which are a frequent source of generally small facility industrial development financing), student loan bonds and redevelopment bonds, qualified 501(c)(3) bonds (generally for hospitals), and, importantly in the municipal context, exempt facility bonds, i.e., those bonds at least 95 percent of the proceeds of which are used to provide airports, docks and wharves, mass commuting facilities, water, sewage and solid waste facilities, facilities for local furnishing of electricity or gas, local district heating or cooling facilities, qualified hazardous waste facilities, qualified residential rental facilities, high-speed intercity rail facilities,

environmental enhancements of hydro-electric generating facilities, qualified public educational facilities, qualified green building and sustainable design projects, and qualified highway or surface freight transfer facilities.

This is a complex area and League staff strongly advises that municipalities contemplating issuing industrial development bonds obtain additional assistance from an investment banking firm and from bond counsel.

The Cater Act

In 1949 the Alabama Legislature adopted what is popularly referred to as the Cater Act. The provisions of this Act are codified at Sections 11-54-80 through 11-54-101, Code of Alabama 1975. The Cater Act authorizes the creation, in each municipality, of a public corporation known as an industrial development board to promote trade and industry and to further the use of agricultural products and natural resources of the state by inducing new manufacturing projects in the state. Such corporations are authorized to lease and dispose of properties for this purpose. The term “project” is defined to include the following:

- A. “Any land and any building or other improvement thereon and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, which shall be suitable for use by any one of the following or by any combination of two or more thereof:
 - 1. Any industry for the manufacturing, processing or assembling of any agricultural, manufactured or mineral products;
 - 2. Any commercial enterprise in storing, warehousing or distributing any products of agriculture, mining or industry, or providing hotel, motor inn services, specifically excluding public dormitories or student housing facilities for institutions of higher learning, including food or lodging services or both;
 - 3. Any commercial enterprise providing linen rental services (including laundry and cleaning services related or incidental thereto) primarily to industries and commercial enterprises described in either of the proceeding subparagraphs 1 and 2 and to institutions such as hospitals, nursing homes or other health care facilities and educational and training institutions;
 - 4. Any enterprise for the purpose of research in connection with any of the following:

- i. Any of the foregoing;
 - ii. the development of new products or new processes;
 - iii. the improvement of existing products or known processes.
 - iv. the development of facilities for the exploration of outer space or promotion of the national defense.
5. Any utility for the production of electricity by water power. In connection with a project described in this paragraph, “project” does not include facilities designed for the sale or distribution to the public of electricity, gas, water or telephone or other services commonly classified as public utilities.
6. Any commercial enterprise engaged in banking, specifically including bank holding companies.
- B. Any project may consist of or include any facility necessary or appropriate for use by any industry or enterprise of the character described in the first sentence of this subdivision, including, without limiting the generality of the foregoing:
- 1. Office facilities designed for use by any such industry or enterprise not only in connection with its operation in this state but also for use by it as national, regional or divisional offices in the management and supervision of its manufacturing, processing, assembling, storing, warehousing, distributing, selling or research operations, wherever located.
 - 2. Facilities for or useful in the control, reduction, abatement or prevention of pollution of air or water or both.
- C. This amendment (Acts 1983, Number 83-199) does not pertain to restaurants or food service operations which are not a part of hotels or motor inns mentioned above.”

In addition, Sections 11-54-120 through 11-54-123, Code of Alabama 1975, as amended, give industrial development boards additional powers to sell and issue their bonds for and to acquire, construct, enlarge, improve, replace, equip, maintain, use, operate, lease and dispose of “ancillary facilities,” which term is defined at Section 11-54-120(3), Code of Alabama 1975, as follows:

“(3) Ancillary facility: Any land and any building or other improvement thereon and all real and personal properties deemed necessary in connection therewith, including without limitation office facilities and any other necessary or appropriate facilities, whether or

not now in existence, which shall be suitable for use by any of the following or by any combination of two or more thereof;

- a. a. Any industrial development board;
- b. b. Any local or regional chamber of commerce, board of trade or other similar association or organization, one of the purposes or objects of which is the promotion of industrial or commercial development or the improvement of trade, business, professional or economic conditions;
- c. c. Any convention, visitors or other similar bureau or organization, one of the purposes or objects of which is the promotion of tourism or of conventions or meetings of business, civic or trade association groups; and
- d. d. Any nonprofit educational foundation, one of the purposes or objects of which is the acquisition, development and sale of land for industrial development purposes and whose net earnings inure to the benefit of one or more institutions of higher education operated by the state of Alabama.”

Formation of Corporation

The Cater Act Industrial Development Corporation is authorized to be formed in the following manner:

First, three or more natural persons who are qualified electors and taxpayers in the municipality file written application with the municipal governing body requesting permission to incorporate an industrial development board of the city or town pursuant to the provisions of Section 11-54-80, et. seq., Code of Alabama 1975. It is customary for the application to set out the proposed name of the corporation as “The Industrial Development Board of the City [Town] of _____,” and also to accompany the application with a copy of the proposed certificate of incorporation. Sections 11-54-82 and 11-54-83, Code of Alabama 1975. The attorney general has ruled that pursuant to Section 11-54-83, a municipal industrial development board has no authority to change the style of its name from anything other than the foregoing. AGO 2004-014.

Next, the municipal governing body adopts a formal resolution approving the application and extending permission to incorporate. The petitioners then take the certificate of incorporation, which they subscribe and acknowledge and file with the probate judge of any county in which a portion of the municipality is located. When the probate judge approves and files this certificate in the corporation records of his office, the corporation is legally formed. Section 11-54-84, Code of Alabama 1975.

When the corporation is formed, the municipal

governing body then appoints not less than seven qualified electors and taxpayers of the municipality to serve as directors of the corporation. As nearly as possible, they are divided into three groups for appointment to staggered terms of two, four and six years, respectively. Thereafter the terms of directors are for six years. The directors serve without compensation except that they may be reimbursed for actual expenses incurred. At the time of the election of directors, if a chamber of commerce or similar organization exists in the municipality, the directors shall be chosen from among the membership of such organization unless in the judgment of the governing body there are no such members both suitable and available. **No director shall be an officer or employee of the municipality.** Section 11-54-86, Code of Alabama 1975. Additionally, all meetings of the board for any purpose are open to the public. Section 11-54-87(c), Code of Alabama 1975.

Powers of Corporation

The powers of a Cater Act corporation are expressly provided in Section 11-54-87, Code of Alabama 1975. Cater Act corporations are authorized to acquire one or more “projects” by purchase, construction, exchange, gift or lease. They may also improve maintain and equip those projects. Industrial development boards are recognized as separate legal entities apart from the municipality. Projects are financed through the issuance of revenue bonds which may be payable not only from revenue of the project being financed but also from revenues of other projects and properties of the board. Bonds of the board may be made payable over a period of 40 years, and there is no restriction upon the length of time the project may be leased to an industry. The Act does not require the board to enter a lease agreement with the industrial lessee before the bond is issued. This practice is customary, however. Sections 11-54-87 and 11-54-89, Code of Alabama 1975.

After the project is completed and the lessee is settled, the board may later engage in another project calling for the extension of the original project without fear of constitutional restrictions. Amendment 108, Alabama Constitution of 1901. Lease agreements entered by the board with its lessee may contain options to renew and options to purchase for either a nominal or substantial consideration, also without fear of constitutional restriction. The board is given statutory authority to sell or donate any or all of its properties whenever its board of directors determines that such action will further the purposes of the corporation. Section 11-54-87, Code of Alabama 1975.

Since the Cater Act was originally adopted, corporations created under its authority have, by amendment, been authorized to construct projects, and they have been authorized to borrow funds for temporary use pending the

issuance of their principal bond issues. Section 11-54-91, Code of Alabama 1975. Their jurisdictions have been extended to include areas located within 25 miles of the corporate limits of the municipality, with the provision that projects, other than projects consisting principally or solely of facilities for or useful in the control of air and/or water pollution, may not be constructed within the corporate limits of another municipality or in the police jurisdiction of another municipality without the consent of such municipality. If the project is in another county, the board must have the consent of the county governing body. Section 11-54-87, Code of Alabama 1975.

Exemptions

By statute, properties acquired by a Cater Act corporation are exempt from ad valorem taxes. Section 11-54-96, Code of Alabama 1975. The bonds of such corporations (together with the income therefrom) are exempt from property and income taxes of the state. Section 11-54-96, Code of Alabama 1975. As noted above, the interest income from bonds issued to finance such projects is exempt from federal income taxes, provided the bonds meet the test of the federal laws which limit the amounts of bonds that may be issued by a municipality.

All hotels and motor inns built under Section 11-54-80 are not exempt from ad valorem taxes. Section 11-54-96.1, Code of Alabama 1975.

Industrial development boards are also exempted from the laws of the state of Alabama governing usury or prescribing or limiting interest rates, including, without limitation, the provisions of Chapter 8 of Title 8. Section 11-54-97, Code of Alabama 1975.

The industrial development board and all contracts made by it shall be exempt from the provisions and requirements of Sections 41-16-50 through 41-16-63, which provide for competitive bids in connection with certain contracts. Section 11-54-98, Code of Alabama 1975.

Endowment Trust Funds

Certain industrial development boards are authorized to establish endowment trust funds for the promotion of industry, commerce and trade within their respective areas and to accept contributions to such funds. Section 11-54-125, et seq., Code of Alabama 1975.

Caution about the Cater Act

Caution should be used if the Cater Act lease contains an option to purchase at the termination of the lease. If the lease contains an option to purchase for a nominal consideration, the Internal Revenue Service might deem it a lease-sale agreement. In such cases, the deductibility of the lessee’s rent and the tax-free character of the bond issue

(together with the bond interest) might be jeopardized. In any event, approval of such an option to purchase in the lease should be obtained from the IRS before final closing.

The Wallace Act

In 1951 the Legislature adopted the Wallace Act which authorizes municipalities to promote industry and trade by the acquisition and financing of manufacturing and industrial projects for lease to industrial interests. The Act is codified at Sections 11-54-20 through 11-54-32, Code of Alabama 1975. The term “project” is defined to include the following:

“Any land and any building or other improvement thereon and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, which shall be suitable for use by the following or by any combination of two or more thereof:

- a. Any industry for the manufacturing, processing or assembling of any agricultural or manufactured products;
- b. Any commercial enterprise, in storing, warehousing, distributing or selling products of agriculture, mining or industry;
- c. Any commercial enterprise providing linen rental services (including laundry and cleaning services related or incidental thereto) primarily to industries and commercial enterprises described in either of the preceding subparagraphs (a) and (b) and to institutions such as hospitals, nursing homes, other health care facilities and educational and training institutions.
- d. Any enterprise for research in connection with any of the foregoing or for the purpose of developing new products or new processes or improving existing products or known processes or for the purpose of aiding in the development of facilities for the exploration of outer space or promoting the national defense; and
- e. Pollution control facilities, which shall be suitable for use by any industry or enterprise or by any combination of two or more thereof, but not facilities designed for the sale or distribution to the public of electricity, gas, water or telephone or other services commonly classified as public utilities.” Section 11-54-20, Code of Alabama 1975.

In *Newberry v. Andalusia*, 57 So.2d 629 (Ala.1952), the Supreme Court not only upheld the constitutionality of the Wallace Act, but also held that the act provides authority for a municipality to equip and furnish such projects.

A municipality is not limited to projects within its corporate bounds. The Wallace Act authorizes a municipality to acquire projects no more than 15 miles of its corporate limits. Section 11-54-22, Code of Alabama 1975.

Instead of working through a separate corporate entity, such as the Cater Act corporation, the municipal governing body acts directly under the Wallace Act. Upon finding an industrial prospect, the governing body adopts a resolution stating its willingness to provide a project under the terms of the Act and then enters a contract with the prospect, the latter agreeing to lease the project. Prior to issuing revenue bonds to finance the project, the municipality is required to enter into a firm lease agreement with the industrial prospect, conditioned upon completion of the project and providing for payment to the municipality of such rentals as, based upon its determinations and findings, will be sufficient to pay the principal and interest on the bonds, to maintain necessary reserves and to provide for maintenance and insurance (unless the lease requires the lessee to maintain and insure). Sections 11-54-21, 11-54-23, and 11-54-30, Code of Alabama 1975.

Wallace Act Bonds

Wallace Act bonds may be made payable over a period of 30 years and may be sold at public or private sale. They may be secured by pledge or rental revenues, mortgage of the project and pledge of the lease. **A municipality is forbidden to contribute any part of the cost of acquiring a project.** Costs of the project must be raised from the sale of bonds pursuant to the Act. The indebtedness created by such bond issues is not chargeable against the municipal debt limit and is not regarded as a debt chargeable against the taxing powers of the municipality. Sections 11-54-24 and 11-54-30, Code of Alabama 1975.

Projects constructed and financed under the Wallace Act, being the property of the municipality, are free from all ad valorem taxation. The bonds and interest therefrom are free from state property and income taxation. Also, interest from Wallace Act bonds is free from federal income taxation, provided it meets the limitations prescribed by Congress which limit the total amount of tax-free industrial revenue bonds. Furthermore, Wallace Act bonds are made legal investments for savings banks and insurance companies organized under Alabama law. Section 11-54-31, Code of Alabama 1975.

Wallace Act Limits

Several factors must be considered as limiting the use

of the Wallace Act. A municipality may not give the lessee an option to purchase for a nominal consideration upon the termination of the lease, and doubt has been expressed as to whether a municipality may lease the project (including options for renewal) for a period of longer than 30 years.

Ready to Use Either

Neither the Cater nor Wallace acts were intended to favor outside or new industries over the expansion of industries existing in a municipality. Both acts may be used to expand established local industries, and both may be used to expand an industry which is leasing an existing Cater Act project. Generally, an industrial prospect will make the final decision as to which of these acts will be used to finance the project it is to lease. Therefore, every municipality which is seeking new industry should establish a Cater Act corporation to have it available should the prospect wish to proceed under its authority. As a matter of fact, records show the Cater Act is preferred in most industrial financing projects.

Constitutional Amendments

In November of 2004, Amendment 772, Alabama Constitution of 1901 was ratified and added to the Constitution as Section 94.01. This Amendment grants specific authority to counties and municipalities to lend credit to or grant public funds and things of value to any individual, firm, corporation, or other business entity, public or private, for the purpose of promoting the economic or industrial development of the county or municipality.

However, no such action should be taken unless prior thereto the governing body approves the action, at a public meeting, by resolution stating that the expenditure of public funds for the purpose specified will serve a valid and sufficient public purpose notwithstanding any incidental benefit accruing to any private entity or entities. Also, the governing body must give at least seven days notice of this meeting, to be published in the newspaper having the largest circulation in the county or municipality as the case may be, describing in reasonable detail the action proposed to be taken, a description of the public benefits sought to be achieved by the action, and identifying each individual, firm, corporation, or other business entity to whom or for whose benefit the county or the municipality proposes to lend its credit or grant public funds or thing of value. See Amendment 772(c) Alabama Constitution of 1901.

Prior to the ratification of Amendment 772 many special constitutional amendments were ratified. Since 1950, Alabama voters have ratified numerous amendments which confer special powers upon specific counties and municipalities to tax, issue bonds, construct industrial projects and enter into special industrial development

activities. Many of these amendments require an election at the county or municipal level before exercising such powers. One exception is Amendment 84, which relates to municipalities located in Marion County, the first of the series adopted in 1950.

The other amendments are as follows:

Amendment 94, relating to municipalities in Fayette County; Amendment 95, relating to municipalities located in Blount County; Amendment 104, relating to the municipalities of Haleyville and Double Springs; Amendment 128, relating to Bullock County; Amendment 155, relating to the municipality of Uniontown; Amendment 166, relating to Chilton County (trade school and industrial development); Amendment 174, relating to Jackson County (trade school and industrial development); Amendment 183, relating to Autauga County and municipalities located therein; Amendment 186, relating to Franklin County and municipalities located therein; Amendment 188, relating to Greene County and municipalities located therein; Amendment 189, relating to Lamar County and municipalities located therein; Amendment 190, relating to Lawrence County and municipalities located therein; Amendment 191, relating to Madison County and the city of Huntsville; Amendment 197, relating to St. Clair County and municipalities located therein; Amendment 217, relating to Clarke County; Amendment No. 220, relating to the City of Bayou La Batre; Amendment 221, relating to the city of York; Amendment 228, relating to industrial revenue bonds not included in debt limit; Amendment 244, relating to the town of Lester; Amendment 245, relating to Madison County and Huntsville; Amendment 246, providing that Marion County municipalities may issue refunding bonds for industrial development; Amendment 250, relating to Sumter County; Amendment 251, relating to the city of Livingston; Amendment 256, relating to the towns of Addison and Lynn; Amendment 259, relating to the city of Evergreen; Amendment 261, relating to the city of Bayou La Batre; Amendment 263, relating to municipalities in Geneva County; Amendment 277, relating to the town of Carbon Hill; Amendment 302, relating to municipalities in Pickens County; Amendment 303, relating to the cities of Hartselle and Decatur; Amendment 312, relating to the municipalities in Bibb County; Amendment 313, relating to the municipalities in Hale County; Amendment 376, relating to industrial parks in the city of Anniston; Amendment 415, relating to industrial sites and industrial park projects in Calhoun County and the municipalities therein; Amendment 429, relating to economic and industrial development in certain named counties and the municipalities therein; Amendment 468, relating to industrial development in Marengo County; Amendment 545, relating to the Industrial Development

Board of Lawrence County; Amendment 596, relating to the promotion of economic and industrial development in Walker County; Amendment 642, relating to the promotion of economic and industrial development in Lee County; Amendment 646, relating to the promotion of economic and industrial development in Marengo County; Amendment 679, relating to the promotion of economic and industrial development in Chilton County; Amendment 713, relating to the promotion of economic and industrial development in Montgomery County; Amendment 719, relating to the promotion of economic and industrial development in Butler County; Amendment 723, relating to the promotion of economic and industrial development in Coffee County; Amendment 725, relating to the promotion of economic and industrial development in Covington County; Amendment 729, relating to the promotion of economic and industrial development in Henry County; Amendment 737, relating to the promotion of economic and industrial development in Russell County; Amendment 739, relating to the promotion of economic and industrial development in Tallapoosa County; Amendment 748, relating to economic development in Crenshaw County; Amendment 750, relating to economic development in Baldwin County; Amendment 752, relating to the promotion of commercial development in Hartselle, Morgan County; Amendment 757, relating to economic and industrial development in Barbour County; Amendment 759, relating to economic and industrial development in Baldwin, Bullock, Coffee, Coosa, Dallas, Etowah, Geneva, Houston, Jefferson, Lawrence, Macon, Marengo, Mobile, Morgan, Talladega, Madison, Shelby, and Tuscaloosa counties and of each municipality situated in said counties; and Amendment 761, relating to economic and industrial development in Etowah County.

While these amendments have been used in several instances, there is a natural reluctance toward the subsidization of industry with tax money and the general credit of the municipality or county. In most instances the Wallace and Cater acts provide ample assistance for the attraction of a desirable industry. This is evident by the wide use of the two acts.

Authority to Advertise and Promote

Sections 11-47-9 and 11-47-10, Code of Alabama 1975, give all municipalities the authority to enter into contracts or agreements with any persons, firms or corporations for the advertisement of the municipality or any function or undertaking of the municipality both inside and outside the corporate limits. In so doing, a recognized medium of advertising must be used. The costs of such advertising are made legal charges against available municipal funds.

Section 11-47-11, Code of Alabama, 1975 authorizes every municipality in Alabama to set aside, appropriate

and use municipal funds or revenues for the purpose of developing, advertising and promoting agricultural, mineral, timber, water, labor and all other resources of every kind within its police jurisdiction and for purposes of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries within the municipality, or elsewhere inside the county, not more than 15 miles from the boundaries of the municipality.

Power to Sell or Lease

Sections 11-47-20 and 11-47-21, Code of Alabama 1975, provide authority for a municipality to sell or lease real estate belonging to it which is no longer needed for public or municipal purposes. While property sold under the authority of these sections must be sold for an adequate consideration, in several instances, municipalities have sold such property to Cater Act corporations for individual development purposes.

The Attorney General has opined that Alabama cities and towns have the authority to appropriate funds to Cater Act corporations and to deed property to such corporations for a nominal consideration. It is advised that each municipality get an opinion from the Attorney General whenever such a grant or appropriation is made.

A municipality may not put any of its money or property into a Wallace Act project. Wallace Act projects must be financed wholly through the funds derived from the sale of bonds to finance the project. Section 11-54-30, Code of Alabama 1975.

The transfer of land by a commercial development authority to a private person, firm, or corporation, originally acquired from the state and transferred to the authority through one or more transactions between governmental entities, is subject to the competitive bid requirements of the Land Sales Act, except if transferred for the purpose of promoting the economic and industrial development of the county or municipality or for the purpose of constructing, developing, equipping, and operating industrial, commercial, research, or service facilities of any kind under Section 94.01 of the Recompile Constitution of Alabama, and in compliance with section 94.01(c) of the Constitution if transferred for less than fair market value. AGO 2009-008 and AGO 2008-009.

A city may transfer property to an Electrical Cooperative for less than adequate consideration if the city determines that the transfer serves a public purpose. AGO 2010-102. The publication and resolution requirements found in Section 94.01 (Amendment 772) of the Alabama Constitution of 1901, may apply.

A municipality, for less than adequate consideration, may convey real property owned by the city to the industrial development board for the board's use for the promotion of

industry within the city, if the city council complies with the conditions of section 94.01 (Amendment 772) of the Alabama Constitution, including a determination that a public purpose is served by the transfer. AGO 2011-051. To determine whether a public purpose is served, the governing body must look to the statutes setting forth the powers of the governmental entity. If within such powers, there exists the authority to promote the action at issue, then the governing body need only decide whether the appropriation will help accomplish that purpose. AGO 2012-002.

Growing Pains

One of the biggest problems confronting future industrial expansion is the procurement of proper industrial sites. Under the Wallace and Cater acts, Alabama municipalities and their industrial development corporations do not have the power to condemn industrial sites for their projects. In many municipalities this has already become one of the foremost obstacles to industrial expansion, and as the state becomes more and more industrialized it will become more acute. It should be noted that Cater Act corporations have the authority to purchase industrial sites for future development if they can arrange the financing of such acquisitions. Also, a municipality can control the use of property within its corporate limits and police jurisdiction by adopting comprehensive land use plans and zoning regulations. In this connection, close contact should be maintained between the municipality, the industrial development corporation and the municipal planning commission.

Industrial Parks

It is certainly best if municipalities can establish an industrial park which will be ready for prospects. Alabama municipalities have the authority to establish industrial parks, and industrial development boards created under the Cater Act have the authority to establish industrial parks. This authority was given to municipalities by League-sponsored legislation which is codified at Sections 11-54-1 through 11-54-3, Code of Alabama 1975. Sections 11-92-1 through 11-92-11, Code of Alabama 1975, provide another procedure for establishing industrial parks by a county or a municipality or both.

As noted, the Attorney General has ruled that a municipality may grant land to industrial development corporations and make appropriations to such industrial development corporations for this purpose. It is strongly recommended that each municipality obtain an opinion from the Attorney General before making any such grants or appropriations. There is a long list of Attorney General's opinions which uphold this position, however.

Commercial Development

There has always been a strong urge to use industrial revenue bonds to finance commercial development. It appears that these bonds, issued by a Cater Act industrial board or by a municipal governing body under the Wallace Act, can only be used in very limited circumstances for commercial development purposes.

All municipalities have the authority to establish a commercial development authority for such purposes pursuant to Sections 11-54-170 through 11-54-192, Code of Alabama 1975. Such authorities are given a more detailed overview in a separate article entitled "Commercial Development Authorities" in this publication.

Sections 11-54-140 through 11-54-153, Code of Alabama 1975, as amended, give municipalities the authority to establish hotel projects.

Pre-Issuance Procedure

To prevent unscrupulous promoters from taking advantage of the authorizing act by inducing issuers to issue industrial revenue bonds which, upon careful investigation, would reveal to be improvident, the Legislature passed a law which requires a notice of issuance of bonds. The law requires any issuer proposing to issue any industrial revenue bonds to, at least 20 days prior to the date of delivery of such industrial revenue bonds, deliver to the director of the Securities Commission a notification in writing of its intention to issue the industrial revenue bonds. Section 8-6-115, Code of Alabama 1975. Under certain circumstances, the director of the Securities Commission can issue a stop order requiring the issuer to not issue the bonds within a specified period of time. The complete procedure involved in pre-issuance validation of industrial revenue bonds is codified at Sections 8-6-110 through 8-6-122, Code of Alabama 1975, as amended.

Although a city or town cannot be held liable for bad bond issues, any bad issues can adversely affect future bond issues. For this reason, the League strongly recommends that municipalities and industrial development boards of this state work closely with the director of the Alabama Securities Commission.

Special Tax Exceptions

To encourage the building, expansion and operation of certain plants, industries and factories in the state, municipal and county governing bodies are authorized to abate several types of taxes, including state taxes, assessed for all county and municipal purposes (except for educational purposes) for a period of 10 years. Section 40-9B-4, Code of Alabama 1975. An owner of real property who leases it for industrial development use under the Tax Incentive Reform Act of 1992 is entitled to an abatement of non-educational ad

valorem taxes, if approved by the abatement granting authority. AGO 98-201. Under the Tax Incentive Reform Act of 1992, Section 40-9B-1, et seq., Code of Alabama 1975, neither a municipality nor its industrial development board can enter into an agreement to abate non-educational county ad valorem taxes or county construction related transaction taxes if there is no corresponding municipal ad valorem tax or construction related transaction tax to be abated. A municipality or its industrial development board can abate all or part of the state's non-educational ad valorem taxes, the state's construction related transaction taxes, and the mortgage and recording taxes related to private use industrial property and security documents and other recordable documents associated therewith. AGO 2005-112. The list of types of industry included in this authority is too long to include in this article but is found in Section 40-9B-3, Code of Alabama 1975. Municipalities and public industrial development authorities are required to obtain written consent from the governing body of a county prior to granting an abatement of any county taxes. Sections 40-9B-5 and 40-9B-8, Code of Alabama 1975.

The governing body of a municipality may, in its discretion, grant an abatement to any taxpayer of all or a portion of the applicable business license tax otherwise due for up to three license years if the taxpayer substantially complies with the criteria for abatement of sales or use taxes under the Tax Incentive Reform Act of 1992, found at Section 40-9B-1, et seq., following a public hearing on same. Section 11-51-189, Code of Alabama.

The Alabama Tourism Destination Attraction Incentive Act (Act 2012- 436) became effective on May 15, 2012, and amended Sections 40-9B-3, 40-18-190 and 40-18-193 Code of Alabama 1975. This Act defines and includes "tourism destination attraction" in the definition of "industrial research enterprise" and authorizes municipal governments to approve the abatement of specified ad valorem taxes or construction related taxes upon the adoption of a resolution by the municipal governing body.

Downtown Redevelopment Authorities

Sections 11-54A-1 through 11-54A-25, Code of Alabama 1975, authorize any municipality in Alabama to incorporate a downtown redevelopment authority to promote trade and commerce by inducing commercial enterprises to upgrade, improve, modernize, and expand existing facilities and to locate new facilities in the central business district of the municipality. Section 11-54A-1 notes that such development promotes the general welfare of the municipality by creating a favorable climate to attract new industry and commerce.

Incorporation Procedures

To incorporate a downtown redevelopment authority, any number of natural persons (not less than three) who are duly qualified voters of the municipality, shall file a written application with the municipal governing body to adopt a resolution declaring it wise, expedient and necessary that the proposed authority be formed and authorizing the applicants to proceed with the incorporation. The governing body shall review the application and adopt a resolution either approving or denying the application. A copy of the application shall be made a part of the minutes of the meeting where final action is taken. Section 11-54A-4, Code of Alabama 1975.

Within 40 days of the adoption of the resolution, the applicants must file for record, with the probate judge of the county where the municipality is located, a certificate of incorporation containing the names of the persons forming the authority and other information required by Section 11-54A-5. The certificate of incorporation must be filed and acknowledged by the incorporators. The corporation comes into existence as a public corporation upon the filing for record of the certificate of incorporation and the other information requested. Section 11-54A-5, Code of Alabama 1975.

The incorporators of a redevelopment authority for a municipality located in more than one county may file the certificate of incorporation in only one of those counties. It should be noted that nothing would prohibit the recording of a copy of that filing in the other counties in which the city is located to place the residents of those counties on notice of the authority in the incorporating county. AGO 2010-085.

Board of Directors and Officers of the Authority

Each downtown redevelopment authority shall be governed by a board of directors consisting of any number of directors (not less than three) who shall be elected by the municipal governing body. The initial board shall be divided into three groups. Group one shall serve for a term of two years. Group two shall serve for a term of four years. Group three shall serve for a term of six years. Thereinafter, each director will serve for six years. Directors shall be duly qualified voters of the municipality and shall be eligible for re-election. Vacancies shall be filled by the municipal governing body. Directors are eligible to receive reimbursement for expenses actually incurred by them in the performance of their duties. Section 11-54A-7, Code of Alabama 1975.

Officers of the authority shall consist of a chairman, vice chairman, secretary, treasurer and such other officers as the board deems desirable. The chairman and vice chairman shall be elected by the board from its membership. The other officers shall be elected by the board but do not have

to be members of the board. The office of secretary and treasurer may be held by the same person. The chairman, vice chairman, secretary and treasurer shall also hold those positions on the board. Section 11-54A-8, Code of Alabama 1975.

Power of the Authority

Section 11-54A-9, Code of Alabama 1975, lists the powers of a downtown redevelopment authority. Subsection 5 gives the authority the power to acquire (whether by purchase, construction, exchange, gift, lease or otherwise), to refinance existing indebtedness on, and to improve, maintain, equip and furnish one or more “projects,” including all real and personal properties which the board of the authority may deem necessary in connection therewith, regardless of whether or not the project was then in existence.

Section 11-54A-2, Code of Alabama 1975, defines “project” as the interests in land, buildings, structures, facilities or other improvements located or to be located within the downtown development area (the downtown central business district of the municipality, including areas used primarily for business and commercial purposes) and any fixtures, machinery, equipment, furniture or other property of any nature whatsoever used on, in, or in connection with any such land, interest in land, building, structure, facility or other improvement, all for the essential public purpose of the development of trade, commerce, industry and employment opportunities in the downtown development area. A project may be for any use, provided a majority of the members of the authority determine, by resolution, that the project and such use thereof would further the public purpose of the act. Section 11-54A-2, Code of Alabama 1975.

The authority has the power to sell, exchange, donate or convey and grant options to any lessee to acquire any of its projects and any or all of its properties. The authority may issue bonds and mortgages and pledge any or all of its projects as security for the payment of the principal of, and interest on, any such bonds and any agreements made in connection therewith. The authority has broad powers to finance, acquire and operate projects and to pay for the costs of such projects from bond proceeds or other funds of the authority. All bonds issued by the authority shall be payable solely out of the revenues and the receipts derived from the leasing or sale by the board of its projects. Section 11-54A-9, Code of Alabama 1975.

A municipality may utilize its downtown redevelopment authority, organized pursuant to Section 11-54A-1 et seq. Code of Alabama 1975, to revitalize and rebuild commercial and or retail enterprise in its central business district. AGO 2006-118.

Power to Extend Credit

The authority has the power to extend credit to make loans to any person, corporation, partnership or other entity for the costs of any project upon such terms and conditions as the authority shall determine to be reasonable in connection with such extension of credit or loans, including provision for the establishment and maintenance of reserve funds. A number of other powers are given to the authority in Section 11-54A-9, Code of Alabama 1975.

Exemptions from Taxation, Usury and Bid Laws

The authority, its property and income and other interests, are exempt (1) from all taxation in the state, (2) from the state usury laws, and (3) from the competitive bid law where no city, state, county or federal tax revenues are being used. Sections 11-54A-14, 11-54A-16 and 11-54A-17, Code of Alabama 1975. According to the Attorney General’s office, whether a tax exemption under Section 11-54A-1, et seq., applies is a question of fact concerning whether the property is located in a defined downtown redevelopment area. AGO 1997-179.

Loans, Grants by Counties, Municipalities

Any county, municipality or other political subdivision, public corporation, agency or instrumentality of this state may, upon such terms and with or without consideration as it may determine, lend or donate money or property to or perform services for the benefit of the authority. Section 11-54A-22, Code of Alabama 1975.

Enterprise Zones

Sections 41-23-20 through 41-23-32, Code of Alabama 1975, authorize the creation of enterprise zones for promoting growth in economically-depressed areas. An enterprise zone is a geographical area where governmental restrictions and taxation are reduced in the hopes of stimulating private investment. Section 41-23-21, Code of Alabama 1975.

Enterprise zones are another marketing tool to help attract new businesses to Alabama. The law defines an enterprise zone as a “geographic area which is economically depressed, in need of expansion of business and industry and the creation of jobs and designated to be eligible for the benefits of this article.” Both urban and rural areas can qualify to be designated as enterprise zones. Section 41-23-21, Code of Alabama 1975.

Section 41-23-40, Code of Alabama 1975, provides for exemptions for businesses that locate in depressed areas of the state.

The Alabama Department of Economic and Community Affairs (ADECA) administers the enterprise zone program. ADECA is responsible for establishing criteria for areas to

qualify as enterprise zones. In developing the standards, ADECA is to consider five categories: unemployment, poverty rates, per capita income, migration from the area and number of residents receiving public assistance.

A company may not receive enterprise zone benefits if it closes or reduces employment in one location in order to expand into an enterprise zone in another location within Alabama. AGO 94-00230.

Designating Areas as Enterprise Zones

The law states that either the state or a governmental entity may apply to have an area classified as an enterprise zone. The application must include a statement of the incentives the governmental entity is offering. In addition, the law lists a number of services and duties the governmental entity must perform before an area can be designated as an enterprise zone. State, county and municipal governments are expected to devise innovative programs and to actively pursue enterprise zone designation. Section 41-23-23, Code of Alabama 1975.

The maximum number of zones allowed by law is 27 and the maximum acreage in a zone is 10,000 acres. Section 41-23-22, Code of Alabama 1975.

Attorney General's Opinions

The Attorney General of Alabama has rendered a number of opinions relating to the authority of municipalities with regard to industrial and economic development. Special attention is called to the following:

- Cities may transfer, for sufficient consideration, real property to an industrial development board and such board may sell or develop such property as long as it is used for industrial development purposes. AGO 1979-225 and AGO 1980-464.
- An industrial development board is not authorized to sell property to the board chairman even when he or she is the highest bidder. AGO 1979-156.
- An industrial development board may not participate in the expansion of facilities to be located within the corporate limits of another municipality. AGO to Hon. Lyman Mason, January 28, 1970.
- Industrial development boards should require a bond as provided by law on its construction contracts. AGO to Mayor J. R. Brunson, December 4, 1969.
- A city may contribute funds to its industrial development board. The law does not prohibit a city officer from selling property to the board. AGO to Hon. H. E. Holladay, April 18, 1969. **Note:** Due to possible conflict with Section 94 of the Alabama Constitution, the League strongly urges all municipalities to obtain their own opinion on this subject.
- An industrial development board has authority to convey real property owned by it to an individual for nominal consideration. AGO to Hon. Doyle R. Young, September 14, 1971.
- A county may contribute to a municipal industrial development board. AGO to Hon. J. H. Faulkner, January 15, 1975.
- Neither a municipality nor its industrial development board is legally authorized to acquire private property by condemnation for the purpose of providing a plant site for leasing to an industry. AGO to Hon. John E. Adams, August 13, 1971.
- A municipal industrial board may make a loan from a commercial bank to construct a manufacturing facility. Interest paid on loans made by industrial development boards is exempt from state and local taxation. 132 Quarterly Report of the Attorney General 49.
- A municipality may sell or lease property acquired under the Wallace Act only for fair and adequate consideration. AGO to Marie Hay, April 27, 1977.
- A municipal industrial development board may make a loan by giving its promissory note therefor secured by a mortgage. AGO to Hon. Kenneth W. Gilchrist, December 27, 1981.
- A municipality may grant an industry an option to renew its lease under the Wallace Act at a nominal consideration after the bonds have been paid, but this does not give the municipality the authority to grant the industry an option to purchase for a nominal consideration. AGO to Hon. Pleas Looney, May 5, 1957.
- A municipality may not invest surplus funds in revenue bonds issued under the Wallace Act. AGO to Hon. Grover Bice, June 5, 1975.
- Where a municipality has constructed projects under the Wallace Act it may not give a lessee an option to purchase prior to the expiration of the lease and prior to the amortization of the bond issue. Time or option to purchase must be conditioned on prepayment of all outstanding bonds against the project. AGO to Hon. Pleas Looney, August 5, 1957.
- A Cater Act industrial development board is entitled to an exemption from all sales taxes provided the property is purchased by the board or its agency, the purchases are made in the name of the board, the board's credit

is obligated, and the purchases are paid for with board funds. AGO 1983-199.

- The quorum of an industrial development board is 50 percent of the number of authorized directors plus one. AGO 1983-397.
- A municipality may contribute funds to its industrial development board or make loans to the board which could be secured with a commercial promissory note and a real estate mortgage. However, the city cannot lend its credit to the board. AGO 1984-045.
- All mortgages executed by an industrial development board are exempted from the filing tax. AGO 1984-146.
- Industrial development boards incorporated pursuant to Act 77-762 may not hold executive sessions for any purpose. AGO to Hon. William C. Brewer, III, July 13, 1984.
- An industrial development board may not buy equipment in its name at a discount in order to pass the savings on to interested industries. AGO 1985-155.
- The director of an industrial development board does not have to be a property owner or pay ad valorem taxes in the city. AGO 1985-186.
- A municipal governing body has no authority to override a decision by the industrial development board as to the expenditure of municipal funds. AGO 1985-391.
- A downtown redevelopment authority may define the “central business district” so as to include additional parts of the city. AGO 1985-516.
- Municipalities are not authorized to purchase bonds of an industrial development authority. AGO 1986-082.
- The exemption from taxation for industrial development boards in Section 11-54-95, Code of Alabama, exempts documents from the deed tax in Section 40-22-1 of the Code only where the industrial development board is a party to the deed. AGO 1987-298.
- A municipal industrial development board may not sell property to a board member. Municipal industrial development boards may finance the sale of a building. AGO 1987-311.
- A municipality may grant funds to a county industrial development board which is located less than 15 miles from the corporate limits of the municipality, and ADECA may reimburse the municipality for its contributions. AGO 1988-022.
- A municipality may contribute property to the industrial

development board for nominal consideration. AGO 1988-440.

- It is a conflict of interest for an industrial development board member to do business with the industrial development board. AGO 1989-198.
- An industrial development board must obtain adequate consideration when selling property contributed by a municipality. AGO 1989-216; AGO 1990-254.
- A utilities board may purchase property, convey it to the industrial development board and take a mortgage from the board. AGO 1990-057.
- An industrial development board may not donate funds to a private committee to oppose moving a local school. AGO 1990-198.
- Section 11-63-2, Code of Alabama 1975, authorizes municipalities to make appropriations to industrial development boards. AGO 1991-108.
- An industrial development board may not grant exemptions from taxation, but industrial development property may be exempt. AGO 1991-312.
- An industrial development board is empowered under Section 11-54-80, et seq, Code of Alabama 1975, to secure the services of an individual who will be paid for causing an industry to locate in a city. AGO 1992-222.
- A city industrial development board may borrow funds from a bank to purchase and develop real estate for future projects. AGO 1993-024.
- Industrial development boards have no authority to create a nonprofit corporation which will acquire a for-profit entity whose profits will be paid to the board. AGO 1992-120.
- Funds raised by a group of volunteers for industrial development must be used for that purpose once they are deposited in an account under the control of the industrial development board. Funds which remain under the control of the volunteers may be spent for other purposes. AGO 1993-081.
- A city or town may convey real property to its industrial development board for use as an industrial park. AGO 1993-189.
- An industrial development board is not authorized to pledge TVA in-lieu-of-tax money to retire the debt on a project. AGO 1994-175.
- The attorney general’s office has held that a municipality may convey real property to its industrial development board. The property must be used by the board pursuant

to Sections 11-54-80 through 11-54-101 of the Code of Alabama. AGO 1998-191.

- A municipality may loan funds to its industrial development board. AGO 1999-094.
- A municipality may appropriate money to its industrial development board to purchase land for an industrial park. AGO 2000-042.
- A municipality may convey real property to its industrial development board for immediate resale at less than fair market value without violating Section 94 of the Alabama Constitution, 1901, if it determines that the conveyance furthers a public purpose. AGO 1999-150.
- A municipality may use general fund money to buy land and then convey title of the land to the IDB. AGO 2000-072.
- A municipal industrial development board may transfer property for purposes that do not qualify as projects under the statutes if the board determines that the sale furthers the purposes of the board and the board receives adequate consideration for the property. AGO 1999-127.
- A municipality may guarantee repayment of bonds issued by the county industrial development board. AGO 1998-180.
- An industrial development board may sell land that it owns to a member or superintendent of a utility board as long as the price received by the municipality is at least equal to the total amounts expended by the municipality with respect to the property sold or not less than reasonable market value of the property sold, as the value is established by the appraisals of at least two independent appraisers. AGO 2001-038.
- An industrial abatement begins on the date the county, city or public authority issues bonds to finance the costs of private use property or, if no bonds are issued, the later date on which title to the property is acquired by or vested in the county, city or public authority, or the date on which the property is or will become owned, for federal income tax purposes, by a private user. While the property is owned and used by the industrial development board, the property is not subject to current use valuation for ad valorem purposes; therefore, the rollback that occurs when current use property is converted to other taxable use is not applicable. AGO 2002-029.
- The use of city and/or county notes or warrants by an industrial development board to pay the cost of purchasing certain real property and performing the

site preparation and improvements to property will not constitute the “issuance of bonds” as that phrase is used in the definition of “maximum exemption period” in Section 40-9B-3(8)a.1, Code of Alabama 1975. AGO 2002-290.

- Pursuant to Section 11-54-83, a municipal industrial development board has no authority to change the style of its name from anything other than “The industrial development board of the _____ of _____”. AGO 2004-014.
- A city may collect contributions and donate those contributions to an industrial development board so long as the board uses the funds for purposes that are consistent with the statutory authority granted to the board. AGO 2004-067.
- Under the Tax Incentive Reform Act of 1992, Section 40-9B-1, et seq. of the Code of Alabama 1975, neither a municipality nor its industrial development board can enter into an agreement to abate non-educational county ad valorem taxes or county construction related transaction taxes if there is no corresponding municipal ad valorem tax or construction related transaction tax to be abated. A municipality or its industrial development board can abate all or part of the state’s non-educational ad valorem taxes, the state’s construction related transaction taxes, and the mortgage and recording taxes related to private use industrial property and security documents and other recordable documents associated therewith. AGO 2005-112.
- An industrial development authority must use its discretion in determining how much weight the classification of a proposed development as “industrial” has on the determination of whether a proposed facility is deemed a “project.” The determination of an authority that a proposed development is a project is conclusive. Whether a specific proposed industrial development is, in fact, a “project” is a determination of fact that must be made by the industrial development authority. AGO 2007-070.
- A municipality has no control over the expenditure of funds or the incurring of obligations by an industrial development board. Conversely, the board does not have the authority to invest its excess funds. The board must pay any net earnings to the city after payment of expenses, bonds, and other obligations. AGO 2008-080.
- Section 94.01(a)(3) of the Recompiled Constitution of Alabama permits a city to provide public funds to a public or private company to attract economic development within the city if such action serves a public purpose and a public meeting where proper

notice is given is held regarding the proposed action. Whether the proposed action by the city serves a public purpose is a determination that must be made by the city. The city may not provide public funds to a movie theater company in the form of a rebate of the gross receipts license movie ticket tax. If it determines a public purpose would be served, the City may make an annual appropriation to the company that is not tied directly to the tax. AGO 2007-122.

- A municipality has no control over the expenditure of funds or the incurring of obligations by an industrial development board. Conversely, the Board does not have the authority to invest its excess funds. The Board must pay any net earnings to the city after payment of expenses, bonds, and other obligations. AGO 2008-080.
- When a county abolishes an Industrial Park pursuant to Section 11-23-7 of the Code of Alabama 1975, the County Commission may sell the land remaining to a municipality for an amount less than the actual cost of the property and the improvements thereto. AGO 2009-012.
- Under Section 94.01 of the Alabama Constitution, a town may borrow money and grant public funds to a private corporation or other private entity to aid the corporation with the expense of installing a center turn lane for the purpose of promoting economic development in the town, if the town determines a public purpose will be served. Local Constitutional Amendments may also authorize the expenditure of funds by the town. If public funds are transferred to a private entity, such funds are not subject to Alabama's laws regarding competitive bidding or public works bidding. AGO 2009-086.
- A county commission may appropriate funds to a local university, which is a state institution of higher learning, to be utilized in support of its football program, if the commission determines that the appropriation serves to promote economic development within the county. AGO 2010-010.
- Section 11-23-7 of the Code of Alabama sets forth the mechanism by which an industrial park created pursuant to this statutory authority may be abolished or portions of that property removed therefrom. Property located within an area designated as an industrial park maintains its status as an industrial park until such time that action is taken pursuant to section 11-23-7 of the Code. A county commission should monitor industrial parks to ensure such areas are being used for industrial purposes. A county commission has the authority to enforce restrictions and abolish an industrial park that

is no longer used for industrial purposes. The county commission has no legal duty to inspect or require owners of industrial parks to maintain community standards. AGO 2010-104.

- The subdivision regulations of a County apply to the industrial park in the county. The
- County may inspect facilities in the park to ensure they are being used for industrial purposes. Additional facilities that locate in the park are not required to pay for building permits. AGO 2012-047.
- The fact that a municipality levies no ad valorem tax does not deprive that municipality and its industrial development board of their power, pursuant to Sections 40-9B-4 and 40-9B-5 of the Code of Alabama 1975, to grant abatements of county-levied non educational ad valorem taxes. AGO 2016-017.
- Pursuant to Section 3 of the Local Acts for Geneva County of the Constitution of Alabama, the Geneva County Commission may abolish the Geneva County Industrial Park and sell the remaining acres to a city located in the county, provided that the one industry located in the park request abolishment, the property continues to be used for industrial purposes, and the county complies with paragraph 3 of Section 3. The county may not convey lots to the city for no monetary consideration. AGO 2016-021.
- A city may guarantee the mortgage of a nonprofit organization to support the construction of soccer fields for the purpose of promoting economic development if the city council complies with the conditions of Section 94.01(c) of article IV or Section 3 of the Local Amendments for Baldwin County of the Recompiled Constitution of Alabama. AGO 2017-006.
- An industrial development board is not authorized to provide financial assistance through loans or grants to a nonprofit corporation that will create an entrepreneurial collaborative business service center for shared work space because the business does not meet the definition of a project. AGO 2018-026.
- The Commercial Development Authority (CDA) may take actions and expend funds related to the acquiring, owning, and/or leasing of projects to induce new commercial enterprises to locate in the city and to expand existing facilities. The CDA may make improvements to property acquired as projects. The CDA may sell or donate such property to businesses or structure leases with beneficial terms related to a project. The CDA may not award financial grants to businesses. The city may make improvements to its

property unrelated to a project through the net earnings of the CDA remaining after the payment of all expenses. The CDA may provide financial assistance to its board members attending conferences, seminars, and workshops related to the promotion of commerce and trade. The CDA may hire employees. While it may not hire them to work for other agencies, it may enter into an employee-sharing agreement with another agency so long as each compensates the employee in proportion to the work performed for that agency. The CDA may share its conference room if used for business related to the purposes in section 11-54-170. AGO 2018-051.

- The city may expend public funds and allow its employees, agents, or contractors to enter private property with the owner's consent to remove any unsightly and damaged trees if the city council determines that the work promotes economic and industrial development for the city and the council complies with the conditions of section 94.01(c) of the Recompiled Constitution of Alabama. AGO 2019-040.

21. Commercial Development Authorities

Commercial development authorities are intended to mirror industrial development authorities, which already existed prior to the Commercial Development Authority legislation to promote industrial concerns. With the transition from an industrial economy to a service economy, the legislature recognized the need to promote commercial development, an area not covered by industrial development statutes. The Commercial Development Authority Act is codified in Section 11-54-170 through Section 11-54-192, Code of Alabama 1975.

It was the intent of the legislature to allow the incorporation, in any municipality, of non-profit commercial development authorities to acquire, own, and lease projects to promote trade and commerce by inducing commercial enterprises to locate new facilities and expand existing facilities. It was not the intent of the legislature to allow any commercial development authority itself to operate any commercial enterprise.

What is a Commercial Project?

A “project” is defined in the act as any land and any building or other improvement thereon and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, suitable for the following enterprises:

- any commercial enterprise engaged in the manufacturing, processing, assembling, storing, warehousing, distributing, or selling of any products of agriculture, mining or industry;
- any enterprise for the purpose of research in connection with either the development of new products or new processes, the improvement of existing products or known processes, or the development of facilities for the exploration of outer space or promotion of the national defense;
- any commercial enterprise engaged in selling, servicing, providing or handling any policies of insurance or any financial services.

In addition, the act further defines project as any land, building or other improvement thereon and all real and personal property deemed necessary in connection therewith, whether or not now in existence, which shall be suitable for use as all or any part of the following:

- a ship canal, port or port facility, off-street parking facility, dock or dock facility, harbor facility, railroad, monorail or tramway, railway terminal or railway belt line and switch;

- an office building or buildings;
- a planetarium or museum;
- a pollution control facility;
- a hotel, including parking facilities, facilities for meetings and facilities suitable for rental to persons engaged in any business, trade, profession, occupation or activity;
- a shopping center or similar facility suitable for use by two or more commercial enterprises engaged in any business, trade, profession, occupation or activity, provided that a project shall not include facilities, other than office buildings or other buildings suitable for use as corporate headquarters, designed for the sale or distribution to the public of electricity, gas, water, telephone or other services commonly classified as public utilities. Section 11-54-171, Code of Alabama 1975.

How to Form a Commercial Development Corporation

To form a commercial development authority, Section 11-54-173, Code of Alabama 1975, stipulates that any number of persons shall first file a written application with the city council. Every such application shall be accompanied by such supporting documents or evidence as the applicants may consider appropriate. As promptly as may be practicable after the filing of the application in accordance with the provisions of this section, the governing body of the municipality with which the application was filed shall review the contents of the application, and shall adopt a resolution either (i) denying the application or (ii) declaring that it is wise, expedient, and necessary that the proposed authority be formed and authorizing the applicants to proceed to form the proposed authority by the filing for record of a certificate of incorporation in accordance with the provisions of Section 11-54-174. The governing body with which the application is filed shall also cause a copy of the application to be spread upon or otherwise made a part of the minutes of the meeting of such governing body at which final action upon said application is taken. Section 11-54-173, Code of Alabama 1975.

Within 40 days after the council adopts the resolution assenting to the incorporation, the applicants must file a certification of incorporation in the office of the probate judge. The certificate shall state:

- The names of the persons forming the authority;
- The name of the authority and;

- The duration of the authority;
- The name of the authorizing municipality together with the date on which the council adopted the authorizing resolution;
- The location of the principal office of the authority, which shall be within the corporate limits of the municipality;
- The authority is organized pursuant to the pertinent provisions of Section 11-54-170 through Section 11-54-192, Code of Alabama 1975; and
- Any other matters the incorporators may choose to insert not inconsistent with the enabling statute. Section 11-54-174, Code of Alabama 1975.

The certificate of incorporation must be signed and acknowledged by the incorporators before a notary public. When the certificate is filed for record, attached to it must be a copy of the application to the city council to create the authority, a certified copy of the authorizing resolution adopted by the council, and a certificate by the Secretary of State that the name proposed for the authority is not identical to that of any other corporation organized under the laws of the state. When the certificate of incorporation and all the required documents are filed with the probate judge, the authority comes into existence as a public nonprofit corporation. Section 11-54-174, Code of Alabama 1975.

Composition of the Board of Directors

Each authority shall be governed by a board of directors. All powers of the authority shall be exercised by the board. The board shall consist of five directors who shall be elected by the city council for staggered terms. Section 11-54-176, Code of Alabama 1975.

The initial terms of office of two directors shall begin immediately upon their appointment by the council and shall end at 12:01 a.m., on March 15 of the first succeeding odd-numbered calendar year following their appointment. Section 11-54-176, Code of Alabama 1975.

The initial terms of office of three directors shall begin immediately upon their respective appointments and shall end at 12:01 a.m., March 15 of the second succeeding odd-numbered calendar year following their election. Section 11-54-176, Code of Alabama 1975.

Thereafter, the term of office of each director shall be four years. Section 11-54-176, Code of Alabama 1975.

Vacancies are to be filled by the council. No officer of the state or of any county or municipality shall be eligible to serve as a director. Each director must be a duly qualified elector of the municipality. Each director shall be reimbursed for expenses actually incurred in the

performance of duties as director. Any director may be impeached and removed from office as provided for in Section 175 of the Constitution of Alabama and by the general laws of the state. Section 11-54-176, Code of Alabama 1975.

The officers of the authority shall consist of a chairperson, vice chairperson, secretary, treasurer, and such other officers as its board shall deem necessary or appropriate. The offices of secretary and treasurer may, but need not, be held by the same person. Section 11-54-177 Code of Alabama, 1975.

The chairperson and vice chairperson of an authority shall be elected by the board from its membership. The secretary, treasurer and any other officers of the authority may, but need not, be members of the board and shall also be elected by the board. The officers of the authority shall also be the same officers of the board. Section 11-54-177, Code of Alabama 1975.

Meetings of the board are open to the public. Section 11-54-178, Code of Alabama 1975.

Powers of the Authority

An authority shall have the following powers:

- to have succession by its corporate name for the duration of time;
- to sue and be sued;
- to adopt and make use of a corporate seal;
- to adopt bylaws;
- to acquire, whether by purchase, construction, exchange, gift, lease or otherwise and to refinance existing indebtedness on, improve, maintain, equip and furnish one or more projects, including all real and personal properties which the board may deem necessary, regardless of whether any such projects shall then be in existence;
- to lease to others any or all of its projects and to charge and collect rent;
- to sell, purchase, exchange, donate, convey and grant options to any lessee to acquire any of its projects and any or all of its properties;
- to issue bonds for the purposes of carrying out its powers;
- to mortgage and pledge any or all of its projects or any part as security for the payment of the principal and interest on any bonds so issued;
- to execute and deliver mortgages and deeds of trust and trust indentures;

- to appoint, employ, contract with, and provide compensation of such officers, employees and agents, as the board finds necessary for the conduct of business;
- to provide for such insurance as the board deems advisable;
- to enter into such contracts, agreements, leases and other instruments and to take such other actions as may be necessary to accomplish any purpose for which the authority was organized;
- to require payments in lieu of taxes to be made by the lessee of the project to either the authority or the municipality. Section 11-54-178, Code of Alabama 1975.

Location of Projects

All projects of the authority shall be located wholly or partly within the corporate limits of the municipality and shall be wholly within the following areas: one where a redevelopment plan has been prepared; one where an urban renewal plan has been prepared; or one where it shall be included as part of the project's facilities, where an urban development action grant has been made to the project. Section 11-54-178, Code of Alabama 1975.

Exemption from Certain Taxes and Bid Law

The income of the authority, all bonds issued by the authority and the interest paid on any such bonds, all conveyances by the authority, and all leases, mortgages, and deeds of trust by or to an authority shall be exempt from all taxation by the state of Alabama. Any authority shall also be exempt from all license and excise taxes imposed for the privilege of engaging in business. Section 11-54-183, Code of Alabama 1975.

The property of an authority, however, is not exempt from any ad valorem taxes which can be imposed. An authority is not exempt from any privilege or license taxes levied by the state or any county, municipality or other political subdivision on tangible personal property purchased or used by an authority. Section 11-54-183, Code of Alabama 1975.

Regarding the competitive bid law, any authority and all contracts made by it shall be exempt from state laws requiring competitive bids. Section 11-54-186, Code of Alabama 1975. The Land Sales Act requires that land acquired from the state may not be resold within five years from the date it is acquired without providing the state the opportunity to repurchase the land and if they do not wish to repurchase then the sale of the land must be competitively bid. Section 9-15-82, Code of Alabama 1975. Pursuant to section 11-54-186, Code of Alabama 1975, the transfer from a municipality to a commercial development authority of land acquired from the state, and the subsequent transfer of the land by the authority, is exempt from the competitive

bid requirements of the Land Sales Act, codified at section 9-15-70 *et seq.*, Code of Alabama 1975. AGO 2007-131. The transfer of land by a commercial development authority to a private person, firm, or corporation, originally acquired from the state and transferred to the authority through one or more transactions between governmental entities, is subject to the competitive bid requirements of the Land Sales Act, except if transferred for the purpose of promoting the economic and industrial development of the county or municipality or for the purpose of constructing, developing, equipping, and operating industrial, commercial, research, or service facilities of any kind under Section 94.01 of the Recompiled Constitution of Alabama (Amendment 772), and in compliance with section 94.01(c) of the Constitution if transferred for less than fair market value. AGO 2009-008 and AGO 2008-009.

Non-Liability of Authorizing Municipality

The authorizing municipality shall not in any way be liable for the payment of principal or interest on any bonds of an authority or for the performance of any pledge, mortgage or obligation of any kind by an authority. Section 11-54-184, Code of Alabama 1975.

Attorney General's Opinions

The Commercial Development Authority (CDA) may take actions and expend funds related to the acquiring, owning, and/or leasing of projects to induce new commercial enterprises to locate in the city and to expand existing facilities. The CDA may make improvements to property acquired as projects. The CDA may sell or donate such property to businesses or structure leases with beneficial terms related to a project. The CDA may not award financial grants to businesses. The city may make improvements to its property unrelated to a project through the net earnings of the CDA remaining after the payment of all expenses. The CDA may provide financial assistance to its board members attending conferences, seminars, and workshops related to the promotion of commerce and trade. The CDA may hire employees. While it may not hire them to work for other agencies, it may enter into an employee-sharing agreement with another agency so long as each compensates the employee in proportion to the work performed for that agency. The CDA may share its conference room if used for business related to the purposes in section 11-54-170. AGO 2018-051.

22. Solid Waste Collection and Disposal

There is no subject of more constant interest to municipal officials than solid waste collection and disposal. Without adequate ordinances and careful planning, municipalities are helpless to deal with this growing problem. As landfill space continues to shrink, municipal governments must be knowledgeable about federal and state statutes and regulations concerning the collection and disposal of garbage and how localities can comply with those laws. Garbage collection and disposal is clearly a multi-jurisdictional problem. This article provides an overview and basic guidance for municipalities on the subject of waste disposal.

Power to Adopt Ordinances

All cities and towns are given the power to maintain the health and cleanliness of the city or town within the corporate limits and police jurisdiction under Section 11-47-130, Code of Alabama 1975. Section 11-45-1, Code of Alabama 1975, allows municipalities to adopt ordinances and resolutions to carry out this power. Section 11-47-131, Code of Alabama 1975, also gives municipalities the power to adopt ordinances and regulations deemed necessary to ensure good sanitary conditions in public places or on private premises. The Attorney General, interpreting Section 11-40-10, Code of Alabama 1975, advised Hon. James Powell on September 21, 1977, that a municipality may collect garbage in its police jurisdiction even when the police jurisdiction extends across county lines. The police jurisdiction of municipalities of less than 6,000 inhabitants is one and one-half miles from the corporate limits while the police jurisdiction of cities of 6,000 or more inhabitants extends three miles from the corporate limits. Section 11-40-10, Code of Alabama 1975.

The Alabama Supreme Court, in *Wheat v. Ramsey*, 224 So.2d 649 (1969), held that the governing body of a city has the legal authority under its police power to adopt reasonable health and sanitary ordinances to protect the public health and promote the general welfare. Municipal ordinances carry a presumption of validity. *Chadwick v. Hammondville*, 120 So.2d 899 (Ala. 1960). However, the ordinance must bear a substantial relation to the public health, safety or welfare. *Russellville v. Vulcan Materials Co.*, 382 So.2d 525 (Ala. 1980).

Pursuant to Section 22-27-3, Code of Alabama 1975, any municipal governing body which is providing services to the public under the Solid Wastes Disposal Act, may adopt a resolution or ordinance to make participation in the solid waste disposal service mandatory. This would require every person, household, business, industry or property

generating solid wastes, garbage or ash as defined in this section to participate in and subscribe to the system unless granted a certificate of exception, as provided in subsection (g). "Provided, however, any individual, household, business, industry or property generating solid wastes that were sharing service for a period of at least 6 months may continue to share service without filing for a certificate of exception." Section 22-27-3(a)(2), Code of Alabama 1975.

Enforcement of garbage ordinances is a constant headache. Violations of most municipal ordinances are punishable by criminal sanctions authorized by Section 11-45-9, Code of Alabama 1975. This section grants a municipality the power to enforce its ordinances with a penalty of up to six months in jail and a fine of up to \$500. However, the Alabama Supreme Court has held, in *Eclectic v. Mays*, 547 So.2d 96 (1989), that municipalities may not assess these criminal penalties against persons who fail to comply with solid waste disposal ordinances. One factor the Court did not address, however, is the fact that the Solid Waste Disposal Act states that anyone who fails to pay a fee for garbage services may be fined from \$50 to \$200. Section 22-27-7, Code of Alabama 1975.

Following *Mays*, the Attorney General issued an opinion upholding the power of municipalities to assess criminal penalties pursuant to Section 22-27-7. AGO 1993-243. However, this power is not self-executing. A municipality would have to adopt the penalties in its own ordinance to enforce the violation in municipal court. Thus, although the fine for violation of a garbage disposal ordinance is limited, municipalities can clearly enforce these ordinances with criminal sanctions in municipal court. In addition to any other remedy provided in this act, a municipality may bring a civil action in circuit court to compel the mandatory participation and subscription in the local service. Section 22-27-3(a)(2), Code of Alabama 1975.

The Attorney General has held that a city may place a duty on garbage customers to provide the garbage department with updated contact information if the customers are not receiving garbage bills in the mail. The city is authorized to adopt a payment plan to bring delinquent accounts up to date. Section 22-27-5 of the Code provides the city with the option to discontinue service for failure to pay service fees. Section 22-27-5(e) of the Code also authorizes a city to pursue civil penalties, and section 22-27-7 authorizes a municipality to pursue criminal penalties for failure to pay service fees. The city may publish the names and account balances of delinquent garbage customers. AGO 2010-106.

Fees for Services

Section 11-47-135, Code of Alabama 1975, states that all municipalities have the power to establish facilities for the destruction of garbage or to otherwise dispose of garbage, either inside or outside the city limits. In addition, municipalities can haul trash and garbage, cause its destruction, and fix and collect a reasonable fee for the service.

This statute specifically authorizes a fee for the collection and disposal of trash and garbage, provided that the fees are reasonable. Further, the Attorney General has held that a municipality may require its residents use the garbage collection service and may charge a fee for the service. *See*, AGO to Hon. P. W. Thrasher, February 4, 1966, and AGO 1982-294 (to Hon. Gene L. Hughes, April 23, 1982). The collection and disposal of garbage and trash is necessary to the public health and each citizen may be required to share the cost.

Charges for garbage collection services are service charges, not taxes, even when mandatory. *Martin v. Trussville*, 376 So.2d 1089 (Ala. Civ. App. 1979). Thus, the amount of the fee must be reasonably related to the expense of the garbage service. *Eclectic v. Mays*, 547 So.2d 96 (Ala. 1989). A municipality may not impose protective covenants requiring owners of patio homes, garden homes and town homes to pay extra for the collection and disposal of their garbage while the municipality provides these services to other residents without extra charge. Nor can the municipality provide certain residents with an inferior method of disposal. AGO 1997-122.

Sections 11-89A-1 through 11-89A-25, Code of Alabama 1975, authorize the creation of solid waste disposal authorities to jointly dispose of the solid waste of two or more counties or municipalities. However, Section 22-27-3(a)(4) states that no county commission shall provide solid waste collection and disposal services within the corporate limits of a municipality without the express consent of the municipal governing body of such municipality nor shall any municipality provide solid waste collection and disposal services outside its corporate limits without the express consent of the county commission of the county in which it is situated.

Exemptions

Pursuant to Section 22-27-3(g), Code of Alabama 1975, ordinances which make municipal garbage collection services mandatory on all citizens must allow for the exemption of citizens who dispose of their own garbage in accordance with special permits granted by the State Health Department. AGO to Dr. Ira L. Myers, May 3, 1971 and AGO 1995-329.

Additionally, persons whose sole income is derived

from Social Security are exempt from paying garbage collection fees. The household seeking to claim the exemption must present proof of income to the County Health Officer no later than the first billing date of any year in which the exemption is desired. The County Health Officer or his designee shall forward the exemption request and proof of income to the solid waste officer or municipal governing body upon receipt. The exemption shall apply only so long as the household's sole source of income is Social Security and shall be requested each year in which the exemption is desired. Section 22-27-3(a)(3), Code of Alabama 1975.

The Attorney General has issued several opinions concerning the Social Security exemption from the payment of garbage service fees. In AGO 1993-102, the Attorney General held that persons whose sole income is derived from Social Security benefits, Supplemental Security Income (SSI), or a combination of the two, are exempt from paying garbage fees. In another opinion, the Attorney General ruled that food stamps cannot be counted as income in determining whether an individual is eligible for the exemption. AGO 1993-314. Further, where an individual's sole income comes from Social Security and veterans benefits which directly reduce the Social Security benefits, the individual is eligible for the exemption. AGO 1994-104. The exemption from payment of solid waste disposal fees for anyone whose sole source of income is Social Security benefits applies to every county or municipality that provides solid waste disposal services. AGO 1998-075. A municipality charging fees for solid waste collection services, whether through a private corporation or otherwise, must grant an exemption for any household whose sole source of income is Social Security benefits. AGO 1998-099.

In AGO 1995-080, the Attorney General ruled that it is the responsibility of eligible individuals to claim the exemption. However, although the Attorney General stated that a municipality did not have a duty to seek out eligible persons and inform them of the exemption, the Attorney General advised municipalities to give some type notice to the public that the exemption exists. The opinion was silent as to how notice should be given. Perhaps the best method would be through a direct mailing, either in the bill or at the time a person applies to receive garbage service.

In addition to these exemptions, a municipality may provide other exemptions in its garbage ordinance. For example, the ordinance may provide for free garbage collection service to its elderly. AGO 1979-038 (to Hon. Randall Shedd, August 10, 1979); AGO 1982-171 (to Hon. Kenneth Moss, February 5, 1982); and AGO 1987-216. To qualify for the statutory solid waste exemption, a person and his or her household must either be eligible for and have

no other income than Social Security or, where authorized by local law, his or her household's total income must not exceed 75 percent of the federal poverty level. No separate exemption has been created for individuals who receive veteran's benefits. AGO 1999-118.

In *Limestone County v. Lambert*, 674 So.2d 618 (1996), the Alabama Court of Civil Appeals ruled that a property owner did not qualify for the shared-use exemption from the county's mandatory garbage collection charge. In *Owens v. Bentley*, 675 So.2d 476 (1996), the Alabama Court of Civil Appeals held that a property owner had no claim against the county for denying his request for an exemption from the mandatory solid waste collection service.

Collection of Fees

Many cities and towns collect garbage fees through billings for water or utility services. *See*, AGO 1990-301. This is perhaps the surest method of collection and generally is the most inexpensive. Further, the average citizen would prefer to make only one payment to the city for services rendered. But, in *Eclectic v. Mays*, 547 So.2d 96 (1989), the Alabama Supreme Court held that if a municipality uses utility bills to collect garbage fees pursuant to a mandatory garbage service, the municipality must have a method in place to collect the garbage fees from those who do not participate in the utility service.

Termination of Service Upon Nonpayment

Many municipalities have ordinance provisions that terminate other municipal services if a customer fails to pay the garbage collection fee. The Attorney General advised Hon. Clarence F. Rhea on December 11, 1972, that a municipality could contract with a municipal utility board, under Alabama Code Section 11-40-1, under which the board would have the authority and duty to collect the garbage fee imposed by the municipality. The Attorney General was also of the opinion that this power was broad enough to allow the board to discontinue its water and gas service when a customer refused to pay the garbage collection fee. In a later Opinion, though, the Attorney General advised Mayor Raymond C. Elwell on May 27, 1974, that a municipality has no authority to discontinue water service when the garbage collection fee is not paid. And, in AGO 1993-243, the Attorney General held that municipalities have no authority to discontinue any utility service for failure to pay a garbage fee.

Additionally, some courts have held that termination of water service due to nonpayment of a mandatory trash collection fee is in violation of substantive due process of the Fourteenth Amendment to the U.S. Constitution. *Uhl v. Ness City, Kansas*, 590 F.2d 839 (10th Cir. 1979). The League recommends that municipalities do not cut off other

utility services for nonpayment of the garbage fee.

Municipalities can terminate garbage collection service for nonpayment. This was made clear in *Town of Eclectic v. Mays*, 547 So.2d 96 (Ala. 1989). However, in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), the U.S. Supreme Court ruled that a municipal utility must provide its customers with an administrative procedure for hearing complaints prior to termination of service. The Court held that final notice, contained in municipal utility bills and stating that payment was overdue and that service would be discontinued if payment was not made by a certain date, did not reasonably inform customers of the availability of or procedure for, protesting the proposed termination of utility service and thus deprived customers of notice to which they were entitled under the Due Process Clause. The expectation of continued utility service is considered to be a property interest entitled to the due process protection of the Fourteenth Amendment to the U.S. Constitution on the grounds that a municipal utility service is a necessity of modern life. *Goss v. Lopez*, 419 U.S. 565 (1975); *see also, Golden v. Public Utilities Commission*, 592 P.2d 289 (Cal. 1979).

However, these cases do not prohibit a municipality from terminating garbage service for failure to pay service charges which are justly due. *Craft* only says that notice to the utility customer that service will be terminated unless a delinquent bill is paid within a specified time is not sufficient. *Craft* at 14. A customer must also be notified that he or she is entitled to a hearing at which objection to the termination may be presented prior to termination. No hearing is necessary if not requested by the customer. No formal hearing is necessary. The utility superintendent or other city officer may be designated to conduct the hearing. If the amount of the bill owed is in dispute, the hearing should be held by some person authorized to make corrections, if necessary.

The League recommends following these procedures when terminating garbage service as well as utility services.

Municipalities should designate an employee to handle disputed claims. This employee should be authorized to adjust disputed bills and should be empowered to reinstate service once the dispute has been resolved.

If a garbage fee becomes delinquent, notice should be sent to the person responsible for paying the bill. The notice should be substantially as follows:

“Final Notice: Your garbage service [or other specified utility] will be disconnected if this bill is not paid by [date]. If there is any dispute concerning the amount due on this bill, you may call [title or name of individual] at [phone number], or bring this bill to the office of the above individual at

[address] between the hours of [time] Monday through Friday.”

The court failed to discuss the length of time for the notice prior to disconnecting service. There is no magic test for to determine the amount of notice that is required, except that it must be reasonable. *Goss v. Lopez*, 419 U.S. 565 (1975). The League recommends that the notice be five to 10 days in length.

The person reviewing disputed bills should carefully review the problem and make accurate notes on any facts presented by the customer, offsetting facts from the utility and the disposition of the dispute. In every case, some finality to the dispute must be reached before the time set for disconnecting the utility service or discontinuing garbage service. It must be clear to the customer what decision has been made regarding the dispute and what action will be taken.

The Supreme Court’s opinion in *Craft* dealt only with the notice required to be given to the person paying for the utility service. *Craft* at 13. The court did not discuss the question of whether or not the utility must notify tenants as well as landlords in cases where the user of the utility service is not the party responsible for payment.

Under the Solid Waste and Recyclable Materials Management Act, if fees are not paid within 30 days, service may be suspended, or the public authority may proceed to recover the amount of any delinquency with interest. Section 22-27-5, Code of Alabama 1975. However, the Attorney General’s office has held that solid waste disposal authorities or any other local authority do not have the power to grant extensions of time to apply for an exemption provided under Section 22-27-3(a) of the Code of Alabama 1975. AGO 2000-141.

Alternative to Termination of Service

Federal cases have suggested that, rather than terminating service, cities should enforce their waste disposal programs through less drastic alternatives such as penalty provisions, civil actions, or liens against real property. *Uhl v. Ness City, Kansas*, 590 F.2d 839 (10th Cir. 1979). The Alabama Supreme Court in *Alabama State Board of Health v. Chambers County*, 335 So.2d 653 (1976), held that the Legislature has the right to permissively authorize counties and municipalities to establish and maintain waste disposal systems and to regulate the methods used by counties and municipalities electing to exercise such authority.

In *Eclectic v. Mays*, 547 So.2d 96 (Ala. 1989), the court held that Section 22-27-5(e), Code of Alabama 1975, limits the remedies for failure to pay a garbage fee to suspension of service and civil actions to recover unpaid

fees. However, violations of the Solid Waste Disposal Act are misdemeanors with fines of not less than \$50 nor more than \$200. Section 22-27-7, Code of Alabama 1975. As noted above, municipalities may adopt this penalty as a violation of a municipal ordinance. AGO 1993-243.

Municipalities may wish to file suit for unpaid fees in the Small Claims Court under the Alabama Small Claims Rules adopted on November 23, 1976.

Alternatives to Public Collection

With the rising costs of public garbage collection and disposal, a municipality may find it more advantageous to employ independent contractors to implement the city disposal program or grant a franchise, under Section 220 of the Alabama Constitution, to an individual, partnership, or firm to provide for garbage collection services. A municipality might also want to consider one of these alternatives for liability reasons. Cities and towns are liable for the damages for injury done to another through the neglect, carelessness or unskillfulness of agents, officers or employees of the municipality, and garbage collection is a major source of liability problems. *Bessemer v. Chambers*, 242 Ala. 666, 8 So.2d 163 (Ala. 1942).

Under Section 11-40-1, Code of Alabama 1975, a municipality may contract and be contracted with. However, municipal contracts involving expenditures of \$15,000 or more are subject to the Competitive Bid Law found in Sections 41-16-50 through 41-16-63, Code of Alabama 1975. Contracts between public entities are not required to be competitively bid. Solid waste disposal contracts between the County and municipalities are not required to be let by competitive bidding. AGO 2008-093.

The Attorney General advised Hon. Arthur Lee Taylor on May 24, 1977, that a city may enter into contracts with private firms to collect, dispose of and destroy garbage. Such contracts, however, may not be let for periods in excess of three years due to the restrictions on the length of such contracts found in the bid laws. Section 41-16-51, Code of Alabama 1975, exempts contracts for renewal of sanitation or recycling services from the bid laws, although solid waste contracts can be renewed without rebidding, provided the terms of the contract are not changed. Section 41-16-51(10), Code of Alabama 1975; AGO 1993-310. The Attorney General’s office has held that a municipality may contract with a private entity to collect delinquent garbage fees at a fixed rate, a percentage of the amount collected, or a fixed percentage of the total amount owed. AGO 1998-107.

An alternative to employing an independent contractor is to grant a franchise to a private business to collect garbage in the city. Under the Alabama Constitution, Section 220, municipalities may permit persons, firms, associations or corporations to use the streets or public places for the

operation of any public utility or private enterprise. The “consent” in this section has uniformly been held to be a franchise. *Bowman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960). In cities of 6,000 or more, public utility franchises are limited to a maximum term of 30 years by Section 228 of the Alabama Constitution. If the local government grants only a franchise and spends no local money, the bid law does not apply. AGO to Dr. Ira L. Myers, July 29, 1974, and AGO 1981-025 (to Hon. G. William Noble, October 20, 1980).

However, in granting franchises, municipalities must be careful not to violate constitutional provisions which prohibit granting an exclusive franchise. In *Beavers v. County of Walker*, 645 So.2d 1365 (1994), the Alabama Supreme Court voided an agreement between BFI and Walker County on the grounds that the agreement amounted to an exclusive franchise to provide solid waste collection and, thus, should have been bid.

Solid Waste and Recyclable Materials Management Act

The Solid Waste and Recyclable Materials Management Act can be found in Sections 22-27-1 through 22-27-18, Code of Alabama 1975, as amended.

This comprehensive act charges the Alabama Department of Environmental Management (ADEM) with the implementation of its provisions and requires that county and municipal governing bodies accomplish solid waste management practices.

Of particular interest is the 1971 amendment to the Act, which states that a municipality, if it establishes fees or charges, may suspend services if fees are not presently paid and may recover any such delinquency by civil action. The Act also authorizes municipalities to enter into joint contracts with other municipalities or counties for the disposal of solid waste. Section 22-27-5, Code of Alabama 1975.

A 2008 amendment establishes the Department of Environmental Management as the state agency with primary regulatory authority over the management of solid waste in Alabama. Section 22-27-9(a), Code of Alabama 1975. Section 22-27-9(b) establishes the Alabama Department of Public Health as the state agency with authority over the collection and transportation of solid waste in Alabama, which include the provision of collection services by municipalities. Municipal collection of solid waste must be consistent with regulations adopted by the Department. *See*, Section 22-27-10, Code of Alabama 1975.

A 2011 amendment placed a 24-month moratorium on the issuance of permits by ADEM or any other state or local governmental agency to certain solid waste management facilities which receive or are intended to receive waste not generated by the permittee in order to allow adequate

time for ADEM, the Solid Waste Management Advisory Committee, and the Alabama Department of Public Health to perform their responsibilities pursuant to Executive Order 8, and for the development of a comprehensive plan to identify the state’s solid waste management needs. This amendment does provide a procedure to allow for a waiver to allow the issuance or modification of permits on a limited basis during the moratorium. *See*, Section 22-27-5.2, Code of Alabama, 1975. A 2012 amendment expended the moratorium until May 31, 2014. Act No. 2012-434.

Operation of Landfills

In *Birmingham v. Scogin*, 115 So.2d 505 (1959), the Alabama Supreme Court, strongly indicated that every city has the obligation to carefully supervise the manner of operating its garbage disposal areas and ensure that the best methods of operation are employed. Failure to do so could result in the enjoining of garbage collection and disposal until errors are corrected.

The complaint in *Scogin* alleged that the city was operating a garbage dump and through carelessness had permitted it to become a health hazard. The complaint also stated that the city had failed, after demand, to abate the conditions and, as a result of the unsanitary conditions, the complainants were suffering damage. The dump was a landfill and was located in an “A-residential” zone. The facts showed that the city had purchased the property prior to the date the property of the complainants was purchased, and the city’s witnesses testified that the sanitary landfill was being operated in a proper manner, i.e., the garbage was covered daily. Testimony was introduced to the effect that the city was doing a good job in controlling flies, roaches and rodents.

The court held that there can be no abatable nuisance in doing in a proper manner what is authorized by law. The city, under provisions of Section 11-47-135, Code of Alabama 1975, may operate a garbage disposal system. The court stated that, “The action of a governmental agency acting within its authority will not be controlled or revised by injunction.” However, even though the operation was a governmental function, if a nuisance is created the nuisance is subject to being abated by an injunction. *See, Downey v. Jackson*, 65 So.2d 825 (Ala. 1953); *Bessemer v. Chambers*, 8 So.2d 163 (Ala. 1942).

The court, under the facts of *Scogin*, required the city to cover all garbage by 6:00 p.m. on the day in which the garbage is deposited but refused to issue a permanent injunction.

In addition, *Scogin* is important because the court held that zoning does not apply to the operation of a governmental function – such as garbage collection – by a municipality.

In *TransAmerican Waste Industries, Inc. v. Benson*, 690 So.2d 346 (1997), the Alabama Supreme court used a balancing test, balancing the urgent need for action on a landfill against the need to set aside a county commission's actions based on perceived deficiencies in the public notice, to find that notice was sufficient to apprise the public of the subject of the hearing. In a Tenth Circuit Court case, the court found that a municipal ordinance that prohibits the maintenance of hazardous waste in areas zoned for industrial use conflicts with the goals of CERCLA and is preempted. *U.S. v. Denver*, 100 F.3d 1509 (10th Cir. 1996).

The Attorney General's office has held that the proceeds from tipping fees at a solid waste landfill may be deposited into the county general fund, but the money must be earmarked for expenses related to the operation of the landfill. AGO 1998-005.

In *Peake Excavating, Inc. v. Town Board of Hancock*, 93 F.3d 68 (2d Cir. 1996), the Second Circuit held that a municipal ordinance that prohibits the operation of a dump or the dumping of waste materials in the municipality, except at a municipally operated landfill or transfer station does not violate the Commerce Clause.

Similarly, the United States Supreme Court held in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*, 127 S.Ct. 1786 (U.S. 2007), that waste disposal is typically and traditionally a local government function and courts should be particularly hesitant to interfere with local government efforts in this area under the guise of the Commerce Clause. Any incidental burden on interstate commerce that resulted from application of county flow control ordinances, which required businesses hauling waste in counties to bring waste to facilities owned and operated by public benefit corporation, was not clearly excessive in relation to public benefits provided by these ordinances, which increased recycling and conferred significant health and environmental benefits on citizens of the counties.

Section 22-27-8 provides that all permitted operators of municipal solid waste landfills must establish and maintain financial assurance for proper closure, post-closure care, or corrective action in the form and amount specified by the Department of Environmental Management. This requirement is applicable to all municipal solid waste landfills required by federal law or regulations to demonstrate such assurance.

These assurances must be submitted as required by the Department. The financial assurance mechanism shall be maintained for the life of the municipal solid waste landfill, and for a period of not less than 30 years after closure, unless the owner or operator demonstrates to the director that a period less than 30 years is sufficient to protect human health and the environment and the director approves

this demonstration, or the solid waste is removed and the Department determines that no waste or contamination remains at the site. The Department may extend post-closure care or corrective action periods for longer than 30 years when necessary to protect human health and the environment. In no event shall the Department require financial assurance or other requirements pursuant to this section which are more stringent than the Environmental Protection Agency requirements in effect at the time.

Beginning in October 1, 2008, generators of solid waste who dispose of the waste and management facilities permitted by the Department of Environmental Management must pay a disposal fee in accordance with Section 22-27-17 Code of Alabama 1975.

Conclusion

Every city is obligated to carefully supervise the operation of its garbage disposal areas and ensure that the best methods of operation are employed. Failure to do so could result in an injunction and possible tort liability. Additionally, municipalities must comply with federal and state regulations regarding the operation of landfills.

Selected Opinions and Court Decisions on Solid Waste Collection and Disposal

- Section 22-27-5, Code of Alabama 1975, does not authorize the state health officer to review contracts or mutual agreements for solid waste services between solid waste authorities and private contractors. AGO 1992-037.
- Section 22-27-3, Code of Alabama 1975, does not exempt a company or individual who has a contract for waste disposal with a private company from participating in the county's solid waste disposal plan, unless a certificate of exemption has been issued pursuant to Section 22-27-3(g). AGO 1992-169.
- In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), the U.S. Supreme Court held that a Michigan statute which prohibits private landfill operators from accepting solid waste generated in another county, state or country discriminates against interstate commerce in violation of the Commerce Clause.
- Persons whose sole income is derived from Social Security benefits are exempted from solid waste disposal fees. AGO 1992-346.
- Solid waste disposal is a governmental function. Solid waste contracts may extend beyond the term of the current administration. A change in an existing contract to provide for curbside recycling at no additional cost

does not substantially alter the contract and it does not have to be bid. A municipality may not renew an existing solid waste contract without bidding unless the existing contract contains a renewal clause or an option to extend. AGO 1992-352.

- Persons whose sole income is derived from Social Security benefits, Supplemental Security Income or a combination of the two, are exempt from paying solid waste disposal fees. AGO 1993-102.
- Counties may award contracts for the collection of solid waste outside municipal corporate limits. AGO 1993-213.
- A county may restrict the disposal of solid waste at a county-owned landfill to wastes generated within the county, provided that the county operates the landfill as a market participant and not as a market regulator. AGO 1993-214. **Note:** Courts are reluctant to recognize the validity of these flow-control regulations. Any municipality considering this type of restriction should consult with the city attorney. However, *see, United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*, 127 S.Ct. 1786 (U.S. 2007).
- Municipalities may not discontinue other utility services for nonpayment of garbage fees. However, Section 22-27-7, Code of Alabama 1975, clearly authorizes imposition of criminal penalties. AGO 1993-243.
- Renewal of a county solid waste landfill contract is not subject to competitive bid laws, provided the price remains the same and there is no substantial change in the terms of the contract. AGO 1993-287.
- Section 22-27-5(a), Code of Alabama 1975, provides authority for county commissions to levy fees to operate a solid waste program. AGO 1993-291.
- Municipalities may provide solid waste collection and disposal services outside their corporate limits with the consent of the county, even if the municipality charges different rates than the county. AGO 1993-310.
- An agreement between a county and municipalities to allow the municipalities to continue to collect solid waste in areas outside their corporate limits is not subject to competitive bidding. However, solid waste disposal contracts are subject to competitive bidding, unless the price is unaffected, the terms of the contract are not substantially changed, and the existing contract contains a renewal clause. AGO 1993-310.
- Persons whose sole income is derived from Social Security benefits are exempted from solid waste disposal fees. Food stamps are not income for purposes of determining such exemption. AGO 1993-314.
- Host governmental approval is required for modification of a permit to increase daily tonnage of waste accepted and/or to expand the area serviced by subject landfill. AGO 1993-329.
- Section 40-12-180, Code of Alabama 1975, sets forth the maximum fees that municipalities can charge persons engaged in the business of purchasing and receiving or collecting waste grease for rendering or recycling. AGO 1994-099.
- A resident whose sole income is made up of Social Security benefits and veterans benefits which directly reduce his Social Security entitlement is qualified to receive the garbage fee exemption authorized by Section 22-27-3 of Alabama's Solid Waste and Recyclable Materials Management Act. AGO 1994-104.
- Contracts between a municipality or county and a solid waste authority are not subject to the competitive bid law. AGO 1994-183.
- If the county or the state is a market regulator, the county or state cannot restrict disposal of solid waste at landfills to waste which is generated in Alabama. AGO 1994-186.
- Where an agreement between a county commission and a private solid waste hauler provides that the contractor will receive a certain rate times the number of residences served, the amount is due whether or not a resident pays the amount charged by the county for the collection service. AGO 1994-196.
- Persons whose sole income is derived from Social Security benefits, Supplemental Security Income, and/or food stamps are exempt from paying solid waste disposal fees under Section 22-27-3(a)(2), Code of Alabama 1975. AGO 1994-229.
- The county health officer and the county board of health have both the duty and the responsibility to clean up unauthorized dumps on private land, provided the county is reimbursed for the cost. This can be accomplished with agreement from the owner to reimburse and to allow entry onto the land for this purpose. AGO 1994-240.
- In *Beavers v. County of Walker*, 645 So.2d 1365 (1994), the Alabama Supreme Court held that an agreement entered into between the county commission, a solid waste authority, and BFI granted an exclusive franchise, and was not competitively bid, and, therefore, was void.
- The Eleventh Circuit Court of Appeals has upheld a federal district court ruling that several municipal flow control ordinances in Alabama violated the Interstate

- Commerce Clause of the U.S. Constitution. *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566 (M.D. Ala. 1994). A municipal flow control ordinance was found to violate the Interstate Commerce Clause in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994). However, see, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*, 127 S.Ct. 1786 (U.S. 2007).
- In *Parr v. Goodyear Tire and Rubber Co.*, 641 So.2d 769 (1994), the Alabama Supreme Court held that summary judgment against a solid waste authority was improper in a case against a manufacturer for dumping hazardous materials in the landfill.
 - A solid waste disposal authority can be formed to collect solid waste. AGO 1995-008.
 - A county commission may not impose a solid waste disposal fee on residents of a municipality without the express consent of the municipality. AGO 1995-027.
 - In *Jasper City Council v. Woods*, 647 So.2d 723 (1994), the Alabama Supreme Court held that a resolution prohibiting the city department from disposing of solid waste – other than inert materials – at the city landfill until the end of the fiscal year was not permanent and not subject to the mayor's veto.
 - The responsibility for claiming an exemption to payment of solid waste fees rests on the person seeking the exemption. Although a governmental entity has no duty to seek out persons who are entitled to the exemption, sufficient notice of the exemption should be given to the public. AGO 1995-080.
 - A county may provide for the terms of paying collection fees in the franchise. Nothing prohibits collection of fees three months in advance. AGO 1995-157.
 - A county may use general fund revenue to subsidize the solid waste department. AGO 1995-197. **Note:** Solid waste fees cannot be used to subsidize the general fund. *Eclectic v. Mays*, 547 So.2d 96 (Ala. 1989).
 - A resident whose sole income is derived from Social Security benefits and veterans benefits which directly reduce his or her Social Security entitlement qualifies for the garbage fee exemption in Section 22-27-3(a)(2), Code of Alabama 1975. AGO 1995-232.
 - In *USA Recycling, Inc. v. Babylon, N.Y.*, 66 F.3d 1272 (2d Cir. 1995), the Second Circuit Court of Appeals held that a town which assumes exclusive control over collection and disposal of solid waste within the municipality, and then contracts out that service to a private hauler does not violate the Interstate Commerce Clause.
 - Under Alabama law, individuals may obtain exemptions from participation in mandatory garbage pickup plans pursuant to Section 22-27-3(g), Code of Alabama 1975. AGO 1995-329.
 - In *Carter v. Haleyville*, 669 So.2d 812 (1995), the Alabama Supreme Court found nothing improper about the city opting out of the county's Ten-Year Solid Waste Management Plan.
 - A county may contract with a private landowner for the county road department to dump debris onto the property in exchange for the use of the county's personnel and equipment to cover the debris. AGO 1996-083.
 - A municipality may renew an existing solid waste disposal contract without taking bids if the material terms of the contract are not changed. AGO 1996-142.
 - A municipality may not impose protective covenants requiring owners of patio homes, garden homes and town homes to pay extra for the collection and disposal of their garbage while the municipality provides these services to other residents without extra charge. Nor can the municipality provide certain residents with an inferior method of disposal. AGO 1997-122.
 - The exemption from payment of solid waste disposal fees for anyone whose sole source of income is Social Security benefits applies to every county or municipality that provides solid waste disposal services. AGO 1998-075.
 - A municipality charging fees for solid waste collection services, whether through a private corporation or otherwise, must grant an exemption for any household whose sole source of income is Social Security benefits. AGO 1998-099.
 - In a First Circuit Court case, the court upheld a flow control ordinance because the sole contractor hired to haul and dispose of waste was hired following a competitive bidding procedure. *Houlton Citizen's Coalition v. Houlton, Maine*, 175 F.3d 178 (1st Cir. 1999).
 - In *TransAmerican Waste Industries, Inc. v. Benson*, 690 So.2d 346 (1997), the Alabama Supreme Court used a balancing test, balancing the urgent need for action on a landfill against the need to set aside a county commission's actions based on perceived deficiencies in the public notice to find that notice was sufficient to apprise the public of the subject of the hearing.
 - In *Peake Excavating, Inc. v. Town Board of Hancock*, 93 F.3d 68 (1996), a Second Circuit Court held that a municipal ordinance that prohibits the operation

of a dump or the dumping of waste materials in the municipality, except at a municipally operated landfill or transfer station does not violate the Commerce Clause.

- In *U.S. v. Denver*, 100 F.3d 1509 (1996), a Tenth Circuit Court found that a municipal ordinance that prohibits the maintenance of hazardous waste in areas zoned for industrial use conflicts with the goals of CERCLA and is preempted.
- The Attorney General's office has held that the proceeds from tipping fees at a solid waste landfill may be deposited into the county general fund, but the money must be earmarked for expenses related to the operation of the landfill. AGO 1998-005.
- In *Concerned Citizens v. Fairfield*, 718 So.2d 1140 (1998), the Alabama Court of Civil Appeals upheld Fairfield's solid waste collection fee.
- An individual who received a lump sum retirement benefit in 1992 but whose sole source of income at the present time is Social Security, may currently receive the exemption from the payment of garbage fees under Section 22-27-3(a)(3), Code of Alabama 1975. AGO 2002-225.
- Any household whose sole source of income is Social Security benefits is exempt from solid waste collection and disposal fees, regardless of whether the service provided is mandatory. AGO 2002-173.
- Although a municipality has the authority to maintain health and cleanliness within its police jurisdiction, the authority to regulate solid waste extends only to the corporate limits and does not extend into the municipal police jurisdiction. *Disposal Solutions Landfill v. Lowndesboro*, 837 So.2d 292 (Ala. Civ. App. 2002).
- A city ordinance requiring generators of solid waste to subscribe to a city program for the collection of such waste absent an exemption was insufficient to justify entry of a preliminary injunction against a waste disposal company that did not itself generate solid waste, in the city's action seeking to require the company to discontinue its operations in the city. The ordinance, in and of itself, did not establish that the city would suffer immediate and irreparable harm from the company's continued operations, that the city was likely to succeed on the merits, or that the hardship imposed upon the company would not unreasonably outweigh any benefits to the city. *Blount Recycling v. Cullman*, 884 So.2d 850 (Ala. 2003).
- Section 11-89A-5 of the Code of Alabama allows a county solid waste disposal authority to amend its certificate of incorporation to become a municipal solid waste disposal authority that would qualify for the exemption from the Competitive Bid Law found in Section 11-89A-18. AGO 2007-059.
- Contracts between public entities are not required to be competitively bid. Solid waste disposal contracts between the county and municipalities are not required to be let by competitive bidding. AGO 2008-093.
- A city's contention that the director of the Department of Environmental Management acted beyond his authority in issuing a landfill permit without first obtaining a consistency report or adequate hydrological evaluation involved an action seeking review of the sufficiency of the evidence on which the director rested his official action in issuing the permit, rather than an action seeking interpretation of a statute, and, thus, did not fall within any exception to the exhaustion-of-administrative-remedies doctrine. There are recognized exceptions to the exhaustion of administrative remedies doctrine, including when (1) the question raised is one of interpretation of a statute, (2) the action raises only questions of law and not matters requiring administrative discretion or an administrative finding of fact, (3) the exhaustion of administrative remedies would be futile and/or the available remedy is inadequate, or (4) where there is the threat of irreparable injury. *City of Graysville v. Glenn*, 46 So.3d 925 (Ala.2010)
- A city may place a duty on garbage customers to provide the garbage department with updated contact information if the customers are not receiving garbage bills in the mail. The city is authorized to adopt a payment plan to bring delinquent accounts up to date. Section 22-27-5 of the Code provides the city with the option to discontinue service for failure to pay service fees. Section 22-27-5(e) of the Code also authorizes a city to pursue civil penalties, and section 22-27-7 authorizes a municipality to pursue criminal penalties for failure to pay service fees. The city may publish the names and account balances of delinquent garbage customers. AGO 2010-106
- The county commission may deposit proceeds from the sale of carbon credits generated from the destruction of methane at the landfill into the general fund. AGO 2015-020.
- Any modification of a renewable contract for residential solid waste collection, transfer, and disposal that includes an increase in the amount charged for services, beyond that contemplated by the original contract, requires competitive bidding. AGO 2015-032.

- A municipality may enter into an agreement with a county for the collection and disposal of solid waste, and receive a percentage of the revenue generated, even if the municipality does not participate in the collection or disposal. The funds received must be used for solid waste disposal. AGO 2016-051.
- Operation of landfill by corporation formed by outside county did not violate statute stating that governing bodies may enter into agreements or contracts with each other for disposal of solid waste, even though county did not obtain city's permission before corporation acquired and began operating landfill; use of word "may" indicated a discretionary or permissive act. *City of Brundidge v. Dept. of Env'tl. Mgmt.*, 218 So.3d 798 (Ala.Civ.App.2016).

23. Municipalities and Recreation

Urban municipalities early recognized the need to provide for the recreational and athletic needs of the public. In earlier times, municipalities provided little more than public parks or, perhaps, places for volunteer bands to entertain. Today, the municipal recreational role has expanded to include swimming pools, golf courses, jogging paths, bike trails, ball fields, tennis courts – almost any activity citizens participate in for enjoyment.

During the summer months, with children out of school and warmer weather, the municipal role in recreation becomes even more important. If municipalities were not willing to open large amounts of land free of charge or at a nominal cost, many citizens would not be able to afford much in the way of entertainment. This article examines the powers of municipalities in fulfilling the recreational needs of their citizens, the liabilities municipalities face and the steps necessary to sell recreational property for another use.

General Powers

All cities and towns in Alabama are given the power to create parks and to provide for the amusement of their citizens by Section 11-47-19, Code of Alabama 1975. This section, which was first passed in 1939, provides municipalities with a broad grant of power to entertain the public.

Sections 11-47-210.1, 11-47-211, 11-47-212 and 11-47-213 of the Code also give municipalities the power to operate entertainment facilities for their citizens either individually or in cooperation with one or more other municipalities.

Section 11-47-210.1, Code of Alabama 1975, states that any municipality may acquire lands and facilities, either inside or outside the municipality, to “acquire, operate, manage, and control parks, playgrounds, and other recreational or athletic facilities” or any other recreational activities and purposes.

The only restrictions under this section are that no municipality may locate a recreational facility within the police jurisdiction of any other municipality unless the governing body of the other municipality consents by passing a resolution. Further, no recreational facility may be located in a county other than where the municipality is located unless the county commission consents by resolution. Section 11-47-211, Code of Alabama 1975.

Section 11-47-212 extends municipal power over recreational facilities located outside municipal limits to the same extent as permitted within the municipal limits. Section 11-47-213 authorizes two or more municipalities

to jointly acquire and operate recreational facilities for the benefit of the inhabitants of the participating municipalities.

While these sections authorize municipal governing bodies to directly control recreational facilities, many governing bodies prefer to delegate the power to control recreation to a separate board. Fortunately, Alabama law recognizes this desire by specifically authorizing municipalities to create any of several types of boards for this purpose.

Park and Recreation Authorities

The creation of park and recreation authorities is permitted by Sections 11-47-214 through 11-47-220, Code of Alabama 1975. Park and recreation authorities are incorporated bodies established to operate recreational facilities for two or more municipalities. To create a park and recreation authority, at least three individuals shall file with the governing body of each municipality a written application for permission to incorporate. A proposed form of a certificate of incorporation must be attached to the application. Section 11-47-214, Code of Alabama 1975. The required elements of the certificate are set out in Section 11-47-215.

If the governing bodies of the municipalities with which the application is filed approve the application by resolution the applicants may proceed to incorporate by filing with the probate judge a certified copy of the form which was attached to the application. A certified copy of the resolutions of approval must accompany the application. Section 11-47-216, Code of Alabama 1975.

The number of members of the board of directors of the authority should be an odd number not less than three, and the terms of office cannot exceed six years. Section 11-47-215, Code of Alabama 1975. The board consists of directors who have the qualifications and are elected or appointed for certain terms of office as specified in the certificate of incorporation of the authority. Each director serves without compensation but should be reimbursed for expenses actually incurred in the performance of his or her duties. Directors may be removed from office only by impeachment. Section 11-47-217, Code of Alabama 1975.

At any time when an authority has no bond or other obligations outstanding, its board may adopt a resolution declaring that the authority is dissolved. Section 11-47-219, Code of Alabama 1975.

Public Athletic Boards

Sections 11-59-1 through 11-59-17, Code of Alabama 1975, authorize the creation of public athletic boards. The

purpose of these boards is to own and operate recreational facilities as broadly defined in these sections. Public athletic boards are authorized to issue bonds and to mortgage their property. Section 11-59-8, Code of Alabama 1975.

To incorporate, any three qualified electors and taxpayers of the municipality shall file an application with the municipal governing body. The municipality may authorize the formation of the corporation by adopting a resolution to that effect. A copy of this resolution must be attached to the certificate of incorporation which is filed with the probate judge of any county in which any portion of the municipality is located. Once the certificate is approved by the probate judge, the corporation comes into existence. Section 11-59-3, Code of Alabama 1975.

The board is governed by a board of directors consisting of not less than three qualified electors and taxpayers of the municipality. Directors may receive a salary of no more than \$5 per meeting attended, not exceeding one meeting per calendar month. Directors serve staggered terms of six years. No municipal officer or employee may serve as a director. Section 11-59-7, Code of Alabama 1975.

Public athletic boards may condemn property and may mortgage any of their property. They may issue bonds to acquire or operate recreational facilities. Section 11-59-8, Code of Alabama 1975.

Municipalities are not liable for any of the obligations of the board. However, municipalities may convey by ordinance any recreational property to the board. Section 11-59-11, Code of Alabama 1975. The income and property of the board is exempt from all taxation. Section 11-59-16, Code of Alabama 1975.

Public Park and Recreation Boards

Public park and recreation boards are authorized by Sections 11-60-1 through 11-60-20, Code of Alabama 1975. These boards are very similar to public athletic boards. They, too, are authorized to own and operate recreational facilities as defined in the authorizing law. However, the definition used in these sections is much broader than that permitted by public athletic boards.

The sections creating public park and recreation boards were first adopted in 1967 – whereas the sections creating public athletic boards were adopted in 1947 – and reflect changing perceptions of how people spend their leisure time. Section 11-60-1, Code of Alabama 1975 includes the acquisition of properties such as forests, rivers, botanical gardens, bowling alleys, motels and souvenir shops within the permitted sphere of operation of the board.

Public park and recreation boards are created by the same procedure as that used to create a public athletic board. The creation of one public park and recreation board does not preclude the municipality from establishing another,

provided that a different name is used. Section 11-60-3, Code of Alabama 1975.

Directors of public park and recreation boards serve without compensation. No officer or employee of the municipality may serve on the board. Section 11-60-7, Code of Alabama 1975.

Like public athletic boards, the property and income of public park and recreation boards are exempt from taxation. Section 11-60-17, Code of Alabama 1975. Additionally, public park and recreation boards are exempt from having to pay any license fees to carry out their functions. Section 11-60-17, Code of Alabama 1975. However, any park and recreation board property are subject to police power ordinances of the municipality within which the facility is located.

Park and recreation boards are also exempt from the bid law and all usury and interest laws. Sections 11-60-18 and 11-60-19, Code of Alabama 1975.

Recreation Boards

Perhaps the most common recreation board is the type authorized by Sections 11-86-1 through 11-86-6, Code of Alabama 1975. Any municipality with a population of 100,000 or less according to the most recent federal census may create a recreation board pursuant to these sections by adopting an ordinance or resolution to that effect. Section 11-86-1, Code of Alabama 1975.

These boards are unincorporated. The board of directors is composed of from five to nine residents of the municipality who serve staggered five-year terms. Board members receive no compensation. Municipal officers or employees may serve on these boards. Section 11-86-2, Code of Alabama 1975.

Recreation boards are responsible for operating any recreation programs that contribute to the general welfare of the residents of the municipality. The board has control over all property and facilities assigned to it by the municipal governing body and any property it purchases. Section 11-86-3, Code of Alabama 1975.

The board may employ a director of recreation as its executive officer. The director, with board approval, may employ a staff. The salary and tenure of the director and employees are set by the board. Section 11-86-4, Code of Alabama 1975.

Municipalities and counties may jointly form a recreation board. The Attorney General has ruled that recreation boards created pursuant to these sections are given statutory power to direct, supervise and promote city recreation programs. Therefore, while a municipality may elect to abolish the board by ordinance, it cannot rework the purpose of the board to make it simply an advisory

board to the city council. AGO to Honorable Johnny Gray, November 13, 1973.

Selling Park Property

Alabama Constitutional Amendment 112 and Section 35-4-410, Code of Alabama 1975, state that no municipality can sell or convey public park or recreational property for another use unless the transfer is approved by the citizens of the municipality at a referendum held for this purpose.

What constitutes park and recreation property? In *Harper v. Birmingham*, 661 F.Supp. 672 (N.D. Ala. 1986), the court held that the provisions governing alienation of recreational property apply only where there has been a clear dedication by the property owner, and subsequent acceptance by the public entity, of the property for recreational uses. To establish a dedication, the clearest intention on the part of the owner to dedicate the property for recreational purposes must be shown. *O'Rorke v. Homewood*, 286 Ala. 99, 237 So.2d 487 (Ala. 1970).

In order for the dedication to become effective, the municipality must accept the dedication for park and recreation purposes. *Vestavia Hills Board of Education v. Utz*, 530 So.2d 1378 (Ala. 1988).

There are many ways to accept a dedication. A municipality may adopt an ordinance or resolution to that effect or make improvements to the property which indicate acceptance. The *Vestavia Hills* case also makes clear that a common law acceptance may occur where the public uses the property for recreational purposes. Such an acceptance is determined on a case-by-case basis by examining the extent of the public's use of the property.

Section 35-4-411, Code of Alabama 1975, establishes the procedure for alienating park property. This section requires the municipal governing body to adopt a resolution or ordinance describing the proposed conveyance, the consideration for the conveyance, and the names of the parties involved. This ordinance must be published once a week for four consecutive weeks in a newspaper published in the city or town. If there is no newspaper published in the municipality, it must be published in a newspaper having general circulation in the municipality. The ordinance becomes effective only after being approved by a majority of the qualified electors of the municipality.

A water tower may be erected on park property if the council finds that the tower does not interfere with the recreational use of the property. AGO 1996-212.

Liability Issues

Another common issue concerning recreation is the extent of municipal liability when providing a recreation area. In Alabama, the duty of care a property owner owes to persons using his or her property for sporting or recreational

purposes is governed by Sections 35-15-1 through 35-15-5, Code of Alabama 1975.

Sections 35-15-1 and 35-15-2 state that no owner owes a duty of care to keep his or her premises safe for entry and use by others for any recreational purpose, even if the use is at the invitation of the property owner or occupant. Further, Section 35-15-1 states that, with certain exceptions, there is no duty to warn of dangerous conditions, use of structures or activities.

The exceptions are listed in Section 35-15-3. First, a property owner or occupant is liable for willfully or maliciously failing to warn or guard against a dangerous condition, use, structure or activity. Second, if a property owner or occupant grants permission to use his or her property for hunting, fishing, trapping, camping, hiking or sightseeing for a commercial benefit, the owner is responsible for any injuries which result. Finally, the property owner or occupant is liable to third persons to whom he or she owes a duty if someone using the property – with the owner's permission – to hunt, fish, trap, camp, hike or sightsee, damages the third person's property.

In *Wright v. Alabama Power Co.*, 355 So.2d 322 (Ala. 1978), the plaintiff was injured when he struck a fence partially submerged in a lake while he was riding an inner tube being pulled by a power boat. The lake had been created by a dam built by Alabama Power Company. The plaintiff alleged that Alabama Power owed him a duty to warn of the existence of the fence.

The court examined Sections 35-15-1 through 35-15-5 and held that persons upon land with permission or invitation for non-business purposes are considered licensees. Therefore, the landowners owed no duty to warn of potentially dangerous conditions unless they do some positive act which creates a new hidden danger that a person could not avoid by the use of reasonable care and skill.

Similarly, in *Russell v. TVA*, 564 F.Supp. 1043 (N.D. Ala. 1983), the court construed these sections as requiring only that a landowner refrain from wantonly, maliciously or intentionally injuring someone who uses his land. Licensees, the court stated, assume the risk of whatever they encounter on the property.

In *Glover v. Mobile*, 417 So.2d 175 (Ala. 1982), the City of Mobile operated a city park that bordered on the shoreline of the Dog River. The park was open to the public. No admission fee was charged. Two children drowned while swimming in the Dog River, although the city did not permit swimming at the park. The court found no reason to apply the statutes, holding that since the children were on the property without financially benefiting the city, they were licensees, and the city was not liable for their deaths.

Similarly, in *Edwards v. Birmingham*, 447 So.2d 704 (Ala. 1984), the plaintiff was injured while playing baseball

at a city-owned park. Because he did not pay an admission fee, the court found he was a licensee, and the city was not liable.

However, the fact that a municipality or board charges an admission fee does not automatically remove municipalities and recreation board from the protection of these sections. In *Martin v. Gadsden*, 584 So.2d 796 (1991), the Alabama Supreme Court held that these liability limitations shield municipalities from liability even where an admission is charged, provided that the facility is not operated for profit. Thus, the key issue is whether the fee charged is sufficient for the municipality or board to make a profit. These sections merely require that the recreational facility operate on a noncommercial basis. *See also, Cooke v. Guntersville*, 583 So.2d 1340 (Ala. 1991).

Limitation of Liability for Noncommercial Public Recreational Use of Land

Further limitations on the liability for the noncommercial recreational use of public land are found in Sections 35-15-20 through 35-15-28, Code of Alabama 1975. The stated policy behind these sections is to encourage the donation of property for noncommercial recreational purposes without exposing the owner to liability. The definition of the word “owner” in Section 35-15-21, specifically includes municipalities and recreational boards.

Section 35-15-24 limits the property owner’s liability to situations in which he or she has actual knowledge of a defect or condition that involves an unreasonable risk of death or serious bodily harm and is not obvious to users of the property. If the owner chooses not to guard or warn against the defect or condition, he or she may be held liable for any injuries that result. *Keenum v. Huntsville*, 575 So.2d 1075 (Ala. 1991).

However, Section 35-15-22 states that the owner owes no duty of care to inspect or keep the land safe for entry or use for any noncommercial recreational purpose, or to give warning of a dangerous condition, use, structure or activity on the land. So, there is a duty to warn only of defects of which the owner has actual knowledge. Constructive knowledge of the defect is not enough.

Also, Section 35-15-23 provides that the property owner makes no assurance that the property is safe by allowing the property to be used for noncommercial recreational purposes. This section goes on to state that the person using the property does not become a licensee or invitee, nor does the property owner incur any legal liability for injuries incurred while on the property. These sections place the users of non-commercial recreational property in the status of trespassers, regardless of the common law distinctions.

In *Grice v. Dothan*, 670 F.Supp. 318 (M.D. Ala. 1987), a child drowned while swimming at a public park owned by the City of Dothan. The property was used for fishing and picnicking and was clearly marked with “No Swimming” signs.

The court pointed out that, in Alabama, the purpose for which property is maintained is the controlling factor. The court said that Chapter 15 of Title 35 limits the city’s liability only to acts which constitute willful or malicious failure to guard or warn against a dangerous condition or activity on the property. The court found no facts to support such a claim.

The plaintiff also alleged the court should consider the minority of the victim as a mitigating circumstance. The court pointed out that Section 35-15-21(4) specifically defines a person to be any individual, regardless of age. Therefore, the exceptions to the general rules of premises liability which protect children do not apply in cases governed by these sections.

And, in *Ex parte Geneva*, 707 So.2d 626 (1997), the Alabama Supreme Court held that Section 36-15-24 did not subject the city to liability. In *Geneva*, the city placed a one-foot high fence around the entrance of the park to allow pedestrians to enter while keeping vehicles out of the park. There was also at the entrance a walk area a few feet wide between the post and another fence that allowed pedestrians to go around the cable. An 11-year-old girl broke her leg when she failed to step over the cable after dark. When the cable was first installed, the city attached a caution sign and white cloth strips to it, but there was some evidence suggesting that warning devices might not have been affixed to the cable when the accident in this case occurred. The trial court awarded the plaintiff \$20,000 and the Court of Civil Appeals upheld the verdict.

The Alabama Supreme Court reversed the decision. The court held that the plaintiff failed to present substantial evidence that the danger presented by the cable was not apparent, and in order to hold the municipality liable for an injury to a licensee, the danger had to be unavoidable by a person using reasonable skill and care, known to the municipality, which then failed to warn about the danger. The court said:

“... undisputed evidence shows that the cable could be seen by the use of reasonable care, and, therefore, the City had no duty to warn licensees using the park of its presence. Several of the other minors at the park with [the plaintiff] were able to see and jump over the cable only moments before her accident, even as they too were running out of the park. [the plaintiff] admitted that she knew of the cable because she had stepped over it upon

entering the park. Finally, there was no evidence that anyone besides [the plaintiff] had ever tripped over the cable, despite the park's history of nighttime use."

The fact that the injured person was a minor made no difference. They are held to the same duty of care under the recreational liability statutes. Section 35-15-21, Code of Alabama 1975.

In *Ex parte Town of Dauphin Island*, 274 So.3d 237 (2018), the Alabama Supreme Court held that pursuant to the recreational-use statutes, the Town was immune from a lawsuit to recover from a daughter's injuries suffered in a park on land leased by the town when the daughter was on a swing suspended from a tree branch and the branch fell. In *Town of Dauphin Island*, the court held that while it was undisputed the Town had knowledge of the existence of the swing suspended from the tree, there was no evidence, much less substantial evidence, indicating that the Town had actual knowledge that the swing presented an "unreasonable risk of death or serious bodily harm" to the public.

Skateboard Parks

Section 6-5-342 of the Code of Alabama 1975 outlines requirements for skateboard parks and roller skating parks and rinks. This law requires every operator of a skateboard or roller skating park to post and maintain a warning sign in a clearly visible location at the entrance of the park or rink and any other conspicuous location within the park or rink as specified in this section. The sign shall serve as a warning to the roller skaters, skateboarders, assistants, spectators, and any others involved in this activity that the operator of the park or rink has limited civil liability under Alabama law for skateboarding and roller skating activities occurring at the park or rink. Failure to comply with the requirements concerning warning signs provided in this section shall prevent an operator of a park or rink from invoking the privileges of immunity provided by this section. The warning notice shall appear on the sign in black letters with each letter to be a minimum of one inch in height and shall contain the following notice:

"WARNING: Under Alabama law, a skateboard or roller skating park or rink operator is not liable for injury, damages, or death of a participant, assistant, or spectator in skateboarding or roller skating activities in the park or rink resulting from the inherent risks of skateboarding or roller skating activities. If skateboarding is permitted in this facility, any person skateboarding in this facility must wear appropriate protective equipment including a helmet, elbow pads, and knee pads."

Attorney General's Opinions and Cases

- Where municipal funds are transferred to a publicly incorporated parks and recreation board, Section 11-43-12, Code of Alabama 1975, prohibits a municipal law enforcement officer from contracting with the board to provide security work. AGO 2000-191.
- Under Section 11-86-3 of the Code of Alabama 1975, a park and recreation board is autonomous to the extent that it has the final authority to direct, supervise and promote recreational facilities and programs that will contribute to the general welfare of the residents of the municipality. The board, however, is required to cooperate with local agencies for the purpose of maintaining and improving recreational services and facilities for the municipality. AGO 2007-076.
- A Park Board, formed and operating pursuant to section 11-86-1, et seq., of the Code of Alabama may create an expense account to pay travel and other expenses incurred by the director and staff of the Board while in performance of their official duties if the expense allowance bears a reasonable and substantially accurate relationship to the expenses incurred. To the extent an expense allowance exceeds actual expenses, however, it is an unauthorized increase in salary and violates sections 68 and 281 and Amendment 92 of the Constitution of Alabama. AGO 2008-016
- A municipality may charge a higher fee to nonresidents for the use of municipally owned parks and other municipal recreation facilities. AGO 2008-026.
- A municipal lodging tax imposed by ordinance without a specific exemption, would be applicable to a Park and Recreation Board created under section 11-18-1, et seq., Code of Alabama 1975. Section 11-22-13 of the Code of Alabama does not exempt such a Park and Recreation Board from collecting and remitting the lodging tax established by a lodging tax ordinance. AGO 2013-050.
- Genuine issues of material fact, as to whether county park and recreation authority officials knew that bleachers on recreational land were in need of repair, knew that someone was likely to fall as result of condition of the bleachers, knew that a fall onto concrete from bleachers presented an unreasonable risk of death or serious bodily harm, and failed to guard the bleachers or warn the persons using the bleachers, precluded summary judgment in action under provision of recreational use statute, which permitted owner to be held liable when, despite having knowledge of recreational use and a danger which was not apparent to recreational users, owner chose not to guard or warn.

Shirley v. Tuscaloosa County Park and Recreation Authority, 163 So.3d 352 (Ala.Civ.App.2014).

- A city may enter into an agreement with the YMCA of a county for the YMCA to provide services to its citizens in exchange for the use of city property. Whether the property has been dedicated as a public park is a factual determination to be made by the city. AGO 2017-024.
- City was entitled to municipal immunity in negligence action brought by invitee after the invitee fell through a broken drain gate in a city-owned park. *Ex parte City of Muscle Shoals*, 257 So.3d 850 (Ala. 2018).
- Recreational-use statutes precluded town from being liable for park user's injuries suffered while using a swing connected to a tree branch that fell. *Ex parte Town of Dauphin Island*, 274 So.3d 237 (Ala. 2018).

24. Conflicting Offices and Interests

Problems with the legal incompatibility of offices and conflicts of interest are troublesome subjects which always nag at municipal officials. Even after elections are over, these issues continue to nag public officials and employees. Under the common law, offices were considered incompatible if their functions were inconsistent, one being subordinate to and interfering with the other so as to induce the presumption that they could not be executed impartially by the same officer. Also, at common law, the Biblical admonition that “no man can serve two masters” has been applied to prevent public officers from doing public business with themselves.

In addition to these heritages from the common law, there are definite provisions on the subject found in the Alabama Constitution of 1901 and the Code of Alabama. From a practical standpoint, these laws are the principal guides. Few cases construing these laws exist, but conscientious officials have requested numerous opinions of the Attorney General’s office over the years relating to conflicting offices and conflicts of interest.

This article is a summary of constitutional and statutory provisions dealing with the compatibility of offices and conflicts of interest together with a collection of related opinions from the Attorney General and the courts.

Offices of Profit

State laws which prevent the holding of two offices of profit by the same person at one time have generated more opinions from the Attorney General than any other aspect of this subject. Section 280 Alabama Constitution, 1901, states:

“No person holding an office of profit under the United States except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public and commissioners of deeds.”

In addition to this provision, Section 36-2-1(b), Code of Alabama 1975, provides that:

“No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this state, nor shall any person hold two offices of profit at one and the same time under this state, except constables, notaries public and commissioners of deeds.”

What exactly does the term “office of profit” mean? The lack of a concise definition for the term has caused most of the trouble in construing these laws. The Alabama Supreme Court gave this guidance: “We are of the opinion and so hold, that any state, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the state, the term and salary or prerequisites of which are fixed by law, is an office of profit within the purview and meaning of Section 280, Alabama Constitution, 1901.” *State v. Wilkerson*, 124 So. 211 (1929). Stated another way, an office of profit is one that “derives its authority directly from the state by legislative enactment; its duties and powers are prescribed by law; and its holder is vested with a portion of the powers of government, whether it be legislative, judicial or executive.” *Opinion of the Clerk* No. 27, 386 So. 2d 210 (Ala. 1980).

In *Montgomery v. State*, 107 Ala. 372, 18 So. 157 (Ala. 1895), three tests were established by the court to determine if an office is one of profit:

- whether the sovereignty, either directly or indirectly, as through a municipal charter, is the source of authority;
- whether the duties pertaining to the position are of a public character; that is, due to the community in its political capacity; and
- whether the tenure is fixed and permanent for a definite period by law.

To this might be added that the office must carry with it a right to compensation for the performance of its duties. See *Opinion of the Justices* No. 64, 13 So.2d 674 (1943).

It is important to understand that these provisions of the law do not prevent a person who holds an office of profit from being a candidate in an election for another office of profit, nor from continuing to hold the first office after election to the second office up to the time the duties of the second office are assumed. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57 (Ala. 1913). Acceptance of the second office of profit automatically vacates the first office. *State v. Herzberg*, 141 So. 553 (Ala. 1932). This, of course, is true whether the second office of profit is elective or appointive.

Ruled Offices of Profit

The following positions have been held to be offices of profit either by the courts or by the Attorney General: **Mayor**, 1 Q. Rep. Att. Gen. 85, 88 Q. Rep. Att. Gen. 8, and AGO to Hon. Bentley Hill, July 21, 1972; **members of county board of registrars**, AGO to Hon. W. H. Olvey,

July 23, 1959 and AGO 2005-031; **municipal judge** (see exception below), AGO to Hon. Arnold Teks, July 13, 1960, and Hon. P. M. Johnston, September 11, 1964; **county solicitor**, 64 Q. Rep. Att. Gen. 108, and AGO to Hon. P. M. Johnston, September 11, 1964; **member of county board of education**, 77 Q. Rep. Att. Gen. 77 and AGO 1988-114; **supernumerary probate judge**, AGO 1980-518 (to Hon. Don Siegelman, August 19, 1980); **register of circuit court**, 52 Q. Rep. Att. Gen. 238 and 103 Q. Rep. Att. Gen. 8; **circuit solicitor**, AGO to Hon. Glenn Manning, August 23, 1956; **state docks director**, 88 Q. Rep. Att. Gen. 8, and AGO to Hon. K. L. McRae, July 8, 1957; **member of board of equalization**, 82 Q. Rep. Att. Gen. 20; **member of state legislature**, *Smith v. State*, 162 So.2d 473 (Ala. 1964), and Biennial Reports of the Attorney General, 1928-30, page 636; **councilmembers where their salary has been established by ordinance or resolution**, 103 Q. Rep. Att. Gen. 8 and AGO 1988-114; **holder of any elective office of the county**, 77 Q. Rep. Att. Gen. 47 and AGO to Mayor of Cherokee, August 2, 1956; **police chief**, *Alexander v. State*, 150 So.2d 204 (1963) and AGO to Hon. Larry Moody, November 18, 1975; **county license inspector**, AGO to Mr. T. C. Almon, April 17, 1964; **coroner**, AGO to Hon. Moran Baxter, February 21, 1975; **county commissioner**, AGO to Hon. Charles R. Adair, Jr., January 27, 1975; **district attorney**, AGO to Hon. John Starnes, September 26, 1973; **deputy district attorney**, AGO to Hon. John T. Reid, April 9, 1974; **deputy coroner**, AGO 1979-221 (to Hon. William J. Murray, June 11, 1979); **member of water improvement commission**, AGO 1979-160 (to Hon. Robert Gullledge, April 26, 1979); **supernumerary probate judge**, AGO 1980-518 (to Hon. Don Siegelman, August 19, 1980); **fire chief**, AGO 1981-235 (to Hon. Charles A. Nix, February 10, 1981); **postmaster**, AGO to Hon. Berniece T. Clark, July 14, 1972; **city school superintendent**, AGO 1982-066 (to Hon. Bob M. English, November 6, 1981); **supernumerary district attorney**, AGO 1982-309 (to Hon. Joseph M. Carlton, April 29, 1982); **clerk of the State Supreme Court**, AGO 1984-136 (to Hon. John F. Tanner, January 27, 1984); **member of the board of Alabama Board of Funeral Services**, AGO 1993-212; **member of State Board of Education**, AGO 2003-065; **member of Macon County Racing Commission**, AGO 2004-199; **members of the State Oil and Gas Board**, AGO 1994-132.

Section 280, Alabama Constitution, 1901, does cover a municipal councilmember who is entitled to receive a salary. If the councilmember is not entitled to receive a salary, then he or she does not hold an office of profit. The Attorney General has ruled that a councilmember entitled to receive compensation cannot waive that compensation in order to make the position one that is not an office of profit. AGO to Hon. John A. Denton, March 8, 1974; AGO

2000-064. Neither Sections 145, 147, nor 280, Alabama Constitution, 1901, prohibit a municipal judge from also serving as a city council member. AGO 2006-060.

Ruled NOT Offices of Profit

On numerous occasions the courts or the Attorney General have ruled that certain public positions are not offices of profit. Caution must be used in this aspect of the discussion of offices of profit. Simply because a position is not an office of profit does not necessarily mean it may be held simultaneously with an office of profit. Conflicts of interest statutes might prevent an officer of a municipality from being employed in a position not deemed to be an office of profit. Any position with a governmental unit which is a matter of contract is not deemed an office of profit.

The following is a list of positions held **not** to be offices of profit: **Councilmembers whose salary or compensation has not been set by ordinance or resolution**, 103 Q. Rep. Att. Gen. 8 and AGO 1992-400; **school principal**, AGO to Hon. William Olvey, August 31, 1956; **delegate to political party convention**, 83 Q. Rep. Att. Gen. 32; **city attorney**, AGO to Hon. Donald Burtkiewicz, September 28, 1964; **vocational teacher**, AGO to Hon. W. W. Weatherford, August 16, 1960; **jury commission clerk**, AGO to Hon. H. F. Koonce, February 9, 1961; **Civil Defense director**, AGO to Hon. W. M. Griffin, October 7, 1964; **assistant city attorney**, *State v. Wilkinson*, 124 So. 211 (Ala. 1929); **assistant director of vocational trade and technical school**, AGO to Hon. Herman Thompson, June 25, 1966; **city clerk**, 15 Q. Rep. Att. Gen. 350; **city treasurer**, 15 Q. Rep. Att. Gen. 350; **member of State Planning Board**, 46 Q. Rep. Att. Gen. 82; **superintendent of school bus transportation**, 52 Q. Rep. Att. Gen. 268; **member of municipal water board**, 81 Q. Rep. Att. Gen. 32; **school teacher**, AGO to W. H. Olvey, August 31, 1956 and AGO 1984-108 (to Hon. Fred M. Scoggins, January 4, 1984); **director of municipal utility board**, AGO to Hon. Robert S. Milner, June 5, 1967; **county attorney**, AGO to Hon. L. H. Boden, November 5, 1970; **president of a state university**, AGO to Hon. Robert Guillot, March 13, 1972; **rural mail carrier**, AGO to Ms. Martha Lawrence, June 29, 1972; **deputy sheriff**, AGO to Hon. E. H. Graves, Jr., June 15, 1972; AGO 2009-048; **bailiff**, AGO to Hon. Curtis Wright, February 6, 1976; **unpaid member of city board of education**, AGO to Mr. Clifford S. Smith, August 1, 1977; **special assistant attorney general**, AGO to Hon. James D. Evans, December 20, 1977, and February 2, 1978; **county RSVP director**, AGO 1982-166 (to Hon. William B. Duncan, February 5, 1982); **assistant district attorney**, AGO 1985-084 (to Hon. John C. Jay, Jr., November 20, 1984); **members of utility board, housing authority**

and industrial development board, AGO 1985-137 to Hon. R. C. Hagood, December 27, 1984; **classified employees elected to county office**, AGO 1986-010 (to William G. Hause, October 8, 1985); **County Clerk**, AGO 1986-384; **employees of separately incorporated electric corporations**, AGO 1992-309; **members of the board of commissioners of an emergency management communications district**, AGO 1992-375; **retired probate judge receiving retirement pay**, AGO 1992-497; **distribution clerk with U. S. Postal Service**, AGO 1980-586 (to Hon. Thomas E. Manning, September 15, 1980); **Water Authority board member**, AGO 2004-193; **county legislative coordinator**, AGO 2004-224; **uncompensated member of local volunteer fire department**, AGO 2006-138; **uncompensated reserve police officer**, AGO 2004-174; and an **uncompensated volunteer fire chief**, AGO 1993-012; **uncompensated county park and recreation board members** serving on a board created pursuant to Section 11-22-1, et seq., Code of Alabama, 1975, AGO 2009-064; A **supernumerary circuit clerk** employed with a unit of local county government in a clerical non-policymaking position. AGO 2013-22; The position of **judicial secretary**. AGO 2014-19.

Nepotism

The question often arises as to whether employees of cities and towns may be related to officers of the municipality by blood or marriage. In an opinion to Hon. L. C. Grigsby, dated December 21, 1959, the Attorney General ruled that his office could find no general laws which prohibit a relative of the municipal governing body from holding a position with the municipality. The state nepotism statute applies **only** to state officials and employees. AGO to Hon. Elizabeth O. Thomas, January 12, 1976; AGO 2002-168, AGO 2004-149 and AGO 2015-005.

It should be pointed out, however, that several municipalities have local civil service statutes which prescribe conditions under which relatives may not be employed. The Attorney General's office has determined that absent local civil service prohibitions, a council member's spouse may be employed by the municipality as long as the council member does not participate in the employment decision or any other issue specifically concerning the spouse's employment. AGO 2000-181.

Membership on Boards

Alabama laws provide for the establishment of boards which act as agencies of municipalities. Notwithstanding any other provision of law, employees of any separately incorporated public corporation authorized to be created by a municipality pursuant to state law are employees of that separately incorporated entity and are not employees

of the municipality authorizing the creation of the entity. Section 11-40-24, Code of Alabama 1975. These statutes invariably prescribe restrictions upon the persons who may serve as directors. Care must be used by a municipal governing body or other appointing authority, to comply with these restrictions in each case. Examples of these restrictions are revealed in the following Attorney General and court opinions:

- A municipal councilmember may not be appointed to serve as a member of the municipal housing authority because Section 24-1-24, Code of Alabama 1975, provides that "None of the commissioners may be city officials." AGO to Hon. E. E. Wakefield, December 11, 1956.
- A councilmember may not be a member of a zoning board of adjustment. AGO to Hon. John B. Nisbet, Jr., February 24, 1970.
- A mayor cannot serve as a member of the State Ethics Commission. AGO 1979-344 (to Hon. Leslie S. Wright, January 25, 1979).
- A councilmember may be employed by a separately incorporated utility board if he or she does not hold a managerial position with the board. AGO 2004-213.
- Section 11-50-313, Code of Alabama 1975, has been amended to permit councilmembers serving on utility boards organized pursuant to said law to receive a fee for this service, provided the board of directors of the utility approves it first. However, a utility board cannot pass a resolution allowing a municipal officer to receive retroactive compensation for serving on the board. AGO 1986-268.
- Prohibition against municipal officer serving on city waterworks and gas board included in board's original certificate of incorporation was invalidated and superseded by restated and amended certificate of incorporation that omitted any such prohibition; restated and amended certificate was properly adopted and recorded, as required by statute, and embodied all the terms and provisions required in a new certificate of incorporation, and thus complete reading of restated and amended certificate indicated clear intent for it to be treated prospectively as controlling certificate, superseding all prior amendments and expressing in totality powers of board. *State ex rel. Sargent v. Edwards*, 291 So.3d 1166 (Ala., 2019)
- A member of a city gas board may serve on the city medical clinic board, although Section 11-58-4, Code of Alabama 1975, prohibits a city officer from serving on a medical clinic board. However, the Alabama Supreme Court concluded in *Mobile v. Cochran*, 276 Ala. 530,

165 So.2d 81 (1964), that a member of a separately incorporated municipal utility board is not an officer or employee of the city. AGO to Hon. Louis P. Moore, November 3, 1978.

- A municipal officer or employee may serve as a director of a downtown redevelopment authority. Section 11-54A-7, Code of Alabama 1975.
- A councilmember may serve as a director of a county hospital association. AGO 1981-003 (to Hon. W. D. Scruggs, Jr., October 2, 1980).
- A member of a County Board of Human Resources created pursuant to Section 38-2-7 of the Code may not also serve as a municipal official. AGO 2009-017.
- A member of the State Board of Human Resources may serve as a councilmember. AGO 2009-017.
- Section 11-54-86 of the Code of Alabama, prohibits a member of the industrial development board serving both as an officer or employee of the municipality and as a director on an industrial development board. AGO 2006-104.
- A member of the Walker County Civil Service Board (“Board”) vacates his or her position on the Board at the time he or she files qualifying papers for an elective office, due to a provision of Act 80-673 which authorized creation of the board. The board member’s subsequent withdrawal as a candidate for elective office does not reinstate the board member. A vacancy exists on the Board that may be filled by appointment in accordance with section 5 of Act 80-673. AGO 2008-086.

At times questions are raised as to the legality of professionals serving on municipal boards. Section 36-25-9, Code of Alabama 1975, states that nothing in that section shall prohibit real estate brokers, agents, developers, appraisers, mortgage bankers or other persons in the real estate field or other state-licensed professionals from serving on any planning boards or commissions, housing authorities, zoning board, board of adjustment, code enforcement board, industrial board, utilities board, state board or commission. The statute further provides that all municipal regulatory boards, authorities or commissions currently comprised of any real estate brokers, agents, developers, appraisers, mortgage bankers or other persons in the real estate industry may allow these individuals to continue to serve out their current term if appointed before December 31, 1991, provided that, at the conclusion of such term, subsequent appointments shall ensure that membership of real estate brokers and agents shall not exceed one less of a majority of any municipal regulatory

board or commission effective January 1, 1994.

The mayor, as a member of the city council and of the planning commission and who is also a realtor with a client affected by a vote, is prohibited from voting on any matter defined in Sections 11-43-53 and 36-25-9, Code of Alabama 1975. AGO 1993-193. Pursuant to Section 11-43-45 of the Code of Alabama, councilmembers who have been nominated to fill the position of council president may vote for themselves. AGO 2017-014.

Public Utility Employees

Section 11-43-11, Code of Alabama 1975, states the following:

“No officer of any municipality shall, during his term of office, be an officer nor employed in a managerial capacity, professionally or otherwise, by any corporation holding or operating a franchise granted by the city or the state involving the use of the streets of the municipality. This section shall not apply to or affect any attorney or physician employed by the municipality, and any municipality incorporated or organized under any general, special or local law of the state of Alabama may employ an attorney or physician, or attorneys or physicians, employed by a public utility.”

The Alabama Supreme Court in *State v. Morrow*, 162 So.2d 480 (1964), held that the legislative intent and purpose of this section is clear. The court stated that this provision of law was enacted on the theory that employment by a public utility holding a franchise granted by the city involving the use of the city’s streets could be incompatible with serving as an officer of the municipality at the same time. The real basis of such incompatibility is the possibility of a conflict of interest between the interest of the municipality and the interest of the public utility. The Attorney General has ruled that the law does not prevent a person covered by its provisions from running for municipal office and being elected thereto. But before assuming the duties of the office that person must resign from employment with such utility, even though that employment is not within the municipality. AGO to Hon. Charles R. Cain, September 22, 1960. This section prohibits the treasurer of the Northwest Alabama Gas District from serving as mayor or councilmember where the district serves the municipality. AGO to Hon. M. C. Hollis, Jr., July 24, 1956. A cable television company which holds a franchise issued by the city is within the coverage of the section. AGO to Hon. W. K. Little, May 12, 1972.

This statute does not prohibit the mayor of a municipality from being appointed superintendent of utilities as such is expressly authorized by law. *See*, Section 11-43-161,

Code of Alabama 1975. The manager of the local office of Alabama Power Company cannot be a member of the city's incorporated utility board. AGO 1981-403 (to Hon. J. D. Falkner, June 2, 1981). A person employed by a utility holding a city franchise may serve on the city governing body unless he serves in a managerial capacity for the utility. AGO 1986-211 (to Hon. W. A. Smith, April 15, 1986).

Conflicts of Interest

A number of statutes prohibit municipal officers and employees from having specific dealings with a municipality, but the one most widely referred to is found in Section 11-43-12, Code of Alabama 1975. It provides, in part, as follows:

“No alderman or officer or employee of the municipality shall be directly or indirectly interested in any work, business, or contract, the expense, price, or consideration of which is paid from the treasury, nor shall any member of the council, or officer of the municipality be surety for any person having a contract, work, or business with such municipality, for the performance of which a surety may be required.”

This section not only prohibits officers and employees from having contracts with the municipality, it prohibits their being employed by the municipality. 53 Q. Rep. Att. Gen. 67. The following opinions indicate the wide scope of this section.

- An officer of a municipality may not hold any other salaried position in the municipality even though he receives no pay for such office. AGO to Hon. Cecil White, February 7, 1966. An officer of a municipality may not also serve as a police officer even though the only compensation provided would be payment for gasoline, oil and automobile upkeep. AGO to Hon. H. B. Wilson, December 14, 1964. However, the law does not prohibit a municipal firefighter from serving as a county commissioner. AGO 1992-277. A municipal clerk is not prohibited from serving as a director of a separately incorporated utility board or from receiving compensation for such service. AO NO. 1993-1.
- A municipal councilmember is prohibited from engaging in the bail bond business while serving on the council. A properly authorized professional bail company owned by the spouse of a councilmember may do business in the municipality. AGO 1997-084.
- A mayor has an indirect interest in the contracts of his wife who does business in her individual capacity and the municipality is prohibited from contracting with her by law. AGO to Hon. Josh Mullins, May 4,

1965. The section prohibits a municipality from doing business with a corporation whose sole stockholder and owner is the spouse of a municipal employee. AGO 1988-275. These sections also prohibit a mayor from selling insurance to the municipality, if he or she is an agent for the insurance company. AGO to Mayor of Florence, March 14, 1952. A municipal officer may not subcontract to perform part of a contract between the city and its prime contractor without violating the section. AGO to Hon. Carlton Mayhall, October 6, 1964. An officer may not lease a water supply to the waterworks system since he would be directly interested in a contract the consideration for which would be paid from the municipal treasury. AGO to Hon. E. C. Morrison, September 2, 1964. When a municipality serves as a sponsor for a summer food service program and federal funds pass through the municipal treasury, councilmembers are prohibited by Section 11-43-12, Code of Alabama 1975, from serving as the compensated program administrator. AGO 1992-299.

- A councilmember may not lawfully sell goods, wares or merchandise to a municipality which he serves as councilmember. However, the Attorney General has ruled that an exception exists when the only newspaper in the municipality is owned by a municipal official. In this case, the city may go ahead and advertise in that paper as required by law. It is reasoned that the publication requirement overrides the conflict prohibition; it is further noted that publication rates for legal advertisements are established by law. 56 Q. Rep. Att. Gen. 108.
- A municipal employee may not use municipal facilities to conduct Tupperware or jewelry parties on a lunch break or after hours, when the party will result in a financial gain to the employee or a business with which he or she is associated. AO NO. 1996-59.
- A member of a city council, who is employed by an insurance agency, may not vote, attempt to influence or otherwise participate in any matters coming before the city council involving a client of their employer, if either the employer or the councilmember stands to benefit from council action. AO NO. 2004-07.
- Members of a city council may vote on a rezoning issue affecting the neighborhood in which they or a family member resides, as there is no personal gain, nor will the members be affected any differently than the other residents of the neighborhood. AO NO. 2004-08 and AO NO. 2008-03.
- A municipality may sell real property to a group of

citizens, one of which is a councilmember, provided the city receives the fair market value of the property and the councilmember does not take any part in the consideration of the sale and does not vote on the sale of the property. It is the best public policy to sell such property by competitive bidding. The councilmember should make a public disclosure of the potential conflict of interest. AGO 1993-194.

- In *Mobile v. Cochran*, *supra*, the Alabama Supreme Court ruled that members of separately incorporated boards are not officers of the city and, therefore, are not governed by the restrictions of Section 11-43-12, Code of Alabama 1975.
- The chair of a municipal water and sewer board may accept employment with the city housing board as long as the individual does not use either position to financially benefit either the waterworks and sewer board or the housing authority. AO NO. 1993-126.
- A councilmember may not hold the job of municipal clerk even though no pay is received for services as a councilmember. AGO to Hon. Lloyd Barnes, November 26, 1956. A municipal employee who is elected to the council may not continue to serve as an employee when he assumes office on the council. AGO to Hon. Charles Adams, July 31, 1956.
- Although public officials and employees may accept free athletic tickets to sporting events or other social occasions, they may not solicit these tickets. AO NO. 1999-16.
- Section 11-50-313, Code of Alabama 1975, allows councilmembers serving as directors of utility boards to receive compensation for their service. Also, Section 11-43-80, Code of Alabama 1975, specifically allows the mayor to be hired as superintendent of utilities for additional compensation. An individual may not serve on a utility board and also be employed as manager of the board. AGO 1993-052.
- An employee of a separately incorporated municipal utility board, incorporated pursuant to the provisions of Act 175 of the 1951 Regular Session of the Alabama Legislature, may serve on the board of a municipal housing authority. AGO 2006-003.
- The spouse of a city council member may serve on the board of a municipal housing authority. AGO 2006-003.
- A person may serve as a postmaster and as a part-time councilmember. AGO 2005-019.

Section 11-43-12, Code of Alabama 1975, has also been interpreted to prohibit a city parks and recreation director from simultaneously serving as mayor. AGO to

Hon. T. E. Whitmore, April 6, 1976. It also prohibits the same person from simultaneously serving as city judge and as city attorney. AGO to Hon. Bobby Claunch, November 21, 1972. However, different members of the same law firm may serve as municipal judge and as municipal attorney, provided the earnings of neither position become revenues of the firm and are not taken into account when firm profits are divided. AGO 1992-044.

This section prohibits a town from purchasing land from its mayor. AGO 1981-239 (to Hon. Charles Couch, February 10, 1981). A municipality may, however, condemn the property of a municipal officer or employee provided that the officer or employee refrains from the decision-making process regarding the condemnation. AGO 1996-231. A municipality may purchase property owned by the mayor's mother when the mother is not a member of the mayor's household, not financially dependent on the mayor and the mayor does not participate in either the discussion or the vote. AGO 1997-140. A city may enter into an agreement, which involves the mayor's son as a real estate broker, provided the mayor does not reside in the same household as his son, is not financially dependent on his son, and does not participate in the discussion or vote on whether or not to enter into the agreement. AGO 2005-181.

The section also prohibits a company in which a councilmember owns a majority of the stock from selling materials to an independent contractor who is working on a city project if such materials will be used in the city project. AGO 1981-258 (to Hon. William J. Trussell, February 19, 1981). A councilmember who is a landlord may not participate in a community block grant program in the municipality for which he or she serves. AGO 1996-323.

A councilmember may not be employed by an engineering firm as a resident inspector for a project where the engineering company is performing services under direct contract with the city. AGO 1982-077 (to Hon. Charles E. Bailey, November 16, 1981). A councilmember may participate in the appointment or election of a son-in-law or stepfather to a city board provided the relative is not financially dependent upon the councilmember and is not an employer or employee of the councilmember. AGO 1983-112 (to Hon. Fred W. Purdy, December 29, 1982). A police dispatcher cannot serve as an agent for a bail bonding business in the city. AGO 1993-116. A mayor and members of the council may receive water and cable television discounts only if granted as part of their salaries. AGO 1991-173.

Section 41-16-60, Code of Alabama 1975, prior to its amendment by Act 2011-583, stated that no member of the municipal governing body or of a municipal board shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or

contract for any personal property or contractual services. This section is part of the competitive bid law applicable to municipal purchases of personal property or contractual services. The office of the Attorney General has determined that a member of a municipal utility board who is the sole owner of a business may not sell trucks to the utility board, with or without bids. AGO 1999-098. Section 41-16-60, Code of Alabama 1975, also precludes a member of the Water Works and Sewer Board from having any personal or financial beneficial interest, directly or indirectly, in a contract for the provision of services to the Board. Whether a direct or indirect benefit actually exists is a question of fact for the Board to determine. AGO 2007-078. These opinions were based on the prohibitions of Section 41-16-60 before amended by Act 2011-583. Section 41-16-60 of the Code, as amended, states as follows:

“Members and officers of the city and county boards of education, the district boards of education of independent school districts, may be financially interested in or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for *any personal property or contractual service* under either of the following conditions:

1. The contract or agreement under which the financial interest arises was created prior to the election or appointment of the individual to the position he or she holds.
2. The individual holding the position does not participate in, by discussion or by vote, the decision-making process which creates the financial or personal beneficial interest.”

The Attorney General relying on the amended version of Section 41-16-60 of the Code, determined that a member of a city or county board of education may contract with the board of education for personal property or personal services if: (1) the contemplated contract was in existence before a person was elected or appointed to the board or (2) the individual does not participate in the deliberation or vote on the proposed contract. AGO 2012-017 and 2012-018. These opinions also noted that Section 41-16-60 is not applicable to contracts subject to the Public Works Law. Furthermore, members of city and county boards of education may be subject to the Ethics Law and should submit these questions directly to the Ethics Commission.

The Alabama Firefighters’ Personnel Standards and Education Commission/Alabama State Fire College may employ off-duty municipal firefighters and paramedics during their “off time” as educational adjunct fire instructors for the Commission’s “open enrollment” training classes

to teach educational training classes to other firefighters and paramedics, including his or her own coworkers who may also be enrolled in such classes. This employment does not violate section 11-43-12 of the Code of Alabama. AGO 2011-019.

Section 11-43-12 of the Code of Alabama does not prohibit a city employee from holding the position of president of the humane society that provides contractual services to the City of Lanett, so long as the employee receives no compensation from the humane society. AGO 2013-002

The Water Works and Gas Board of the Town of Maplesville may lease equipment from an employee without violating sections 11-43-12, 41-16-60, or 13A-10-62 of the Code of Alabama. AGO 2013-031.

Section 11-43-12 of the Code of Alabama prohibits the receipt of federal grant funds by a municipal employee when the grant program is administered by the municipality for which the employee works. AGO 2013-010.

Purchase of property by the City of Florence from an estate of which a current employee is a beneficiary could result in a violation of section 11-43-12 of the Code of Alabama. The prohibitions found in section 11-43-12 do not apply to the Lauderdale County Commission. Thus, neither the Lauderdale County Commission, nor a municipal employee, would violate the criminal provisions of section 11-43-12 if the property in question is purchased by the county commission using county funds from an estate that has a municipal employee as a beneficiary. AGO 2016-018.

Section 11-43-12 of the Code of Alabama prohibits a city council member from engaging in business contracts with the municipality for which the council member serves. AGO 2013-028.

Violation of Section 11-43-12 is deemed a misdemeanor and constitutes grounds for impeachment. A violation of Section 41-16-60 also constitutes a misdemeanor punishable by fine not exceeding \$500 or imprisonment not exceeding 12 months. Removal from office is mandatory.

Exception for Class 7 and 8 Municipalities

Exceptions to Sections 11-43-12 and 41-16-60, Code of Alabama 1975, are provided by Section 11-43-12.1 for Class 7 and 8 municipalities (under 12,000 population according to the 1970 federal decennial census). Notwithstanding any statute or law to the contrary, any Class 7 or 8 municipality may legally purchase from any of its elected officials or employees any personal service or personal property, provided the elected official or employee is the only domiciled vendor of the personal service or personal property within the municipality. The cost or value of such personal property or service shall in no event exceed \$3,000. The elected official or employee, who proposes to

sell to the municipality, shall not participate in the decision-making process determining the purchase but shall make any disclosure required by the state ethics commission. The governing body of such municipality shall determine and find that the elected official is the sole vendor domiciled in the municipality and that the selling price of such service or property is lower than could be obtained from a vendor domiciled outside the municipality. In making such determination, consideration may be given to the quality of service or property proposed to be supplied, conformity with specifications, purposes for which required, terms of delivery, transportation charges and the date of delivery. The office of the Attorney General has determined that a Class 8 municipality may contract, under the provisions of Section 11-43-12.1, with a wood-waste recycling business partially owned by a council member if the provisions set out in the statute are followed. AGO 2003-014.

Section 11-43-12.1, Code of Alabama 1975 permits a Class 8 municipality to do business with a shop owned by a municipal officer when that shop or vendor is the only domiciled vendor within the municipality and the cost of the personal property or service offered by the vendor does not exceed \$3000 yearly. If the vendor is not the only one of its kind domiciled within the Town limits, or the service will exceed \$3,000 yearly, the elected official or municipal employee may bid on providing service to the Town pursuant to Section 11-43-12.1(b) and in accordance with Section 41-16-50 of the Code. AGO 2015-051.

This law also allows any Class 7 or 8 municipality to legally purchase from any of its elected officials any personal service or personal property under competitive bid law procedures. This authority is not restricted to situations where the elected official or employee is the sole vendor within the municipality. The elected official or employee, if he or she proposes to bid, shall not participate in the decision-making process determining the need for or the purchase of such personal property or personal service or in the determination of the successful bidder. The governing body shall affirmatively find that the elected official or employee is the lowest responsible bidder as required by the state law. It shall be the duty of the municipality to file a copy of any contract awarded to any of its elected officials or employees with the state ethics commission. All awards shall be as a result of original bid taking. In the event an elected official or employee offers to sell or submit a bid to the municipality, he or she shall make full disclosure of his or her ownership or the extent of ownership in the business organization with which he or she is associated, under oath, to the municipality.

Other Exceptions

Although Sections 11-43-12 and 41-16-60 have been

used as authority for prohibiting numerous activities, the courts and the Attorney General have ruled that certain exceptions, other than Section 11-43-12.1, do exist. For instance, a municipal official's son is not prohibited from bidding on a municipal contract because of kinship as long as the father has no financial interest in the son's business. AGO to Hon. James C. Wood, September 10, 1975. A person whose spouse serves as a municipal judge may serve on the municipal council provided he recuses himself from voting on issues dealing with his wife's position as judge. AGO to Hon. James H. Sims, July 8, 1975. A councilmember may serve as a volunteer firefighter for the municipality provided he receives no compensation for his services other than reimbursement for expenses incurred in the performance of his municipal duties. AGO to Hon. Paul Shipes, February 8, 1974. An incorporated water board may purchase insurance from an insurance agency owned by the municipal attorney. *Mobile v. Cochran, supra*. A municipal official may rent TV sets to patients in a municipal hospital. AGO to Hon. Oscar Peden, June 11, 1971.

These sections prohibit a municipal official or employee from doing business with the municipality, even if the contract is made on a competitive bid basis. However, the Attorney General has ruled that these sections do not prohibit a municipality from doing business with incorporated firms which have municipal officers or employees as shareholders or corporate officers. 128 Q. Rep. Att. Gen. 30. A municipality may not, however, do business with the incorporated firm if the firm is a **family-held** corporation or if the municipal official is a majority shareholder in the corporation. *See*, AGO to Hon. Frankie J. Kucera, April 6, 1976; AGO to Hon. Wayne Harrison, December 6, 1973; AGO to Hon. Herbert G. Hughes, August 9, 1968; and AGO to Hon. Andrew J. Gentry, Jr., March 8, 1974.

These sections do not prohibit a municipal official from bidding on real property being sold by the municipality, 129 Q. Rep. Att. Gen. 48, nor does it prohibit a corporation which employs a municipal official from selling automobiles to the municipality which the official serves. AGO to Hon. Robert S. Milner, April 4, 1975.

A municipality may do business with a bank where the mayor of the city serves on the bank's board of directors and is a minority stockholder, provided, however, that the mayor does not vote on matters relating to the bank that are brought before the city council. AGO 1993-168 and AGO 2005-047.

Political Activity of Public Employees

Section 17-1-4, Code of Alabama 1975, provides that no city employee, whether classified or unclassified, shall be denied the right to participate in county and state

political activities to the same extent as any other citizen of the state, including the endorsing of candidates and contributing to campaigns of his or her choosing. The statute gives county employees the right to participate in city and state elections and gives state employees the right to participate in county and city elections.

Section 17-1-4, Code of Alabama 1975, allows municipal employees the right to participate in municipal elections. To be a candidate, the employee must take an unpaid leave of absence or use personal leave or compensatory time. Employees who violate this provision must be dismissed. Employees may not use public funds or property for political activity. AGO 1993-00108. Supervisors may not coerce employees to campaign. Employees who campaign must do so on their own time.

Unpaid reserve officers do not have to take a leave of absence to run for municipal office unless the council establishes a policy requiring this. AGO 1997-00034. A personnel policy that allows employees during an unpaid leave to continue their health insurance coverage, provided they pay the premiums, would permit an employee taking time off to run for office to do the same. AGO 1998-00090. A part-time municipal judge is not required to resign or take a leave of absence in order to qualify and run for the office of probate judge. AGO 2018-013. A municipal police officer is not required to take a leave of absence to be a candidate for the office of sheriff because he is not seeking a municipal political office. AGO 2006-067.

A local act that prohibits employees of a county commission from participating in political activities at the city, county and state levels is in conflict with Section 17-1-4 of the Code of Alabama, which sets forth the right of city, county and state employees to participate in political activities. AGO 2000-153.

The federal Hatch Act covers federal employees and officers and employees of a state or local agency if their principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States government or a federal agency. Generally, this law does not restrict activity in nonpartisan elections. Municipal elections are nonpartisan. The Hatch Act is enforced by the U.S. Office of Special Counsel. Additional information may be obtained from that office.

Other Statutory Restrictions

No officer of a municipality may be surety for any person having a contract, work, or business with the municipality for the performance of which a surety may be required. Section 11-43-12, Code of Alabama 1975. Certain exceptions exist for public works bids. *See*, Section 39-1-4, Code of Alabama 1975.

No officer or employee of a municipality, personally or through any other person, shall deal or traffic in any manner whatsoever in any warrant, claim or liability against the municipality. Violation constitutes a misdemeanor and grounds for impeachment. Section 11-43-14, Code of Alabama 1975.

A councilmember or mayor is prohibited from voting on questions which come before the council in which he or she or his or her employer or employee has a special financial interest, either at the time of voting or at the time of his or her election. Section 11-43-54, Code of Alabama 1975. The Attorney General has ruled that this section requires a councilmember whose spouse is employed as a teacher in the city's school system to refrain from voting on all matters pertaining to compensation, tenure and benefits of his or her spouse. AGO 1989-084 and AO NO. 1992-87. However, the Attorney General has ruled that a mayor whose spouse is employed by the city school system may vote on school board appointments or on appropriations to the school system if the vote of the council ends in a tie. AO NO. 1992-83. Section 36-25-5(a), Code of Alabama 1975, permits a councilmember, whose spouse is employed in a private capacity by a person who is a current member of the city board of education, to vote on the appointment of a new board member. AO NO. 1991-51.

A county commissioner may not vote on a one-cent sales tax that would benefit a city board of education which employs him or her. AO NO. 1994-33. Councilmembers who are employed by a board of education cannot vote on a proposed sales tax increase for school system capital outlays. AGO 1991-041. A councilmember may not vote on a budget which would benefit his or her spouse, nor vote on a disciplinary matter, if the vote might affect his or her spouse financially. AO NO. 1992-98.

No member of a municipal council may be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he or she was elected. He or she may not be interested, directly or indirectly, in any contract, job, work, material or the proceeds thereof or services to be performed for the municipality, except as provided by law. Section 11-43-53, Code of Alabama 1975.

The towing company of a councilmember who is chairman of the police committee may be placed in rotation for dispatch by police if the councilmember does not participate in the discussion of the consideration of, or the vote on, the issue by the city council or committee. AGO 2015—030.

Chapter 10 of Title 13A, Code of Alabama 1975, as amended, sets out a number of offenses against public administration, such as obstructing governmental operations, refusal to permit inspection, failure to file a

required report, tampering with governmental records, bribery of public officials, failure to disclose conflict of interests, trading in public office, misuse of confidential information and perjury. Municipal officials should become familiar with these statutes.

The Theft of Honest Services Act. did not make criminal undisclosed self-dealing by a public official or private employee, i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty. The honest services statute covers only bribery and kickback schemes. *Skilling v. U.S.*, 561 U.S. 358(.2010).

25. Expenses of Municipal Officers and Employees

Generally, in the absence of any legal provision to the contrary, municipalities are not liable for the expenses their officers and employees incur. *McQuillin, Municipal Corporations*, 3rd Edition, Section 12.190. Most states, however, have enacted laws authorizing municipalities to reimburse officers and employees for expenses they incur in the performance of their official duties.

In Alabama, Sections 36-7-1 through 36-7-5, Code of Alabama 1975, provide a method for municipalities to reimburse officials and employees for expenses incurred while traveling beyond the municipal limits on official business. In addition, the Attorney General's office has consistently held that officials may be reimbursed for all expenses incurred in the performance of official duties.

This article discusses expense allowances and some of the issues which have arisen concerning reimbursement of municipal officials and employees for their expenses.

Expense Allowances

While there is no express statutory or judicial requirement that municipalities in Alabama reimburse employees and officials for their expenses, most municipalities do so. By the same token, there is no prohibition on reimbursement, provided that the actions of the municipality do not violate Sections 68 and 281, or Amendment 92, of the Constitution of Alabama 1901, or Sections 11-43-9 and 11-43-80, Code of Alabama 1975. These sections prohibit granting extra compensation to officers and employees after a service is rendered and also prohibit increasing or decreasing the salaries of municipal officials during the term in which they serve. Additionally, to advance travel expenses, the municipality and the official receiving the advance must comply with Section 36-7-3, Code of Alabama 1975, which sets out mandatory procedures to account for travel advances.

Clearly, the reimbursement of actual expenses does not violate these laws. The municipal official or employee is not receiving any extra compensation when reimbursement is received for expenses. Instead, the official or employee is left in the same position which he or she occupied prior to incurring any expenses.

Similarly, a municipality may establish a flat expense allowance for its employees or officials. In an opinion addressed to Hon. W. W. Malone, Jr., city attorney for Athens, dated October 20, 1965, the Attorney General's office stated "this office has consistently held ... that a flat expense allowance, if based upon a reimbursement to the officer concerned for expenses incurred by him in the performance of his official duties and bearing a reasonable and substantially accurate relationship to the actual expenses

incurred, is not considered as an increase in compensation." See, also, AGO 2008-038.

Thus, a municipality may, by ordinance, establish a flat expense allowance to be paid to its officials on a periodic basis provided the allowance bears a reasonable and substantially accurate relationship to the actual expenses incurred. To the extent an expense allowance exceeds actual expenses; however, it is an unauthorized increase in salary and violates the sections of the constitution and code cited above. AGO 1981-187 (to Hon. E. W. Patton, Jr., January 28, 1981). Also, amounts above actual expenses must be treated as income by the official or employee for income tax purposes.

Similarly, the Attorney General has ruled that a park board, formed and operating pursuant to section 11-86-1, et seq., of the Code of Alabama may create an expense account to pay travel and other expenses incurred by the director and staff of the Board while in performance of their official duties if the expense allowance bears a reasonable and substantially accurate relationship to the expenses incurred. To the extent an expense allowance exceeds actual expenses, however, it is an unauthorized increase in salary and violates sections 68 and 281 and Amendment 92 of the Constitution of Alabama. AGO 2008-016.

Recognizing the difficulty of determining whether an expense allowance is reasonably related to actual expenses incurred, the Attorney General's office pointed out in its opinion to Mayor Patton that the better practice is for municipalities to adopt a policy of reimbursing their officers for the actual expenses incurred while performing their duties only after receiving an affidavit from the officer listing the expenses. This method helps avoid the potential legal and tax problems encountered when a municipal official is paid a fixed periodic sum for expenses. However, the Attorney General's office pointed out that no law is violated when a municipality authorizes paying its officials a fixed expense allowance.

A \$100 per diem provided to members of a board that is in addition to the reimbursement for travel expenses is considered a salary or compensation. An expense allowance, however, is not compensation. AGO 2008-038.

Items Allowed in Expense Allowances

Regardless of whether a municipality chooses to reimburse its officials only for their actual expenses or to authorize paying them a fixed expense allowance, the general rule appears to be that municipal officers are entitled to reimbursement for all reasonable and necessary expenses legitimately incurred in the performance of their official

duties. Regarding the specific items which may be considered as legitimate expenses, the Attorney General's office has stated that this determination must ultimately be made by the municipal governing body.

However, some guidance was provided in the opinion to Mayor Patton cited above. In that opinion, the Attorney General stated that expenses for phone calls, gasoline and automobile repairs may be included in the expense allowance, provided that the expenses were incurred in the performance of official duties. AGO 2001-046. The time spent performing these official duties cannot be included in the expense allowance. Municipal officials are compensated for their time by salary and any extra money received for their time equates to an impermissible salary increase.

In an opinion to Hon. George W. Ivy, Jr. and Hon. John M. Anthony, Jr., dated December 2, 1974, the Attorney General ruled that municipalities have no authority to furnish telephone service at a city commissioners business or residence, even if he or she establishes his or her official office at either location.

The provision of telephone service is particularly appropriate for demonstrating the difficulties of using a flat monthly expense allowance. If the official is allotted a certain amount of money for telephone expenses yet does not make enough official calls to justify this amount, the official would be required to refund the extra funds to the city. Similarly, if the official spends more money for telephone calls than is allotted, reimbursement would be requested from the city. Reimbursing the official for actual expenses removes these difficulties.

Finally, in the opinion to Ivy and Johnson, the Attorney General ruled that municipalities may not pay the civic club dues of their officers or employees. However, municipalities may furnish city officials with automobiles, provided the automobiles are used solely for official municipal business. AGO to Hon. John M. Franklin, January 28, 1974. A municipality has the power to reimburse volunteers for mileage they incur on municipal business, if the council determines that reimbursing mileage serves a municipal purpose. AGO 1995-134.

Travel Expenses

While flat expense allowances are permissible for municipal officials who incur expenses in the performance of their official duties while in the municipality, in an opinion to Hon. Emory Folmar, mayor of Montgomery, dated May 19, 1980, the Attorney General stated that this allowance cannot "include reimbursement for expenses incurred while traveling or remaining beyond the limits of the municipality." Instead, reimbursement for expenses "beyond the limits of the municipality" is governed by Sections 36-7-1 through 36-7-5, Code of Alabama 1975.

Procedure for Approval

Section 36-7-1 provides that no officer or employee of a municipality or county in Alabama shall be reimbursed from the treasury of the municipality or county unless an itemized statement of expenses is presented and is approved as provided in Section 36-7-2.

Section 36-7-2 requires the officer or employee, immediately upon return, to present the statement to the municipal comptroller in a commission-governed municipality and to the treasurer in a council-manager municipality. This statement must be presented to the council or commission at a regular meeting held within 30 days after it is presented to the comptroller or treasurer. If the governing body disallows the statement, the official or employee cannot be reimbursed. It is the opinion of the League that if the governing body finds only certain items should be disallowed, those items may be deleted from the statement and the statement approved as amended.

In an opinion to Hon. B. R. Winstead, Jr., director of finance for Birmingham, dated October 31, 1973, the Attorney General ruled that, although Section 36-7-2 requires the official who incurred the expenses to present the itemized statement of expenses immediately upon returning from his or her trip, the official must simply present the statement as soon as is practicable after returning. Then, in order for the official to receive reimbursement for those expenses, the municipal governing body must, at a regular meeting within 30 days after the statement is presented, approve the statement of expenses.

The Attorney General has held that a town council may require its municipally sanctioned volunteer fire department to provide the town with unredacted copies of fire and emergency medical services reports to keep on file for use in determining the reimbursement of expenses of department personnel making fire and medical calls. AGO 2007-111

Advances

Section 36-7-3 states that no sum shall be advanced from the municipal treasury to defray the travel expenses of a municipal official or employee unless the governing body passes a resolution allowing the expense. This resolution must state the purpose and object of the proposed trip.

The Court of Civil Appeals of Alabama has held that a city council may not retroactively approve an advance of travel expenses which were not properly made pursuant to Title 36, Chapter 7, Article 1, Code of Alabama 1975. *Cassady v. Claiborne*, 590 So.2d 339 (Ala. Civ. App. 1991).

When funds are advanced to a municipal official or employee, an itemized statement, as specified in Section 36-7-1, must be presented immediately upon the return of the official or employee. Section 36-7-4, Code of Alabama 1975. Failure to present this statement and to have it

approved renders the officer or employee personally liable to the municipality for the advanced funds. If the officer or employee receives a salary for services, the amount of the advance can be deducted from any future salary received from the city.

The provisions of the code which deal with reimbursement of expenses for traveling beyond the municipal limits – including the provisions relating to advancement of funds – do not apply to the use of a municipal credit card beyond the corporate limits on official municipal business. *See* Section 36-7-1, Code of Alabama 1975. Thus, a municipal council does not have to approve, by resolution in advance, the use of a credit card issued in the name of a municipality for trips outside the municipality by municipal officers and employees.

Reimbursable Travel Expenses

While no Attorney General's opinions or Alabama cases deal with the question of what items may be claimed as travel expenses, it seems clear that items such as gasoline, business-related phone calls, automobile expenses, hotel rooms and meals are permissible. In addition, traveling officials and employees can probably participate in special planned events, assuming that the events are part of a convention or meeting the official or employee is attending. Again, however, the time the official spends away from the municipality is generally not reimbursable. These are questions that must be answered on a case-by-case basis with the ultimate decision on the items which are allowable resting solely with the municipal governing body.

In addition, no opinions or cases explain what trips are reimbursable. The general rule is that if the trip is related to official municipal business, the officer or employee is entitled to be reimbursed for expenses.

However, it is clear that a municipality may not pay the expenses incurred by the spouse of an official or employee while traveling. AGO to Hon. George W. Ivy, Jr. and Hon. John M. Anthony, Jr., December 2, 1974. Further, a city may adopt a personnel policy that provides for the reimbursement of travel expenses for select candidates for employment with the city and for the reimbursement of moving expenses for select new employees, subject to restrictions to prevent abuse and promote fiscal responsibility. AGO 1999-278.

Some boards or municipalities have legislative acts that specify the items which can be included as reimbursable expenses or which limit the amount of expenses an official can claim. These acts would govern the amount or the type of expenses which can be claimed in these instances. Officials should be aware of the acts and code sections which govern their operation.

Penalties

Any officer or employee drawing or approving any warrant drawn on the municipal treasury in violation of these provisions shall be guilty of a misdemeanor and punished as provided by law. Therefore, proper care should be taken before deciding what items to allow as part of the expense allowance and the municipal governing body must ensure that the expenses which are being claimed by the officer or employee are legitimate.

Additionally, officers and employees who fail to account for travel advances may be convicted for a violation of the Ethics Law. *Langham v. State*, 662 So.2d 1201 (Ala. Crim. App. 1994).

Recommended Accounting Procedures

There appears to be a conflict in the Attorney General's opinions regarding flat expense allowances and actual expense reimbursements. The opinions indicate that officials may receive a flat expense allowance, but this allowance may not exceed actual expenses incurred. The better practice seems clear – municipalities should reimburse officials for the actual expenses incurred. This satisfies all the requirements of the various code sections as well as the accounting requirements of the Internal Revenue Service.

In deciding which expenses to allow, one requirement is common to both the IRS and state laws – the expense must be both reasonable and necessary. Reimbursing officials only after they present a list of actual expenses helps the municipality ensure that this requirement is met.

Regarding travel expenses, in most cases, an official or employee will request an advance from the municipal treasury to help defray expenses. As noted above, the Code of Alabama permits this practice, provided a resolution to this effect is passed by the governing body of the municipality. This resolution should include detailed instructions concerning the accounting to be made by the official or employee upon his or her return. When the accounting, in written form, is made to the municipality, it relieves the employee from making an accounting to the IRS, provided the procedure is done properly. The League suggests enlisting the aid of the city auditor to ensure that the proper procedure is followed.

26. Military Leave for Municipal Employees

Alabamians have traditionally supported a strong military and backed this support with a willingness to serve. In terms of total numbers, Alabama has one of the largest National Guards in the country.

Many guardsmen and reservists are also municipal employees and officials. Events of recent years have resulted in an increase in employees and officials entering military service. Of course, these individuals already serve the public, often in positions which cannot easily remain vacant. When they take time off to serve in the armed forces, losing them – even on a temporary basis – creates hardships for the municipality. Often, the municipality has to hire replacements.

With the withdrawal of troops across the globe, many of these employees and officials will be returning home and seeking reemployment. This article examines state and federal laws regarding military leave to which municipal employees and officials are entitled.

Elected and Appointed Officials

Sections 36-8-1 to 36-8-6, Code of Alabama 1975, govern the temporary replacement of elected or appointed officials who are on active duty status. Pursuant to these sections, an official who is serving in the military at any time during an existing state of war or when a national emergency has been declared by the President does not vacate his or her office. It doesn't matter whether the official volunteers for service or is called involuntarily. Service in the United States Department of Homeland Security, constitutes "military service" for purposes of Section 36-8-2 of the Code of Alabama, such that the official's office shall not be deemed vacated by reason of the service. AGO 2011-018.

Section 36-8-3 gives the person or entity with the power to fill vacancies in the office the authority to temporarily appoint an acting official to serve while the regular official is gone. The regular official must notify the appointing authority in writing that he or she will enter military service and wishes to have an acting official appointed. If there is no written notice, the authority may temporarily fill the vacancy itself.

The official who is temporarily vacating the position may recommend a successor to the appointing authority. The temporary official has all the powers, duties and authority of the regular official. If the temporary replacement official enters into active duty, the appointing authority may fill the vacancy temporarily once they are notified in writing. If the temporary official does not notify them within 30 days of

entering service, the appointing authority may fill the office with another temporary official.

The temporary acting official serves during the absence of the regular official and until 30 days from the date the regular official provides written notice that he or she intends to return to office.

Employees and Officers Granted 168 Hours Paid Leave to Serve

Section 31213, Code of Alabama 1975, provides that all municipal employees and officers who are active members of the National Guard, any reserve unit of the military, the Civil Air Patrol or the National Disaster Medical System are entitled to 168 hours of paid leave of absence per calendar year, in order to attend training sessions. Absences cannot be deducted from the employee's vacation or sick leave time, nor can they affect the employee's efficiency rating. Public entities cannot refuse an employee the right to join the reserve or guard or interfere in his or her membership in the reserves or guard. AGO 2002-090. Pursuant to Section 31-2-13 of the Code of Alabama, all employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, are entitled to paid military leave for 168 working hours every calendar year. AGO 2006-135. The Attorney General's Office has opined that this statute also applies to employees of a gas district incorporated pursuant to Section 11-50-390 of the Code of Alabama, 1975. AGO 2017-032.

In short, Section 31213, Code of Alabama 1975 guarantees employees and officers 168 hours each year in order to serve in Reserve branches of the military or the Guard without the leave counting against them. Job performance ratings, seniority, or any other job benefits may not be reduced due to the absence of the employee.

For purposes of this provision, it doesn't matter that the employee voluntarily joined or re-enlisted in the Reserve or Guard. AGO 1981-309 (to Hon. W. H. Bendall, April 2, 1981). The legislative intent behind Section 31213 was to encourage employees of public agencies to join military units. *Britton v. Jackson*, 414 So.2d 966 (Ala. Civ.App.1981). A municipality may not pass an ordinance providing that an employee on military leave will receive the difference between the employee's salary and military base pay. Employees and officers are entitled to receive pay for both their military service and their jobs as municipal employees. AGO 1996188.

State Active Service Duty

In addition to leave for military training purposes,

Section 31213 grants employees another 168 hours “at any one time while **called by the governor** to duty in the **active service of the state.**” (emphasis added).

In interpreting Section 31-2-13, the Attorney General stated in AGO 2002-090, that a qualifying individual is entitled to 168 hours of leave with pay while in federal status per calendar year *and an additional* 168 hours of leave with pay while in the active service of the state by the governor. The opinion goes on to hold that a member who has used only a portion of his or her federal status hours of leave with pay may use the remainder of federal leave status with pay when called into federal service in the war on terrorism. If there is a question as to how an official or employee was called to active duty, the League recommends checking with his or her commanding officer.

Citing AGO 1991-140 (where the Attorney General opined that Troy State University could not pay the difference in an employee’s military pay and his normal pay provided by the university), the Attorney General went on to hold that because Section 31-2-13 caps military leave with pay at 168 hours per calendar year, public entities may not pay for additional military leave with pay beyond 168 hours per calendar year.

The Attorney General, though, did determine that Section 31-2-13 does not cap other benefits that a municipality may provide to those who are on active military duty. Section 31213 constitutes the minimum to which an employee is due. In other words, a municipality could grant additional benefits to encourage its employees to participate in the Guard or Reserve, if it chose to do so. For instance, in AGO 1991-140, the Attorney General held that Troy State could continue to pay its share of an employee’s insurance benefits while the employee was on active duty, and to allow the employee to remain eligible for all insurance benefits to which they would normally be entitled.

In *Birmingham v. Hendrix*, 58 So.2d 626 (Ala. 1952), the court addressed whether employees of the city of Birmingham were entitled to credit for annual vacation and sick leave accumulated while on absence for extended duty as members of the United States Naval Reserve. The employees claimed they were due one day of leave for each month they were on active duty. The court disagreed, stating that Birmingham’s personnel policy clearly indicated that no vacation or sick leave was to accumulate while an employee was on military leave. The court found nothing in Section 31213 to contradict this, stating that this section requires only that the employee be allowed military leave “without loss” of vacation or sick leave. To the court, this meant that the employee could not be forced to use sick leave or vacation time for military leave. The court applied

Birmingham’s policy on accumulation of sick leave and vacation time.

Other Allowable Benefits

Chapter 12, Title 31, of the Code of Alabama 1975 provides additional benefits for employees of the State of Alabama. While these benefits are generally mandatory for state employees, adoption of these benefits are optional for municipal and county governments.

Section 31-12-6 of the Code allows any municipality, at the option of the municipal governing body, to provide an employee who is called into active duty during the war on terrorism which began in September, 2001, to receive the difference between active duty military pay and the higher public employment salary he or she would have received if not called into active duty. If a municipality elects to become subject to this provision, the Attorney General has opined that military pay under this provision means basic pay as set forth in Chapter 3 of Title 37 of the United States Code and does not, therefore, include the special and incentive pay set forth in Chapter 5 nor the allowances set forth in Chapter 7 of Title 37 of the United States Code. AGO 2002-270.

Sections 31-12-7 and 31-12-8 provide additional benefits for public employees. Again, in the League’s opinion, these provisions are optional for municipalities. Section 31-12-7 allows employees to continue their insurance coverage (individual and dependent) and have the premiums deducted from their salary. As required by this code section, an employee must be receiving compensation from the employing entity to be eligible for these benefits. Thus, the only way a municipal employee would be receiving pay under this Section is if the municipality has adopted a policy to continue paying a salary pursuant to Section 31-12-6 of the Code.

Section 31-12-8 allows the reinstatement of any leave an employee used as a result of being called into active duty. In AGO 2002-270, the Attorney General also opined that Section 31-12-8 of the Code requires the state of Alabama to reinstate the annual leave that a reservist/public employee felt compelled or was required to take under the circumstances and in the exercise of his or her independent judgment as a result of being called to active duty in the war against terrorism. Again, the League feels that this provision is optional for municipalities because it applies only to an employee who is covered by Section 31-12-7.

NOTE: In the League’s opinion, if a municipality elects to grant benefits pursuant to either Sections 31-12-6, 31-12-7 or 31-12-8, they must also grant the additional benefits provided in each of these other sections as well. In other words, a municipality cannot grant an employee the pay difference permitted in 31-12-6 without also granting their employees the rights protected by Sections 31-12-6

and 31-12-8. A municipality may, however, refuse to grant any of these benefits. If they do grant any of these benefits, though, they must grant them all.

Federal Reemployment Rights

Federal law also provides job security for employees who leave their jobs for military service. Chapter 43 of Title 38, United States Code, commonly known as the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, preserves the reemployment rights of these employees.

Courts have held that the protection of veteran's reemployment rights is a legitimate exercise of the congressional power to raise armies. *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir.1979). The act clearly applies to municipal employees, although courts must consider local legislation in determining the rights returning veterans are due. *Smith v. Little Rock Civil Service Commission*, 218 S.W.2d 366 (Ark. 1949). Local legislation can increase the benefits a service member may receive, but it cannot reduce those benefits and rights.

In *Peel*, cited above, the court held that the act provides a floor for the protection of veteran's rights. The Act does not preempt state laws which provide greater or additional rights (such as Section 31-2-13, Code of Alabama 1975). 38 U.S.C. Section 4302(a). However, laws which conflict with rights granted under the act are invalid. 38 U.S.C. Section 4302(b).

The Act is liberally construed for the benefit of returning veterans. *Coffee v. Republic Steel Corp.*, 447 U.S. 191 (1980). However, the Act is not unlimited in its protection of veteran's rights. *Smith v. Missouri Pacific Transport Co.*, 313 F.2d 676 (8th Cir.1963). For instance, the veteran has the burden of proving that he or she has satisfied the statutory requirements and is entitled to the protection of the Act. *Shadle v. Superwood Corp.*, 858 F.2d 437 (8th Cir.1988).

This burden, though, is not as difficult to meet as one might assume, because Section 4311(c) basically provides that an employer shall be considered to have discriminated against the service member if the military service was simply a motivating factor, rather than having to prove that military service was the *sole* motivating factor. As indicated below, if the service member meets this standard, the employer must then prove that the action would have been taken despite the employee's military service. Congress spells out the purposes of the Act in Section 4301. These are:

1. to encourage non-career service in the armed forces by eliminating civilian career barriers
2. to minimize the disruption to the lives of persons serving in the military

3. to prohibit discrimination against individuals as a result of military service.

The Act prohibits employers from discriminating against individuals who have served in the military. Discrimination is defined as any termination, denial of employment or reemployment, or refusal to grant a benefit motivated entirely or in part by the applicant or employee's military service. The burden is on the employer to demonstrate that its action would have been taken regardless of the person's military service.

Reemployment Rights

To be eligible for reemployment, a veteran must:

1. Give notice (does not have to be in writing) to the employer that he or she has been in the military, unless notice cannot be given for military necessity (notice can be provided by someone other than the individual); and
2. Apply for reemployment within the time frame set out in the act.

There is, though, a five-year cumulative service limit on the amount of voluntary military leave an employee can use and still retain reemployment rights. The five-year total does not include the following: inactive duty training (drills), annual training, involuntary recall to active duty or additional training requirements determined and certified in writing by the service secretary and considered to be necessary for professional development or for completion of skill training or retraining.

The time within which the individual must apply for reemployment varies depending on the length of the person's military service. If the service was for less than 31 days, or for an examination to determine fitness for service, the veteran must simply report to work on the first full scheduled workday following the completion of service and the expiration of eight hours for travel. Veterans are also entitled to reemployment following the eight-hour transportation period if they fail to report on time due to no fault of their own, or if reporting on time is impossible or unreasonable.

If the term of service was for more than 30 days, but less than 181 days, the veteran must apply for reemployment within 14 days of completing service. If it is impossible or unreasonable for the veteran to apply within this time, the veteran must apply on the first full calendar day possible. If service was for more than 180 days, the veteran must apply within 90 days of completing service.

If the veteran is hospitalized for or convalescing from an illness or injury suffered during military service, the veteran must apply for reemployment at the end of the time needed for recovery. Again, the time within which

the veteran must apply depends upon the length of service, as set out above. For example, a veteran who served less than 31 days but who is hospitalized following the 31-day period must report to the employer on the first full scheduled workday following the completion of service. As noted above, the veteran would be permitted eight hours for travel. The provisions dealing with impossibility or impracticality of reporting on time also apply.

The period necessary for the veteran to recover from the illness or injury may not exceed two years. However, a veteran may receive an extension for the minimum time required to accommodate circumstances beyond the veteran's control.

However, even if a veteran fails to apply for reemployment within the time required by the act, he or she does not lose the protections the act provides. Instead, the veteran merely becomes subject to the employer's rules and regulations regarding discipline and explanations for absences from scheduled work time.

Documentation

When a veteran applies for reemployment, the employer has the right to request documentation for the following purposes:

1. to prove that the employee's application is timely
2. to prove that the length of service did not exceed five cumulative years
3. to prove that the veteran's reemployment rights have not extinguished due to:
 - a. a dishonorable discharge
 - b. a court martial
 - c. commutation of a court martial sentence
 - d. being AWOL for three or more months or
 - e. for having been dropped from the military rolls for serving time in a federal or state prison.

A veteran is not required to produce documentation if what is requested is not available or does not exist. However, if the appropriate documentation later comes available and establishes that the employee's military service ended for a reason that would extinguish the veteran's reemployment rights, the employer may terminate the veteran.

Reemployment Positions

If the military service was for less than 91 days, a veteran is entitled to return to the position he or she would have held had employment not been interrupted. If the veteran is not qualified for this position, the employer must take reasonable steps to try to qualify the veteran. If the veteran cannot be qualified, the employer must place the veteran

in the position he or she had before serving in the military.

If the military service was for more than 90 days, the veteran must be placed in a position he or she would have held had employment not been interrupted, or to a position of like seniority, status and pay, if the veteran can reasonably be qualified for this position. If the veteran cannot be qualified, the employer must place the veteran in the position he or she held before serving in the military, or in a position of like seniority, status and pay.

As a general rule, the returning employee is entitled to reemployment in the position he or she would have held had employment not been interrupted. This is called the "escalator position." However, if the returning employee is not qualified for the escalator position and cannot become qualified with reasonable efforts by the employer, the employee is entitled to the job that he or she left, or a position of equivalent seniority, status and pay. If the employee is not qualified for that position for any reason other than service-related disability and cannot become qualified through reasonable efforts by the employer, the employee must be employed in any other position for which he or she is qualified and that most nearly approximates his or her former position. Reasonable efforts to render a returning veteran qualified for a position include providing training or retraining. An employer is also obligated to reasonably accommodate returning employees with service-related disabilities. However, an accommodation requiring significant expense, considered in light of the nature of the business or operation and overall financial impact on the business or operation, may be considered an undue hardship on the employer and remove this obligation.

If a veteran is not qualified due to a disability suffered during military service, and the disability cannot be reasonably accommodated, the veteran must be placed in a position with like seniority, status and pay to the position he or she would have occupied had employment not been interrupted. If the veteran cannot be qualified for a position, the employer must place the veteran in a job which retains the nearest approximation to the seniority, status and pay the veteran would have had if his or her employment not been interrupted.

When Reemployment is Not Required

An employer is not required to reemploy a veteran if the employee's circumstances have changed to make reemployment impossible or unreasonable, or if reemployment would pose an undue hardship on the employer. Further, an employer has no duty to reemploy a veteran if the employee's position was for a brief, non-recurrent period without a reasonable expectation that employment would continue for an indefinite or significant

period. The employer bears the burden of proving that any of these circumstances prevent rehiring a veteran.

At least one court has interpreted the predecessor to this provision. In *Mowdy v. ADA Board of Education*, 440 F.Supp. 1184 (D.C.Okla.1977), the court held reasonable the failure to immediately rehire a returning employee where reemployment would have required firing the replacement or the creation of a useless position.

Miscellaneous Provisions

If two or more veterans request reemployment for the same position, the veteran who left first must be reemployed. Section 4316(b) provides that an employee serving in the military is deemed to be on furlough or leave of absence and is entitled to all rights and benefits which are due to such employees pursuant to the rules and regulations of the employer. However, the employee's seniority rights are not affected by their absence. The employee may contribute to any funded benefit plan to the same extent as other employees or furlough or leave of absence.

Employees who serve in the military are entitled to continue participating in any health insurance plan as spelled out in 38 U.S.C. Section 4317. However, no waiting period or exclusion can apply to any veteran whose insurance was terminated by reason of military service unless the exclusion or waiting period would have applied had employment not ceased. Employees may continue participating in employee pension plans as set out in 38 U.S.C. Section 4318.

Questions frequently arise concerning retirement programs. For instance, if a municipality participates in a retirement program, whether it is the Alabama Employees Retirement System or some other system, is the municipality governed by federal or state law with regard to retirement credit for employees who are called into active military service? This issue is covered specifically by USERRA. The rights provided under USERRA to public employees serving in the military cannot be diminished in any way by state law.

So, what responsibilities does a municipality have with regard to retirement credit for municipal employees who are returning to work after being on active military duty? Under USERRA, a municipality must reemploy a person returning from active military duty and shall, with respect to the period of military service, be liable to the retirement system the municipality participates in for funding the employer's obligation to that system. With regard to retirement benefits, USERRA specifically provides the following:

1. A reemployed person must be treated as not having incurred a break in service with the employer

2. Military service must be considered service with an employer for vesting and benefit accrual purposes
3. The employer is liable for funding any resulting obligation
4. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

For purposes of determining an employer's liability or an employee's contribution for retirement credit, the employee's compensation during the period of his or her military service must be based on the rate of pay the employee would have received from the employer but for the absence during the period of service. If the employee's compensation is not based on a fixed rate such that the determination of such rate is not reasonably certain, then it must be based upon the employee's average rate of compensation during the 12-month period immediately preceding such period or, if shorter, the period of employment immediately preceding such period.

As far as a returning municipal employee's repayment of contributions, he or she has up to three times the length of military leave, up to a maximum of five years, to make any contribution payments he or she would have made to establish retirement credit without having to pay any interest. No such payment may exceed the amount the municipal employee would have been required to contribute had the person remained continuously employed by the municipality throughout the period of military service.

It should be noted, though, that a municipality does not have to pay the retirement credit for municipal employees who are on active military duty during the time the employee is serving. Instead, USERRA provides generous time periods for the payment of missed contributions without any interest penalties. Upon returning from active military duty, the employee would have to exercise his or her option of remitting any missed retirement contributions and not until that point would the municipality be obligated to pay its portion of any retirement benefits missed.

— 27. State-Mandated Training for Municipal Personnel —

The Alabama Legislature has enacted legislation to regulate the employment of peace officers, firefighters, emergency medical technicians and water and wastewater treatment personnel. This article summarizes the state laws and regulations applicable to each of these classes of municipal employees.

Peace Officers

A 1971 act of the state Legislature established the Alabama Peace Officers Standards and Training Commission (APOSTC) a seven-member body which regulates the employment and training of peace officers at the state and local levels. The Act, which is codified at Sections 36-21-40 through 36-21-51, Code of Alabama 1975, gives the commission numerous functions and duties including the power to promulgate regulations to implement the provisions of the law relating to the hiring and training of peace officers.

All persons applying for a position as a law enforcement officer must meet the minimum standards prescribed by the act and by commission regulations. The applicant for a position as a law enforcement officer shall be not less than 19 years old and must be a graduate of a high school accredited with or approved by the State Department of Education or hold a GED certificate. Furthermore, an applicant must be a citizen of the United States, have a valid driver's license, and, if a veteran, his or her discharge from the service must be honorable. The applicant must be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of the duties of a law enforcement officer. The applicant must be a person of good moral character and reputation. In making this determination, the commission must consider convictions for misdemeanors and other factors set forth in its duly adopted and promulgated rules. No person who has been convicted of a felony shall be certified, employed, appointed or approved by the commission as a law enforcement officer. Section 36-21-46, Code of Alabama 1975.

Prior to certification, the applicant shall complete the required course of training established by the commission. According to commission regulations, the trainee must complete 480 hours of training at an approved academy. An applicant may be provisionally appointed for a period of six months. No individual may be employed for an additional period until that individual is certified by the commission. Section 36-21-46, Code of Alabama 1975; *see also*, Rule 650-X-4-.01.

Training Rules

Section 36-21-45(3), Code of Alabama 1975, gives the Alabama Peace Officers Standards and Training Commission (APOSTC) the power to promulgate rules related to the physical, mental and moral fitness of law enforcement candidates in Alabama.

Rule 650-X-2-.01 provides that applicants are provisionally appointed only for a period of six months. This amounts to a total of 180 days during a two-year period (730 days) from the time the applicant is first appointed by *any* law enforcement agency. Each day of the six-month provisional appointment is cumulative, no matter how many law enforcement agencies the applicant has worked for during his or her six-month appointment. This means that the six-month period cannot be extended or restarted by an applicant being terminated or rehired by the same or another law enforcement agency or by the applicant's voluntarily changing employment from one agency to another.

Additionally, this rule limits the activities untrained officers may perform during this provisional period to activities that are similar to those which reserve officers may perform under Section 11-43-210 Code of Alabama 1975. Applicants are limited in the following ways:

- Applicants who are involved in patrol operations for the purpose of crime detection, prevention or suppression, or for the enforcement of traffic laws, must be under the direct supervision of a certified law enforcement officer.
- Applicants involved in traffic direction and crowd control may act without direct supervision, but supervisory control must be exercised by a certified officer whose total span of control would be considered within reasonable limits.
- Applicants may render crowd control assistance at public gatherings or governmental functions as directed by their employing law enforcement agency provided supervisory control will be exercised by a certified law enforcement officer whose span of control would be considered within reasonable limits.

The provisional appointment does not apply to unpaid volunteers and auxiliary or officers who do not have the power of arrest. The provisional appointment of any applicant who does not complete the required training within six months from the date of his or her initial hiring is void. Applicants who do not attain certification may not re-apply for employment/appointment as a law enforcement officer for two years following the expiration of their provisional appointment time. In addition to these

requirements, applicants must be gainfully employed as full-time law enforcement officers at the time they apply to attend a training academy. Full-time employment means that the applicant must work an average of 40 hours per week during the pay period. Applicants who work less than this must request a waiver. Rule 650-X-2-.01.

Physical Agility

APOSTC requires that each applicant take a physical/agility/ability test. As an applicant you are required to pass a test of physical agility and ability as an entry-level requirement to the law enforcement training academy condition of certification. The test is composed of two phases, physical agility and physical ability components, with both parts being administered on the same day. The test is formatted in a pass/fail structure. Failure to successfully complete any part of phase one or two means failure of the entire physical agility and ability test. After failure of any part of the exam, the applicant will be given an opportunity for one (1) retest within forty-eight (48) to seventy-two (72) hours (determined at the test administrator's discretion). The examination will be conducted at the Police Academy during your 480 hours of basic training. Each event will be videotaped. The physical agility/ability test is to be administered within the first five class days of the academy. *Alabama Peace Officers Standards and Training Commission Physical Agility/Ability Examination Test Outline and Script*, <https://www.apostc.alabama.gov/wp-content/uploads/2019/12/PAAT-Script-STUDENT-HANDOUT.pdf>.

Character Issues

Rule 650-X-2-.05 provides that the applicant shall be a person of good moral character and reputation. Conviction of any felony pursuant to any state or federal law shall be a complete and absolute bar to certification, employment, appointment or approval as a law enforcement officer. The existence of a pardon does not nullify a conviction for the purpose of this rule. An applicant having pleaded guilty or nolo contendere to any felony pursuant to state or federal law is not eligible for certification, employment, appointment or approval as a law enforcement officer, notwithstanding suspension of sentence or withholding of adjudication. Conviction of any conduct, including by a plea of guilty or nolo contendere, in any other jurisdiction that would have constituted a felony in Alabama and been punishable by a sentence exceeding one year in Alabama shall be a complete and absolute bar to certification, employment, appointment or approval as a law enforcement officer, notwithstanding suspension of sentence, withholding of adjudication or the existence of a pardon. An applicant must disclose and produce to the

Commission, any expunged record of any arrest, regardless of the disposition of the case. For the purpose of certification and regulation of law enforcement and correctional officers the Commission must have access to any expunged records sealed or archived. In *Gilbert v. Homar*, 520 U.S. 924 (1997), the U.S. Supreme Court held that tenured employees in positions of public trust and visibility – such as police officers in this case – who are charged with felonies, are not entitled by due process to notice and a hearing prior to suspension without pay.

Conviction of a misdemeanor pursuant to any municipal, state or federal law shall not automatically disqualify a person as a law enforcement officer. Such a conviction may be considered as a factor among several in evaluating fitness as a law enforcement officer, which factors shall include but not be limited to the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of the sentence and the nature of the job held or sought and such other factors as to affect the applicant's character. In the case of a misdemeanor conviction, involving a guilty plea or plea of nolo contendere, involving force, violence, moral turpitude, perjury, or false statements, notwithstanding suspension of sentence or withholding of adjudication, results of psychological testing shall also be considered as a factor in considering the applicant's fitness as a law enforcement officer.

The psychological test administered to law enforcement officers will be approved by the commission. At the request of the agency, and at the expense of the applicant or agency, a complete comprehensive psychological evaluation may be approved for an applicant who fails the psychological test. This complete comprehensive psychological evaluation will be administered by an agency selected by the Commission and must be given immediately after failure of the first test.

The results of the psychological test will be furnished to the commission. The psychological test results must include a statement of whether or not the person is recommended for law enforcement. If an applicant fails the psychological test, he/she must wait one year to be eligible to submit a new application package requesting to attend the academy. This does not exempt the applicant from Alabama Peace Officers Rule 650-X-2-.01. Adjudication as a youthful offender or juvenile shall not be considered as a conviction for the purpose of these rules.

Any person who is prohibited by state or federal law from owning, possessing, or carrying a firearm, including but not limited to a pistol, handgun, rifle or shotgun, shall not be employed or certified as a law enforcement officer. Any person who is required to register as a convicted sex offender as defined in Title 13A-11-200, Code of

Alabama 1975, as amended, shall not be employed or certified as a law enforcement officer.

The arrest of any certified law enforcement officer, provisionally appointed law enforcement officer or applicant for any felony or misdemeanor offense shall be immediately reported to the commission by the employing agency, arresting agency and the law enforcement officer. No law enforcement officer, either certified or provisionally appointed, shall knowingly and willfully provide false or misleading information to the Commission or any of its agents. No law enforcement officer shall knowingly and willfully violate the Rules and Regulations of the Commission. Any law enforcement officer who knowingly and willfully provides false or misleading information to the Commission or its agents, or who knowing and willfully violates the Rules and Regulations of the Commission, shall be subject to having their Certification suspended or revoked by the Commission. Applicants who falsify their application must wait two years to be eligible to submit a new application package requesting to attend the academy

Failure to Complete Training

An applicant may have two attempts to complete the requisite training. If a trainee fails the police academy physically or academically, the hiring agency may request that the trainee be allowed to attend another session. If an applicant fails the academy twice, he or she is ineligible to attend an academy for two years from the date of the second failure. If, after two years, the applicant is rehired as a law enforcement officer, a new application must be submitted. Alabama Peace Officers Rule 650-X-11-.01

Continuing Education

Under Rule 650-X-12-.02 certified law enforcement officers in this state shall annually complete 12 hours of continuing education courses as approved by the hiring agency. Law enforcement officer includes all officers certified by the Alabama Peace Officers Standards and Training Commission who have arrest powers to include reserve officers who are certified and have the power of arrest. The Alabama Peace Officers Standards and Training Commission may, for sufficient cause, grant an extension of time in which to complete said courses.

Any certified law enforcement officer who is a member of the Alabama National Guard or U.S. Military Reserve and who is ordered to active duty because of a declared state of emergency shall be exempt from continuing education requirements while he or she is serving on active military duty, provided the certified law enforcement officer's continuing education is current and not delinquent at the time he or she is called to active military service.

The chief law enforcement officer of the employing

agency must file a written request to the Executive Secretary stating that the officer is currently employed and has been ordered to active military duty because of a national emergency. A copy of the officer's military orders shall be included with the request. The military exemption shall not extend beyond twenty-four months.

A certified law enforcement officer in this state may keep up or maintain their continuing education courses for two years without being employed as a law enforcement officer to allow them to re-enter the field of law enforcement without having to take the recertification training. The training will be maintained by the law enforcement officer and sent to the Alabama Peace Officers Standards and Training Commission immediately after reemployment as a law enforcement officer within the two-year period. The courses must be acceptable and approved by the commission.

After a two year absence from employment as a law enforcement officer in this state, a previously certified law enforcement officer in this state shall be required to apply for renewal of his/her certification which will require successful completion of an approved 80-hour academy recertification course. A previously certified law enforcement officer in this state, who has not been employed as a law enforcement officer for two years or more in this state, may be provisionally appointed for six months by the employing agency upon their submitting a notice to the commission as required by Rule 650-X-1-.16(5) and an application for training as set out in Rule 650-X-2-.09, requesting to attend the next available 80-hour academy recertification course.

If the commission is unable to provide an 80-hour academy recertification course within the state, during the six-month provisional appointment period for a previously certified officer, the commission may through the executive secretary extend the provisional appointment period for a period up to 180 days.

The provisional appointment of any law enforcement officer shall be null and void at the end of one year after appointment unless that person has completed the 80-hour academy recertification course. Said person shall then be required to attend the regular basic law enforcement training course (480 hours). Continuing education credit may not be granted for recertification training, i.e., chemical aerosol, firearms qualification, defensive driving, etc.

No more than six hours of continuing education credit may be obtained through video, computer, multimedia, or satellite-based training and the training must:

- a. Be approved by the agency head in advance, and
- b. Be directly related to law enforcement, and
- c. Occur in a classroom setting, and

- d. Have a training coordinator or department official present, and
- e. The student achieves a minimum passing score of 70 percent or above on a post-viewing examination.

Continuing education shall be reported to the commission by each agency head in the manner prescribed by the commission. Permanent training records verifying course of study, including syllabus listing instructor(s), institution sponsoring name, date and time of training and proof of officer attendance shall be maintained by the law enforcement agency. All training records shall be available to inspection and verification by the Commission.

The certification of any law enforcement officer, not otherwise exempt, shall be suspended if the law enforcement officer's continuing education becomes delinquent twenty-four or more hours. The law enforcement officer shall then be required to complete the Alabama Peace Officers Standards and Training Commission 80-hour refresher training program before having his/her certification reinstated. The executive secretary shall notify the law enforcement officer and the chief law enforcement officer of the employing agency, 30 days before the effective date of said suspension.

The certification of any law enforcement officer shall be automatically suspended if the law enforcement officer's employment is terminated and he/she is in violation of this section at the time of termination. Any law enforcement officer who fails or refuses to comply with the provisions of this section or who falsely reports training shall be subject to having his/her certification revoked by the Alabama Peace Officers Standards and Training Commission. Law enforcement officers who have honorably retired from law enforcement in this state, and who qualify under Title 36-21-9, Code of Alabama, with 20 years or more of service, are exempt from Sections (3) and (4) of this rule. Any law enforcement officer who is aggrieved by any order or ruling made under the provisions of this section shall have the same rights and procedure of appeal as from any other order or ruling of the Alabama Peace Officers Standards and Training Commission.

Executive Continuing Education

Rule 650-X-12-.01 provides that each chief of police or acting chief of police of any municipality in Alabama must annually complete 20 hours of executive level continuing education courses approved by APOSTC. Any chief of police or acting chief of police who fails or refuses to comply with this requirement or who falsely reports executive training is subject to having his or her certification revoked by APOSTC. APOSTC may, for sufficient cause, grant an extension of time in which to complete said

courses. Any chief or acting chief who is aggrieved by any order or ruling made under this section may appeal using procedures that apply to any APOSTC order or ruling.

Responsibilities of Law Enforcement Agencies

Rule 650-X-1-.16 provides that law enforcement agencies are responsible for submitting all required forms and information in a timely manner. The agency must submit an application to POST on the day an applicant is hired. The agency must also notify APOSTC within 10 days of hiring any officer who has previously been certified by APOSTC and must notify APOSTC within 10 days of firing any law enforcement officer.

Section 36-21-50

Section 36-21-50, Code of Alabama 1975, establishes harsh penalties for those who knowingly recommend or pay officers who fail to meet state standards. This section provides:

Any person who shall appoint any applicant who, to the knowledge of the appointer, fails to meet the qualifications as a law enforcement officer provided in Section 36-21-46 or the standards, rules and regulations issued by the commission under this article and any person who signs the warrant or check for the payment of the salary of the person who, to the knowledge of the signer, fails to meet the qualifications as a law enforcement officer provided in Section 36-21-46 or any standard, rule or regulation issued pursuant to this article shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not exceeding \$1,000.

Although it appears that this section is rarely, if ever, applied, it remains on the books and places responsibility for recommending qualified individuals squarely on the individuals who recommend or pay those officers. Even without this section, the League strongly recommends conducting thorough background checks on all law enforcement applicants before hiring them and sending them to the academy. Taking these steps ahead of time can help the municipality avoid liability and disciplinary problems. And the possibility of conviction under 36-21-50, Code of Alabama 1975.

The foregoing requirements shall not apply to any person who is presently employed as a law enforcement officer in the state and who continues to be so employed when he or she makes application for or is employed as a law enforcement officer in a different capacity or for a different employer.

Reserve Law Enforcement Officers

Section 11-43-210, Code of Alabama 1975, governs the appointment of reserve law enforcement officers. The appointing authority of any municipality may appoint, with or without compensation, one or more reserve law enforcement officers to assist or aid full-time or part-time certified law enforcement officers.

“Certified law enforcement officer” means a municipal police officer who has completed the training requirements of the Alabama Peace Officers Standards and Training Commission. Reserve law enforcement officers appointed pursuant to this section shall serve at the pleasure of the municipal appointing authority. Therefore, it is the League’s opinion that reserve officers are “at will” employees.

Any person desiring appointment as a reserve law enforcement officer shall submit a written application to the municipal appointing authority certifying that the applicant is 19 years of age or older, of good moral character and reputation and that he or she has never been convicted of a felony or of a misdemeanor involving force, violence or moral turpitude. The applicant must also consent in writing to a fingerprint and background search.

The functions of a reserve law enforcement officer shall be confined to the following:

- Patrol operations performed for the purpose of detection, prevention and suppression of crime or enforcement of the traffic or highway laws of the state, provided the reserve law enforcement officer acts at all times under the direct control and supervision of a certified law enforcement officer.
- Traffic direction and control may be performed without direct supervision, provided, however, that supervisory control is exercised by a certified law enforcement officer whose total span of control would be considered within reasonable limits.
- Reserve officers may render crowd control assistance at public gatherings or municipal functions as directed by the municipality provided supervisory control will be exercised by a certified law enforcement officer whose span of control would be considered within reasonable limits.

No reserve law enforcement officer shall have authority to exercise any power of arrest unless he or she has completed the training requirements of the Alabama Peace Officers Standards and Training Commission as set out in Section 36-21-46, Code of Alabama 1975. Commission regulations mandate 480 hours of training in order to meet those requirements.

No reserve law enforcement officer shall carry any firearm unless he or she has obtained a properly issued

permit for such firearm and the appointing authority has approved his or her use of the firearm. Reserve law enforcement officers may use such firearms only to the extent permitted by properly promulgated regulations of the appointing authority.

For more information on peace officer training, contact the Alabama Peace Officers Standards and Training Commission, P. O. Box 300075, Montgomery, Alabama 36130-0075; phone (334) 242-4045.

Firefighters

In 1975, the state legislature established the Alabama Firefighters Personnel Standards and Education Commission, a seven-member body which regulates the employment and training of firefighters at the state and local levels. Sections 36-32-1 through 36-32-13, Code of Alabama 1975, empowers the commission to adopt rules and regulations to implement the law.

All trainees (recruit firefighters who have not been certified by the commission as having met the basic training requirements) must be certified to be in good health and physically fit for the performance of duties as a firefighter. Fitness must be determined by a licensed physician deemed satisfactory to the appointing authority. The firefighter trainee must also meet the employment qualifications of the appointing authority.

All persons permanently employed in fire administration, fire prevention, fire suppression, fire education, arson investigation and emergency medical services must, prior to permanent employment or a period not exceeding 12 months after the date of employment, meet the requirements for certification as prescribed by the commission. Commission regulations require candidates for the position of Firefighter I to complete 360 hours of approved training. Training must be given by an instructor approved by the commission and may be administered within the department in which the applicant seeks to serve, if the department meets the requirements of the commission for a training center.

Prior to entering the certification course, the candidate must meet the Entrance Requirements and the general knowledge, skill, performance and additional requirements for Fire Fighter I set out in the National Fire Protection Association (NFPA) 1001, Standard for Fire Fighter Professional Qualifications, as adopted by the Commission. The candidate must have a high school diploma or GED and be at least 18 years old. Prior to certification, the candidate must be a Certified Hazardous Materials First Responder: Awareness and Operations. The candidate must provide proof of successful completion of a course of instruction equivalent to or exceeding the requirements of NFPA 1001, current edition prior to entering the certification course.

The Fire Fighter I certification course must be conducted

over a period of not less than forty-five (45) training days with attendance required eight (8) hours per day, five (5) days per week (weekends and holidays excepted). After the training is completed, the commission shall administer a comprehensive written test to each applicant and each applicant must pass this test as a condition of completion of training.

An overall score of 70% is required for the successful completion of this examination. Re-test may be taken after 30 days of the date of the original examination for state certification and within 12 months of employment date. Section 36-32-7, Code of Alabama 1975; Alabama Fire College & Personnel Standards Commission Rule 360-X-2-.02.

Volunteer firefighters may be certified by the commission, although certification is not mandated. Candidates for volunteer firefighters must complete 160 hours of training within a 24-month period at a training center approved by the commission. An overall score of 70% is required for the successful completion of this examination. Re-test may be taken after 30 days and within 12 months of the date of course completion. This training need not be taken during continuous sessions. Section 36-32-7, Code of Alabama 1975; Alabama Fire College & Personnel Standards Commission Rule 360-X-2-.01.

Further information may be obtained from the Alabama Firefighters Personnel Standards and Education Commission, 2015 McFarland Boulevard East, Tuscaloosa, Alabama 35202; phone (205) 391-3776.

Ambulances and Ambulance Personnel

The Alabama Legislature in 1971 adopted an act which is codified at Sections 22-18-1 through 22-18-9, Code of Alabama 1975. The Act directed the State Board of Health, with advice and recommendation of a 10-member advisory board, to establish and publish reasonable rules and regulations for the training, qualification and licensing of ambulance drivers, ambulance attendants, ambulance driver-attendants and ambulance operators and for the operation, design, equipment and licensing of ambulances. The Committee of Public Health has promulgated regulations in compliance with the 1971 act. Section 22-18-2, Code of Alabama 1975 and Alabama State Board of Health Rule 420-2-1-.03 provide that these regulations **do not** apply to:

- Volunteer rescue squads that are members of the Alabama Association of Rescue Squads, Inc.
- Ambulances operated by a federal agency of the United States and ambulance drivers and attendants of such ambulances.
- Ambulances which are rendering assistance to licensed

ambulances in the case of a major catastrophe, emergency or natural disaster in which the licensed ambulances of Alabama are insufficient or unable to cope.

- Ambulances which are operated from a location or headquarters outside of Alabama in order to transport patients who are picked up outside the state and transported to locations within the state.
- Basic life support ambulances operated free of charge by private business or industry exclusively for employees of that business or industry.

The regulations provide that each ambulance owned and operated by an ambulance service operator for which a license has been issued shall be inspected by the Office of Emergency Medical Services and Trauma (OEMS&T) or by persons designated by the OEMS&T. The OEMS&T shall have the authority to investigate and determine the qualifications of ambulance drivers, ambulance attendants, ambulance driver-attendants and of ambulance operators. Alabama State Board of Health Rule 420-2-1-.07.

The regulations provide that no person shall be employed as an ambulance attendant, ambulance driver or ambulance driver-attendant nor shall any person, firm or corporation operate an ambulance on the streets, alleys or other public ways in the state of Alabama without having first obtained a valid license from the Board of Health. The amount of the license fee is set by Section 22-18-4, Code of Alabama 1975. Each license shall be valid for a period of 12 months from the date of issuance for Emergency Medical Services Personnel (EMSP).

Licenses for ambulance drivers, attendants or driver-attendants may be classified according to the qualifications and capabilities of the individual.

The Initial EMSP qualifications are:

- The license candidate shall be 18 years of age within one year of the course completion date of the entry level course;
- The license candidate shall meet the essential functions of an EMSP as outlined in the Functional Job Analysis. The Functional Job Analysis was developed and adopted for the State examination accommodations to meet the requirements of the Americans with Disabilities Act ("ADA"). A copy of these functions may be reviewed in the U.S. Department of Transportation, National Highway Traffic Safety Administration's Emergency Medical Technician: EMT, National Standard Curriculum: Appendix A;
- The license candidate shall disclose any felony convictions during enrollment procedures and gain

clearance through the OEMS & T prior to beginning any classes;

- The licensure candidate shall complete the current National Standard Curriculum approved by the Board. Alabama State Board of Health Rule 420-2-1-.20.

Driver qualifications include:

- A valid Driver license;
- A current emergency vehicle operations certificate from an approved course that shall be maintained in the emergency medical provider service's employee file;
- A current approved CPR card (approved list available at www.adph.org/ems); and;
- A certificate of completion from a Department Of Transportation Emergency Medical Responder Curriculum Course (effective March 31, 2013.) Alabama State Board of Health Rule 420-2-1-.19

More information may be obtained from the Office of Emergency Management Services (OEMS), Alabama Department of Public Health, 201 Monroe Street, Suite 1100, Montgomery, Alabama 36104; phone (334) 206-5300.

Water-Sewer Operators

The state Legislature adopted legislation in 1971 to regulate water and wastewater systems, treatment plants and their operators. This act is codified at Sections 22-25-1 through 22-25-16, Code of Alabama 1975. A number of these sections were repealed or amended by a 1982 act which transferred the responsibility for administration of the law from the state Department of Public Health to the Alabama Department of Environmental Management.

It is illegal for any person, firm, corporation, municipal corporation or other government subdivision or agency operating a water treatment plant, water distribution system or wastewater treatment plant to operate same unless the competency of the operator is duly certified by the director of the Alabama Department of Environmental Management. It is also unlawful for any person, except a trainee as defined in Section 22-25-1, Code of Alabama 1975 and Alabama Department of Environmental Management Rule 335-10-1-.14, to perform the duties of an operator without being duly certified by the Alabama Department of Environmental Management.

The Alabama Department of Environmental Management must hold at least one certification examination each year at a time and place designated by the department. When the director of the department is satisfied that the applicant is qualified, by examination or otherwise, the director shall issue a certificate attesting to the competency of the applicant as an operator. The certificate shall indicate

the classification of works which the operator is qualified to supervise. Alabama Department of Environmental Management Rule 335-10-1-.07

Certificates of proper classifications shall be issued without examination to persons certified by a governing body or system owner to have been the operator of a treatment plant or a water distribution system on September 28, 1971. A certificate so issued will be valid only for that particular treatment plant or system but shall remain in effect for three years unless revoked by the director as provided in the act. All certificates must be renewed every three years. Alabama Department of Environmental Management Rule 335-10-1-.11

The act gives the department the authority to promulgate rules and regulations necessary to carry out the provisions of the law.

Any person or corporation who violates any of the provisions of the act or any rule promulgated there under, after written notice by the director, is guilty of a misdemeanor. Section 22-25-15, Code of Alabama 1975; Alabama Department of Environmental Management Rule 335-10-1-.13.

Further information may be obtained from the Alabama Department of Environmental Management, Operator Certification Program, Water Supply Branch, P.O. Box 301463, Montgomery, Alabama 36130-1463; phone (334) 271-7796.

Judges

In 2011 the Alabama Supreme Court adopted Rules for Mandatory Continuing Judicial Education for Alabama Municipal Court Judges. All municipal court judges must complete a minimum of six hours of approved continuing judicial education (including one hour of judicial ethics) specifically relating to municipal court practice and procedure per calendar year. Newly appointed municipal court judges must complete the six-hour mandatory judicial education requirements within the first full year of their appointment to the office.

Judicial education credits for each municipal judge shall be reported in writing to the Alabama Judicial College director by December 31 annually. Alabama Mand. Cont. Jud. Ed. Rule 2. In the event that a municipal court judge fails to comply with these Rules, the AJC director will promptly notify the municipal court judge and the mayor or other equivalent executive official of the municipality of the noncompliance by sending a notice thereof to the official's principal office. The statement of noncompliance shall advise the judge and the mayor or municipal official that within 30 days a plan to correct the noncompliance must be submitted to the AJC director for consideration and approval. Should a municipal court judge fail to

correct the noncompliance within a period approved by the AJC director, the AJC director shall make the fact of the noncompliance open for public view and inspection. Alabama Mand. Cont. Jud. Ed. Rule 4.

Rule 5 of the Rules for Mandatory Continuing Judicial Education for Alabama Municipal Court Judges requires that the cost of meeting the mandatory judicial education requirements established in these Rules for municipal court judges shall be the responsibility of the municipality employing the municipal court judges. Municipal courts may apply to the Administrative Director of Courts for a waiver in the event funds are not available to comply with these Rules. Waivers must be submitted and approved by December 31 annually for the following year.

Reimbursement of Training Costs

When a state or local governmental entity hires law enforcement officers, firefighters, emergency medical personnel, water or wastewater operators and court clerks or magistrates within two years from the date those personnel complete their mandatory training, the hiring entity shall be required to reimburse the governmental entity which paid for the training an amount equal to the total expense of the training, including, but not limited to, salary paid during training, transportation costs paid to the trainee for travel to and from the training facility, room, board, tuition, overtime paid to other employees who fill in for the trainee during his or her absence, and any other related training expenses.

Section 36-21-7, Code of Alabama 1975, provides for the reimbursement to a municipality of mandated training costs incurred by that municipality for training law enforcement officers, certified corrections officers, fire protection personnel, or firefighters when those employees are hired by other governmental entities within 24 months of their training. The 24-month period for reimbursing police training costs in Section 36-21-7, Code of Alabama 1975, is computed from the time an individual completes the APOSTC training. AGO 1997-117. Only training mandated by Sections 36-21-40 through 36-21-51, Code of Alabama 1975, is required to be reimbursed by a municipality who hires an officer within 24 months after another municipality has paid for that training. Costs of any extra training the municipality elects to provide are not required to be reimbursed by the hiring municipality. AGO 1991-195. A governmental entity does not have to reimburse a municipality for expenses incurred in training a former city employee under the Peace Officers Standards and Training Act, when the entity employs the individual in a position where such training is not required. AGO 1987-138.

Section 22-18-8, Code of Alabama 1975, provides for the reimbursement of training expenses for ambulance service operators, ambulance drivers, ambulance attendants,

ambulance driver-attendants, or emergency medical technicians, when those employees are hired by other governmental entities within 24 months of completing their training.

Section 22-25-16, Code of Alabama 1975, provides for the reimbursement of training expenses for water or wastewater operators of any municipality or municipal utility board, when those employees are hired by other governmental entities within 24 months of completing their training. A water and wastewater board which hired away an employee who had been trained by a city for certification as a grade I distribution system operator was required to reimburse the city for the salary and related training expenses rather than just expenses related to classroom or formal instruction. Section 22-25-16, Code of Alabama 1975, requires a city to be reimbursed for training expenses if a municipal utility board hires a water operator away within 24 months after completing the certification requirements. The statute does not limit reimbursable expenses to only formal or classroom training, and the definition of “trainee” in a related statute indicated that the reimbursable expenses were restricted to the one period during which an employee was considered a trainee. *Water and Wastewater Bd. of City of Madison v. City of Athens*, 17 So.3d 241 (Ala.Civ.App.2009)

Section 12-14-53, Code of Alabama 1975, provides for the reimbursement of training expenses for municipal court clerks or municipal court magistrates, when those employees are hired by other governmental entities within 24 months of completing their training.

28. The Municipal Budget and Auditing Processes

Assembling, preparing and adopting a municipal budget requires about three months of hard work and deliberation. No statutory provision exists which expressly requires all municipalities of the state to establish any particular period for the fiscal year. It should be noted, however, that Section 1-3-4, Code of Alabama 1975, does state that “the fiscal year of the government shall commence on the first day of October and end on the thirtieth day of September”. This fiscal year shall be used for purposes of making appropriations and of financial reporting and shall be uniformly adopted by all departments, institutions, bureaus, boards, commissions and other state agencies.” The Attorney General has ruled that the term “government” is a very comprehensive term and “includes the affairs of a state, community, or society. It is all-inclusive.” AGO to Hon. H. K. Hawthorne, March 12, 1968. Therefore, most of the cities and towns of Alabama begin their fiscal years on October 1. Therefore, budget preparations for the next year should begin in the month of July.

The importance of a budget to municipal administration cannot be overemphasized. A budget is more than a perfunctory, itemized plan of proposed expenditures balanced against estimated revenues for the fiscal period. It is an authorization for the administration to implement municipal policy during the coming year. It is a means of attaining unity in administration by drawing all municipal programs together for overall scrutiny. It is also a means of assuring adequacy of municipal services in the most efficient manner.

Once adopted, a budget is the financial and administrative compass for the executive, administrative and legislative agencies of the municipality. The city or town that is budget-conscious throughout the year produces more services for its revenue, makes more capital improvements, keeps the public more reliably informed and adheres to the policies established by its governing body.

This article will discuss Alabama laws relating to municipal budgets, what a budget should accomplish, who is responsible for the budget, types of budgets, procedures generally followed in preparing a budget, the adoption of the budget and what it means and budget reporting to be followed throughout the fiscal year.

Municipal Budget Laws

Section 11-43-57, Code of Alabama 1975, is as close as Alabama law comes to requiring municipal budgets. That section states that in all cities under the mayor-council form of government, the council shall appropriate the

sums necessary for the expenditures of the several city departments. It shall also appropriate the sums necessary for the interest on municipal indebtedness; the council shall not appropriate, in the aggregate, an amount in excess of its annual legally authorized revenue.

This section also permits the council to appropriate the sums necessary for the operation of city departments and for the interest on its bonded and other indebtedness, not exceeding in the aggregate within 10 percent of its estimated revenue. Municipalities may, though, anticipate any expected revenue for the year and contract for temporary loans or use bonds or appropriate anticipated revenue at any time for the current expenses of the city and interest municipal indebtedness.

In an opinion of the Attorney General, found in the April-June *Quarterly Reports of 1940* at page 304, it was held that this section does not apply to municipalities under 2,000 in population. The opinion pointed out that cities at that time were required to submit their budgets to the Division of Local Finance of the State Finance Department under the provisions of Title 55, Sections 151-154, Code of Alabama 1940. These code sections were repealed by the Acts of 1951. Therefore, there is certainly room to doubt that any Alabama cities or towns are actually required by general state law to make an annual budget. However, certain cities are required by local legislation to adopt budgets.

For example, Montgomery is required to have an annual budget by Article 5 of Act No. 618, 1973 Regular Session. Similarly, Birmingham is required to make an annual budget under the provisions of Article 5 of Act No. 452, 1955 Regular Session, as amended.

Alabama laws which allow the employment of a city manager, found in Section 11-43-20 through 11-43-22, Code of Alabama 1975, do not require that a budget be made and submitted to the governing body. However, the Council-Manager Act, found at Sections 11-43A-1 through 11-43A-52, Code of Alabama 1975, as amended, provides for and requires a budget to be adopted by ordinance in municipalities operating under the council-manager form of government. *See*, Section 11-43A-29, Code of Alabama 1975, as amended. Also, Section 11-44C-1 through 11-44C-93, establishing the form of government for Mobile, requires the adoption of an annual budget. Other municipalities may have similar legislatively-created requirements.

Official Responsibility

While state laws do not require cities and towns to adopt a budget, most municipal governing bodies realize

the importance of planning their finances in advance and do operate under a budget. Section 11-43-56, Code of Alabama 1975, gives the council control over the municipal purse strings in mayor-council cities and towns. Some cities and towns require, by ordinance, the preparation of a budget and designate the officer or employee responsible for its preparation and how the budget is to be compiled and submitted. In other municipalities, a budget is prepared and presented to the governing body without formal requirement in keeping with long standing precedent.

Adopting a budget is the responsibility of the municipal governing body. The budget reflects wage and salary policy for the coming year, municipal programs which will be added or deleted, whether services will be increased or reduced, and the amount of planned capital improvements which will be undertaken. Regardless of who prepares the budget, once adopted it becomes the established financial and administrative policy for the coming year.

Who Prepares the Budget?

The responsibility for preparing a budget should rest with the officer who administers the overall municipal operation. This officer is in the best position to prepare the budget and should be given the opportunity to present a program for consideration by the council. Section 11-43-81, Code of Alabama 1975, makes the mayor the chief executive in charge of municipal administration in a mayor-council city or town. Therefore, the mayor should see that a budget is prepared, under his or her direction, for presentation to the council in ample time for consideration and adoption before October 1, or the start of the municipal fiscal year. If the council adopts an ordinance requiring the preparation and submission of a budget, it is doubtful that the mayor can be required to perform this duty because of constitutional issues of separation of powers. The council should require the clerk, treasurer, or comptroller to prepare the budget under the mayor's supervision for presentation to the council at its first meeting in September.

The officer charged with the responsibility of submitting the budget explains and stands up for departmental requests when the governing body considers the budget. Once adopted, it is very important that each member of the governing body support the budget before the public. If a particular cut in service or deleted program is criticized, it can be pointed out that in the council's considered judgment the sacrifice was made for a more necessary function.

Types of Budgets

There are three principal types of budgets – the lump-sum budget, the line-item budget, and the program budget. Actually, the **lump-sum budget** should not be regarded as a budget at all. It merely makes a lump-sum appropriation

for expenditures by a department or agency without any restrictions as to what the appropriation is for. It provides no means of oversight during the fiscal year to ensure the various administrative agencies are performing their duties or operating within their appropriations.

The **line-item budget** itemizes the appropriations to be made to each department or agency of the municipality. Generally, it is a detailed summary of all the various expense accounts in each department with an allotment for each. This type of budget is probably used by more cities and towns than either of the other two types. Nevertheless, it leaves much to be desired.

The main deficiency with the line-item budget is that it concentrates the governing body's attention on a host of detailed accounts and fails to correlate expenditures with definite programs or services. It serves well because it is an accurate method of determining if various departments and agencies are operating within their detailed appropriations during the year.

The **program budget**, or performance budget, shows the overall cost of major municipal functions, the amount allotted to each organizational unit performing these functions by particular activity, and the detailed objects of expenditures within each unit breakdown.

A program budget reveals departmental objectives, the programs used to achieve these objectives, the volume of work required to accomplish each program and serves as a combined management and fiscal control instrument. The program budget allows a governing body to determine appropriations by programs and services as opposed to concentrating its time on a multitude of meaningless cost items. Program budgets reveal administrative policy as established by the council and present an understandable fiscal picture to the press and public.

The foundation of a proper and satisfactory budget lies in the use of an adequate classification and chart of accounts. When the budget is being prepared, the budget officer should seriously consider whether the accounting system of the municipality facilitates the preparation and execution of budgets for the coming year. If the current system is considered to be inadequate, recommendations for change during the next fiscal year should be offered along with an estimated cost for the change.

Content of the Budget

The budget should contain a budget message from the official who prepared it, followed by a listing of estimated revenues, recommended agency expenditure appropriations, and capital improvement appropriations. The message explains the budget, shows what it does and what it fails to do and denotes any significant changes which

occurred over the past year. Six important features of the message are listed below:

- it sets out the policy and general objectives of the city;
- it presents and carries forward the comprehensive theme developed by the budget officer in reviewing and formulating the budget;
- it gives a general statement of the financial status of the city;
- it highlights major program changes, tax increases or decreases and sets out significant data;
- it accurately states problems still remaining to be solved and recommends improvements to the revenue structure; and
- it should be attractive, easy to understand, and brief.
- In addition, some budget officers like to include a brief summary of the budget and a table of contents to first allow an overall view, with references for more detailed examination.

Steps to Prepare a Budget

The budget officer should set up a calendar of steps to be followed in preparing a budget. The League recommends the following minimum steps.

First, each department and agency of the city or town should be notified to begin the preparation of budget requests for the coming year. Approximately one month should be allowed to submit budget requests and a deadline date should be set. With this notice, the budget officer gives department heads worksheets and guidelines relating to the information desired and the form in which it is to be submitted. The budget officer should also indicate where statistical and financial data not available in their immediate departments may be obtained.

After receipt of departmental and agency requests, the budget officer should allow approximately 10 days to study and preliminarily assemble the budget. After this step, the officer then schedules hearings with departmental and agency heads for discussion of their requests. These meetings reveal categories where requests need to be cut, omissions which should have been included, duplication of services and ideas for better service at a saving. Furthermore, these conferences give each department head a chance to see the budget instrument in its entirety and to feel that they are included as a member of the team for overall municipal accomplishment.

Following departmental conferences, which may continue for about 10 days, the budget officer should allow approximately 10 days to draft the message and prepare the budget instrument in final form. The budget is presented to

the governing body in time to allow one month for study and hearings before final adoption.

Upon presentation, the budget is explained by the budget officer who sits with the council during deliberations. Often, department heads are asked to be present for these conferences to give detailed explanations of activities planned for the coming year in their departments. The governing body may or may not hold a public hearing on the budget. Whether or not information relating to the budget is released to the press before its adoption is a matter which the governing body should decide.

The last step is the adoption of the budget finally decided upon by the governing body. This should be done before the beginning of the fiscal year on October 1.

Most budget officers confer informally with members of the governing body during the preparation process, generally at council committee meetings. In this way, the budget officer learns the feelings of the final arbiters on important points such as possible salary and wage increases, increased taxes, and program increases before the budget is prepared and submitted. This procedure often eliminates many changes which might otherwise result at a council meeting.

Estimating Revenues

The procedure generally followed in estimating revenues is to list the receipts from each particular revenue source over the last three to five years and project the trend of increase or decrease for the coming year. Caution must be exercised in making such projections where license or tax rates have been changed during the projection period.

A careful check should be made to determine if any state legislation might affect receipts from state-shared revenues for the coming year or if any other factors might affect this source of revenue. If a new license tax is being considered, computations should be made to find out what revenue the tax will be expected to produce. This may be done by contacting a municipality of the same population range. Finally, the budget officer should check with the tax assessor for the assessed valuation of properties within the municipality for the coming year. Ad valorem tax receipts can be computed from these figures. Information relating to auto tag receipts should be obtained from the office of the probate judge.

Budget Reporting

Budgeting is a year-round process. Each month the governing body should receive a report from the officer in charge of finances showing revenues and expenditures during the month and through that date for the year. This report should also show the budgeted figure for such revenues and expenditures. From this report, the governing body should be able to determine if it was accurate in its appropriations,

if departments are performing as they should and if it will be necessary to take remedial action.

Municipal Audits

At least once a year, the mayor shall appoint an accountant to make a detailed examination of all books and accounts of the city or town to cover the period since the preceding examination and make a full report thereof, in writing, under oath to be submitted to the council at its first meeting after the completion of the report. The audit report shall be spread upon the minutes of the council. The mayor is required to employ either an independent public accountant or the Department of Examiners of Public Accounts to conduct this annual audit. There is no prohibition against employing the same accountant for successive years, although Acts applicable to some municipalities prohibit hiring the same auditors in some circumstances. For services rendered, the accountant shall be paid such sum as may be agreed upon. Section 11-43-85, Code of Alabama 1975.

The mayor **must** secure an audit at least once a year. The council **may not** appoint the accountant. Section 11-43-85 authorizes the mayor to enter into a contract fixing the accountant's fee at a reasonable amount without the approval of the council. The council is legally obligated to pay a reasonable fee for such services, although it did not authorize or take part in the agreement. AGO to the League of Municipalities, November 4, 1959. However, if annual audits have been made for previous years and were accepted by the council, the mayor may not employ, without the consent of the council, an auditor to re-audit the books of the city for such years. AGO to Hon. E. R. Caldwell, June 15, 1965. If the council is not satisfied with the audit provided by the mayor's auditor, the council may order an additional audit to be made by the auditor of its choice.

Section 36-25-4(a)(7), Code of Alabama 1975, authorizes the Ethics Commission to direct the state director of the Examiners of Public Accounts to audit a municipality. Section 11-43-85 authorizes the mayor to request the Examiners of Public Accounts to audit the municipality. AGO 1992-322.

Upon request by the mayor, the Department of Examiners of Public Accounts is required to perform an audit of a city or town pursuant to section 11-43-85 of the Code of Alabama. A town cannot waive the requirement of a yearly audit and at least once a year the town must secure an audit and pay an agreed upon sum for the services rendered by either the Department of Examiners of Public Accounts or an independent auditor. AGO 2010-068.

Municipal Audit Accountability Acts

During the 2019 Regular Legislative Session, the Legislature passed Act 2019-449 concerning municipal

audits. This Act, also known as the Municipal Audit Accountability Act, gives the Department of Examiners of Public Accounts authority to perform an audit of a municipality when fraud or mismanagement of funds is suspected. The Act also gives the Department authority to access financial penalties up to \$250 per week against municipal officials or municipal councils for failure or refusal to perform audits or submit audits requested by the Department. Section 41-5A-12.1, Code of Alabama 1975.

Conclusion

This article does not attempt to cover every particular facet of the budget and auditing processes because space does not allow it. Items such as public improvement assessments, bonded indebtedness and capital improvement budgeting have not been mentioned. It is hoped that the municipal official has found a few helpful suggestions in the foregoing material. The goal of this article is to emphasize the importance of a budget as a management and policy tool, an aid to be used continuously rather than a financial instrument to be adopted and forgotten.

— 29. Sources of Revenue for Alabama Cities and Towns —

Section 104, Alabama Constitution, 1901, states: “The Legislature shall not pass a special, private, or local law in any of the following cases ... (18) amending, confirming, or extending the charter of any private or municipal corporation, or remitting the forfeiture thereof; provided, this shall not prohibit the Legislature from altering or rearranging the boundaries of the city, town or village.”

Prior to 1901, municipalities in Alabama were created individually by acts of the Legislature, each municipality having its special grant of charter powers. Section 104 placed a responsibility on the Alabama Legislature to provide for the incorporation of cities and towns under general laws available to all which might qualify within such general classifications as the general acts adopted by the Legislature might specify.

Between 1901 and 1907, the Legislature began passing general laws relating to the creation and operation of Alabama municipalities. In 1907, these laws were collected in one body of law known as the “Municipal Code of 1907.” Since that time, this code has been added to, amended and handed down in the Alabama Code of 1923, the Code of Alabama 1940, and 1958 Recompiled Edition of the Code of 1940, and Title 11 of the Code of Alabama 1975, as amended.

Alabama is not a so called “home rule” state. Cities and towns in Alabama are dependent on the Legislature for their powers and the Legislature has the power to abolish a municipality in the exercise of its plenary powers, subject to U.S. Constitutional prohibitions against impairing obligations of contract.

This background points out that Alabama cities and towns are created under authority of the Legislature, they receive their charter powers from the Legislature, and they can be abolished by the Legislature.

Municipal taxing power must be granted by the Legislature, either expressly or through an implied grant of power. Thus, simply because municipalities in one state have certain types of taxing authority does not mean that Alabama municipalities have the same power. Alabama cities and towns can only exercise the taxing authority they are granted by the Legislature.

Statutory Taxing Powers of Alabama Municipalities

The principal statutory grant of authority for Alabama cities and towns to tax businesses or trades, occupations or professions is found in Section 11-51-90, Code of Alabama 1975. Through the years the Supreme Court of Alabama has sanctioned the levy of business license taxes, gasoline taxes, tobacco taxes, amusement taxes, lodgings taxes,

gross receipts license taxes in the nature of sales taxes and the occupational license tax similar to an income tax based on this grant of license power. Except as limited by special provisions hereafter listed or discussed in detail in the article on licensing exemptions elsewhere in this publication, the rates are left to the legislative discretion of the municipal governing body, subject to the court-required test of reasonableness.

Section 11-51-90, Code of Alabama 1975, gives all municipalities the power to license any exhibition, trade, business, vocation, occupation or profession not prohibited by the Constitution or laws of the state which may be engaged in or carried on in the municipality. They have the authority to fix the amount of licenses, the time for which they are to run, not exceeding one license year, to provide a penalty for doing business without a license. Further, a municipality may not charge a fee not exceeding \$10.00 for issuing each license. The city or town may require sworn statements as to the amount of capital invested or value of goods or stocks, or amounts of sales or gross receipts where the amount of the license is made to depend upon the amount of capital invested, value of goods or stocks, or amount of sales or gross receipts and to punish any taxpayer for failure or refusal to furnish sworn statements or for giving of false statements in relation thereto.

The license authorized by subsection (a) of this section as to taxpayers engaged in business in connection with interstate commerce shall be confined to that portion within the limits of the state and where the taxpayer has an office or transacts business in the municipality imposing the license.

The power to license conferred by this section may be used in the exercise of the police power as well as for the purpose of raising revenue, or both. The taxes authorized by Section 11-51-90, Code of Alabama 1975, apply in the corporate limits of municipalities. Under authority of Section 11-40-10 of the Code, cities and towns are granted extraterritorial police powers extending 1.5 miles beyond the corporate limits of municipalities of less than 6,000 inhabitants and three miles beyond the corporate limits of municipalities having 6,000 or more inhabitants. The licensing powers given to municipalities may be exercised in the police jurisdiction to an extent not exceeding one-half the levy in their corporate limits. Special rules apply to the timing of these levies, and what notice must be provided. Please see the article on the Police Jurisdiction elsewhere in this publication for more information.

All funds received from this type of levy must be spent in providing services to the police jurisdiction area. Authority for this power is found in Section 11-51-91, Code

of Alabama 1975. Although this section gives a municipality the authority to assess a license tax against businesses located outside the corporate limits of the municipality but within the police jurisdiction, in order to reasonably reimburse the municipality for supervision of the businesses so located, the governing body must make an effort to relate the fees levied to the reasonable cost of supervision in the area. *See, Hueytown v. Burge*, 342 So.2d 339 (Ala. 1977).

The Alabama Supreme Court in *Ex parte Leeds*, 473 So.2d 1060 (1985), held that in order to collect license fees from businesses located in the police jurisdiction, the city had to show that the amount collected from each business bore a reasonable relationship to the cost of the services the city provided for that business. In 1986, Section 11-51-91, Code of Alabama 1975, was amended to provide that police jurisdiction taxes will be valid as long as the amount of revenue collected from the police jurisdiction as a whole does not exceed the cost of providing services to the area as a whole. A business-by-business accounting is no longer necessary. This was upheld in *State Department of Revenue v. Reynolds Metals Co.*, 541 So.2d 524 (Ala. 1988).

Section 40-25-2, Code of Alabama 1975, prohibits additional municipal tobacco taxes beyond the rate in place on May 18, 2004. Counties and municipalities may use the authority granted in Section 40-25-2(g) of the Code of Alabama 1975, to administer a tobacco tax for cigarettes and require the use of monthly reports, rather than stamps, to account for the monthly sales of cigarettes and remit the taxes collected. AGO 2004-221.

Additional information on business licenses can be found in the article entitled “License Schedule Ordinance” and other articles in this publication.

Limitations on Licensing Powers

Special limitations on the municipal licensing power are found as follows (all references are to the Code of Alabama 1975): fire and marine insurance companies (Section 11-51-120); insurance other than fire and marine (Section 11-51-121); railroads (Section 11-51-124); sleeping car companies (Section 11-51-125); express companies (Section 11-51-126); telegraph companies (Section 11-51-127); telephone companies (Section 11-51-128); other public utilities (Section 11-51-129); banks (Section 11-51-130); savings and loans (Section 11-51-131); financial institutions (Section 40-16-6); motor carriers (Section 37-3-33); beer (Section 28-3-194); table wine (Section 28-7-13); certain electrical contractors (Section 34-36-13); realtors (Section 11-51-132 and Act 2008-383); Shriner events (Section 40-9-13); and waste renders (Section 11-40-23). In addition, there are a number of partial or full exemptions such as exemptions for farmers (Section 11-51-105) and others. These exemptions are discussed in detail in the

article entitled “License Exemptions and Limitations” in this publication.

Occupational License Tax

Section 11-51-90, Code of Alabama 1975, has been interpreted by the courts as giving municipalities authority to levy a tax for the privilege of working in the municipality. Such a tax operates in a manner similar to an income tax. The tax, which is in effect in at least 20 cities and towns, has been upheld by the Alabama Supreme Court on two occasions in the cases of *Estes v. Gadsden*, 266 Ala. 166, 94 So.2d 744 (1957), and *McPheeter v. Auburn*, 288 Ala. 286, 259 So.2d 833 (1972). Such a tax cannot be collected from persons who work only in the police jurisdiction of a municipality. *See, Mountain Brook v. Beaty*, 349 So.2d 1097 (Ala. 1977).

Act 2020-14 prohibits a municipality that does not have an occupational tax prior to February 1, 2020 from imposing an occupational tax unless the tax is authorized by local law. Section 11-51-106, Code of Alabama 1975.

True Sales Tax

In 1969 the Legislature gave municipalities the authority to convert their gross receipts license taxes in the nature of sales taxes to true sales and use taxes which are assessed on the consumer rather than on the seller. Sections 11-51-200 through 11-51-207, Code of Alabama 1975. However, no municipality may levy any such tax against the Alcoholic Beverage Control Board of the State of Alabama in the sale of alcoholic beverages. Section 11-51-200, Code of Alabama 1975.

All municipalities are authorized to collect sales and gross receipts license taxes through the Alabama Department of Revenue. Sections 11-51-180 through 11-51-185, Code of Alabama 1975. Those municipalities not using the Department of Revenue may collect their taxes themselves or hire private collectors.

Further, municipalities may adopt ordinances to obtain information relating to the amount of sales tax that has been reported by specific businesses within their taxing jurisdiction. Municipal officials must follow the laws relating to confidentiality of sales and use tax information due to privacy concerns found in Section 40-2A-10, Code of Alabama 1975. Please see the article entitled “Municipal Sales Tax in Alabama” elsewhere in this publication for more detailed information on this and other issues related to sales and use taxes.

Simplified Sellers Use Tax (SSUT)

The “Simplified Sellers Use Tax Remittance Act”, codified at Sections 40-23-191 to 199.3, Code of Alabama 1975, allows “eligible sellers” to participate in a program

to collect, report and remit a flat 8 percent Simplified Sellers Use Tax (SSUT) on sales made into Alabama. An “eligible seller” is one that sells tangible personal property or a service into Alabama from an inventory or location outside the state and who has no physical presence and is not otherwise required by law to collect tax on sales made into the state. The term also includes “marketplace facilitators” as defined in Section 40-23-199.2(a)(3), Code of Alabama 1975, for all sales made through the marketplace facilitator’s marketplace by or on behalf of a marketplace seller.

The proceeds from the SSUT 8 percent tax are distributed as follows:

- 50% is deposited to the State Treasury and allocated 75 percent to the General Fund and 25% to the Education Trust Fund.
- The remaining 50% shall be distributed 60% to each municipality in the state on the basis of the ratio of the population of each municipality to the total population of all municipalities in the state as determined in the most recent federal census prior to distribution and the remaining 40% to each county in the state on the basis of the ratio of the population of each county to the total population of all counties in the state as determined in the most recent federal census prior to distribution.

The department of revenue will provide a list of SSUT account holders on the website disclosing the start and cease date of participants in the program, as applicable. This list is provided so that the local governments are aware of the taxpayers who fall under the protection of the SSUT Act.

Ad Valorem Tax

All cities and towns of the state are authorized to levy a five-mill tax upon real and personal property located within their limits computed on the value as assessed for state and county taxation. No referendum is required for the levy of this tax. Section 216, Alabama Constitution, 1901. Amendment 56 (Section 216.04) Alabama Constitution, 1901, authorizes all municipalities to levy such a tax at a rate not exceeding 12.5 mills, provided that all over five mills is authorized by the electors at an election called for that purpose. Amendments six (Dallas Section 4), eight (Section 216.01), 13 (Section 216.03), 17 (Section 216.02), 54 (Winston Section 9), and 84 (Marion Section 4), Alabama Constitution, 1901, provide different rates for specified cities and towns. The responsibility for levying the ad valorem tax rests upon the council.

Amendment 373 (Section 217) Alabama Constitution, 1901:

- Authorizes any county, municipality or other taxing

authority to decrease any local ad valorem tax rate at any time, provided such decrease does not jeopardize the payment of any bonded indebtedness secured by such tax.

- Authorizes increasing local ad valorem tax rates through a procedure calling for, first, a proposal and public hearing by the local taxing authority; second, enactment of the proposal by the legislature; and third, approval in a special election by a majority of the qualified electors of the area in which the tax is to be levied or increased who vote on the proposal.
- Provides that, except as otherwise provided in the Constitution for the cities of Mountain Brook, Vestavia Hills and Huntsville, the amount of ad valorem taxes payable to the state and to all counties, municipalities and other taxing authorities with respect to any item of taxable property described as Class I Property (utility property) shall never exceed two percent of the fair and reasonable market value of such taxable property in any one taxable year. For Class II Property (all property not otherwise classified), the limit is 1.5 percent. For Class III Property (agricultural, forest, single-family, owner-occupied residential, and historic site property), the limit is 1 percent. For Class IV Property (private automobiles and pickup trucks), the limit is 1.25 percent.
- Allows all local taxing entities within a county to levy additional millage not to exceed two mills in the aggregate to recoup the costs of the court-ordered statewide reappraisal program. The additional millage is to remain until the cost of the reappraisal program has been recovered.
- This amendment was implemented by legislation codified in Chapters 7 and 8 of Title 40 of the Code of Alabama 1975.

Most cities and towns use the optional method of levying and collecting their ad valorem taxes which is provided in Sections 11-51-40 through 11-51-74, Code of Alabama 1975. Under this authority, the council adopts a resolution or ordinance establishing the levy in May. A certified copy of this action is delivered to the county tax assessor on or before June 1. If this procedure is followed, the county tax collector makes the collection for the municipality, which is due on October 1, based on the state and county assessment for the preceding year. If a municipality has established its ad valorem tax by ordinance, providing it shall be in force from year to year until repealed or amended, then the council would not be required to take any further action on the subject except to amend or repeal.

If a municipality has established its ad valorem tax by ordinance, providing that it shall be in force from year to year until repealed or amended, then the governing body would not be required to take any further action on the subject except to amend or repeal. For this service many municipalities pay the maximum assessment fee of two percent and a collection fee of 2 percent. The fee is one half of one percent each in Jefferson County. *See*, Section 11-51-74, Code of Alabama 1975. In those counties where the tax assessor and tax collector are paid a salary, the municipality pays its pro rata share of the salary. *See*, Section 40-6A-2, Code of Alabama 1975, as amended.

The municipal property tax on automobiles is handled the same way and the law prohibits the issuance of an auto tag without the production of a valid paid certificate.

A grant of general legislative authority to a municipality to assess and levy taxes on property within its jurisdiction confers no express, implied, or inherent authority to exempt any property or any particular class of property from taxation. AGO 2004-217.

Selected Attorney General's Opinions and Court Decisions relating to Ad Valorem Taxes

NOTE: In reviewing cases and opinions, please remember these summaries are not intended as a substitute for reading the opinion or decision itself.

- A subdivision lot on which a house is under construction cannot be classified as a Class III property unless the house is occupied by the owners for their exclusive use as a single-family dwelling on law day, October 1. A farm on which a house is under construction can be classified as Class III property, regardless of occupancy, if the farm is being used for any of the purposes described in Section 40-8-1(b)(1), Code of Alabama 1975, on law day, October 1. Any questions of equal protection concerning Section 40-8-1 must be left to the courts. AGO 2000-123.
- Property of a medical clinic board organized under Sections 11-58-1, et seq., Code of Alabama 1975, is exempt from ad valorem taxation. AGO 1996-147.
- Property of the State Retirement System is exempt from ad valorem taxation. AGO 1996-154
- A property owner must claim an exemption from ad valorem taxation in order to receive the exemption. Absent factual issues which might justify it, the taxing official may not grant an exemption for years in which the exemption was not claimed. AGO 1997-064 and AGO 1996-220.
- In *State v. Delaneys, Inc.*, 668 So.2d 768 (1995), the Alabama Court of Civil Appeals held that the classification of land as timberland in one tax period did not preclude reclassifying the land during a different tax period if the assessor determined that the property was no longer being used as timberland.
- In *Pilcher Land Corp. v. Johns*, 677 So.2d 746 (1996), the Alabama Supreme Court held that the tax assessor properly refused to classify property as current use property.
- In *Mingledorff v. Vaughn Regional Medical Center, Inc.*, 682 So.2d 415 (1996), the Alabama Supreme Court held that a nonprofit hospital is entitled to an ad valorem tax exemption as a charitable organization because receipt of payment from patients financially able to pay does not defeat the charitable purpose of the hospital.
- There is no income limitation for claiming a homestead exemption for someone who has a permanent and total disability or who is blind as defined by Section 1-1-3 of the Code. AGO 1998-079.
- The burden is on a person claiming an ad valorem tax exemption to prove that they are entitled to the exemption. AGO 1998-040.
- The question of what constitutes occupancy on tax day is to be determined by the assessing officer. AGO 1998-084.
- A county tax official cannot exempt property that is not listed by the taxpayer as exempt for the tax year in question. AGO 1997-119
- Motor vehicles held under a lease-purchase agreement and used for personal or private use should be classified as Class IV property. AGO 1998-145.
- Although the Amendment 509 (Section 36.01) Alabama Constitution, 1901, makes English the official state language, this Amendment does not restrict non-English speaking residents from being able to claim a homestead exemption. AGO 1998-223.
- Pursuant to Section 40-11-1(15), Code of Alabama 1975, ad valorem taxes are due on all manufactured homes located on land owned by the home owner, except homes leased for business purposes or those in the inventory of a manufactured home dealer or manufacturer. AGO 1999-073.
- The Legislature cannot by local law waive an entity's responsibility to contribute a pro rata share of the cost of programs for equalization of ad valorem taxes. AGO 1999-237.
- The tax assessor must determine whether property owned by a Lions Club and leased to other groups is

exempt from taxation because it is being used for purely charitable purposes. AGO 1999-124.

- Tools used exclusively by the owner to maintain and repair farm tractors and implements are exempt from the requirement that they be listed on the property return forms filed as a part of the ad valorem taxation process. The tools would continue to be subject to sales tax when purchased. AGO 2001-057.
- If a portion of ad valorem taxes are collected and earmarked for a particular purpose, a city must use it for that purpose. Generally, a tax levied and collected for a particular purpose cannot be diverted for other purposes. AGO 2002-174.
- A taxpayer has the responsibility to make a claim for an exemption to paying ad valorem taxes. A taxpayer, who is entitled to an exemption, but paid ad valorem taxes by mistake because the taxpayer failed to claim the exemption, is entitled to a refund pursuant to Section 40-10-160 of the Code of Alabama 1975. AGO 2002-280.
- Intentional misrepresentations by a taxpayer do not constitute “other error” under Section 40-10-160 of the Code of Alabama 1975 so as to allow a refund of taxes. AGO 2005-096.
- Under Section 40-2A-6 of the Code of Alabama 1975, a city, county, or state agency in Alabama may engage a private firm on a contingency-fee basis to collect delinquent property taxes by verifying from the tax assessor’s records that property taxes are due, but any determination concerning the proper amount of taxes due must be made by the tax assessor. AGO 2005-168.
- An owner of property that is reclassified from Class II to Class III because it is a historic building or site is eligible to claim a refund for years in which it was improperly classified. Refunds are limited to two years from the date of payment of the tax. AGO 2006-089.
- A single-family dwelling owned by a limited liability company, partnership, or corporation does not qualify to be Class III property for ad valorem tax purposes. AGO 2007-043.
- A homeowner that owns more than one dwelling on the same piece of property, or even a dwelling on a different parcel, may lawfully claim that the property is Class III property in accordance with section 40-8-1 of the Code of Alabama, so long as the property is used exclusively by the homeowner as a single-family dwelling for his or her family. AGO 2007-082.
- Status of facilities as nonprofit charitable organizations exempt from federal income taxation did not

automatically exempt them from ad valorem taxation. *Surtees v. Carlton Cove, Inc.*, 974 So.2d 1013 (Ala. Civ. App. 2007).

- Section 40-7-25.1 of the Code of Alabama specifically requires the owner of Class III property to request appraisal on the basis of current use and states that failure of the owner to do so means that the property must be appraised based on its fair and reasonable market value. A Class III taxpayer who fails to timely request appraisal on the basis of current use and consequently pays ad valorem taxes on the fair market value of the property is not entitled to a refund under section 40-10-160. AGO 2008-012
- The county tax collector is required to collect for any municipal or county liens according to statute. The purchaser of a tax certificate at a tax sale is required to pay any liens or assessments that accrue during his or her time of ownership of the tax certificate. AGO 2008-034
- Residential property owned by a limited liability company may be properly classified as Class III property if occupied by an individual pursuant to an executory sales contract. AGO 2008-049
- Section 40-9-21 of the Code of Alabama is a full exemption from ad valorem taxation. Anyone meeting the “permanent and total” disability requirement set forth in section 40-9-19(d) would certainly meet the “total disability” requirement set forth in section 40-9-21, as there is no requirement that the person be retired or that the disability be permanent. There is no age or income limitation for claiming a homestead exemption for someone who is retired because of a permanent and total disability or who is blind as defined by section 1-1-3 of the Code of Alabama. AGO 2008-079
- Residential property, in order to be classified as Class III single-family owner-occupied residential property, must be being used by the owner as their dwelling at the time taxes are assessed. A taxpayers’ single family residence did not qualify as “residential property,” and, thus, was not eligible for classification as Class III single-family owner-occupied residential property for taxation purposes, as their residence was still under construction and was not occupied by or being used by taxpayers as a single-family dwelling on the applicable assessment date. *Weinrib v. Wolter*, 1 So.3d 1032 (Ala. Civ.App.2008)
- Retroactive modifications to tax abatement agreements, while permissible, may not violate existing law. A city cannot, through the vehicle of a retroactive amendment to a Tax Abatement Agreement (“Agreement”), forgive

ad valorem taxes that accrued as a fixed obligation prior to the date of the subject Agreement. AGO 2008-108.

- The municipal ad valorem taxes collected on October 1, 2007, by the municipality are based on the assessment for the preceding tax year (October 1, 2006) according to section 11-51-40 of the Code, and not on subsequent changes in classification which occurred in January 2007. No refund is authorized where there is no error in the assessment. AGO 2009-018
- A vacant parsonage loses its tax-exempt status if there is no good-faith intent that it is to be used for a future tax-exempt purpose. A minister's family member may live in the parsonage without the parsonage losing its otherwise tax-exempt status. Pursuant to section 40-9-1 of the Code of Alabama, real or personal property owned by any educational, religious, or charitable institution, society, or corporation let for rent or hire or for use for business purposes shall not be exempt from taxation notwithstanding that the income from such property shall be used exclusively for educational, religious, or charitable purposes. AGO 2009-053
- Excess proceeds arising from a tax sale are properly payable to the owner of the property or a representative or agent of the owner. The original owner can contract with a third party to receive the excess funds. AGO 2009-058
- Act 2009-508 applies to tax assessment dates falling on or after October 1, 2009 and expands the definition of Class III residential property found under section 40-8-1(a) of the Code of Alabama. AGO 2010-047
- Property occupied by the original owner after being sold at a tax sale is not qualified for the age and disability homestead exemption under section 40-9-21 of the Code of Alabama. As a new purchaser, the taxpayer is only allowed the exemptions in effect on the assessment date for which the property was sold for taxes and no more. AGO 2010-078
- The income of a professional corporation that is owned by the taxpayer should not be considered when determining whether the taxpayer has met the income qualification for the ad valorem tax exemption provided in section 40-9-21 of the Code of Alabama. AGO 2012-062.
- Additional legislative approval is not required to propose ad valorem tax increases pursuant to Amendment 202 and Amendment 382 of the Constitution of Alabama. AGO 2012-070.
- Section 40-10-12, Code of Alabama 1975, authorizes the property tax commissioner to post notice of a tax sale at the county courthouse and at some other public place in each precinct within the county within which the real estate is located in lieu of publication in a newspaper published in the county. AGO 2013-024.
- A person must be retired because of permanent and total disability to be granted the ad valorem tax exemption found in section 40-9-21(a), Code of Alabama 1975. AGO 2013-027.
- A tax-sale purchaser of land on which a manufactured home was located did not acquire the manufactured home by virtue of the tax deed for the real property. The treatment of certain manufactured homes as realty for purposes of ad valorem taxation does not serve to convert them to real property. A manufactured home is personal property unless and until the certificate of title is canceled. *Green Tree-AL LLC v. Dominion Resources, L.L.C.*, 104 So.3d 177 (Ala.Civ.App.2011).
- Pursuant to section 40-10-28 of the Code of Alabama, the mortgagor, as owner, and the person against whom ad valorem taxes are assessed is entitled to excess funds received as a result of a tax sale. AGO 2013-059.
- The new owner of property, who is tax exempt, would be responsible for the roll-back charges expressed in section 40-7-25.3 of the Code of Alabama in the property in question was not being used exclusively for charitable purposes as of the October 1 next succeeding conversion of the property. Even though the developer changed the current use of Portion "B" in November 2013, it is the owner of property as of October 1 who is responsible for the ad valorem taxes levied on a particular parcel of land. Section 40-7-25.3 of the Code authorizes a tax assessor to apportion an assessment to a particular parcel of land. Accordingly, the amount assessed in ad valorem taxes should stand alone as to Portion "B." AGO 2015-021.
- The 30-day period for taxpayer to file a notice of appeal of a final ad valorem tax assessment with the secretary of the county board of equalization began to run on the date of the entry of the final tax assessment. *Ex parte Shelby County Bd. of Equalization*, 159 So.3d 1 (Ala.2014).
- The county health care authority may provide financial support to Community Hospital, a private, nonprofit corporation in the county from the lease revenue or other authority funds that are not ad valorem tax proceeds. AGO 2017-020.
- A private residence used as a home school is not exempt from ad valorem taxation if it is not used exclusively for educational purposes. AGO 2017-031.

Permit Fees

Authority to establish inspection fees for building, fire, plumbing and electrical inspections is granted by Section 11-43-59, Code of Alabama 1975. Similar power is given to establish garbage collection fees by Sections 11-47-135 and 22-27-1, et seq., food inspection fees in Section 11-47-136, slaughterhouse inspection fees in Section 11-47-138, market regulation fees and also agreed upon fees with other municipalities for inspection of dairies, meats, etc. in Section 11-47-139.

Parking Meters

The authority to establish parking meters was derived from the Alabama Supreme Court decision in *Decatur v. Robinson*, 251 Ala. 99, 36 So.2d 673 (1948). The decision was based on the power of municipalities to regulate traffic and parking on their streets.

Franchises

Section 220, Alabama Constitution, 1901, and Section 11-43-62, Code of Alabama 1975, authorize municipalities to require that franchise fees be paid by public utilities as a condition of franchise rights to use city streets. Such contracted franchise fees are separate from the municipal licensing power.

Courts

Municipal courts should not be used as sources of revenue for municipalities. For information regarding court cost and fines, see the article in the publication titled “The Municipal Court”.

Other Sources of Locally-Generated Revenue

In addition to the sources mentioned above, municipalities can raise revenues locally by levying scale fees (Section 11-43-59); selling or leasing municipal property no longer needed for public purposes (Sections 11-47-20 and 11-47-21); investing municipal funds (Sections 11-81-19, 11-81-20, and 5-5A-28); and by operating municipally-owned utilities such as water systems, gas distribution systems, electric systems, cable television systems, interactive computer services, Internet access and services and other advanced telecommunications services.

Intergovernmental Revenues

In addition to the revenues generated by measures adopted by the municipal governing body, Alabama cities and towns receive revenues from other levels of government.

Revenues come from the federal government in the form of federal grants and loans. Incorporated municipal utilities make payments to municipalities in lieu of taxes.

In some cases, counties and municipalities share in the proceeds from joint ventures such as county-city libraries and similar operations.

Municipalities in Alabama share in the proceeds from several state taxes. For a full discussion, please see the article entitled “State Revenue Shared and State Taxes Paid by Municipalities” in this publication, but these revenue sources include state ABC store profits (Section 28-3-74, Code of Alabama 1975); state motor vehicle license tag tax (Section 40-12-270, Code of Alabama 1975); state seven-cents and five-cents per gallon gasoline tax (Section 40-17-70, et seq., Code of Alabama 1975); state four-cents per gallon gasoline tax (Section 40-17-220, Code of Alabama 1975); state annual license tax and registration fees on private passenger automobiles and motorcycles (Section 40-12-242, Code of Alabama 1975); state financial institutions excise tax (Section 40-16-6, Code of Alabama 1975); state privilege tax on oil and gas production (Section 40-20-8, et seq., Code of Alabama 1975 as amended); TVA in lieu of tax payments (Section 40-28-1, et seq., Code of Alabama 1975); coal severance tax (Section 40-13-30, et seq., Code of Alabama 1975); state table wine tax (Section 28-7-16, Code of Alabama 1975); state beer tax (Section 28-3-190, Code of Alabama 1975); state two percent sales tax on sales made by ABC stores (Section 28-3-280, et seq., Code of Alabama 1975); state inspection fee on motor fuels and motor oil (Section 8-17-87, Code of Alabama 1975); and the oil and gas trust fund (Sections 11-66-1 through 11-66-7, Code of Alabama 1975).

30. State Collected and Distributed Local Revenue and State Taxes Paid by Municipalities

Municipalities in Alabama currently receive a share of state revenue from a number of sources which by law must be shared back with municipal governments under a variety of formulas. The largest single source of shared revenues is state gasoline taxes. For a complete discussion of state gasoline taxes, please see the article titled “Municipalities and State Shared Fuel Taxes” in this publication.

Conversely, municipal governments are required by law to pay several state taxes and, in addition, municipal courts are required to collect several special court costs from which municipal governments receive little or no direct benefits.

This article examines the state revenues that are shared with municipal governments and also lists the state taxes and other costs which must be paid by Alabama cities and towns.

Sources of State Collected and Distributed Local Revenues

1. State 7-Cent Gasoline Tax – Section 40-17-359, Code of Alabama 1975, provides for the distribution and use of the 7-cent state gasoline tax. For a complete breakdown of the distribution of such funds to municipalities, please see the article titled “Municipalities and State Shared Fuel Taxes” in this publication.

State gasoline tax funds are distributed monthly by the state treasurer. Under the law, cities must use these funds only for street and highway purposes and must keep them in a special fund. Some municipalities contract with the state for street construction projects and pledge their gasoline tax revenues to pay for the work. This procedure involves checking with the Alabama Department of Transportation to determine how long the city’s share will be diverted to the department to pay out such contracts.

2. State 5-Cent Gasoline Tax – Section 40-17-359, Code of Alabama 1975, also provides for the distribution and use of a supplemental gasoline excise tax of 5-cents per gallon on the sale, use or consumption, distribution, storage or withdrawal from storage in this state for any use.

For a complete breakdown of the distribution of such funds to municipalities, please see the article titled “Municipalities and State Shared Fuel Taxes” in this publication.

A municipality’s share of the proceeds from this tax shall be used for the same purposes and deposited in the same municipal fund as the 4-cents per gallon gasoline tax. See, Sections 40-17-359(f) and 40-17-362, Code of Alabama, 1975, and AGO to Hon. Ricky Harcrow, September 5, 2012.

3. State 4-Cent Tax on Gasoline and Lubricating Oils – Section 40-17-325(a)(1), Code of Alabama 1975, levies a tax of 4-cents per gallon on all gasoline and lubricating oil sold in the state. For a complete breakdown of the distribution of such funds to municipalities, please see the article titled “Municipalities and State Shared Fuel Taxes” in this publication.

Use of these funds is limited to resurfacing, restoring and rehabilitating roads, streets and bridges. The funds can also be used to construct new roads and streets and for bridge replacement. Taxes collected must be kept in a separate fund. See, Section 40-17-362, Code of Alabama, 1975, and AGO to Hon. Ricky Harcrow, September 5, 2012.

4. State 10-Cent Gasoline Tax – Section 40-12-242, Code of Alabama 1975, levies a 10 cents gasoline tax increase authorized by Rebuild Alabama Act, the money will be distributed among the state and local governments as follows:

1. 66.77% - ALDOT
 - a. Transportation infrastructure statewide
 - b. ALDOT Grant program (not less than \$10M annually – for local government projects upon competitive application)
 - c. ATRIP II – (\$30-50M annually – fund projects of “local interest on the state maintained highway system, which may include local roads and bridges”)
2. 25% - Counties
3. 8.33% - Municipalities
 - a. 25 percent will be allocated evenly - every municipality will receive approx. \$14,109
 - b. 75% will be distributed by population.

Distributions are monthly beginning no later than January 2020.

5. State Inspection Fee on Motor Fuels and Motor Oil and State 6-Cent Tax on Diesel Fuels -Section 8-17-87, Code of Alabama 1975, imposes an inspection fee which shall be collected on petroleum products sold, offered for sale, stored or used in the state. The fee is 2-cents per gallon on gasoline and diesel fuel with varying amounts for other fuels and lubricating oil. It shall be the duty of the person first selling, storing or using any petroleum product in the state to pay such inspection fee. The inspection fee shall be paid to the Commissioner of Agriculture and Industries on or before the 20th day of each month on all

petroleum products sold, stored or used in the state during the preceding month.

Section 40-17-325 levies a 6-cents per gallon tax on diesel fuel sold in the state, a portion of which is distributed to municipalities and is used as provided in Section 8-17-91.

Section 8-17-91, Code of Alabama 1975, provides that the proceeds from the permit fees, inspection fees and penalties, if any, collected by the Commissioner of Agriculture and Industries shall be paid into the state treasury and distributed on a monthly basis as follows:

- An amount equal to 5 percent or no less than \$175,000 to the Agricultural Fund with the balance distributed as follows:
- 13.87 percent to each of the 67 counties equally
- \$408,981 to Highway Department for Public Road and Bridge Fund
- 2.76 percent to incorporated municipalities (45.45 percent of this revenue is allocated among counties equally and 54.55 percent of this revenue is allocated among the counties on the basis of population). The amount allocated to each county is distributed monthly, on the basis of population, by the state treasurer to the municipalities within the county.

A municipality must use its share of the inspection fee revenues for transportation planning or for the construction, reconstruction, maintenance, widening, alteration and improvement of public roads, bridges, streets and other public ways, including payment of the principal and interest of any securities at any time issued by the municipality pursuant to law for the payment of which any part of the net tax proceeds were or may be lawfully pledged. Funds distributed to municipalities under the provisions of this law shall not be commingled with other funds of the municipality, except with the municipality's portion of the highway gasoline tax. The funds shall be kept and disbursed by the municipality from a special fund only for the purposes enumerated above. This fund is commonly referred to as the Public Road and Bridge Fund.

6. Motor Vehicle License Tag Tax – Section 40-12-248, Code of Alabama 1975, levies an annual license tax and registration fee for trucks and truck tractors using the public highways of the state. The annual fee consists of a base amount plus an additional amount as provided by the statute. Section 40-12-242, Code of Alabama 1975, levies a \$13 fee for license tags for private passenger automobiles and a \$7 fee for license tags for motorcycles. Sections 40-12-269 and 40-12-270, Code of Alabama 1975, provide for the distribution of these revenues. The moneys collected each month by the probate judge from motor vehicle license taxes and registration fees shall be distributed in one of two

ways depending upon the source of the revenue. Under either formula, 2.5 percent is deducted for the probate judge's fee and five percent goes to the state treasurer for administrative costs. The remaining revenue is known as the "net proceeds."

That portion of the "net proceeds" that consists of additional amounts paid under the schedule of additional amounts for truck and truck tractors under Section 40-12-248 shall be remitted by the probate judge to the state treasurer who shall distribute said amounts as stated in Section 40-12-270, Code of Alabama 1975:

- 64.75 percent to state of Alabama
- 35.25 percent apportioned to the counties (42.16 percent of the apportionment to the counties equally and 57.84 percent on a population basis).
- The entire residue of the "net proceeds" remaining after distribution of the additional amounts for trucks and truck tractors shall be distributed as follows:
- 72 percent to state of Alabama for the Highway Department
- 21 percent remitted by probate judge to counties and municipalities on the basis of vehicle situs
- 7 percent held by state treasurer and distributed monthly to counties pro rata on the basis of vehicle registrations. Ten percent of the amount each county receives is further distributed to the municipalities within the county on a population basis.

Revenues from this tax must be spent for street and road purposes. All municipal officials should note that the main portion of the city or town's share of the tag tax is distributed by the probate judge on the tax situs of the vehicle. No tag may be issued by the probate judge unless the owner of a vehicle produces a tax receipt showing that the ad valorem tax has been paid. If the owner has listed a rural address to evade the municipal ad valorem tax, the municipality will also be cheated out of the tag tax, for the probate judge must distribute 21 percent of the license tax revenue to either the county or municipal government on the basis of vehicle situs as shown on the ad valorem tax receipt.

7. ABC Profits – Section 28-3-74, Code of Alabama 1975, provides for the sharing of profits from ABC stores as follows:

First \$2 million in profits:

- 50 percent to state general fund
- 19 percent to Alabama Department of Human Resources
- 10 percent to wet counties equally for their general funds
- 1 percent to wet counties equally for public health

- 20 percent to incorporated wet municipalities where ABC stores are located on the basis of store profits.

Next \$200,000 in profits:

- 100 percent to incorporated wet municipalities on a population basis according to the last federal census.

All profits over \$2.2 million:

- 10 percent to wet counties on population basis
- 16-2/3 percent to wet municipalities on a population basis
- 3-1/3 percent to wet municipalities where ABC stores are located on the basis of population
- 10 percent to Alabama Department of Human Resources
- 60 percent to state general fund.

Section 28-3-53.2, Code of Alabama 1975, provides that the total amount of the additional mark-up on the cost of merchandise levied by the ABC Board subsequent to June 30, 1983, shall be designated to the credit of the general fund of the state. The law defines “mark-up” as “the percentage amount added to cost plus freight on spirituous or vinous liquors sold by the board, exclusive of taxes heretofore levied with respect thereto.”

Note: Additional separate state taxes are levied on the selling price of liquors sold in ABC stores. These taxes are generally reported as part of the gross sales of the stores, but they are not distributable as profits. Instead, each tax is earmarked for a particular use at the state level. Sections 28-3-200 through 28-3-207, Code of Alabama 1975.

Because of these superimposed taxes, profits have done well to maintain a slight increase each year. The ABC Board has had to increase prices sharply to cover the taxes. This action has increased bootlegging and the consequent expense of enforcement which is one of the costs of ABC Board operations.

The profits are distributed semi-annually in February and in August. ABC Board profits may be used by municipalities for general purposes.

Section 28-3-53.1, Code of Alabama 1975, provides that funds accumulated by the board as working capital from municipalities and counties many years ago will be distributed to the counties and municipalities from which they were withheld on the same basis as withheld on the next distribution of profits by the ABC Board after October 1, 1984. Municipalities and counties entitled to this refund received a one-time payment in February 1985.

8. State Table Wine Tax – Sections 28-7-1 through 28-7-24, Code of Alabama 1975, allow the sale of table wine at retail establishments in wet counties and in wet municipalities. A tax equal to 45-cents per liter of table wine is added to the purchase price of the table wine and

is collected by the Board or retailer from the purchaser. *See*, Section 28-7-16, Code of Alabama 1975. Thirty-eight cents per liter goes to the state treasury and 7-cents per liter goes to the municipality if the table wine was sold within the corporate limits of the municipality. The money can be used for general purposes. The municipality receives its share of the table wine tax from the ABC Board or from the wholesaler who services the retailer who sold the table wine.

9. Uniform Beer Tax – Section 28-3-190, Code of Alabama 1975, levies a uniform statewide beer tax of 1.625-cents per four fluid ounces of beer. This tax is levied on every person licensed by the ABC Board to sell, store, or receive for the purpose of distribution to any person, firm, corporation, club or association within Alabama. The tax is added to the sales price and must be collected from the purchaser. The tax is collected monthly by a return which must be filed by the wholesaler with the wet county or wet municipality where sold.

The law provides a general formula for the distribution of this revenue. If the beer is sold within the corporate limits of the municipality, the municipality receives all of the tax money. If the beer is sold in the police jurisdiction or beyond, the county gets the tax revenue. Most counties have adopted a different distribution formula. A municipality’s share of this money can be used for general purposes unless otherwise specified by law.

10. Two Percent Tax on State ABC Store Sales – Section 28-3-280, Code of Alabama 1975, levies a state sales tax in the amount of two percent of the retail price, excluding taxes, on the sales of alcoholic beverages sold at retail by the state ABC Board. The taxes collected shall be paid to the Department of Revenue, which shall redistribute the proceeds as follows: 25 percent to the county where the tax was collected and 75 percent to the municipality where the tax was collected. This revenue can be used by a municipality for general fund purposes.

11. Financial Institutions Excise Tax – Section 40-16-6, Code of Alabama 1975, provides that each municipality shall receive 33.3% of the State Financial Institutions Excise Tax levied on institutions such as banks, loan agencies, etc., which are located in the municipality. This is actually an income tax levied on the net taxable income of financial institutions. It is administered by the Income Tax Division of the Alabama Department of Revenue.

The municipal share of the State Financial Institutions Excise Tax is paid each calendar quarter. It may be used for general purposes. Marked fluctuations can take place in this source of state-shared revenue, since it is dependent upon the operations of financial institutions in each municipality. Should one major bank decide to take a large write-off of bad investments for a year, this could drastically affect the Financial Institutions Excise Tax paid in that municipality.

12. Privilege Tax on Oil and Gas Production – Section 40-20-2, Code of Alabama 1975, levies an annual privilege tax on every person engaging or continuing to engage in the business of producing or severing oil or gas from the soil or waters or beneath the soil or waters of the state for sale, transport, storage, profit or for use. The amount of the tax is measured at the rate of eight percent of the gross value of said oil and gas at the point of production, with certain exceptions. All wells producing 25 barrels or less of oil per day or 200,000 cubic feet or less of gas per day shall be taxed at the rate of four percent of the gross value of said oil or gas at the point of production. All oil and gas produced from onshore discovery wells, onshore development wells on which drilling commenced within four years of the completion date of discovery well and producing from a depth of 6,000 feet or greater, and all oil and gas produced from onshore development wells on which drilling commenced within two years of the completion date of the discovery well and producing from a depth less than 6,000 feet shall be taxed at a rate of six percent of the gross value of said oil and gas at the point of production for a period of five years from the date production begins from said discovery and development wells, provided said wells were permitted by the State Oil and Gas Board after July 1, 1984. However, for any well for which an initial permit is issued on or after July 1, 1988, the tax on oil or gas produced by offshore production from a depth of 18,000 feet or greater and the general eight percent tax, is reduced by two percent

Section 40-20-8, Code of Alabama 1975, provides for the distribution of the revenues derived from this tax. Revenues derived from offshore production are divided as follows: 90 percent to the state general fund and 10 percent to the county where the oil or gas was produced. The remaining oil and gas tax revenue shall be collected by the Department of Revenue and distributed as follows:

- 25 percent to state general fund
- The remaining 75 percent to be divided as follows:
- 16.66 percent to state general fund
- 16.66 percent to county where produced for general purposes
- 66.66 percent to counties and municipalities for general fund purposes on the following schedule:
 - a. 25 percent to counties where produced for general purposes or for schools
 - b. 10 percent to municipality where oil or gas was severed within corporate limits or police jurisdiction. If a well located within the corporate limits or police jurisdiction of the municipality pays taxes on the four percent rate, then 10 percent of

all taxes collected from said well shall go to the municipality.

- c. 50 percent of the first \$150,000 remaining shall go to the state, 42.5 percent to the county, and 7.5 percent to the municipalities therein on a population basis.
- d. 84 percent of all remaining sums goes to the state, 14 percent to the county and two percent to the municipalities therein on a population basis.

All funds received by a municipality from the state tax on oil and gas production may be used for general fund purposes.

13. TVA Payments – Sections 40-28-1 through 40-28-5, Code of Alabama 1975, provide for the distribution of a portion of the money received by the state from the Tennessee Valley Authority in lieu of taxes to be shared back with the counties and municipalities served by TVA. The law further provides that a portion of this money is to be shared with those dry counties and municipalities not served by TVA. The money can be used for general purposes.

14. Coal Severance Tax – Sections 40-13-30 through 40-13-36, Code of Alabama 1975, provide for the levy and collection of an excise and privilege tax on every person severing coal or lignite within the state in an amount equal to 20-cents per ton of coal or lignite severed. If the coal or lignite was severed within the corporate limits or police jurisdiction of the municipality as it existed on January 1, 1977, then 50 percent of the tax levied on such severance shall go to the municipality and 50 percent shall go to the county. If the coal or lignite was not severed within the corporate limits or police jurisdiction of a municipality, then 100 percent of the tax collected on the coal or lignite severed will go to the county. This money may be used for general purposes.

15. Municipal Government Capital Improvement Fund – Sections 11-66-1 through 11-66-7, Code of Alabama 1975, gives municipalities in Alabama 10 percent of the interest derived from the investment of the Alabama Trust Fund, Amendment 450 (Section 219.02), Alabama Constitution, 1901, in any fiscal year in which the interest equals or exceeds \$60 million. The money must be used for capital improvement purposes and maintained in a separate account.

Fund capital is distributed by the state comptroller on April 15 of the fiscal year for which each annual distribution is made as follows:

- \$1,000 to each incorporated municipality with a population of less than 1,000;
- \$2,500 to each incorporated municipality with a population of 1,000 or more.

The residue of the portion to be paid to the incorporated municipalities in Alabama is distributed pro rata on the basis of population according to the last federal decennial census or, in the case of a municipality incorporated subsequent to the decennial census, according to the official census taken upon incorporation.

16. Simplified Sellers Use Tax (SSUT) - The “Simplified Sellers Use Tax Remittance Act”, codified at Sections 40-23-191 to 199.3, Code of Alabama 1975, allows “eligible sellers” to participate in a program to collect, report and remit a flat 8 percent Simplified Sellers Use Tax (SSUT) on sales made into Alabama. An “eligible seller” is one that sells tangible personal property or a service into Alabama from an inventory or location outside the state and who has no physical presence and is not otherwise required by law to collect tax on sales made into the state. The term also includes “marketplace facilitators” as defined in Section 40-23-199.2(a)(3), Code of Alabama 1975, for all sales made through the marketplace facilitator’s marketplace by or on behalf of a marketplace seller.

The proceeds from the SSUT 8 percent tax are distributed as follows:

- 50% is deposited to the State Treasury and allocated 75 percent to the General Fund and 25% to the Education Trust Fund.
- The remaining 50% shall be distributed 60% to each municipality in the state on the basis of the ratio of the population of each municipality to the total population of all municipalities in the state as determined in the most recent federal census prior to distribution and the remaining 40% to each county in the state on the basis of the ratio of the population of each county to the total population of all counties in the state as determined in the most recent federal census prior to distribution.

The department of revenue will provide a list of SSUT account holders on the website disclosing the start and cease date of participants in the program, as applicable. This list is provided so that the local governments are aware of the taxpayers who fall under the protection of the SSUT Act.

Elimination of Small Payments

Section 40-1-31.2, Code of Alabama 1975, provides that in all cases involving distribution of revenues to counties and municipalities, the state agency charged with the responsibility of apportionment of such funds shall eliminate all payments of less than \$5 to a municipality and shall include the amount so eliminated in any payment to be made to the county in which the municipality is located.

State Taxes or Costs Paid by Municipalities

Section 91, Alabama Constitution, 1901, prohibits

the Legislature from levying taxes on the real or personal property owned by municipal governments. In addition, municipalities enjoy a natural exemption from state taxation unless they are specifically included in the language of the statute imposing a particular tax. *State v. Montgomery*, 228 Ala. 93, 151 So. 856 (Ala. 1933). At present, cities and towns are required to pay two direct taxes to the state. In addition, municipal courts are required to collect several special costs on certain court cases and remit all or part of the revenue to the state. The Alabama Legislature passed Amendment 621 (Section 111.05) Alabama Constitution, 1901, which prohibits the Alabama Legislature from passing a general law or state executive order that would increase or add expenditure of funds held or disbursed by the governing body of the municipality, unless approved by an ordinance or resolution adopted by the governing body of the municipality.

1. State Gasoline Inspection Fee – Sections 8-17-87 and 8-17-91, Code of Alabama 1975, which levies a gasoline inspection fee of 2-cents per gallon, applies to municipalities. However, municipalities also receive a portion of the revenue from this levy.

2. Utility Tax – Section 40-21-80, Code of Alabama 1975, specifically includes “every municipal corporation in the state of Alabama” as being subject to the four percent privilege or license tax imposed on the gross receipts of utility services. Section 40-21-83 does exempt electricity used by a municipality or municipal board in furnishing or providing street lighting or traffic control signals, water used by a municipality or municipal board to fight fires and telephone service used by a municipality or municipal board for fire alarm systems.

3. Alabama Uniform Severance Tax – Municipalities are required to pay a tax of ten cents per ton on severed material sold as tangible personal property when purchased by the municipality. The tax shall be collected by the producer and become due and payable by the purchaser thereof at the time of sale or delivery, whichever first occurs, provided that the tax shall be identified as a severance tax on a bill of sale, invoice, or similar sales document to the purchaser thereof, otherwise the tax shall instead be the obligation of the producer. Twenty-five percent of the funds distributed to a county as a result of the severance of materials from within the corporate limits of a municipality in the county shall be expended by the county on county roads or other projects authorized by the law within the corporate limits of that municipality. Sections 40-13-50 to 40-13-61, Code of Alabama 1975.

4. Solid Waste Management Fee – Municipalities must pay a fee of \$1 per ton for disposal of solid waste within the state the proceeds of which shall be used to adequately fund the solid waste management program of

the Alabama Department of Environmental Management; establish a trust fund to provide for a grant program for local governments to develop, implement, and enhance recycling and waste minimization efforts; and to establish minimum standards for solid waste reduction, minimization, and recycling. Section 22-27-17, Code of Alabama, 1975.

5. State Rental Tax – Under section 40-12-222 of the Code of Alabama, a lease tax is levied upon the lessor of tangible personal property measured by the gross proceeds received by the lessor. The economic burden of the lease tax may not be passed on to the state, a municipality, or a county unless the flat amount collected by the lessor includes both the tax and the leasing fee. Each contract entered into by the municipality must be reviewed by the municipality to determine whether the total rental price includes the lease tax. 2007-038

6. Special Court Costs – State laws require that municipal courts shall assess, in addition to the cost established by the municipality for the operation of the court, the following special costs:

- An additional \$8.50 cost upon conviction of any offense involving a traffic infraction, to be remitted to the state treasurer to the credit of the State Driver's Fund for distribution pursuant to Section 32-5-313, Code of Alabama 1975. Section 12-14-14, Code of Alabama 1975.
- An additional \$12 for every conviction in municipal court. Five dollars of this amount is to be remitted to the state general fund; \$5 is remitted to the municipal general fund; and \$2 is remitted to the Police Officers Annuity and Benefit Fund. Section 12-14-14, Code of Alabama 1975.
- An additional \$1 cost for each traffic infraction and an additional \$5 cost in each such proceeding where the offense constitutes a misdemeanor and/or a violation of a municipal ordinance other than a traffic infraction to be remitted to the Alabama Peace Officers Annuity and Benefit Fund. There shall be no additional costs for offenses related to the parking of vehicles. Section 36-21-67, Code of Alabama 1975.
- An additional \$16 cost for every criminal conviction in municipal court, this is called the "fair trial tax." A municipality may retain that portion of the proceeds so collected necessary to pay for the cost of defending indigents before the municipal judge. The remaining money is remitted to the state treasurer to the credit of the Fair Trial Tax Fund. Sections 12-19-250 and 12-19-251.1, Code of Alabama 1975.
- An additional \$2 cost for each traffic infraction and an additional \$10 cost for each such proceeding where the

offense constitutes a misdemeanor and/or a violation of a municipal ordinance other than traffic infractions, to be remitted to the Crime Victim Compensation Commission. There shall be no additional costs imposed for violations relating to the parking of vehicles. Section 15-23-17, Code of Alabama, 1975.

- Any person who drives a motor vehicle on a public highway without a driver's license, upon conviction, shall be guilty of a misdemeanor and shall pay a fine of not less than \$10 and nor more than \$100. The respective municipality may retain that portion of the proceeds to distribute into their general fund. In addition, there shall be imposed or assessed an additional penalty of \$50. This penalty shall be forwarded to the State Comptroller to be deposited as follows: \$25 to the Traffic Safety Trust Fund and \$25 to the Peace Officers Standards and Training Commission Fund. Section 32-6-18, Code of Alabama 1975. The Attorney General's office has held that the additional \$50 penalty on unlicensed drivers provided by Act 97-494 does not apply in municipal courts. AGO 1997-246.
- In addition, any person convicted or pleading guilty to a misdemeanor shall be ordered to pay a victim compensation assessment of not less than \$25, nor more than \$1,000, for each such misdemeanor for which such person was convicted or otherwise disposed of when the court orders that costs be paid. In imposing this penalty, the court shall consider factors such as the severity of the crime, the prior criminal record, the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant. Such additional assessment shall be collected by the clerk of the court imposing the same and the first \$12.50 of each misdemeanor assessment shall be promptly paid over to the Commission. The remaining \$12.50 shall be paid to the Office of Prosecution Services. Any victim assessment fees ordered above the minimum shall be paid to the Commission fund. Sections 15-23-1 through 15-23-23, Code of Alabama 1975.
- Section 32-5A-191 of the Code of Alabama 1975, specifies the penalties assessed against a person convicted of Driving under the Influence. A first conviction for Driving under the Influence, shall carry no more than one-year imprisonment in a municipal jail, or a fine no less than \$600 and no more than \$2,100, or by both a fine and imprisonment. A second conviction carries a fine not less than \$1,100 and no more than \$5,100 and imprisonment for no more than one year. A third conviction carries a fine no less than \$2,100 and no more than \$10,100 and a minimum of 60 days

imprisonment but no more than one year. A fourth or subsequent conviction carries a fine not less than \$4,100 and no more than \$10,100 and imprisonment of no less than one year and one day and no more than 10 years. The Attorney General has held that a municipal court does not have jurisdiction over a fourth DUI offense. AGO 1998-015. Fines collected for violations of this section charged pursuant to a municipal ordinance shall be deposited as follows:

- The first \$350 collected for a first conviction, the first \$600 collected for a second conviction within five years, and the first \$1,100 collected for a third conviction, and the first \$2,100 for a fourth or subsequent conviction shall be deposited into the state treasury with the first \$100 collected for each conviction credited to the Alabama Chemical Testing Training and Equipment Trust Fund and the second \$100 to the Impaired Drivers Trust Fund after deducting five percent of the \$100 for administrative costs and the balance credited to the State General Fund.
- Any amounts collected over these amounts shall be deposited as otherwise provided by law.
- Section 12-19-310, Code of Alabama, 1975, requires the collection of \$40.00 additional dollars in all criminal cases, except traffic cases, including cases in municipal courts, and an additional \$26.00 in traffic cases, except parking violations. The city retains \$10.00 of this amount.
- Section 12-19-311, Code of Alabama, 1975, requires the collection of bail bonds in misdemeanor cases of a \$35.00 filing fee as well as a bond fee of 3.5% of the total face value of the bond, or \$100.00, whichever is greater, not to exceed \$450.00. The municipality retains a portion of this fee.

Selected Attorney General's Opinions and Court Decisions

NOTE: These summaries are not intended as a substitute for reading the opinions or decision itself.

- The criminal history processing fee found in Section 12-19-180(a) is a "court cost" as that phrase is used in Section 12-19-150, and may be assessed against the defendant in a criminal case (except a non-DUI traffic, conservation, or juvenile case) is dismissed upon payment of the docket fee and the other court costs by order of the judge. AGO 1999-287.
- Corrections fund monies may be used to remodel the city hall auditorium, where the municipal court is located, even though there may be an incidental benefit to the municipality when the remodeled facility is used

for city council meetings. AGO 2000-124.

- Corrections fund monies may be used to repair, remodel and renovate a city's court complex. AGO 2000-136.
- Corrections fund revenues collected pursuant to Section 11-47-7.1, Code of Alabama 1975, cannot be used by a municipality to build or construct a police facility with or without a court complex. AGO 1999-012.
- Court-ordered settlement funds can be used only for the purposes set out in the court's order and do not revert to the general fund at the end of the year. AGO 1997-289.
- In *Prattville v. Welch*, 681 So.2d 1050 (1995), the Alabama Supreme Court held that it was not an unreasonable violation of equal protection to tax private liquor stores while exempting state liquor stores from the tax.
- In *Mobile v. M.A.D., Inc.*, 684 So.2d 1283 (1996), the Alabama Supreme Court held that Alabama's tax on liquor is not a consumer tax and cannot be excluded when computing the license tax owed the city of Mobile. *See also, Montgomery v. Popular Package Stores, Inc.*, 684 So.2d 1288 (Ala. 1996).
- In *Opinion of the Justices*, 694 So.2d 1307 (1997), the Alabama Supreme Court held that because the purpose of a local act imposing a tax on beer was to raise revenue, rather than regulate liquor traffic, as is allowed by Section 104, Alabama Constitution, 1901, and is invalid because it conflicts with a general law on the same subject.
- The meaning of "capital improvement," as used in Section 11-66-2 of the Code of Alabama 1975, does not apply to the purchase of a dump truck and a bulldozer and as such, capital improvement funds may not be used to purchase such items. AGO 2006-043.
- The district attorney's restitution recovery division has the authority to collect court costs, fines and other enumerated sums on behalf of municipal courts that wish to contract with the district attorney's office for such collection. AGO 2003-139.
- For purposes of administering the state coal severance tax, severance occurs when coal is parted from the earth in which it has been imbedded, rather than when the coal is ultimately removed from the earth out of the mouth of the mine. AGO 2005-103.
- Corrections fund monies may be used to pay the cost of police officers transporting prisoners from the county jail to municipal court and for the magistrate to travel to the jail for 48-hour hearings. Provided however, the governing body must determine that the expenditures

are necessary for the operation and maintenance of the jail and court. The determination of the appropriate costs, including mileage rate, per diem, or actual expenses, is in the discretion of the governing body. AGO 2006-066.

- A City may use Corrections Fund monies collected pursuant to Section 11-47-7.1 of the Code of Alabama to purchase a computer-aided dispatch system to be housed in the City Public Safety Facility. Corrections Fund monies should be contributed or used only to the extent that the jail or court complex benefits from the use of this dispatch system. AGO 2008-127.
- Money from the Municipal Capital Improvement Fund may be used to repay a debt incurred for the purpose of renovating city hall. AGO 2009-025.
- A business that sold materials from spoil piles that remained on its site after other companies' mining operations had ended, was a "producer" as defined by the Alabama Uniform Severance Tax Act, and, thus, the severance tax applied to severed materials purchased from the business and the business was responsible for the collection of the severance tax, even though it had never been engaged in mining or quarrying operations. The business processed the materials that had been severed from the ground during the mining operations and sold them to purchasers on whom the tax was levied. *Wilburn Quarries, LLC v. State Dept. of Revenue*, 50 So.3d 1078 (Ala.Civ.App.2010).
- A city is authorized to retain within its coffers the amount of the issuance fee levied by its city council. A municipal license-plate issuing official is required to remit all other taxes and fees in the same manner as the county license-plate-issuing official. If a city retains fees and commissions that are required by general law to be allocated to the county, an audit conducted by the Alabama Department of Examiners of Public Accounts would determine any shortages. Section 2(a) of Act 2012-196, as amended by Act 2014-007, states that the city is responsible for any shortages as determined by an audit. AGO 2014-098.

31. Municipalities and State-Shared Fuel Taxes and Inspection Fees

NOTE: *Acts 2011-565, 2013-402, 2015-54 and 2019-2 make numerous changes in Alabama's motor fuel taxation laws. Therefore, interpretations of the previous law may have to be reconfirmed under the new statutes. Readers are advised to verify for themselves the applicability of any cases or Attorney General's Opinions contained in this article.*

Alabama has various taxes on gasoline, lubricating oil and motor fuels as well as an inspection fee on motor fuels. Section 40-17-325, Code of Alabama 1975, levies a 16-cent per gallon gasoline tax, that is comprised of a 7-cents per gallon excise tax, a 5-cents per gallon supplemental excise tax and an additional 4-cents per gallon tax. Section 40-17-325(a)(2) levies a 6-cents per gallon tax on diesel fuels. The Rebuild Alabama Act passed in 2019 and codified in Sections 40-17-370 and 371, levies an additional 10-cents excise tax on each net gallon of gasoline and diesel fuel. In addition, Section 8-17-87, Code of Alabama 1975, imposes an inspection fee of 2-cents per gallon on gasoline and diesel fuel, with some exceptions for diesel fuel, and inspection fees in varying amounts for other fuels and lubricating oil. The revenues derived from these taxes and fees are shared with counties and municipalities.

The major portion of this article deals with the 7-cents and 5-cents per gallon gasoline tax and its impact on municipalities. A brief overview of the 4-cents per gallon tax on gasoline and lubricating oils, 6-cent per gallon tax on motor fuels, 10-cents gasoline and diesel fuel tax and 2-cents per gallon inspection fee is also provided.

Different Tax Rate on Aircraft Fuels

In addition to the various taxes on gasoline, lubricating oil, and motor fuel, a different tax rate for aircraft fuels is provided for in Section 40-17-325(3), Code of Alabama 1975.

Section 40-17-357 prohibits any municipality from levying new or additional taxes on aviation fuel after October 1, 2012. However, the bulk of the revenue derived from the state aircraft fuel tax has been used to construct, improve and maintain municipal airports. Today, because of this tax, Alabama has one of the best systems of municipal airports in the United States.

Section 40-17-329(g), Code of Alabama 1975, provides an exemption from the aircraft gasoline tax for fuel used by a certified or licensed carrier with a hub operation

in Alabama. A hub operation is defined as one which originates, from a location, 15 or more flight departures and five or more different first-stop destinations five days per week for six or more months during the calendar year, and passengers or property are regularly exchanged at the location between flights of the same or a different certified or licensed air carrier.

Municipalities and Gasoline Taxes - Exemptions

Section 40-17-329(e), Code of Alabama 1975, provides that local governments must pay the state gasoline taxes, then apply for a quarterly refund for gasoline taxes they purchase. Similarly, counties and municipalities are exempt from paying the federal excise tax on gasoline, but must pay the federal gasoline tax and then apply for a refund. Title 40 of the Alabama Code contains several other exemptions to the state gasoline excise taxes.

Section 40-17-330 sets out the procedure for claiming a refund of the state gasoline taxes. Municipalities must request the refund by presenting a sworn petition within two years of the date the fuel was purchased and present the original or a duplicate of the sales slip, invoice or other documentation showing the gallons of fuel purchase and the taxes paid. Entities that are entitled to request a refund pursuant to Section 40-17-329(e), including municipalities, must also accurately maintain adequate records as required under regulations promulgated by the department of revenue pursuant to Chapter 22 of Title 41.

Distribution Formula – 7 and 5 cents Gasoline Taxes

Sections 40-17-359 of the Code, as amended, provides for the distribution and use of the 7-cents gasoline tax. Proceeds from the tax are distributed as follows: 45 percent to the State Highway Department and 55 percent to the counties and municipalities of the state.

The 55 percent which goes to counties and municipalities is divided in the following manner: 25 percent is divided equally among the state's 67 counties and the remaining 30 percent goes to the counties pro rata on the basis of the ratio of the population of each such county to the total population of the state according to the last federal decennial census or any subsequent federal special census. There is a further provision that no county shall receive less than \$550,000 annually.

The state treasurer distributes monthly 10 percent of the county's share among the municipalities in the county. This distribution is based on the ratio of the population

of each such municipality to the total population of all municipalities in the county according to the last federal decennial census. The remaining portion of the amount allocated or apportioned to each county is distributed monthly to the county by the state treasurer.

The amounts distributed by the state treasurer to the municipalities of the county represent 10 percent of the county's share except in the case of the following counties where municipalities share additional gasoline tax revenues from the county's share under special acts:

- Madison County – Act 708 of 1967 as amended by Act 919 of 1969
- Jefferson County – Act 329 of 1969
- Montgomery County – Act 364 of 1967; Act 176 of 1967 as amended by Act 1665 of 1971
- Mobile County – Act 476 of 1967
- Etowah County – Act 619 of 1967 as amended by Act 145 of 1969 and Act 813 of 1971
- Barbour County – Act 546 of 1967; Act 720 of 1967
- Russell County – Act 859 of 1969
- Calhoun County – Act 393 of 1971
- Dale County – Act 1954 of 1971
- Morgan County – Act 80-597 (4-cent tax only), as amended by Act 87-867

Local acts providing for the collection of gasoline taxes by the Alabama Department of Revenue were not repealed by Act 98-192 (the revised sales and use tax law). AGO 1998-210.

Section 40-17-325, Code of Alabama 1975, also levies a supplemental excise tax of 5-cents per gallon on gasoline. Section 40-17-359(f), Code of Alabama 1975, provides that the proceeds from the 5-cents gasoline tax are to be distributed as follows:

Three-fifths of the tax proceeds (3 cents) shall be deposited in the state treasury to the credit of the Public Road and Bridge Fund of the State Highway Department. The remaining two-fifths of the proceeds from the 5-cents gasoline tax (2 cents) are to be distributed in the same manner as the proceeds of the 7-cents gasoline tax as provided by Sections 40-17-359(c)(d) and (e), Code of Alabama 1975, including those special distributions established by local act of the Legislature for distributing the 7-cents gasoline tax in certain counties.

Section 40-17-359(j)(3), Code of Alabama 1975, specifically requires municipalities to keep their share of the 7-cent per gallon state gasoline excise tax in a special fund and specifically prohibits the commingling of these tax funds with other funds of the municipality, except the 2-cent

state inspection fee with which it may be commingled. See, Section 8-17-91(a)(2)(c)(5). The 5-cents gasoline tax may be maintained in a separate account with the 4 cents per gallon tax on gasoline and lubricating oil. See, Sections 40-17-359(f) and 40-17-362, Code of Alabama, 1975, and AGO to Hon. Ricky Harcrow, September 5, 2012.

A municipality's share of the state highway gasoline tax must be kept and expended from a separate account and not commingled with other municipal funds. This law is not sufficiently complied with if a municipality merely utilizes accounting and bookkeeping methods which accurately reflect the amount of state-shared gasoline tax funds on hand and the purposes for which disbursements are made. AGO to Hon. Cecil Gardner, November 6, 1969.

Use of Funds Restricted

Both constitutional and statutory limitations have been placed on municipal use of state-shared gasoline tax funds. Amendments 93 and 354 (Section 111.06) Alabama Constitution, 1901.

Section 111.06 provides:

“No moneys derived from any fees, excises, or license taxes, levied by the state, relating to registration, operation, or use of vehicles upon the public highways except a vehicle-use tax imposed in lieu of a sales tax, and no moneys derived for any fee, excises, or license taxes, levied by the state, relating to fuels used for propelling such vehicles except pump taxes, shall be expended for other than cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulations, and the expense of enforcing state traffic and motor vehicle laws. The provisions of this Amendment shall not apply to any such fee, excises, or license taxes now levied by the state for school purposes for the whole state or for any county or city board of education therein;”

According to the Attorney General, the section is not an affirmative grant of authority to the Legislature, counties or municipalities to expend gasoline tax funds. Rather, the purpose of the section is to prohibit the Legislature from authorizing that the funds mentioned may be expended in any manner other than that prescribed therein. 87 Quarterly Report of the Attorney General 15.

The Supreme Court of Alabama in *In Re Opinion of the Justices*, 96 So.2d 634 (1957), held that the restrictions contained in Section 111.06 apply only to proceeds derived from the state highway gasoline tax and in no way limit the use of taxes collected by virtue of a municipal gasoline tax ordinance.

The legislative limitation on the expenditure of 7-cent

gasoline tax funds is found at Section 40-17-359(j)(3), Code of Alabama 1975, and reads, in pertinent part, as follows:

“Where the use is by a municipality, such use shall be for transportation planning, the construction, reconstruction, maintenance, widening, alteration and improvement of public roads, bridges, streets and other public ways, including payment of the principal of and interest on any securities at any time issued by the municipality pursuant to law for the payment of which any part of the net tax proceeds were or may be lawfully pledged; provided, that no part of the net tax proceeds referred to in this section shall be expended contrary to the provisions of the Constitution.”

Section 40-17-359(k), Code of Alabama 1975, authorizes a county governing body to expend proceeds from the state-shared gasoline tax for the construction and maintenance of streets within the corporate limits of any municipality located within the county. **Note:** Municipalities in Jefferson County should consult their local act on this matter.

Opinions on the Use of 7-Cent Gasoline Tax Revenue

The Attorney General has been asked frequently to rule on the legality of certain uses by municipalities of the 7-cent gas tax. The following opinions are the most important ones issued on the subject:

- A municipality may invest surplus gasoline tax funds in U.S. Treasury notes as long as the gas tax funds are not commingled with other municipal funds. AGO to Hon. Bob A. Davis, October 30, 1969.
- Salaries of employees who perform work necessary for enumerated purposes listed in Section 40-17-78, Code of Alabama 1975, may be paid from funds derived from the state highway gasoline tax. If an employee works only part-time on such purposes, then a proportionate share of his salary may be paid from gasoline tax funds. AGO to Hon. Cecil Gardner, November 6, 1969.
- Improvement bonds were issued covering street improvements but the collections were insufficient to pay the principal and interest of such bonds. The Attorney General held that gasoline tax funds could be used to pay the installments AGO to Hon. W. H. McDermott, December 15, 1969.
- A city may purchase from gasoline tax funds a truck to service traffic control signals. AGO to Hon. Jack B. Rucker, March 24, 1970.
- Gasoline tax funds may be used in lighting streets. AGO to Hon. James M. White, April 30, 1970.
- Gasoline tax funds may not be used for “routine street cleaning” but can be used to pay the expense of removing objects interfering with traffic. AGO to Hon.

John F. Watkins, May 21, 1970 and AGO to Hon. John Gaither, September 4, 1970.

- A city may not use gasoline tax funds to construct off-street parking facilities. AGO to Hon. H. E. Swearingen, May 31, 1971.
- State gasoline tax funds may be used to “rough-in and pave” a street if the street is dedicated for public use. AGO to Hon. Edward Minyard, December 2, 1971.
- Gasoline tax funds may not be put into the general fund and used for general purposes. AGO to Hon. B. H. Reynolds, March 10, 1972.
- Gasoline tax funds may be used to pay a portion of the cost of the annual audit provided the employee donates a part of his time to purposes which may be paid from gasoline tax funds. AGO to Hon. W. J. Coker, September 28, 1972.
- A municipality may use general funds for a paving project and reimburse the fund from future collections of gas tax funds. The minutes should reflect the arrangement. AGO to Hon. John A. Hughes, Jr., January 29, 1973.
- State gasoline tax funds distributed to a municipality may be used to improve, maintain and repair a street. AGO to Hon. A. N. Roberts, May 18, 1973.
- A municipality may use its state-shared gas tax funds to purchase machinery and equipment to be used in construction, reconstruction, maintenance, widening and improvement of public roads, bridges, streets and other public ways. AGO to Hon. Cecil Gardner, September 9, 1969 and AGO to Hon. Gene L. Hughes, May 26, 1977.
- Proceeds from the state gasoline tax fund may be used to construct a building to house those municipal vehicles which are used to construct and maintain the streets and other public ways of the municipality. However, the building may not be used to house other municipal vehicles. AGO to Mrs. Carole Dykes, August 14, 1972.
- The Attorney General has held that Alabama municipalities may expend state-shared gasoline tax funds for lighting and traffic control. AGO to Hon. Herman Nelson, March 20, 1968.
- State gas tax funds cannot be used on a city water project. AGO to Hon. J. W. Donahoe, November 9, 1977.
- State gas tax funds may be used to purchase a town map and erect street signs. AGO to Hon. Janice L. Gurley, October 27, 1977.

- Proceeds from the state gasoline tax cannot be used to pay off a loan for a police car and fire truck. AGO 1981-282 (to Hon. J. G. Morse, March 11, 1981).
- The 7-cents per gallon gasoline tax cannot be used for sidewalks. AGO 1983-115 (to Mr. James R. Stone, December 22, 1982).
- Proceeds from the 7-cents per gallon gasoline tax cannot be used to purchase computer equipment to process and record the tax proceeds. AGO 1984-085 (to Hon. Mac Smith, December 1, 1983).
- The 7-cents per gallon gasoline tax money may be used for drainage improvements if such improvements are directly connected with and necessary for the maintenance and repair of a road. AGO 1984-193 (to Hon. Kenneth Moss, March 5, 1984).
- The 7-cent gasoline tax may be used to maintain structures and equipment which control flood waters which cause road and bridge damage. AGO 1986-387.
- A county commission may not use gasoline tax funds to operate the sheriff's department or jail. AGO 1993-037.
- A county commission may not use gas tax funds to hire deputies or maintain sheriff's department vehicles absent local legislation authorizing the expenditure. AGO 1993-394.
- A municipality may use 7-cent gasoline tax funds to construct new curbs and gutters on existing municipal streets. AGO 1997-170.
- Seven-cent gasoline tax funds may be used to cut grass on the rights of way of public roads. AGO 1999-062
- A municipality may not use gasoline tax proceeds to repair and restore the runway of a regional airport. AGO 1998-179
- Four and 7-cent gasoline tax funds may be used to repair, maintain and construct ditches and culverts along street rights of way. AGO 1998-189.
- Proceeds from the 2-cent fee and the seven-cent gasoline tax may be used by a municipality for a one-time cleaning of the street and the adjoining sidewalk and parking area. These funds may also be used for landscaping along a state right-of-way. AGO 2001-078.
- Gasoline tax funds cannot be used to purchase scales and hire personnel to enforce weight limits on county roads. AGO 1989-442.
- Labor costs, including pension increases and insurance premiums, associated with the general scheme of constructing, maintaining and supervising public roads may be paid from appropriate gasoline tax funds. AGO 1991-267.
- A municipality may use the proceeds of the seven cent gasoline tax to purchase a leaf vacuum truck. AGO 2006-083.
- In the absence of an agreement, a county cannot insist that a municipality's share of the gasoline tax proceeds be used for the upkeep of county roads in a municipality. A county, by virtue of its exclusive authority to maintain and control its roads, is under a common-law duty to keep its roads in repair and in reasonably safe condition for their intended use. A county has a statutory obligation to maintain the safety of its roadways pursuant to §22-1-80 of the Code of Alabama. See *Holt v. Lauderdale County*, 26 So.3d 401 (Ala.2008). If a municipality has not accepted roads for maintenance under the procedure set out in Sections 11-49-80 and 11-49-81 of the Code of Alabama, nor has it assumed responsibility by exercising sole authority over those roads, then the municipality is not responsible for the material costs of maintenance, paving, and scraping of roads within its corporate limits. See AGO 2003-034.
- Fire Protection Districts organized pursuant to Act 79 (1966), as amended, are not exempt from motor fuel and gasoline excise taxes. AGO 2008-07 Note: This opinion overrules AGO 2005-162. Act 79 (1966) applies only to Jefferson County.
- The proceeds from the \$.07 gasoline excise tax, the \$.02 inspection fee, and the motor vehicle license tax may be used for the purchase of reflective street signs. AGO 2016-002.
- Pursuant to Sections 40-17-359(j) and 8-17-91 of the Code of Alabama, the City of Creola may use the proceeds from the \$0.07 gasoline tax or the \$0.02 inspection fee to directly repay the Alabama Department of Transportation for repairs and maintenance to traffic signals. AGO 2018-028.
- Pursuant to Section 40-17-359(j)(3) of the Code of Alabama, the City of Creola may pay the outstanding balance on a backhoe used exclusively in the building, maintaining, and rehabilitation of the roadways and bridges located in the municipality. AGO 2018-047.
- Pursuant to Section 40-17-359(j)(3), the city may construct a building to house equipment used in the building, maintaining, and rehabilitating of the roadways and bridges located in the municipality. AGO 2018-047.
- Alternatively, pursuant to Section 40-17-359(j)(3), the city may pay a proportionate share of the cost to construct a building to house the public works department used for the building, maintaining, and

rehabilitation of roadways and bridges located in the municipality. AGO 2018-047.

4-Cents per Gallon Tax on Gasoline and Lubricating Oil and 5-Cents per Gallon Tax on Motor Fuels

Section 40-17-325(a)(1), Code of Alabama 1975, levies an additional 4-cents per gallon state tax on all gasoline and lubricating oils sold in Alabama. The proceeds of 4-cents per gallon tax on gasoline and lubricating oil are distributed in the same manner as the 7-cents gasoline tax described above, including the special distribution formulas provided for certain counties by local law.

Prior to 2013, these funds could only be used by the recipient municipality for resurfacing, restoration and rehabilitation of roads, bridges and streets, for bridge replacement and for the construction of new roads within the municipality. However, Act 2013-402 amended Section 40-17-362 of the Code to allow the proceeds of the 4-cent per gallon tax to be used for vegetation management on the right-of-way of roads. Section 40-17-362(a)(3), Code of Alabama 1975.

These funds shall be used for the same purposes and may be deposited in the same municipal funds as the 5-cents per gallon gasoline tax. These funds cannot be commingled with other funds of the municipality, including any other gasoline tax revenues and shall be kept and disbursed by such municipality from a special fund only for the purposes specified. See, Sections 40-17-359(f) and 40-17-362, Code of Alabama, 1975, and AGO to Hon. Ricky Harcrow, September 5, 2012.

Use of Funds Restricted

Section 40-17-362, Code of Alabama 1975, imposes even more severe limitations on municipal use of state-shared revenue from the 4-cents per gallon tax on gasoline and lubricating oils than the restrictions on the 7-cents per gallon gasoline tax. See, Sections 40-17-359(f) and 40-17-362, Code of Alabama, 1975, and AGO to Hon. Ricky Harcrow, September 5, 2012. The section provides that revenue from the 4-cent tax may only be used for resurfacing, restoration and rehabilitation of roads, bridges and streets, and for bridge replacement within the municipality. Proceeds of the 4-cents per gallon tax to be used to construct new roads within the municipality. Section 40-17-362(b)(3).

A municipality's share of the proceeds from the 5-cent tax shall be used for the same purposes and deposited in the same municipal fund as the 4-cents per gallon gasoline and lubricating oil tax.

Opinions on the Use of the 4-Cent and 5-Cent Tax Revenues

- Proceeds from the 4-cent per gallon gasoline tax may be used for equipment rental for the purposes of restoring, resurfacing, and rehabilitating roads. AGO 1981-254 (to Hon. Hiram Pitts, February 19, 1981).
- Proceeds from the 4-cent gas tax may be used to repair culverts as well as highways and bridges. AGO 1982-030 (to Hon. William P. Smith, October 21, 1981).
- A town may spend 4-cent gas tax revenues to pay a note for monies borrowed in anticipation of such revenues to be used for resurfacing the main street in town. AGO 1982-155 (to Mrs. Martha F. Kelley, January 26, 1982).
- A county may not use 4-cent gas tax revenue to cut and maintain a right of way. AGO 1982-332 (to Hon. Gerald Dial, May 11, 1982).
- Proceeds from the 4-cents per gallon gasoline tax may be used to pay for labor and fuels needed to repair or restore streets. AGO 1982-469 (to Hon. Kenneth H. Sanders, July 23, 1982).
- Four-cents gasoline tax funds may not be used to pay for water pipe. AGO 1985-238 (to Hon. Glenn Fuller, March 5, 1985).
- Five-cent gasoline tax funds may not be used to cut grass on the rights of way of public roads unless the mowing is part of the rehabilitation or restoration of the road. AGO 1999-062
- Four and 5-cent gasoline tax funds may be used to construct curbs and gutters on existing streets if the curbs or gutters would serve to preserve the streets or return them to a condition of adequate structural support. AGO 1997-170.
- Four-cents gasoline tax funds may be used for restriping and re-signing county roads. AGO 1985-241 (to Hon. Richard H. Ramsey, III, March 12, 1985).
- Four-cents gasoline tax funds may be used to widen the shoulders of a Federal Aid Security Secondary Route in advance of a resurfacing project. AGO 1985-409 (to Hon. F. R. Albritton, Jr., June 26, 1985).
- Four-cents gasoline tax funds cannot be used to mow the shoulders of a road for normal road maintenance. AGO 1985-493 (to Hon. Jack Floyd, September 3, 1985).
- Four-cents gas tax funds may be used for repairing storm drains. AGO 1986-020 (to Hon. David Money, October 23, 1985).

- Funds from the 4-cent gas tax cannot be commingled with funds from a Community Development Block Grant. AGO 1986-314.
- A municipality may not use proceeds of the 4-cent tax to resurface, restore and rehabilitate driveway accesses located on the city's right-of-way. AGO 1989-159.
- Both the 7-cent gasoline tax and the 4-cent gasoline tax may be used to build an access road to the municipal fire station. AGO 1991-071.
- The 4-cent gasoline tax may be used to pave a dirt road. AGO 1993-046.
- Five-cent gasoline tax proceeds cannot be used to convert the fuel systems of city or utility board vehicles to natural gas. AGO 1993-160.
- A county commission may use 4-cent gasoline tax funds to remove debris, resulting from the recent winter storm, from county roads. AGO 1993-172.
- A city may not use four-cent gasoline tax funds to purchase property on which a private road is located. AGO 1996-022.
- Four and 7-cent gasoline tax funds may be used to repair, maintain, and construct ditches and culverts along street rights-of-way. AGO 1998-189.
- A municipality may not use 4-cent gasoline tax proceeds to repair and restore the runway of a regional airport. AGO 1998-179.
- A municipality may not use four-cent gasoline tax proceeds to pay for the removal of trash and debris from public streets on a daily basis, nor may a municipality use 4-cent money to pay for the operation and maintenance of lighting along an interstate highway or public street. AGO 1999-270.
- The 4-cent and 5-cent gasoline tax proceeds may not be used for landscaping alongside state highways because this is not restoration or rehabilitation of a road. The 4-cent and 5-cent gasoline tax proceeds may be used for a one-time cleaning of the street and adjoining parking and sidewalk area only if this work is part of the restoration, rehabilitation or resurfacing of the road. AGO 2001-078.
- Four-cent gasoline tax funds can be used by a municipality to purchase a dump truck for street repair work and for removing debris from streets when the restoration, rehabilitation or resurfacing of streets is involved. Four-cent gasoline tax funds can be used to pay for lighting along an interstate road for streets within the municipality when the lighting is part of the construction of the road, or when it is part of the restoration, rehabilitation or resurfacing of the street or road. AGO 1999-252.
- Proceeds from the 2-cent fee and the 7-cent gasoline tax may be used by a municipality for a one-time cleaning of the street and the adjoining sidewalk and parking area. These funds may also be used for landscaping along a state right-of-way. The 4-cent and 5-cent gasoline tax proceeds may not be used for landscaping alongside state highways because this is not restoration or rehabilitation of a road. The 4-cent and 4-cent gasoline tax proceeds may be used for a one-time cleaning of the street and adjoining parking and sidewalk area only if this work is part of the restoration, rehabilitation or resurfacing of the road. AGO 2001-078.
- A municipality may use the proceeds from a four cent gasoline tax to install speed bumps on streets. AGO 2007-125.
- A town may create a matching fund using 4 cent gasoline tax proceeds for the purpose of road paving. The town should keep the matching funds in a separate account from grant funds because section 40-17-224(3) of the Code of Alabama prohibits gasoline tax funds from being commingled with other municipal funds. AGO 2010-090.
- A town may pay a proportionate share of the cost and maintenance of a backhoe used for
- resurfacing, restoration, and rehabilitation of roads, bridges, and streets within the municipality from the \$.05 and \$.04 gasoline tax funds. AGO 2014-084.
- A town may not use the \$.04 per-gallon gasoline additional excise tax, the \$.05-per gallon
- gasoline supplemental excise tax, or the \$.06 per-gallon diesel fuel additional excise tax to fund the purchase or installation of the emergency street signs. The proceeds from the \$.07 gasoline excise tax, the \$.02 inspection fee, and the motor vehicle license tax may be used for the purchase of reflective street signs. AGO 2016-002.

State Inspection Fee on Motor Fuels and Motor Oils

Section 8-17-87, Code of Alabama 1975, imposes an inspection fee of 2-cents per gallon on gasoline and diesel fuel sold and it imposes a varying tax rate on other petroleum products. Municipalities receive a portion of this revenue each month. A municipality's share of the revenue must be used for transportation planning or for the construction, reconstruction, maintenance, widening, alteration and improvement of public roads, bridges, streets and other public ways, including payment of principal

and interest of any securities at any time issued by the municipality pursuant to law for the payment of which any part of the net proceeds of the tax were or may be lawfully pledged.

Funds distributed under this statute shall not be commingled with other funds of the municipality, except the municipality's share of the 7-cent highway gasoline tax. The funds shall be kept and disbursed by the city or town from a special fund only for the purposes enumerated above.

Separate Accounts and Co-mingling of Funds

By way of summary, municipalities must maintain the proceeds of the various gasoline taxes and inspection fees in separate accounts. Municipalities are authorized to co-mingle the proceeds of the 7-cent gasoline tax and the 2-cent inspection fee in a separately maintained account. Further, municipalities are authorized to co-mingle the proceeds of the 4-cent per gallon tax on gasoline and lubricating oils and the 5-cent per gallon tax on gasoline.

6-Cents per Gallon Tax on Diesel Fuel

Section 40-17-325(a)(2) levies a 6-cents per gallon tax on all diesel fuel sold in Alabama. The proceeds of the 6-cents per gallon tax on diesel fuels are distributed as follows:

1. 4.69 percent shall be distributed equally among each of the 67 counties of the state monthly. These funds shall be used by counties for the purposes specified in Section 8-17-91(a)(2)a.;
2. .93 percent shall be allocated among the incorporated municipalities of the state and distributed and used as provided in Section 8-17-91(a)(2)c.; and
3. The balance shall be paid to the state treasury to be used for highway purposes by the State Department of Transportation."

Provided, however, for the first five full fiscal years following the effective date of Act 2004-546, if distributions to the counties and municipalities provided for in subdivisions (1) and (2) above are insufficient to ensure, in combination with the distributions provided in Section 8-17-91, Code of Alabama 1975, that said counties and municipalities receive no less than the distributions received for fiscal year 2003 under the previous provisions of Section 8-17-91, then the above percentages shall be adjusted accordingly. After the first five full fiscal years, the above percentages shall not be adjusted.

Pursuant to Section 8-17-91(a)(2)(c), Code of Alabama, 1975, municipalities can use these funds for transportation planning, the construction, reconstruction, maintenance, widening, alteration, and improvement of public roads, bridges, streets, and other public ways, including payment

of the principal of and interest on any securities at any time issued by the municipality pursuant to law for the payment of which any part of the net tax proceeds were or may be lawfully pledged. This Code provision states that none of these funds shall be expended contrary to the provisions of the Constitution. Additionally, these cannot be commingled with other funds of the municipality, except the municipalities' portion of the highway gasoline tax (the 7-cent tax), and the 2-cent inspection fee, and shall be kept and disbursed by such municipality from a special fund only for the purposes hereinabove provided.

Rebuild Alabama Act: 10-Cent Gasoline Tax

In 2019 the Alabama legislature passed Act 2019-2, the Rebuild Alabama Act. Section 40-17-370 levies a 10-cents excise tax on each net gallon of gasoline and diesel fuel to be distributed among the state and local governments as follows:

1. 66.77% - ALDOT
 - a. Transportation infrastructure statewide
 - b. ALDOT Grant program (not less than \$10M annually – for local government projects upon competitive application)
 - c. ATRIP II – (\$30-50M annually – fund projects of "local interest on the state maintained highway system, which may include local roads and bridges")
2. 25% - Counties
3. 8.33% - Municipalities
 - a. 25 percent will be allocated evenly - every municipality will receive approx. \$14,109
 - b. 75% will be distributed by population.

Distributions are made monthly. The monies paid to municipalities "shall be deposited into a separate fund". Section 23-8-8, Code of Alabama 1975. It is the opinion of the League that these funds must be maintained in a completely separate account. If a municipality wishes to commingle these funds with other gasoline tax funds and simply account for them separately, it is **STRONGLY** advised that you seek an opinion of the Attorney General opinion issued to your municipality before doing so.

Localities receive two monthly distributions – one for gas tax and one for diesel tax. It is the League's opinion that all of the new gas tax monies coming in as a result of the Rebuild Alabama Act, can go into the same account. In other words, you can combine the diesel and gasoline distributions from this new money into the same account which **MUST** be separate from your other gasoline taxes.

Use of Rebuild Alabama Funds Restricted

Section 23-8-8, Code of Alabama 1975 provides that the funds received from the Rebuild Alabama Act may only be expended for the following:

1. The maintenance, improvement, replacement, and construction of roads and bridges
2. Matching funds for federal road or bridge projects;
3. Debt repayment for road and bridge projects; or
4. Joint road and bridge projects with one or more municipalities and/or counties;

The funds CANNOT be used for the following:

1. Salaries, benefits, or any other form of compensation for county, municipal, or contract employees or officials except as included as project costs and subject to audit by the Examiners of Public Accounts;
2. The purchase, lease, or maintenance of equipment, other than equipment purchased and permanently installed as part of a road or bridge project; or
3. The maintenance and construction of public buildings or other structures that are not integral to the system of roads or bridges;

All fund records shall be audited by the Department of Examiners of Public Accounts in the same manner as all other municipal funds. Section 28-8-8(c), Code of Alabama 1975.

Annual Transportation Plan Required under Rebuild Alabama Act

While receipt of distributions is not tied to any report or plan, the Rebuild Alabama Act requires municipalities to adopt, by majority vote of the council, an annual transportation plan “no later than August 31 for the next fiscal year.” This plan must provide “a detailed list of projects for which expenditures are intended to be made in the next fiscal year” based on an estimate of the revenues from the fund. Once adopted, the plan must be all times be posted at city hall and if a municipality has an official website, on the website. Section 23-8-8(d), Code of Alabama 1975.

Further, at the first meeting in January of each year following the creation of the fund, the municipal engineer or other person designated by the council must present an annual written report detailing expenditures made from the fund during the previous fiscal year. The report must include the status of each project included in the previous fiscal year’s Transportation Plan. The report must be entered into the minutes at a council meeting and must be made available to the public for inspection, including posting on

the municipality’s website, if available. Section 23-8-8(e), Code of Alabama 1975.

32. Municipal Sales Tax in Alabama

What is the easiest municipal revenue to collect and the least painful for citizens, who need and receive municipal services, to pay? What is the only revenue source that spreads the cost of city government fairly among all citizens demanding and receiving city services? What revenue source allows city government to operate without imposing heavy burdens on homeowners and businesses already overtaxed? Many cities and towns in Alabama discovered the answer to these questions when they adopted some form of a municipal sales tax.

Municipal governing bodies may adopt one of two basic types of ordinances that levy a tax in the nature of a sales tax. Many municipalities levy a “true” sales tax as authorized by Sections 11-51-200 through 11-51-211, Code of Alabama 1975.

Other cities and towns have adopted a “gross receipts tax in the nature of a sales tax” as authorized by Section 11-51-90 and limited by Section 11-51-209 of the Code of Alabama 1975. **Only municipalities with this type tax in place before February 25, 1997, can continue to use it.**

“Gross receipts tax in the nature of a sales tax” is defined in Section 40-2A-3(8) of the Code. The distinction between the two types of ordinances is the fact that the true sales tax requires merchants to pass the tax on to consumers while the gross receipts license tax makes it optional with the merchant.

This article explains the options available to a municipal governing body which wishes to enact a sales tax ordinance. It will also explain the procedures available for the administration, collection and enforcement of the tax.

Municipal Exemptions

Section 40-23-4(11) and 40-23-4(15) exempt municipalities from payment of sales and use taxes. Additionally, municipalities and their instrumentalities, except for certain educational facilities, are not required to collect sales and use taxes on items they sell. *See*, Regulation 810-6-2-.92.02.

Nexus

Before determining whether any tax is owed to a particular municipality, there must exist some “nexus” between the transaction and the taxing jurisdiction. Webster defines “nexus” as a connection, a tie or a link. For taxation purposes, legally speaking, nexus is some activity, relationship, or connection which is necessary to subject a person, business, or corporation to a jurisdiction’s taxing powers.

Nexus is related to the minimum contacts test that has historically been applied by the courts for determining personal jurisdiction. Basically, a retailer must have “established some distinct connection with the [taxing jurisdiction], sufficient to have submitted himself to the jurisdiction of the [taxing jurisdiction] for tax purposes.” *See, MacFadden-Bartell Corp.*, 194 So.2d 543, 547 (Ala. 1967). In the *interstate* context, the United States Supreme Court has spelled out nexus requirements to satisfy the requirements of the Commerce Clause to the United States Constitution (discussed in detail in the following section) and although the Commerce Clause is not implicated in *intrastate* commerce, the due process portion of the analysis is applicable.

With regard to the collection of state taxes, the Alabama Supreme Court, interpreting decisions of the United States Supreme Court, has concluded that “there must be a [connection] sufficient to provide a business nexus with Alabama – by agent or salesmen, or at a very minimum, by an independent contractor within the State of Alabama” to require an out of state retailer to collect Alabama use tax. *State v. Lane Bryant, Inc.*, 171 So.2d 91 (Ala. 1965). Issues of nexus generally arise from three types of taxes: true sales and use taxes, gross receipts taxes in the nature of a sales tax and license taxes.

The true sales and use tax is a *consumer* tax; that is, although the seller collects this tax, he or she serves only as an agent for the taxing jurisdiction. The purchaser is the ultimate taxpayer. For purposes of the imposition of a *sales* tax, a sale is deemed completed at the point of delivery, regardless of agreements to the contrary or the mode of delivery. The *use* tax is a companion tax to the sales tax and is imposed on the “storage, use or other consumption” in the taxing jurisdiction of tangible personal property purchased at retail. *See*, Section 40-23-61, Code of Alabama 1975.

In the case of a consumer tax, where the taxpayer takes delivery of the product generally establishes nexus, although in *Yelverton’s, Inc. v. Jefferson County*, 742 So.2d 1216 (Ala. Civ. App. 1997) (cert. quashed, 742 So.2d 1224 (Ala. 1999)), the Alabama Supreme Court held that if the State Department of Revenue adopts a different rule administratively, municipalities must follow DOR’s administrative determination. *See also*, AGO 2000-128, where the Attorney General concluded that the City of Auburn could not require a Montgomery business that only made deliveries of merchandise into Auburn to collect and remit any sales or use tax imposed by the city of Auburn, due to a DOR regulation.

Instead of a true sales tax, a few municipalities assess a gross receipts tax in the nature of a sales tax. The source of this power is Section 11-51-90, Code of Alabama 1975, thus nexus would be determined in the same manner as are license taxes.

Section 11-51-90 authorizes all municipalities to collect license taxes. These fees are collected from the business itself for the privilege of doing business within the municipality. License fees are generally based on either a flat rate or on the gross receipts of the company. Nexus in the license situation generally depends upon a physical connection between the seller and the municipality in question.

Regarding nexus, Section 40-23-190 of the Code of Alabama 1975 establishes the conditions under which an affiliation between an out-of-state business and an in-state business creates remote entity nexus with Alabama to require the business to collect and remit state and local use tax. The following conditions establish remote entity nexus requiring an out-of-state business to collect and remit state and local use tax:

- The out-of-state business and the in-state business maintaining one or more locations within Alabama are related parties; and one or more of the following conditions is met:
 - The out-of-state business and the in-state business use an identical or substantially similar name, tradename, trademark or goodwill, to develop, promote or maintain sales, or
 - The out-of-state business and the in-state business pay for each other's services in whole or in part contingent upon the volume or value of sales, or
 - The out-of-state business and the in-state business share a common business plan or substantially coordinate their business plans, or
 - The in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting or maintaining the in-state market.

An out-of-state business and an in-state business are related parties if one of the entities meets at least one of the following tests with respect to the other entity:

- One or both entities is a corporation, and one entity and any party related to that entity in a manner that would require an attribution of stock from the corporation under the attribution rules of Section 318 of the IRC owns directly, indirectly, beneficially or constructively, at least 50 percent of the value of the corporation's outstanding stock; or
- One or both entities is a limited liability company,

partnership, estate or trust and any member, partner or beneficiary and the limited liability company, partnership, estate or trust and its members, partners or beneficiaries own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the profits, capital, stock, or value of the other entity or both entities; or

- An individual stockholder and the members of the stockholder's family, as defined in Section 318 of the IRC, owns directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of both entities' outstanding stock.

The Gross Receipts License Tax

Prior to 1969, Alabama cities and towns had no authority to levy a "true sales tax" – that is, one placing the tax burden directly on the consumer. However, Section 11-51-90, Code of Alabama 1975, did confer specific authority upon Alabama municipalities to levy and collect taxes for the privilege of doing business in the corporate limits or police jurisdiction of the municipality, including the authority to establish the amount of the license on the basis of gross receipts of the business. This is now called a "gross receipts tax in the nature of a sales tax," and is defined in Section 40-2A-3(8) of the Code. Please note that Section 11-51-209 now prevents implementation of this type tax. Only those cities and towns operating under this type tax on February 25, 1997, can continue to do so.

Section 11-51-90 does not authorize a municipality to levy a tax on the consumer or purchaser for the privilege of consumption. The Supreme Court of Alabama has upheld municipal privilege license taxes based upon gross receipts in the form of a sales tax, provided the licensee (merchant) is not required to pass the tax on to the consumer. The merchant has the option of passing the tax on to the consumer, but the municipal ordinance cannot require the merchant to do so. *Evers v. Dadeville*, 61 So.2d 78 (Ala. 1952); *Al Means, Inc. v. Montgomery*, 104 So.2d 816 (Ala. 1958).

The amount of the gross receipts license tax paid for the privilege of doing business in the municipality may be based upon gross sales, including sales of goods shipped outside of the municipality and its police jurisdiction. *Ingalls Iron Works v. Birmingham*, 27 So.2d 788 (Ala. 1946); *Gotlieb v. Birmingham*, 11 So.2d 363 (Ala. 1943). A few cities and towns have expressly exempted sales of goods which are delivered to customers beyond the corporate limits and police jurisdiction. In most cases, this has resulted in nothing but headaches because it opens the door to violations which cannot be proved by audit. Furthermore, most municipalities rely upon the returns made to the State Sales Tax Division of the Department of Revenue as a

check against the returns made to the municipality. If such sales are exempted from the municipal levy, it is practically impossible to audit the taxpayer's records by comparing this municipal return with the state return. The procedure to be followed by the municipality to obtain state sales tax data will be discussed later in this article.

Retail merchants making deliveries to customers in the municipality from places of business outside of the municipality and its police jurisdiction are liable for payment of the municipality's gross receipts (sales) license tax. In such cases, the sale of the merchandise is not completed until the goods are delivered in the municipality. This delivery, completing the sale, constitutes the taxable incident which subjects the seller to the license. Cases upholding this position are *Haden v. Olan Mills*, 135 So.2d 388 (Ala. 1961); *Graves v. State*, 62 So.2d 446 (Ala. 1952); and *Sanford Service Company v. Andalusia*, 55 So.2d 856 (Ala. 1951).

Section 40-23-3, Code of Alabama 1975, authorizes merchants to exclude all municipal sales tax collections from their gross receipts sales in computing their state sales tax. Until this legislation was passed, merchants were required by the State Department of Revenue to include municipal sales tax collections in their gross sales for the purpose of computing the amount they were to pay as state sales tax. In addition, Section 40-23-130, Code of Alabama 1975, provides that if a municipality imposes a gross receipts tax on the sale of gasoline and motor fuel, then the tax imposed on the sale of gasoline and motor fuel by the state, federal or local government shall not be included in the gross receipts in computing the gross receipts tax owed to the local government.

Section 212 of the Alabama Constitution, 1901, prohibits delegation of the taxing power. Basing his opinion on this Constitutional provision, the Attorney General advised Honorable W. D. Cochran on June 23, 1958, that whether or not a municipality adopts a gross receipts license tax may not be made to depend upon a favorable referendum.

Because the municipal "gross receipts tax in the nature of a sales tax" is a license tax which the merchant may not be required to collect from the consumer or purchaser, the municipality cannot establish brackets to guide the merchant in collecting the tax from the consumer. Nevertheless, there is nothing to prevent the municipal administration from suggesting a realistic bracket system which will help the merchant pass the municipal levy on to the purchaser along with the state sales tax.

The "True" Sales and Use Tax

As of 1969, municipalities have the authority to convert their gross receipts license taxes in the nature of

sales taxes to "true" sales taxes on the consumer rather than on the seller. Municipalities also have the authority to adopt a use tax levied on purchases of goods outside the municipality that are brought into the municipality for use or consumption within the municipality. Sections 11-51-200 through 11-51-211, Code of Alabama 1975.

In 1998, the Legislature passed two acts that implemented sweeping changes in the structure of municipal sales and use taxation. These acts, the Local Tax Simplification Act of 1998, Act 98-192 (hereinafter referred to as Act I) and the Local Tax Procedures Act, Act 98-191 (hereinafter referred to as Act II), affect all municipal and county governments and the State Department of Revenue. The effect varies depending on whether the local government uses the Department of Revenue or is self-administered either with their own staff or by a private collector.

The purpose of Act I is set out in the legislative findings of that act as follows:

"The Legislature hereby finds and declares that the enactment by this state of a simplified system of local sales, use, rental, and lodgings taxes which may be levied by or for the benefit of municipalities and counties in Alabama effectuates desirable public policy by promoting understanding of and compliance with applicable local tax laws."

This article incorporates these two acts and discusses how they relate to the administration of municipal sales, use and "gross receipts tax in the nature of a sales tax" taxes.

The Application of State Rules and Regulations

Although there has been some confusion regarding the applicability of state sales and use tax laws to municipalities, it is now clear that at least local sales and use taxes are subject to certain state laws, including the Taxpayer's Bill of Rights. In *General Motors Acceptance Corp. v. Red Bay*, 894 So.2d 650, (2004), the Alabama Supreme Court made clear that the Bill of Rights does apply to municipalities.

The court's holding in *Red Bay* means that municipalities must be familiar with the procedures followed in the Taxpayer's Bill of Rights and apply them in the administration of their own local sales and use taxes. In the words of the court, this means that, like DOR, local governments must:

"provide a taxpayer with notice of any planned audit of the taxpayer's books and records; with a statement of the taxpayer's procedural rights, including the right to an administrative review of a preliminary assessment; and with a written description of the grounds for any claimed underpayment or nonpayment of a tax. Section 40-2A-4. A taxpayer has the right to the entry of a

preliminary assessment stating the specific amount of taxes the Department claims the taxpayer owes, which must be either mailed or personally delivered to the taxpayer. Section 40-2A-7. The taxpayer is then entitled to dispute the preliminary assessment by filing a petition for review with the Department. If the parties are unable to resolve their differences and the Department determines that the assessment is valid, it must enter a final assessment. The taxpayer may then appeal the assessment to the administrative law division of the Department (or to a similar administrative agency in the event the dispute involves local taxes levied by a municipality or county not administered by the Department) or to the circuit court in the county where the taxpayer resides. Section 40-2A-5.”

Act I – The Local Tax Simplification Act of 1998

Under Act I, municipal sales and use taxes must parallel the state sales and use tax as levied in certain enumerated Code sections, unless otherwise provided and “except where inapplicable.”

Act I states that this phrase: “shall not be construed to permit a self-administered municipality to adopt or interpret an ordinance, resolution, policy, or practice that relies on that phrase, either directly or indirectly, in order to disavow, disregard, or attempt to disavow or disregard the mandate ... for conformity with the corresponding state tax levy, unless the self-administered municipality can demonstrate that the ordinance, resolution, policy or practice will simplify collection or administration of the tax or is being made for the convenience of the taxpayer.” Section 11-51-200, Code of Alabama 1975.

Local sales and use taxes are subject to all definitions, exceptions, exemptions, proceedings, requirements, provisions, rules and regulations promulgated under the Alabama Administrative Procedures Act, direct pay permit and drive-out certificate procedures, and deductions for the corresponding state tax in certain enumerated Code sections, except where the rules are inapplicable, as provided above, or where some other statutory rule applies. Additionally, **the local government may set its own tax rate.**

A municipality may also establish a lodging tax, parallel to the state lodging tax. Self-administered municipalities (those that have not chosen to allow the state to collect the local taxes) may establish rules and regulations for administering their own sales, use and lodging taxes. These rules may not conflict with State Department of Revenue (hereinafter referred to as DOR) regulations promulgated pursuant to the Administrative Procedures Act for the corresponding state tax.

State Collection – Sections 11-51-208 and 11-51-180

Municipal governments may elect to have DOR collect sales and use and lodging taxes for them. These taxes are collected along with state taxes and distributed by the state to the municipality. DOR will only collect the taxes it is authorized by statute to collect. They may not collect any municipal gasoline or motor fuel taxes, privilege or business license taxes, occupational taxes, tobacco taxes or other similar taxes levied pursuant to Section 11-51-90, Code of Alabama 1975. An exception is made for municipalities that currently assess privilege or license taxes levied in the nature of a sales or use tax.

In order for DOR to begin collecting local taxes for a municipality, the municipality must first have an ordinance levying the tax in question. The municipality must file with DOR a certified copy of its ordinance at least 30 days prior to the first day of the month on which the ordinance will take effect. Similarly, changes in the rate must be filed with DOR at least 30 days prior to the date they will take effect. If the state already collects for a municipality, it does not have to send a new certified copy of its ordinance, unless it is making a change in its tax rate.

As noted above, the municipality may set its own tax rate. The state will collect these taxes subject to all definitions, exceptions, exemptions, provisions, statutes of limitations, penalties, fines, punishments and deductions as are applicable to the parallel state tax.

The commissioner of revenue must deposit into the state treasury all municipal taxes that are collected by the state pursuant to this authority. Every two weeks, the commissioner must certify to the state comptroller the amount of taxes that were collected during the two-week period preceding the certification and the amount that must be distributed to each municipality. These funds must be distributed to the municipalities within three days after the commissioner files the certification.

DOR may charge a fee for collecting these local taxes. Act I, though, limits DOR to a maximum charge of two percent of the amount collected for each municipality. Section 11-51-183, Code of Alabama 1975. Additionally, within 60 days of the end of the fiscal year, DOR must recompute the cost of collecting municipal taxes during the preceding year and redistribute any over-charges to the municipalities for which DOR collects. This distribution is made on a pro-rata basis of each municipality’s receipts. If the cost of collection exceeded the amount DOR charged for collecting the municipal taxes, DOR is not permitted to collect any under-charges from the municipalities. At least once each month, the state comptroller must issue a warrant on the local funds collected for the amount of DOR’s collection costs, meaning that DOR’s collection costs will be deducted from the taxes it distributes.

Act I also allows DOR to collect local rental taxes and gross receipt taxes in the nature of a sales tax. Local rental taxes collected by DOR must parallel the state levy, except for the rate of the tax.

Act I also prohibits entities that were not levying a gross receipts tax in the nature of a sales tax on February 25, 1997, from enacting this type of tax. Gross receipts tax in the nature of a sales tax is defined as:

“a privilege or license tax, imposed by a municipality or county, measured by gross receipts or gross proceeds of sales and which: (i) was in effect on or before February 25, 1997, or is an amendment to a tax which was in effect on that date; (ii) is levied against those selling tangible personal property at retail, those operating places of amusement or entertainment, those making street deliveries, and those leasing or renting tangible personal property; and (iii) is due and payable to a county or municipality monthly or quarterly.” Section 40-2A-3(8), Code of Alabama 1975.

A small number of municipalities have this type of tax. This restriction does not affect the authority of these municipalities to continue to levy a gross receipts privilege or license tax.

Section 11-51-184 authorizes the commissioner to hire special counsel as needed to enforce municipal license tax ordinances. The costs of such legal aid are to be paid from the municipal taxes collected for the municipality.

It is very important that all municipal governing bodies using the collection service of the State Department of Revenue set tax rates that can be easily reduced into usable decimal figures. This will make it much easier for DOR to administer the collection of the municipality's taxes. Fractions that are easy to work with should be used, e.g., 1/4, 1/2, 3/4, etc., and not fractions such as 1/8, 3/16, 3/8, etc.

Tax Forms – Section 11-51-210

One of the primary goals of the 1998 legislation was to simplify the completion and filing of forms for the taxpayer. Act I establishes a procedure for the development of standardized forms. The type of form a taxpayer uses will vary depending on whether the local entity collects its own taxes or DOR collects its taxes.

If DOR collects the local taxes, DOR is responsible for creating and distributing the form taxpayer's use.

The form that must be used by self-administered municipalities and counties has been developed by a committee consisting of three representatives appointed by the League, and three representatives appointed by the Association of County Commissions. Now that the form has been adopted, all self-administered municipalities and counties (except those who have gross receipts taxes in the nature of sales taxes) must use this form to collect their local sales, use, rental and lodging taxes.

Bulk Submissions – Section 11-51-210(d)

Self-administered municipalities and counties must accept bulk submissions of sales, use, rental and lodging taxes, provided the bulk submissions are made using the form created above. All bulk submissions must include the local government's assigned identification number for each taxpayer and vendee for each tax paid. Additionally, the submission must contain sufficient information to allow the government to identify each taxpayer and vendee and determine the amount of tax each owes. Acceptance of bulk submissions does not relieve the taxpayer of the liability for any tax due because of an error or omission made by the taxpayer's representative. The municipality or county may require the taxpayer or its authorized representative to sign the submission. Forms for making bulk submissions can be obtained from the Department of Revenue's web site.

Tax Rate Publication – Section 11-51-210(e)

By June 30, 1998, every municipality levying a sales, use, rental, lodging, tobacco, gasoline, or ad valorem tax as of June 1, 1998, must submit to DOR a list of the taxes and the rate of the taxes levied or administered by the municipality. Thereafter, any municipality which enacts or amends one of these taxes must notify DOR in writing at least 30 days prior to the effective date of the tax or amendment.

DOR will compile this information into a written publication that will be published and distributed on a monthly basis to every municipality, county, private auditing firm and to anyone else who requests the publication.

Failure of a municipality to notify DOR of a new tax or amendment does not invalidate the tax. Also, a taxpayer is not relieved of a duty to pay a tax even if the published tax rate is in error. However, no penalties or interest for late payment or underpayment of taxes shall begin to accrue until the proper tax rate or levy has been on file at DOR for 30 days, unless the taxpayer had actual knowledge of the correct tax rate or levy on an earlier date.

Quarterly Returns – Section 11-51-211

For those entities DOR collects for, if a taxpayer's state sales tax liability averages less than \$200 per month during the preceding calendar year, the taxpayer may elect to file a quarterly sales tax return and remittance in lieu of monthly returns. A taxpayer may elect to file a quarterly use tax return only if:

- a. the total state sales tax for which the taxpayer is liable averages less than \$200 per month during the preceding calendar year, and
- b. the total state use tax averages less than \$200 per month during the preceding calendar year.

In either case, the taxpayer must elect to file quarterly by notifying DOR in writing no later than February 20 of each year. Quarterly returns are not due before the 20th day of the month next succeeding the end of the quarter for which the tax is due. In any event, no state-administered local sales or use taxes are due until January 20 of each year unless the total state sales or use tax for which any person is liable during the preceding calendar year exceeds \$10.

Similar rules apply to self-administered municipalities. If a taxpayer's total state sales tax liability averages less than \$200 per month during the preceding calendar year, the taxpayer may also elect to file quarterly returns for local taxes. If the taxpayer is domiciled in Alabama, he or she may also elect to pay use taxes quarterly when the total state sales tax liability averages less than \$200 per month during the preceding calendar year. The municipality must receive notice from the taxpayer that he or she will file quarterly no later than February 20 of each year. Quarterly returns are not due before the 20th day of the month next succeeding the end of the quarter for which the tax is due. In any event, no self-administered local sales or use taxes are due until January 20 of each year unless the total state sales or use tax for which any person is liable during the preceding calendar year exceeds \$10.

Act I does not allow taxpayers who are not domiciled in Alabama to pay their use taxes quarterly to a self-administered municipality. A self-administered municipality may allow a taxpayer to file less frequently than quarterly.

Improper Payments – Section 40-23-2.1(c)

Only one municipal sales tax, gross receipts tax in the nature of a sales tax, use tax or rental tax may be collected from the same sale or rental transaction.

If a sales tax, gross receipts tax in the nature of a sales tax, use tax or rental tax owed to one municipality (called the “proper locality” in Act I) is erroneously paid to a different municipality in good faith, based upon a reasonable interpretation of the enabling ordinance, the municipality receiving the erroneous payment shall refund the overpaid tax, without interest, to the taxpayer within 60 days of the taxpayer's compliance with applicable refund procedures. The taxpayer must comply with refund procedures within 60 days of receiving notice of the erroneous payment. If the taxpayer fails to act within this time, interest begins to accrue on the 61st day and continues until the tax is paid.

If the taxpayer timely files for a refund, the proper locality may not assess or attempt to assess the tax or any related interest or penalties. No interest or penalties accrue until the date the taxpayer or his or her agent receives the overpayment refund. The taxpayer must remit the taxes owed to the proper locality within 15 days of receipt. If the tax rate imposed by the municipality receiving the erroneous

payment exceeds the rate imposed by the proper locality, the municipality that erroneously received the tax does not have to refund the difference unless the actual taxpayer properly files a petition for a refund of the overage.

Interest – Section 11-51-208(f)

A self-administered municipality may elect to collect interest on tax delinquencies. If it does so, it must also pay interest on any refund of a tax that is erroneously paid. The rate of interest in both cases is one percent per month. Erroneously paid refers to taxes “erroneously paid to the self-administered municipality or its agent as a result of any error, omission or inaccurate advice by or on behalf of the self-administered municipality, including [mistakes] in connection with a prior examination of its books and records by the self-administered municipality or its agent.” Section 11-51-208(f), Code of Alabama 1975.

Act II – Local Tax Procedures Act

Act II is designed to protect taxpayers from intrusive tax collection procedures while at the same time guaranteeing the full collection of taxes owed. Many of the provisions of Act II apply to private auditing or collecting firms that contract with local governments for the collection of their taxes.

“Private auditing or collecting firms” is defined in Act II as: “Any person in the business of collecting, through contract or otherwise, local sales, use, rental, lodgings or other taxes or license fees for any county or municipality, or auditing any taxpayer, through the examination of books and records, for any county or municipality.” Section 40-2A-3(17), Code of Alabama 1975.

This definition does not include DOR, counties or municipalities which collect taxes for other counties or municipalities, nor does it include persons or firms whose sole function is the collection of delinquent municipal insurance premium license fees if the person or firm has no authority to determine the amount of the penalty, fee, interests or costs owed. The terms of this definition make it clear that the phrase “private auditing or collecting firms” does not include municipalities or counties which collect their own taxes.

Revenue Rulings – Section 40-2A-5

Act II authorizes the State Revenue Commissioner to issue revenue rulings in response to a written request by the governing body of a self-administered county or municipality, or to a taxpayer, regarding the substantive application of local sales, use, rental or lodging taxes. The commissioner, though, cannot issue rulings concerning self-administered local entities that assess gross receipts taxes in the nature of sales taxes. Also, the commissioner

cannot issue any ruling that establishes a rule of nexus for self-administered local governments.

Revenue rulings issued to self-administered municipalities are binding only with respect to the taxpayer involved in the request and only with respect to the specific facts stated in the request. A taxpayer must pay a fee of \$200 for a ruling. If the request for a ruling comes from a local government, the fee is waived

Upon receiving a request from a taxpayer for a revenue ruling regarding the application of a self-administered tax, DOR must forward a copy of the request to the local government involved and consult with and accept written comments prior to issuing the ruling. Revenue rulings must be issued within 45 following the receipt of the request.

Contingent Contracts – Section 40-2A-6

Section 40-2A-6, Code of Alabama 1975, prohibits certain contracts for the examination of a taxpayer's books or records if any part of the compensation or other benefits paid to the person or firm conducting the examination is contingent on the fees, costs, interest or penalties assessed against or collected from the taxpayer. One exception is where the person or firm collecting the tax has no authority to determine the amount of the tax, interest, penalty or costs owed.

Act II amends this section to also prohibit hearings or appeals officers from receiving compensation or benefits contingent upon the amount of tax, interest, costs or penalties assessed or collected from the taxpayer. Any contract that violates this prohibition is void. Additionally, any assessment that comes out of an arrangement that violates this provision is void and unenforceable. This section does not prohibit employees of a private auditing or collecting firm from participating in a profit-sharing arrangement that is available to other employees of the firm who are not involved in examining taxpayer's books and records, if the formula for the arrangement is based primarily on the overall profitability of the firm.

Violation of this prohibition is a Class A misdemeanor. A private auditing or collecting firm that violates this provision forfeits its license until the firm implements remedial measures recommended by the board created for this purpose, as set out below.

Audit Costs – Section 40-2A-6(d)

With only a few exceptions, state and local taxing authorities are prohibited from assessing the costs of conducting audits against a taxpayer. A self-administered local government may assess reasonable auditing costs (based on the then current state government per diem rate) against a taxpayer if:

1. the taxpayer received notice by certified mail, return receipt requested, at least 30 days prior to the date on which an examination was to start;
2. the taxpayer failed or refused to respond or did not propose a reasonable alternative date for the audit within 15 days of receiving notice of the pending audit;
3. the taxpayer and the local entity agreed in writing to an alternative date for the audit and the taxpayer failed or refused to allow reasonable access to its books and records on that date.

Disclosure of Information – Section 40-2A-10

It is unlawful for any person to print, publish, or divulge, without the written permission or approval of the taxpayer, the return of any taxpayer or any part of the return, or any information secured in arriving at the amount of tax or value reported, for any purpose other than the proper administration of any matter administered by the department, a county, or a municipality, or upon order of any court, or as otherwise allowed by law. Any person found guilty of violating this section shall, for each act of disclosure, have committed a Class A misdemeanor. This does not apply to the disclosure of the amount of local privilege license or franchise fees paid to counties and municipalities by any taxpayer possessing a franchise (whether or not exclusive) granted by the respective county or municipality. However, any information other than the amount of license or franchise fees paid, including returns or parts thereof or documents filed with or secured by any municipality or county or their authorized agent and relating to local privilege licenses and franchises shall remain confidential information.

Local governments may exchange information with each other, provided that the same confidentiality rules apply.

Act II prohibits assessing damages, attorneys' fees or court costs against a government or against government employees, officials or officers for violation of this section.

Contracts with Private Examining or Collecting Firms – Section 40-2A-12

Self-administered local governments may not enter into a contract with a private examining or collecting firm for a term of more than three years. The contract may be renewed once it expires. A contract expires if the private firm loses or foregoes its license pursuant to new Sections 40-2A-13 or 40-2A-14.

Audit Limitations – Section 40-2A-13

Local governments and their agents must comply with Section 40-2A-13 and the Taxpayers' Bill of Rights

when conducting audits for sales, use, rental or lodging tax compliance.

Section 40-2A-13 limits the examination of a taxpayer's books and records for compliance with taxes to one audit every three taxable years. This means that each taxing entity may conduct only one audit of the taxpayer during this period. However, any of these entities may conduct additional audits if, after conducting an investigation, it notifies the taxpayer in writing of the reasons why the additional examination is necessary. Valid reasons for additional audits are:

to fulfill an obligation to another state pursuant to a Southeastern Association of Tax Administrators (SEATA) exchange of information agreement or to the Multistate Tax Commission;

- to follow up on leads furnished by the Multistate Tax Commission or pursuant to a SEATA exchange agreement;
- to verify a direct or joint refund claim and to determine if there is any offsetting tax liability to be credited against or that may exceed the refund claim;
- to secure a tax return and the tax, penalty, interest, and service charge, if any, due thereon for any reporting period for which the taxpayer has failed to file a return by the due date of the return;
- to collect any tax, penalty, interest, and service charge, if any, which the taxpayer has failed to remit within 30 days after receiving notification that the amount is due;
- to secure a corrected return and the additional tax, penalty, interest, and service charge when the taxpayer has failed to file a corrected return and remit any additional amount due within 30 days of receiving a request for a corrected return;
- to collect any tax due based on substantial evidence of fraud or tax evasion discovered since the prior examination, but only if the governing body explains to the taxpayer in writing the basis for the alleged fraud or evasion; or
- to follow up on representations by the taxpayer that it is going out of business or that the taxpayer has gone out of business.

Any person auditing a taxpayer for a self-administered local government must disclose in writing, upon first contact with the taxpayer, the identity of the governments the person represents, and must provide the taxpayer with written authorization from each government represented

On or before January 15 of each year, each private firm must disclose in writing to DOR and to the self-administered local governments it represents on the date of

disclosure, the identity of all local governments for which it performed a sales, use, rental or lodging tax audit during the preceding year.

A private firm must simultaneously examine a taxpayer's books and records for all self-administered local governments it serves on the date it first contacts the taxpayer. The firm may not disclose or encourage others to disclose the fact that the firm is auditing a taxpayer to any non-client local government or its agents. The firm may conduct an audit of the same taxpayer for local government clients it did not represent on the date of first contact with the taxpayer, if the firm has not disclosed or encouraged others the fact that the firm was conducting an audit during the audit and if at least one year has passed since the date the firm completed its last examination of the taxpayer's records, as certified by the firm. This restriction does not apply if grounds exist for a re-audit, as set out above, or if the one-year delay would result in the closing of a tax year by virtue of the applicable statute of limitations and the taxpayer fails or refuses to agree to a written request to extend the statute of limitations.

If, as a result of its audit, the private firm discovers that the taxpayer is owed a refund by or may owe tax to a client local government, the firm must notify both the taxpayer and the local government of this fact in writing. The notice must include the estimated amount of the refund or the tax owed and must advise the taxpayer of the general procedure for claiming a refund or paying the tax. If the firm willfully violates this provision and the taxpayer ultimately receives a refund or pays a tax of more than \$100, the firm must forfeit its license for six months. Additionally, each examiner who participated in the audit but failed to advise the firm of the refund or tax liability shall forfeit their license for six months. The firm or examiner must then apply to be reinstated.

Auditor Certification and Licensing – Sections 40-2A-14 and -15

The Alabama Local Tax Institute of Standards and Training (the board) must certify all auditors employed by a private firm. The board consists of six members. The League appoints three members, as does the Association of County Commissions of Alabama.

The board is responsible for developing a certification program for private firm auditors. The program must require a minimum of at least two years of governmental examining experience or a bachelor's degree in accounting from an accredited university or college and completion of the certification program developed by the board. The program must also provide for continuing education rules similar to those imposed by the State Board of Public Accountancy.

The certification requirements apply only to examiners

employed by a private auditing and collecting firms. They do not apply to municipal employees. Certified public accountants and public accountants who are licensed by the State Board of Public Accountancy are exempt from the certification requirements and any separate continuing professional education requirements. However, when a certified public accounting or public accounting firm is employed to conduct local tax examinations for the first time by a self-administered local government, the firm must notify the board in writing.

Once the board develops its preliminary program, copies of it will be distributed to interested agencies, including all counties and municipalities. Comments must be submitted to the board in writing within 45 days. Following this period, the board will adopt a final examiner certification program.

Examiners who are employed by a private firm on the date Act II becomes law have two years from the date the certification program is finalized to obtain the required certification. Examiners may continue to conduct examinations during this two-year period.

The board may contract out the examiner certification program to any organization the board believes can and will conduct the program in a manner consistent with legal requirements. Any organization operating the program pursuant to a contract must conduct the program subject to rules and regulations issued by the board.

Either the board or an agent conducting the program by contract may charge examiners a registration fee to obtain certification.

Audit Procedures – Section 40-2A-15(g)

The board also has the responsibility for developing a standardized procedure that will be followed by all municipal county or private examiners when examining a taxpayer's books and records. This procedure may not conflict with the Taxpayer's Bill of Rights.

License Fees – Section 40-12-43.1

Every private auditing and collecting firm is required to pay an annual state license fee of \$25 no later than October 1 of each year or within 30 days of entering into a contract with a county or municipality. If the board has hired more than one examiner, each examiner must pay a separate fee of \$25. These funds shall be appropriated by the state comptroller to the board for administration of the examiner certification program.

Bonding Requirements – 40-2A-14

Private firms must maintain fidelity bonds on each examiner. A private firm may not employ examiners who are not bonded or who have not received or

maintained certification from the board. A violation of these requirements shall:

1. automatically terminate any contract or arrangement with a self-administered local government;
2. void any assessment or proposed assessment issued by a self-administered local government or its agent as a result of any audit conducted, in whole or in part, by the examiner; however, the local government may send a qualified examiner to re-examine the taxpayer's book and records, even though the required waiting period has not expired, or the applicable statute of limitations has expired with respect to the period at issue; and
3. cause the private firm to forfeit its license for six months.

Certified public accountants are exempt from the bonding requirements.

Reinstatement of Certification – 40-2A-14(d)

Any private firm that has forfeited its license, must apply for reinstatement pursuant to Section 40-12-43.1, and repay the required state licenses.

Sales Taxes and Excise Taxes

There has been a long-standing practice in Alabama of allowing sales taxes to be applied to the total cost of products even if those products carry an excise tax. In the early 1990s, this practice was challenged in the courts. Act 92-343 allows retailers to continue to charge taxes on the total cost of products purchased whether or not an excise tax is attached to any or all of the products.

Public Records Issues -- Availability of State Sales Tax Data -- Regulation 810-14-1-.29

Section 11-51-181, Code of Alabama 1975, gives a municipality access to state sales tax data. This legislation was sponsored by the Alabama League of Municipalities for license enforcement purposes and as a method of checking on payments of municipal sales taxes when municipalities levy such taxes. It makes available the sales tax returns of local businesses filed each month with the Department of Revenue.

Because of the Taxpayer's Bill of Rights, accessing sales and use tax information is now more complicated due to the privacy concerns raised by Section 40-2A-10 of the Code. In response to this law, DOR has adopted regulation 810-14-1-.29 to govern the disclosure and exchange of sales and use tax information. The pertinent portions of this regulation provide:

- Only the taxpayer or the taxpayer's representative can release information in a sales or use tax return without the expressed written permission of the commissioner

of revenue or pursuant to some other provision of law. The law does, though, provide for the exchange of information under certain circumstances. This regulation was designed to govern inspection of tax returns and return information by persons other than DOR, unless some other law controls access.

- A return is: “Any tax or information return or report, declaration of estimated tax, claim or petition for refund or credit, or petition for reassessment or protest that is required by, provided for or permitted under the provisions of the tax laws of the state.”
- “Return information” includes almost any information that identifies the taxpayer.
- The procedure for requesting tax returns or return information is:
- The agreement to allow inspection must be approved by the commissioner or his delegate.
- The agreement may provide for inspection or exchange of a specific return, or for the regular or routine exchange of returns on the basis as the parties agree.
- Unless prior arrangements have been made and approved by the commissioner or his delegate, requests for inspection must be in writing or verifiable electronic means and must indicate, if available:
 - The tax administration reason for the exchange;
 - The name and address of each taxpayer for whom information is requested;
 - The taxpayer’s social security number and/or federal ID number, if available;
 - The inclusive dates for tax information requested; and
 - Any other information that may help facilitate the exchange, such as the taxpayer’s legal name, business name, address and/or a Department tax ID number.
- The agreement is valid for the duration spelled out in the agreement but may be cancelled. The agreement is void if confidentiality is violated.
- The authorized person (tax administrator viewing or obtaining the information) must sign a non-employee confidentiality and disclosure statement.

Officials and employees must always keep in mind, as discussed previously, that a violation of the confidentiality provisions in the Taxpayer’s Bill of Rights is a Class A misdemeanor. This means that anyone (including municipal officials and employees) who reveals any information on

a taxpayer’s sales or use tax return or information used for computing the amount of tax owed has committed a crime.

Sales Taxes on Motor Vehicles

Sections 11-51-201, 11-51-203, 40-12-4, 40-23-101, 40-23-102, 40-23-104 and 40-29-115, Code of Alabama 1975 govern the payment of sales and use taxes due on sales of motor vehicles. Under the provisions of the law, vehicle dealers are required to show on their invoices the rate and amount of municipal and county sales taxes collected at the time of purchase. When a purchaser of a vehicle goes to transfer the vehicle in his or her name, the clerk will ask to see the bill of sale. If the dealer has collected municipal and county sales taxes for the jurisdiction where the vehicle was purchased, no additional tax will be due. If the municipal and county taxes were not collected at the time of sale, the purchaser will be required to pay the use taxes on the vehicle in effect for the municipality and the county of the purchaser’s residence. AGO 1995-125 states that sales taxes must be collected by the dealer at the point of purchase on vehicles sold inside a municipality even though the vehicle will be registered in a municipality and county in Alabama different from the purchase site.

The law requires the county tax collector to remit all county and municipal sales, gross receipts and use taxes collected pursuant to the act directly to the appropriate county or municipal tax recipient within 20 days following the last day of the month in which such taxes were collected.

For collecting the county or municipal sales tax pursuant to this legislation, the tax collector shall be entitled to a fee from the recipient county or municipality in an amount equal to five percent of all revenue collected each month. The fees allowed shall be deducted from the tax collections for each tax recipient each month and the remainder of the collections shall be remitted to each tax recipient. The law provides that the fee shall be disallowed with respect to any tax collected for the county or municipality unless the collections are remitted to the appropriate county or municipality within the time allowed by law.

For a city or town to collect taxes on vehicles purchased by local citizens from dealers located outside the municipality, the following criteria must be met:

First, the dealers must not have collected municipal sales taxes from the purchaser for the municipality where the dealer is located.

Second, the city or town of the purchaser’s residence must have a use tax in place.

Cities and towns with a gross receipts tax in the nature of a sales tax will not be able to take advantage of this provision of the legislation without changing to a “true” sales and use tax.

Motor Boat Sales and Use Tax

Sections 40-23-100 through 40-23-108, and Section 33-5-11, Code of Alabama 1975 levy a sales and use tax on certain motorboats and provide for the collection of that tax. The motorboats intended to be covered by these provisions include boats with one or more built-in motors or a boat with an outboard type of motor or motors which are intended to be permanently attached rather than readily removable.

Sample ordinances to be used in adopting any of these taxes may be obtained from the Sales and Use Tax Division of the State Department of Revenue.

Police Jurisdiction

Municipalities have the authority to assess, by ordinance, a sales and use tax that must not exceed one-half of the levy inside the municipal limits. This authority was upheld in *Hoover v. Oliver & Wright Motors, Inc.*, 730 So.2d 608 (Ala. 1999), *cert. denied*, 528 U.S. 868 (1999). Additionally, although licenses collected in the police jurisdiction must be spent to provide services in the police jurisdiction, at least one case has indicated that sales and use tax revenue collected in the police jurisdiction do not. *State Dept. of Revenue v. Taft Coal Sales and Associates, Inc.*, 801 So.2d 838 (Ala. Civ. App. 2001). For more information about sales and use taxes and the police jurisdiction, please see the article entitled “The Municipal Police Jurisdiction” in this publication.

Sales Tax Holiday

Sections 40-23-210 through 213 of the Code of Alabama 1975, provide for a sales tax holiday to exempt certain covered items from the state sales and use tax during the first full weekend of August of each year. Any county or municipality may, by resolution or ordinance adopted at least 30 days prior to the first full weekend of August, provide for the exemption of covered items from paying county or municipal sales and use taxes during a period commencing at 12:01 a.m. on the first Friday in August of each year and ending at twelve midnight the following Sunday under the same terms, conditions, and definitions as provided for the state sales tax holiday. Municipalities and counties are prohibited from providing for such exemptions during any period other than the first full weekend in August. Section 40-23-213, Code of Alabama 1975.

Section 40-23-233, Code of Alabama 1975 also exempts certain covered items from the state sales and use tax for the first full weekend of July and the last full weekend of February of each year. Any county or municipality may, by resolution or ordinance adopted at least 14 days prior to the first full weekend of July in 2012 and at least 30 days prior to the last full weekend of

February in subsequent years, provide for the exemption of covered items from paying county or municipal sales and use taxes during a period commencing at 12:01 a.m. on the first Friday in July in 2012, and the Friday of the last full weekend of February in subsequent years, and ending at twelve midnight the following Sunday under the same terms, conditions, and definitions as provided for the state sales tax holiday. Municipalities and counties are prohibited from providing for a sales and use tax exemption during any period of the year that is not designated as a sales tax holiday. Section 40-23-233, Code of Alabama 1975.

One Spot Collection

Section 40-23-240, et seq., Code of Alabama 1975 requires the Alabama Department of Revenue to develop and make available to taxpayers an electronic single point of filing for state, county and/or municipal sales, use, and rental taxes. The system is known as the Optional Network Election for Single Point Online Transactions or “ONE SPOT.” There is no charge to local taxing jurisdictions for utilization of the One Spot system by taxpayers or the local taxing jurisdiction or its designee.

My Alabama Taxes (MAT) is the State’s electronic filing and remittance system used today for the filing of state and some city and county sales, use, rental, and lodgings taxes. Since October 1, 2013, Alabama retailers have been able to file and pay all city and county sales, use, and rental taxes using One Spot. For more information about One Spot, visit <http://revenue.alabama.gov/salestax/osleclindex.cfm>.

The use of the One Spot system requires the use of electronic payments. The returns and payments are sent to the local government or their tax administrator.

Remote Sales Tax Remittance

The “Simplified Sellers Use Tax Remittance Act”, codified at Sections 40-23-191 to 199.3, Code of Alabama 1975, allows “eligible sellers” to participate in a program to collect, report and remit a flat 8 percent Simplified Sellers Use Tax (SSUT) on sales made into Alabama. An “eligible seller” is one that sells tangible personal property or a service into Alabama from an inventory or location outside the state and who has no physical presence and is not otherwise required by law to collect tax on sales made into the state. The term also includes “marketplace facilitators” as defined in Section 40-23-199.2(a)(3), Code of Alabama 1975, for all sales made through the marketplace facilitator’s marketplace by or on behalf of a marketplace seller.

The proceeds from the SSUT 8 percent tax are distributed as follows:

- 50% is deposited to the State Treasury and allocated 75 percent to the General Fund and 25% to the Education Trust Fund.
- The remaining 50% shall be distributed 60% to each municipality in the state on the basis of the ratio of the population of each municipality to the total population of all municipalities in the state as determined in the most recent federal census prior to distribution and the remaining 40% to each county in the state on the basis of the ratio of the population of each county to the total population of all counties in the state as determined in the most recent federal census prior to distribution.

The department of revenue will provide a list of SSUT account holders on the website disclosing the start and cease date of participants in the program, as applicable. This list is provided so that the local governments are aware of the taxpayers who fall under the protection of the SSUT Act.

Attorney General's Opinions and Cases

- A self-administered municipality may provide the same or a smaller discount for the collection of sales and use taxes than that provided by the Department of Revenue. The due date for sales taxes must comply with the law. A self-administered municipality may adopt filing and remittance policies similar to those adopted by DOR and may allow taxpayers who are liable for an average of less than \$200 per month during the preceding calendar year, to file sales tax returns on a basis less frequently than quarterly. AGO 1998-209.
- A municipal utilities board created pursuant to Article 9, Chapter 50, Title 11, Code of
- Alabama 1975, is exempt from sales, use and gross receipts taxes in the nature of a sales tax by Section 11-50-322. AGO 1999-007.
- If a municipality's gross receipts tax is in the nature of a sales tax as defined in Section
- 40-2A-3(a) of the Code of Alabama 1975, then Section 40-23-2.1 of the Code of Alabama 1975, prohibits a second municipality from collecting its sales tax on a transaction where a vendor in the first municipality collected and remitted the gross receipts tax from a consumer/purchaser. AGO 2002-115.
- If an out-of-state company does not have a physical presence in a county or in the state of
- Alabama, then the county or state cannot subject that company to local sales or use taxes. AGO 2001-165.
- The Alabama Court of Civil Appeals held that the state is entitled to an injunction
- preventing a business from operating until delinquent

sales taxes are paid. In this case the owner did not pay taxes when due and there was no evidence of any reason to justify his failure to pay the tax. *State v. Lewis*, 832 So.2d 81 (Ala. Civ. App. 2002).

- A municipality may impose a sales, use, or gross receipts tax upon a waterworks board
- incorporated pursuant to Section 11-50-230, Code of Alabama 1975. AGO 2004-091.
- A city can impose a gross receipts license movie ticket tax pursuant to Section 11-51-
- 200, and this tax can be levied as a general sales tax on places of amusement or entertainment as in Section 40-23-2, Code of Alabama 1975. AGO 2007-107.
- The Local Tax Simplification Act superseded a local act and required the local Tax Board
- to offer an administrative-appeal procedure like that set forth in the Alabama Taxpayers' Bill of Rights. This allowed the taxpayer to pursue an administrative appeal before the time began to run under the local act for filing a notice of appeal in the circuit court. *Pittsburg & Midway Coal Min. Co. v. Tuscaloosa County*, 994 So.2d 250 (Ala.2008).
- Sections 11-51-200 and 11-51-201 of the Code of Alabama prohibit a municipality from
- exempting food from the local sales tax as there is no corresponding exemption of food from the state sales tax levy. AGO 2009-092.
- The City of Boaz, located in Marshall County recently annexed the Town of
- Mountainboro, located in Etowah County. Even though the Town of Mountainboro was annexed by the City of Boaz, the area is still located in Etowah County. Consequently, the Etowah County Commission may still administer and collect a sales tax from areas within the former Town of Mountainboro that are located in Etowah County. AGO 2010-031.
- Section 40-9-25.2 of the Code of Alabama exempts Habitat for Humanity Organizations
- and West Alabama Youth Services, Inc. (WAYS) from "paying state, county, and municipal sales and use taxes" as well as exempting "all property owned and used by the organization" from state, county, and local ad valorem taxation. Accordingly sales made to these organizations and sales made by these organizations are exempt from sales and use tax. AGO 2010-038.
- Alabama's sales and use tax was "another tax" under catch-all subsection of 4-R Act, and

- Alabama’s sales and use tax was subject to challenge under the 4–R Act as “tax that discriminate[d] against a rail carrier, *CSX Transp., Inc. v. Alabama Dept. of Revenue* 131 S.Ct. 1101 (U.S.2011).
- Peanuts provided in a restaurant were “resold” to customers, and, thus, the restaurant
- was not liable for use tax based on its purchase of peanuts in bulk, even though the peanuts were not separately listed and priced on the menu or customers’ bills, rather, the restaurant charged customers for the average incremental cost of peanuts as part of the cost of meals. *Alabama Dept. of Revenue v. Logan’s Roadhouse, Inc.*, 85 So.3d 403 (Ala.Civ.App.2011)
- The sale of admission tickets to the Champions Tour golf tournament, which is conducted
- as a Champions Tour event by PGA Tour, Inc., is exempt from state, county, and municipal sales taxes under section 40-23-5(q) of the Code of Alabama, notwithstanding the incorrect reference in the Code section to “Senior PGA” as “Senior Professional Golfers Association.” AGO 2012-061.
- The Birmingham-Jefferson Civic Center is a governmental entity as defined in Act 2013-
- 205, which is codified in section 40-9-14.1 of the Code of Alabama and is exempt from paying sales and use tax for construction projects. AGO 2014-066.
- The collection fees under section 11-51-203(b) of the Code of Alabama applies only to
- the collection fees on vehicles sold by dealers not licensed in Alabama or by licensed dealers who failed to collect sales taxes at the point of sale and should be collected in the amount specified in section 40-23-107. The collection of fees, generally, under section 11-51-200, et seq. of the Code should be in the graduated amount specified in section 11-51-203(c). AGO 2015-031.
- City’s failure to follow the required administrative procedures of the Alabama Taxpayers’ Bill of Rights and Uniform Revenue Procedures Act (TBOR) prior to suing a limited liability company (LLC) for unpaid municipal sales taxes, business license and occupational taxes deprived the trial court of subject matter jurisdiction over the claim regarding sales tax, but it did not deprive the trial court of subject matter jurisdiction for the claims for the unpaid business license and occupational taxes. *Bonedaddy’s of Lee Branch v. City of Birmingham*, 192 So.3d 1151 (Ala. 2015).
- Local tax is due in the jurisdiction where title to the goods is transferred, which will be at the time of delivery, unless explicitly agreed otherwise. If parties to a retail sales transaction are not using a common carrier for deliver and so agree to allow title to transfer at the place of the sale, then local tax is due in the jurisdiction where the sale takes place. If, however, common carrier is the method of delivery, then local tax is due in the jurisdiction where delivery is completed, regardless of any agreement to allow title to transfer at the place of the sale. AGO 2017-001.
- Pursuant to Section 11-51-204 of the Code of Alabama, a city is authorized to pass an ordinance that is similar to or expressly adopts the provisions in either Section 40-1-2(c) or 40-29-20 of the Code of Alabama, which would authorize the filing of a Certificate of Taxes Due to collect sales and use, but not business license, tax. The city may not use Section 40-1-7 of the Code of Alabama to hold an agent of a company personally liable for the taxes due by the company. AGO 2017-021.

33. License Schedule Ordinance

The League of Municipalities has a proposed Model Licensing Ordinance available upon request that was created with the valuable input of many city attorneys and revenue officers around the state. Although some of the language quoted in this article comes from the model ordinance, this ordinance is merely a suggested approach. Each municipality should evaluate its local needs to arrive at the language it deems appropriate.

The first item to be considered in checking the readiness of a municipal license ordinance is the manner in which it was adopted. The license ordinance should be treated as an ordinance of general and permanent nature. Likewise, an ordinance amending an existing license ordinance should be treated with the same dignity. This means that the procedure prescribed in Section 11-45-2, Code of Alabama 1975, should be followed in adopting the ordinance.

Publication Requirements

Since a license ordinance is an ordinance of general and permanent nature, it must be published pursuant to the requirements of Section 11-45-8, Code of Alabama 1975. Section 11-45-8 (b)(2), Code of Alabama 1975, provides that all ordinances relating to licensing or franchising of businesses may be published in a synopsis form in some newspaper of general circulation published in the municipality provided that the synopsis, at a minimum, includes the following information:

- a. A summary of the purpose and effect of the ordinance.
- b. If the ordinance relates to planning or zoning, a general description of the property or properties affected by the ordinance including the common name by which the property or properties are known and the substance of the ordinance.
- c. If the ordinance relates to the licensing of businesses or the granting of a franchise, the categories of businesses affected by the ordinance and the substance of the ordinance.
- d. The date upon which the ordinance was passed and, if different from the date of publication, the effective date of the ordinance.
- e. A statement that a copy of the full ordinance may be obtained from the office of the city or town clerk during normal business hours.

Except in towns which had a population of less than 2,000 inhabitants as shown by the 1950 federal census, ordinances of a general and permanent nature must be published in some newspaper of general circulation

published in the municipality. “Published” means where the newspaper is put into the mail (put into circulation). If no newspaper is published in the municipality, then the publication requirements are satisfied by posting copies in three public places in the municipality, one of which is the post office or the mayor’s office. Municipalities of less than 2,000 in population by the 1950 federal census may satisfy the publication requirements merely by posting as stated above. For more information about the specific requirements for passing and publishing ordinances, please see the article titled “Municipal Ordinances” in this publication.

Permanent Schedule

A number of municipalities in the past have adopted entire new license ordinances each year even though only minor amendments were made to their old ordinances. The ordinance should be so worded that it provides for the schedule to be in effect for the present year and each successive year thereafter until amended or repealed. This prevents the need to adopt a whole new ordinance each year just to make a few changes which could be made by amendment. Having adopted the ordinance to run from year to year, saves on future publication costs and allows for the ordinance to be printed in quantity for use in future years.

License year

With the passage of the Municipal Business License Reform Act of 2006 (the Act) all municipalities are now required to follow a calendar year with licenses due on January 1st of any given year and expiring on December 31st of that same year. See Section 11-51-90 and 11-51-90.1, Code of Alabama 1975.

Standard License Form

Municipalities must allow taxpayers to use the standard license form set out in the Act to apply for a license. The application form may, however, be altered to incorporate the different business license rates that municipalities are permitted to charge from time to time, and to reflect additional or different instructions to taxpayers that are not inconsistent with this chapter. Section 11-51-90, Code of Alabama 1975.

Penalties

To promote the timely payment of licenses, the ordinance should provide for penalties as allowed by Section 11-51-193, Code of Alabama 1975. Municipalities are authorized to assess a 15 percent penalty on licenses not

paid by due date and 30 percent if not paid within 30 days of due date. These penalties are not cumulative. Further, the law provides that there is no penalty charged if the Taxpayer (TP) can demonstrate reasonable cause.

Reasonable cause means: (1) The death or major illness of or an accident involving a sole proprietor causing serious bodily injury that in either case resulted in the sole proprietor being unable to purchase the license or operate his or her business during the 10 days preceding the due date; (2) natural disaster, fire, explosion, or accident that caused the closing or temporary cessation of the business of the taxpayer during the 10 days preceding the due date, or; (3) reliance on the erroneous advice of an employee or agent of the revenue department of the taxing jurisdiction or its designee given in writing or by electronic mail.

A municipality may waive the penalty for other reasons, including, but not limited to, the taxpayer's reliance on erroneous but good faith advice from its tax adviser or on erroneous, oral advice from an employee or agent of the revenue department of the taxing jurisdiction or its designee.

The burden of proving reasonable cause is on business owner, and a determination by the taxing jurisdiction that reasonable cause does not exist shall be reversed only if that determination was made arbitrarily and capriciously.

Part Year Licenses

A license ordinance should provide for licenses issued to new businesses during the year. Section 11-51-92, Code of Alabama 1975, provides that "In case the license of any business, trade, occupation, or profession is based on a flat rate and is taken out after July 1, only one half of the license shall be charged and collected, except for those subjects for which daily, weekly, monthly, quarterly, or semiannual licenses are provided by law." The League's Model License Ordinance provision states:

"Half Year. Every person who commences business on or after July 1, and whose annual license is based on a flat rate, shall be subject to and shall pay one-half the annual license for such business for that calendar year."

Issuance Fee

Section 11-51-90, Code of Alabama 1975, authorizes municipalities to collect a license issuance fee not exceeding ten dollars. This statutory provision is not self-executing. Therefore, municipalities should include a provision requiring the issuance fee in license ordinances. This issuance fee can help pay the cost of administering the collection of licenses.

The Alabama Department of Revenue shall increase the issuance fee every five license years by an amount equal to the percentage increase, if any, in the U.S. Department of Labor's Producer Price Index during that five-year period,

rounded to the nearest dollar, with the base year being 2006. The Department of Revenue shall notify all municipalities and the Alabama League of Municipalities of any such fee increase no later than the November 30th preceding the license year for which the increase shall take effect.

The failure of the Department of Revenue to so notify all municipalities and the Alabama League of Municipalities shall not, however, prohibit a municipality from increasing the issuance fee, if any increase is otherwise due pursuant to this subsection. A reasonable projection of the Producer Price Index for the months of November and December of the fifth year of the test period may be employed in this calculation.

Small Vendor License

Pursuant to Section 11-51-90(a)(4), Code of Alabama 1975, municipalities may, **but are not required**, to establish a small vendor business license in their ordinance. In order to qualify as a small vendor, the following criteria must be met:

- a. The taxpayer purchased a business license from the municipality with respect to the preceding license year and made a sale or provided services within the municipality thereof during each calendar quarter of the preceding license year.
- b. The taxpayer's gross receipts derived from within the municipality for the preceding license year did not exceed fifteen thousand dollars (\$15,000).
- c. The taxpayer did not qualify for the special delivery license provided for by Section 11-51-194, Code of Alabama 1975.

Delivery License

Section 11-51-194, Code of Alabama 1975, requires municipalities to establish a special delivery license allowing certain out-of-town taxpayers to make deliveries into the municipality and police jurisdiction. The purchase of the special delivery license permits businesses with no physical presence in the municipality or its police jurisdiction to deliver merchandise into the police jurisdiction or municipality without having to purchase any other license for delivery. The amount of the license cannot exceed \$100.00 for the business, although this amount may be adjusted every five years based on the standard set out in Section 11-51-90, Code of Alabama 1975. A municipality may charge a taxpayer an issuance fee for a business delivery license not to exceed \$10.

In order to qualify for the special delivery license fee, the gross receipts from all deliveries into the municipality or its police jurisdiction must exceed ten thousand dollars (\$10,000) during the preceding license year, and the

taxpayer must have no other physical presence within the municipality or its police jurisdiction during the year. If deliveries exceed \$75,000, the taxpayer does not qualify for this special license and would instead, need to purchase a regular business license. The delivery license shall be calculated in arrears, based on the related gross receipts during the preceding license year.

. At its discretion, a municipality may, by ordinance, increase the amount of permitted deliveries up to \$150,000. Again, this figure may be revisited every five years based on the standards contained in Section 11-51-90. Common carriers, contract carriers, or similar delivery services making deliveries on behalf of others do not qualify for the delivery license.

Delivery includes any requisite set-up and installation. To be included, set-up or installation must be required by the contract between the taxpayer and the customer or be required by state or local law. In addition, any set-up or installation must relate solely to the merchandise that is delivered. If the taxpayer or the taxpayer's agents perform set-up or installation that does not qualify under this definition, the taxpayer must pay any required license fee rather than the delivery license.

Municipalities may, by ordinance, require the taxpayer to purchase a decal for each delivery vehicle that will make deliveries within the municipality or its police jurisdiction. The charge for such decal cannot exceed the municipality's actual cost.

If the taxpayer fails to meet the criteria that qualify him or her for the special delivery license at any time during the license year, the taxpayer must within 45 days of the failure purchase a delivery license and all other appropriate licenses for the entire license year.

NAICS Sectors

Municipalities are required to apply the 2002 North American Industrial Classification System ("NAICS") sectors to define businesses in their municipality – **Each municipality still sets its own rates.** (NOTE: Rates that are restricted under the Code of Alabama for certain businesses are still restricted.). Section 11-51-90.2, Code of Alabama 1975.

If a Taxpayer is doing more than one type business at a single location, the taxpayer pays a license fee for each category it derived more than 10 percent of its gross receipts during the preceding license year. (NOTE: Municipalities may, in their ordinances, increase this amount up to 35%.) taxpayers are taxed only on gross receipts which arise within the line of business which is the subject of the license. No portion is untaxed, though. All receipts not accounted for otherwise are taxed at rate charged for the primary business.

Municipalities can use subcategories under the NAICS system except for bank holding companies and utilities, which are taxed separately. Whether to issue a business license is a factual determination that may only be made by the city. Under section 11-51-90.2(c)(1) of the Code of Alabama, a city may amend its business license classification ordinance for a business not specifically classified by creating a subcategory within a classification applying generally to that business. AGO 2010-059

Branch Office Rule

Section 11-51-90(b), Code of Alabama 1975, provides that a taxpayer engaged in business in more than one municipality, shall be permitted to account for its gross receipts so that the part of its gross receipts attributable to one or more branch offices will not be subject to the business license tax imposed on the principal business office required to obtain a business license. Branch office gross receipts are those receipts that are the result of business conducted at or from a qualifying branch office.

To establish the existence of a qualifying branch office, the taxpayer shall meet all the following criteria:

1. Demonstrate the continuing existence of an actual physical facility located outside the police jurisdiction of the municipality in which its principal business office is located, such as a retail store, outlet, business office, showroom, or warehouse, to which employees or independent contractors, or both, are assigned or located during regular normal working hours.
2. Maintain books and records which reasonably indicate a segregation or allocation of the taxpayer's gross receipts to the particular facility or facilities.
3. Provide reasonable proof that separate telephone listings, signs, or other indications of its separate activity are in existence.
4. Billing or collection activities, or both, relating to the business conducted at the branch office or offices are performed by an employee or other representative of the taxpayer who has such responsibility for the branch office, whether or not the representative is physically located at the branch office.
5. All business claimed by a branch office or offices must be conducted by and through the office or offices.
6. Supply proof that all applicable business licenses with respect to the branch office or offices have been issued.

A business license is not required for a person traveling through a municipality on business if the person is not operating a branch office or doing business in the

municipality. Section 11-51-90.2(a)(3), Code of Alabama 1975.

Notification of Renewals for Existing Licensees

Municipalities must notify taxpayers when it is time to renew their licenses. Section 11-51-90(d), Code of Alabama 1975. Each municipality shall mail or otherwise transmit a renewal reminder notice to each taxpayer that purchased a business license during the preceding license year, via regular U.S. mail addressed to the taxpayer's last known address, on or before December 31 of the current license year. The failure of the municipality to comply with the preceding sentence shall not, however, preclude it from enforcing its business license tax laws against a taxpayer but shall preclude the municipality from assessing any fines or penalties otherwise due for late payment until 10 days after a renewal reminder notice has been mailed to the taxpayer at its last known address as indicated in the municipality's records, or personally delivered to the taxpayer, and the taxpayer then fails or refuses to remit the business license tax due for such license year within the 10-day period.

If the municipality mails a renewal reminder notice to the last known address of the taxpayer, as indicated in the municipality's records, there shall exist a presumption that the municipality has complied with state law. A municipality shall not be precluded from assessing fines and penalties otherwise due for late payment if the taxpayer does not notify the municipality of a change in address within 90 days after changing such address.

Taxpayers shall notify the taxing jurisdictions in which they do business of a change of mailing address within 90 days after changing such address. In like manner, taxpayers shall notify the taxing jurisdictions in which they do business of a change in their federal employer identification number or Department of Revenue taxpayer identification number within a reasonable time after such number is changed.

A city may deliver the renewal reminder notice required under the provisions of the Alabama Municipal Business License Reform Act of 2006 by means other than via the U.S. mail. Should the required renewal reminder notice be transmitted other than by use of the U.S. mail, the city would be precluded from assessing any fines or penalties otherwise due for late payment until proof of actual delivery has been achieved, and the city would not be entitled to the statutory presumption of compliance with delivery where the U.S. mail is not utilized. AGO 2009-045

Transfer of Licenses

No license shall be transferred except with the consent of the council or other governing body of the municipality or of the director of finance or other chief revenue officer or his or her designee, and no license shall be transferred to

reflect a physical change of address of the taxpayer within the municipality more than once during a license year and never from one business one taxpayer to another. Section 11-51-192, Code of Alabama 1975.

A mere change in the name or ownership of a taxpayer that is a corporation, partnership, limited liability company or other form of legal entity now or hereafter recognized by the laws of Alabama shall not constitute a transfer for purposes of this chapter, unless (1) the change requires the taxpayer to obtain a new federal employer identification number or Department of Revenue taxpayer identification number or (2), in the discretion of the municipality, the subject license is one for the sale of alcoholic beverages. Nothing prohibits a municipality from requiring a new business license application and approvals for an alcoholic beverage license.

Statements and Audits

The amount of the license fee is established for many classifications on the basis of gross receipts for the previous year, inventory or amount of capital employed in the business. To ensure proper payment and administration, a municipality should require the licensee to render to the clerk a sworn statement of such sales, inventory or capital employed. Furthermore, the clerk should be authorized to perform audits of licensees' records and require other proof when necessary. This power is authorized by Section 11-51-90, Code of Alabama 1975, but the municipality must exercise the power through ordinance provision. The ordinance should be closely inspected to see that the clerk has adequate power in this respect. If the municipality has not authorized the clerk to administer oaths by separate ordinance, that authority should be given in keeping with Section 11-43-5 of the Code of Alabama 1975.

Adjusting Fees

If the ordinance levies the fee on the basis of gross receipts of the business during the preceding year, a provision should be included for new businesses and the amount of the fee that shall be paid. If you use gross receipts as a basis for determining the license fee owed, the taxpayer must use the previous year's receipts for determining the amount owed for the present year's license. If a taxpayer is new to the municipality, he or she is required to project the amount of gross receipts for the remainder of the year and purchase a license based on that projection. The idea is that at the end of that year, the city and the taxpayer will know the actual gross receipts and can base the next year's license on the partial year's gross receipts by obtaining a monthly average based on the actual number of months the taxpayer was in business and multiplying that average by 12. If, at the end of the year, it is determined that the

taxpayer incorrectly projected his or her gross receipts, then the amount of gross receipts (and, theoretically depending on the range of gross receipts used, the amount of the license owed) must be adjusted up or down for the next year by the amount of the difference. See Section 11-51-90.2(c), Code of Alabama 1975.

Bear in mind that in many cases, this won't make much difference in the amount of the license fee. Gross receipts licensing isn't an actual percentage of amount earned. Instead, gross receipts set a range to determine how much the taxpayer owes. In other words, someone who earns from \$1.00 to \$100,000 may pay one amount. Someone who earns over \$100,000 may pay a different amount. But the amount due would not vary within those ranges. Below is a simplified example:

New Business:

Book store opens on June 1. This is the middle of the license year. Taxpayer (TP) estimates projected gross receipts for the remainder of the year of \$12,000. She buys a license based on this amount.

Year One:

Scenario 1: If the TP actually made \$12,000, it is easy. \$12,000 divided by 6 months of operation is \$2,000/month. \$2,000/month multiplied by 12 is \$24,000. The new license would be based on \$24,000.

Scenario 2: Let's assume TP overestimated gross receipts by \$6,000, so that she actually earned \$6,000 rather than \$12,000. Remember that TP's license fee is based on the previous year's gross receipts. The problem here is that you have to account for the overestimation by crediting TP for that amount. This would be done, in the League's opinion, by adjusting the amount of their gross receipts accordingly. You make the same computation above using \$6,000 as your basis: \$6,000 divided by 6 months of operation is \$1,000/month. \$1,000/month multiplied by 12 is \$12,000. The new license would be based on \$12,000, except you were overpaid for the license the previous year.

The law provides that the gross receipts used in calculating the "business license tax liability for the following license year shall be increased or decreased, respectively, by the amount of the difference." The League reads this to mean that you have to adjust the gross receipts by the amount of the difference to determine the license owed. In other words, the Year One license would be based on adjusted gross receipts of \$6,000.

Scenario 3: Let's assume TP underestimated gross receipts and actually earned \$18,000 rather than \$12,000. You have to account for this difference by including the amount of the underestimation in TP's gross receipts. In this case, you compute gross receipts using \$18,000 as

your basis: \$18,000 divided by 6 months of operation is \$3,000/month. \$3,000/month multiplied by 12 is \$36,000. The new license would be based on \$36,000, except you were underpaid for the license the previous year.

Again, the law provides that the gross receipts used in calculating the "business license tax liability for the following license year shall be increased or decreased, respectively, by the amount of the difference." The League reads this to mean that you have to adjust the gross receipts by the amount of the difference to determine the license owed. In other words, the Year One license would be based on adjusted gross receipts of \$42,000.

Year Two and Further:

Now it is easy because you know the actual amount TP earned in Year One. You base the amount owed on the gross receipts earned in Year One, with no adjustment.

Bear in mind that the Act also provides that nothing prohibits:

Allowing or requiring a taxpayer to purchase a minimum business license with respect to the short license year following 90 days of operations in the municipality, based on the amount which bears the same relationship to the actual amount of gross receipts during such preceding license year as the entire license year bears to the number of days during which the taxpayer was operating during such preceding license year. If the taxpayer did not commence operations until after the first day of the calendar year, the municipality may by ordinance require the taxpayer to remit the business license tax at the end of such 90-day period, or on December 31 of the current license year, whichever occurs first.

Taxpayer Bill of Rights (TBOR)

Division 5, Article 2, Section 51 of Title 11, Code of Alabama 1975 (Section 11-51-186 et seq.), establishes a TBOR for licenses. These are assessed and collected in the same manner as sales and use taxes.

TBOR includes confidentiality of information on tax returns. Nothing prohibits the disclosure, upon request, of the fact that a taxpayer has or has not purchased a business license or of the name and address of a taxpayer purchasing or renewing a business license from the municipality. Section 11-51-196, Code of Alabama 1975. Statistical information pertaining to taxes may be disclosed to the municipal governing body upon their request. Any person willfully violating the provisions of this section shall, for each act of disclosure, have committed a Class A misdemeanor.

The governing body of a municipality may adopt from time to time an ordinance consistent with Section 40-2A-10(d) to permit the exchange of business license information between and among the municipality and other

municipalities adopting similar ordinances or between county and state governments, subject to the confidentiality restrictions imposed by this section.

Records

To facilitate future license administration, it is recommended that the ordinance include a provision requiring the clerk to keep a full list of all the persons doing business in the city and subject to a license and to enter all amounts collected for licenses in a well-preserved book kept for that purpose. In addition, it is a good idea to require that a separate listing be kept of all businesses according to license classification with the amounts collected from such classifications. This gives a ready reference to those who have complied with license requirements in each classification and aids in the revision of fees in future years.

Exemptions

There are numerous exemptions and limitations on municipal license power set out in the Code of Alabama. For more information on this, please see article titled “License Exemptions and Limitations” in this publication.

It is within the authority of a municipality to require persons claiming such exemptions to provide the clerk with satisfactory evidence that they meet the statutory conditions which entitle them to such exemptions. A number of cities, in their license ordinances, have provided authority for the clerk to prescribe and require the affidavits to be filed with the municipality before such exemptions are granted. Some ordinances go so far as to set out the affidavit to be used. This is a matter left to the discretion of the council.

Reserve Power to Amend

While it is generally understood that a municipality has the power and authority to amend its license schedule at any time, many municipalities include in their license ordinances a provision similar to the following: “The adoption of this schedule of licenses shall not abridge the right of the city council to change, alter, increase or decrease any of the license fees at any time; nor shall it abridge the right of the city council to require a license for any business, occupation, traffic, calling or profession not included in this schedule.”

Violations

The ordinance should provide that it shall be unlawful (1) for any person to knowingly or willfully make or exhibit any false written affidavit, certificate or statement as to the basis upon which a license is issued for the purpose of defrauding the city by avoiding the payment of a license or for procuring a license for a less sum than is lawfully due by such person or his principal, and (2) for any person to

engage in or carry on any business or to do any act within the corporate limits or within the police jurisdiction of the city for which a license is required by this ordinance without first having taken out such license as provided.

Furthermore, the ordinance should state that any person violating any of the provisions of the ordinance or doing any act made unlawful by the terms therein shall, upon conviction in any case, be fined not more than \$500 and may also be sentenced up to six months in prison, either or both, at the discretion of the court trying the case.

For more discussion on violations and license enforcement, please see the article “License Enforcement” in this publication.

Agents

While not absolutely necessary, it is a good idea to specifically provide in the ordinance that agents shall be responsible for doing business of their principals without a license. A provision of this nature might read as follows: “The agents or other representatives of non-residents who are doing business in this city shall be personally responsible for the compliance with this ordinance of their principals and of the business they represent.”

Construction

It is generally understood that where there is any conflict between two ordinances the provisions of the latter ordinance shall prevail. For this reason, it is usually safe for a municipality to specifically provide in its license ordinance that it is not intended to, nor shall it, repeal such special license ordinances (such as the gasoline license ordinance, cigarette license ordinance, gross receipts sales tax license, and amusement license ordinance) as might be listed. This is a point which should be checked carefully.

The License Levy

While there are many ways in which the actual license levy may be worded, the following from the model ordinance is very specific:

“Pursuant to the *Code of Alabama*, the following is hereby declared to be and is adopted as the business license code and schedule of licenses for the municipality for the year beginning January 1, 20__, and for each subsequent year thereafter. There is hereby levied and assessed a business license fee for the privilege of doing any kind of business, trade, profession or other activity in the municipality, or the police jurisdiction, by whatever name called.

Note that this provision very specifically requires the license and definitely levies it.

Police Jurisdiction Levy

The basic authority for municipalities to license businesses operating in the corporate limits is found at Section 11-51-90, Code of Alabama 1975, and has been upheld many times by the Alabama Supreme Court. *See, Evers v. Dadeville*, 61 So.2d 78 (1952); *Estes v. Gadsden*, 94 So.2d 744 (1957), *Mobile Battle House v. Mobile*, 78 So.2d 642 (1955).

Section 11-51-91, Code of Alabama 1975, authorizes municipalities to license businesses operating within the police jurisdiction of the municipality. The court has sustained the constitutionality of this section. *Birmingham v. Wilson*, 172 So. 292 (Ala. 1936). The court has held that such ordinances are presumptively valid. *Atlantic Oil Co. v. Steele*, 214 So.2d 331 (Ala. 1968).

The amount of the license charged in the police jurisdiction must not exceed the cost of providing services to the area and in no instance may the amount exceed one-half the amount charged similar businesses operating in the corporate limits. In the case of *Hueytown v. Burge*, 342 So.2d 339 (1977), the Alabama Supreme Court ruled that the city must make an effort to relate the amount of the license revenues collected in the police jurisdiction to the cost of providing services to the area. Also, Section 11-51-91 of the Code specifically states that the amount of the license fees collected from businesses in the police jurisdiction cannot exceed the cost of providing services to the police jurisdiction as a whole. The League suggests that municipalities determine this fact on an annual basis. A city's reliance on an audit conducted six years prior to its enactment of an ordinance imposing an annual business-license tax on every business located within its police jurisdiction was sufficient to satisfy the requirements of Section 11-51-91, Code of Alabama, and, thus, the city was not required to do a more extensive analysis to determine that it spent more on municipal services than it collected on license taxes. *Ex parte City of Mobile*, 37 So.3d 150 (Ala.2009)

Care should be taken to ensure that the licenses intended for businesses in the police jurisdiction are specifically levied. The model ordinance states:

“Any person, firm, association, or corporation engaged in any business outside the municipality but within the police jurisdiction hereof shall pay one-half of the amount of the license imposed for like business within the municipality.”

In order for an ordinance adopted after September 1, 2015, to have force and effect in a police jurisdiction of a municipality or town, the municipal governing body shall provide a 30-day notice that the ordinance shall be effective in the police jurisdiction. The notice given shall be the same as required for adoption of an ordinance under

Section 11-45-8. Additionally, if available at no cost to the municipality, the notice shall be submitted to the Atlas Alabama state website or any successor state-operated website providing information to businesses. No ordinance adopted after September 1, 2015, may be enforced against an individual or entity in the police jurisdiction affected by the ordinance until and unless the municipality has complied with the notice requirements provided for in this section. Section 11-40-10(b), Code of Alabama 1975. No ordinance adopted after September 1, 2015, may be enforced against an individual or entity in the police jurisdiction affected by the ordinance until and unless the municipality has complied with the notice requirements provided for in this section. Section 11-40-10(d), Code of Alabama 1975.

Miscellaneous Provisions

In addition to the foregoing provisions, a general survey of ordinances which have been adopted by Alabama cities and towns reveal a number of miscellaneous provisions. These include definitions of specific words and phrases used in the ordinance; provisions that no refunds shall be made on licenses unless the amount collected is in excess of the amount prescribed by the ordinance; provisions that a license issued in return for a check shall not be valid or effective until the check is honored by the drawee; provision for the licensee to file bond with the clerk in certain instances; provision that nothing in the ordinance shall be construed to levy a license for the privilege of engaging in interstate commerce. In *M & Associates, Inc. v. Irondale*, 723 So.2d 592 (1998), the Alabama Supreme Court held that a license tax was not internally consistent and therefore could not be used to base the license on the company's interstate sales. **Note:** This case does not hold that a municipality may not use interstate sales to determine gross receipts, provided that the municipality's nexus with the municipality is sufficient. In *Mobile Marine Radio v. Mobile*, 719 So.2d 213 (1997), the Alabama Court of Civil Appeals held that Mobile's license ordinance allowed a business to deduct portions of its business that are conducted in interstate commerce from the computation of its gross receipts taxes owed.

Severability Clause

In keeping with good ordinance construction, it is generally provided in the license ordinance that: “If for any reason, any clause, sentence, section, subsection, schedule, part of schedule or provision of this ordinance, or the application thereof to any person or any circumstance, is held invalid or inoperative, the remainder of the ordinance and the application thereof to other persons or circumstances shall not be affected thereby.” There are a number of different wordings for such severability clauses.

This is only one example. The point is that such a clause should be included in the ordinance.

Effective Date

In closing the ordinance, a provision usually sets forth the effective date, such as: “The ordinance shall become effective immediately upon its adoption and publication as required by law.” After adoption the duty rests with the clerk to see that it is signed by the presiding officer of the council, which he or she shall attest, or by the mayor if the city is over 12,000 in population. Then the clerk must see that the publication requirements are met and that the original of the ordinance is placed in a well-bound ordinance book with the certificate of publication.

Refunds

The Municipal Business License Reform Act provides specific procedures for refunds. *See*, Section 11-51-191(g), Code of Alabama 1975. Any taxpayer may file a petition for refund with the municipality for any overpayment of business license tax erroneously paid. If a final assessment for the tax has been entered by the taxing jurisdiction, a petition for refund of all or a portion of the tax may be filed only if the final assessment has been paid in full prior to or simultaneously with the filing of the petition for refund. For more information on preliminary and final assessments of licenses, please see the article titled “*License Enforcement*” in this publication.

A petition for refund must be filed with the municipality within three years from the date that the business license form was filed, or two years from the date of payment of the business license tax which is the subject of the petition, whichever is later, or if no form was timely filed, two years from the date of payment of the business license tax.

A municipality must either grant or deny a petition for refund within six months from the date the petition is filed, unless the period is extended by written agreement of the taxpayer and the municipality. The taxpayer shall be notified of the municipality’s decision concerning the petition for refund by first class U.S. mail or by certified U.S. mail, return receipt requested, sent to the taxpayer’s last known address.

If a municipality fails to grant a full refund within the time provided herein, the petition for refund shall be deemed to be denied. If the petition is granted, or the municipality or a court otherwise determines that a refund is due, the overpayment shall be promptly refunded to the taxpayer by the municipality, together with interest to the extent provided in Section 11-51-192, Code of Alabama 1975. If a municipality or court determine that a refund is due, the amount of overpayment plus any interest due thereon may first be credited by the municipality against any outstanding

final tax liabilities due and owed by the taxpayer to the municipality, and the balance of any overpayment shall be promptly refunded to the taxpayer. If any refund or part thereof is credited to any other tax by the municipality, the taxpayer shall be provided with a written detailed statement showing the amount of overpayment, the amount credited for payment to other taxes, and the amount refunded.

A taxpayer may appeal from the denial in whole or in part of a petition for refund by filing a notice of appeal with the clerk of the circuit court of the county in which the municipality denying the petition for refund is located by filing the notice of appeal within two years from the date the petition is denied. The circuit court shall hear the appeal according to its own rules and procedures and shall determine the correct amount of refund due, if any. If an appeal is not filed with the appropriate circuit court within two years of the date the petition is denied, then the appeal shall be dismissed for lack of jurisdiction.

In the discretion of the governing body of a municipality, by ordinance duly adopted, the provisions for refunds under Section 11-51-191(g) may also be applied to one or more of its other taxes not already governed by the Alabama Taxpayers’ Bill of Rights and Uniform Revenue Procedures Act, Chapter 2A, Title 40, Code of Alabama 1975.

Important Attorney General’s Opinions and Court Cases on Licensing Power

(NOTE: Many of the opinions and cases cited herein were decided prior to the adoption of the Municipal Business License Reform Act of 2006 – Act 2006-568. These opinions and cases must be reviewed carefully prior to reliance on their holdings.)

- A contractor of a church, government building or school is not required to obtain a business license pursuant to an ordinance applying to “builders of commercial or industrial buildings.” AGO 1988-409.
- Municipalities may impose business licenses on real estate agents who list and offer to sell property within the municipal limits, even though the agent has no office within the municipality. AGO 1989-380.
- Section 5-17-24, Code of Alabama 1975, exempts credit unions from purchasing a business license. AGO 1990-197.
- A municipality may revoke an improperly-issued business license, but the municipality may be subject to a lawsuit by the licensee if he or she has relied to his or her detriment on having the license. AGO 1990-288.
- Agricultural products cease to be farm products for purposes of the farmer’s exemption in Section 11-51-105, Code of Alabama 1975, when they are not directly

produced and sold by farmers or others engaged in the production of farm products or when the products have been substantially processed, or commercially bottled, packaged or sold. Sale or distribution of farm products encompasses the delivery by the farmer of the farm products to a wholesaler or retailer so as to exempt this process from licensing. AGO 1990-296.

- A municipality may license both the sale of gas under Section 11-51-129, Code of Alabama 1975, and the separate act of transportation of gas under Section 11-51-90. AGO 1990-392.
- A municipality may not require an attorney to purchase a business license unless he or she maintains an office within the municipality. AGO 1990-399.
- Agricultural cooperatives qualified and permitted under Article 4, Chapter 10, Title 2, Code of Alabama 1975, are exempt from purchasing municipal privilege licenses. AGO 1992-031.
- In *American Bankers Life Assurance Company of Florida v. Birmingham*, 632 So.2d 450 (1993), the Alabama Supreme Court held that the fact that American Bankers does not have an office in Birmingham does not preclude the city from levying its license tax upon American Bankers. Merely transacting business within the city will suffice to subject American Bankers to the tax authorized by Section 11-51-90 (b), Code of Alabama 1975.
- A municipality can impose on businesses located within its corporate limits a license fee based upon the gross receipts of those businesses despite the fact that some of those receipts are derived from transactions conducted outside the city's corporate limits. *Tuscaloosa v. Tuscaloosa Vending Co.*, 545 So.2d 13 (Ala. 1989).
- A city may require a sworn statement of gross receipts from a professional who seeks to pay less than the maximum license fee. AGO 1994-223.
- A city may not license engineering or land surveying firms not having a place of business in the city unless the firms provide professional services in the city on a regular and continuing basis. AGO 1995-135.
- A separate utility board incorporated under Sections 11-50-310, et seq., Code of Alabama 1975, is not exempt from a municipal license fee imposed on water works companies. AGO 1996-209.
- An official pardon from the Board of Pardons and Paroles restores full civil rights to an individual, who may then apply for and receive a state-issued occupational license. AGO 1996-297.
- If a business processes seafood at one location solely for sale at a separate location, the business owes only one retail business license. AGO 1997-009.
- A court might determine that a proposed regulation prohibiting certain vendors from opening up on private property during a street fair while allowing others does not further a legitimate municipal interest. AGO 1997-085.
- The First Amendment does not prevent a municipality from charging a newspaper a reasonable business license, if a sufficient nexus exists for the newspaper to become subject to municipal licensing. AGO 1996-204.
- Property of a health care authority created under Section 22-21-310, et seq., Code of Alabama 1975, is exempt from the payment of municipal license and permit fees. AGO 1996-201.
- Where a municipality acts as its own contractor pursuant to Section 34-8-7, Code of Alabama 1975, the municipality must use licensed subcontractors if the project will cost \$20,000 or more. If the municipality elects to use a general contractor to oversee the project, subcontractors do not have to be licensed. In either case, subcontractors whose work does not exceed \$20,000 are exempt from the licensing requirements. AGO 1997-053.
- In *Bah v. Atlanta*, 103 F.3d 964 (1997), the Eleventh Circuit Court of Appeals upheld Atlanta's imposition of a dress code on licensed drivers of vehicles for hire against an equal protection claim.
- In *AT&T Communications v. State Department of Revenue*, 677 So.2d 772 (1995) the Alabama Court of Civil Appeals held that access charges paid by AT&T to local exchange carriers represents a cost of doing business for AT&T and, thus, may not be deducted from AT&T's gross receipts license tax base.
- Following a reversal by the U.S. Supreme Court, the Alabama Supreme Court remanded this case, involving a county occupational tax, back to the trial court for a hearing on the merits of the case. *Jefferson County v. Richards*, 805 So.2d 690 (Ala. 2001).
- In *Millbrook v. Tri-Community Water System*, 692 So.2d 866 (1997), the Alabama Court of Civil Appeals held that a corporation which maintains and operates a system to provide water to its members and not to the general public is not a public utility subject to the municipality's business license tax.
- A municipality may require a gas district who is doing business within the municipality to purchase a privilege license and/or a franchise. AGO 1997-125.

- Payment of a license fee by an insurance company assessed pursuant to Section 11-51-121, Code of Alabama 1975, enables it to do business in the municipality by its agents, who are not required to buy an additional license to represent the company. AGO 1998-025.
- A municipality may not impose a business license fee on an auctioneer or an auction company licensed by the state. AGO 1998-035.
- In *M & Associates, Inc. v. Irondale*, 723 So.2d 592 (1998), the Alabama Supreme Court held that a license tax was not internally consist, and therefore could not be used to base the license on the company's interstate sales. **Note:** This case does not hold that a municipality may not use interstate sales to determine gross receipts, provided the municipality's nexus with the municipality is sufficient.
- In *Mobile Marine Radio v. Mobile*, 719 So.2d 213 (1997), the Alabama Court of Civil Appeals held that Mobile's license ordinance allowed a business to deduct portions of its business that are conducted in interstate commerce from the computation of its gross receipts taxes owed.
- The Eleventh Circuit held that Jefferson County's occupational tax cannot be assessed against federal judges. *Jefferson County, Ala. v. Acker*, 137 F.3d 1314 (11th Cir. 1998).
- The United States Supreme Court has upheld the assessment of Jefferson County's occupational tax against federal judges. *Jefferson County, Ala. v. Acker*, 527 U.S. 423 (1999).
- In *R. Mayer of Atlanta, Inc. v. Atlanta*, 158 F.3d 538 (1998), the Eleventh Circuit Court of Appeals held that federal law preempts municipal licensing of consensual towing services.
- A municipality may impose a license fee on property owners who lease real property in the municipality and on managers or agents employed by the owner to lease property if the municipality determines that this activity is a business. AGO 1999-143.
- The Utilities Board of the City of Oneonta is required to pay a city license tax of three percent of the total revenue collected by the Utilities Board. AGO 1999-275.
- In *Mobile v. Vasilios Simpsiridis* 733 So.2d 378 (1999), the Alabama Supreme Court upheld a lower court ruling that the denial of a liquor license was arbitrary and capricious because the facts did not justify the denial.
- A company that supplies baby chickens to farmers, pays the farmers for their service, and later collects and processes the chickens to various retailers is not exempt from purchasing a business license under Section 11-51-105 of the Code of Alabama. AGO 2000-120.
- A property owner who allows, without compensation, the placement of motor vehicles upon his property for the purposes of advertising the vehicles for sale need not be licensed as an automobile dealer, as defined under Section 40-12-390(11), Code of Alabama 1975. AGO 2001-74.
- Section 11-51-90, Code of Alabama 1975, allows, but does not require, a city to impose a license tax on a utility corporation. A municipal utilities board is not exempt from the business license imposed by another municipality upon gas and water distributions in that municipality unless specifically exempt in the ordinance levying the license. The municipality must have a validly enacted ordinance imposing a license tax and it must be applied uniformly. AGO 2002-200. **Note:** Statutes creating certain boards exempt them from paying any license fees.
- The gross receipts tax or privilege tax paid by a cable company is not the type of sensitive proprietary information that Alabama law protects. Therefore, a city may divulge the amount of privilege or license tax paid to a city by a cable company. AGO 2003-052.
- A pharmacist or apothecary is not a person "engaged in the practice of medicine" under section 40-12-126 of the Code of Alabama. Therefore, a municipal or county government is not limited by this statute in the amount the governing body may charge an apothecary or pharmacist for a business license. AGO 2008-028.
- Montgomery County Circuit Court was the only proper venue for a foreign corporation's appeal from the denial of a refund petition by a Jefferson County municipality, where the corporation had no principal place of business in Alabama. *Ex parte Tellabs Operations, Inc.* 84 So.3d 53 (Ala.2011).
- A municipality may require a business engaged in "Truck Transportation" to pay a license fee based on all of the gross receipts of the business from whatever source derived when the business is not required to purchase a business license from any other municipality and the only physical location for that business is located within the municipal limits or its police jurisdiction. AGO 2012-054.
- An appeal by a property owner whose application for a liquor license was denied based on the claim that

the city failed to provide it with equal protection was moot since it did not include a claim for damages under federal law. *Brazelton Properties, Inc. v. City of Huntsville*, 237 So.3d 209 (Ala.Civ.App. 2017).

- If the city does not levy and collect license fees in its police jurisdiction, it may seek to collect insurance proceeds from applicable policies held by individuals who reside in the police jurisdiction pursuant to the costs of fire, emergency management services (“EMS”), hazardous material, and rescue services rendered by the city’s fire department. Because the city levies and collects taxes to fund the services of its fire department, the city may not seek to collect insurance proceeds from applicable policies held by individuals who reside in the corporate limits pursuant to the costs of EMS, hazardous material, and rescue services rendered by the fire department. The city is not allowed to collect insurance proceeds from applicable policies held by commercial/industrial occupants located in the corporate limits pursuant to the costs of hazardous material mitigation or remediation because the city collects taxes and fees to fund these services. If the city does not levy and collect license fees in its police jurisdiction, it may collect insurance proceeds from applicable policies held by commercial/industrial occupants located in the police jurisdiction pursuant to the costs of hazardous material mitigation or remediation. AGO 2019-012.
- A city, by ordinance, may cease requiring building permits for construction. A county commission may require permits in the corporate limits if the city council consents for the county to apply its building codes. AGO 2019-023.

34. License Exemptions and Limitations

Authority to charge license fees is granted by Section 11-51-90, Code of Alabama 1975. Section 11-51-90 is a broad grant of power to license any trade, business or occupation conducted in the city limits. Unless limited by the Legislature, the amount of the license tax is at the discretion of the council. Where the power to tax has been granted by the state without limitation, it includes all taxing power possessed by the state. *Hackleburg v. Northwest Alabama Gas Dist.*, 170 So.2d 792 (Ala. 1964). A number of limitations and exceptions have been granted by the Legislature. This article examines these restrictions on municipal power.

Reasonableness

As with all municipal ordinances, licensing ordinances are presumed valid. Courts will defer to the council unless it abuses its power in some way. For instance, a court will invalidate a license when the amount of the license is unreasonable. A license can be either for police power (regulation) or to raise revenue, but it cannot be used to prevent legitimate businesses from operating. *American Bakeries Co. v. Huntsville*, 168 So. 880 (Ala. 1936).

Although the burden is on the party challenging the license to prove it is unreasonable, a municipality should be able to justify imposing a high fee on a class of businesses. Studies showing a need for a stronger police presence at the business, or an anticipated increase in police calls (based on reasonable evidence) to the location can help. Or, the council might be able to demonstrate a need for increased regulation of the business in question. Similarly, circumstances may show that the business will have a negative impact on the public.

The council should be able to relate a high fee charged for a classification to a legitimate need to protect the public health, safety and welfare. In *State v. Armstrong*, 117 So. 187 (Ala. 1928), the court said that the business, a dance hall, must show that the municipality acted without any consideration of protecting the “public safety, peace, good or good order” to invalidate the ordinance in question. Because the council could point to a need for a large fee on dance halls, the court refused to intervene.

This case demonstrates the need for a municipality to have sufficient evidence to justify imposing the fee charged. When a municipality sets a high license fee or uses the licensing power for police power purposes, the council should affirmatively state the reason for the action on the minutes and conduct fact-finding activities to justify its action. When it does so, the burden facing the challenger becomes almost insurmountable.

Presumptions and Proof

Tax exemptions are construed against the taxpayer and in favor of the authority to tax. The person claiming an exemption bears the burden of proving that he or she is protected by the exemption. *Alabama Farm Bureau Mut. Cas. Co. v. Hartselle*, 460 So.2d 1219 (Ala. 1984). When a taxpayer generates income, some of which is taxable and some of which is not taxable, the burden rests on the taxpayer to prove that portion which is not taxable. *Alabama Dept. of Revenue v. National Peanut Festival Ass’n, Inc.*, 51 So.3d 353 (Ala.Civ.App.2010)

A municipality may require persons claiming an exemption to provide the clerk with adequate evidence that they meet the statutory conditions which entitle them to the exemption. Many cities and town have granted the clerk the authority to require the filing of affidavits before granting an exemption. Some ordinances even set out the affidavit to be used.

Occupational Taxes and Licensing Other Governments

Can a municipality license the federal, state, county or other municipal governments and their employees?

This is a very broad question, for which there is no easy, uniform answer. Many of the opinions and cases in this area construe municipal occupational taxes. Occupational taxes show just how broad the licensing power is. Act 2020-14 prohibits a municipality that does not have an occupational tax prior to February 1, 2020 from imposing an occupational tax unless the tax is authorized by local law. Section 11-51-106, Code of Alabama 1975.

Occupational taxes are based on the income a person receives but are not an income tax. Courts hold that the occupational tax is owed for the performance of services within the municipality. *McPheeter v. Auburn*, 259 So. 2d 833 (Ala. 1972). An occupational tax taxes the privilege of working within a municipality. The fact that it is based on the salary received is merely the method a municipality has available to measure the worth of that privilege. The employee owes the tax because he or she takes advantage of municipal services and amenities in pursuit of business activities. Because the occupational tax is based on the licensing power, opinions on the occupational tax are instructional for other types of licenses as well.

Government employees are not exempt from paying an occupational tax. In AGO 1992-119, the Attorney General ruled that postal employees who are not regular employees of the postal service are not exempt from an occupational tax. And in *McPheeter v. Auburn*, the city of Auburn wanted to assess its occupational tax against employees of Auburn

University. The court said that, “there is no principle of law clothing governmental employees with immunity ... from a tax that others bear.” The court found no merit in the argument that taxing state employees interferes with or adds additional qualifications for state employment.

Similarly, in *Hayes v. Hamilton*, 572 So.2d 486 (Ala. Civ. App. 1990), an employee of the state’s Corrections Department argued that he should not have to pay a municipal occupational tax to the city of Hamilton. The amount of the tax owed was assessed at \$26.97, plus accrued interest and penalties. The employee filed a counterclaim against the municipality for \$10,000,000 in damages. The court found no merit in the employee’s argument that he was exempt from taxation as a state employee. Thus, he had to pay the tax.

The United States Supreme Court has also upheld the assessment of Jefferson County’s occupational tax against federal judges. *Jefferson County, Ala. v. Acker*, 527 U.S. 423 (1999).

But what about directly licensing governmental agencies?

It appears to be improper to license the federal government. In *Texas Co. v. Carmichael*, 13 F.Supp. 242 (M.D. Ala.), aff’d, *Graves v. Texas Co.*, 298 U.S. 393 (D.C. 1936), a federal court held that the U.S. government was immune from a state license tax for the business of selling, distributing, storing or withdrawing gasoline. And in *O’Pry Heating & Plumbing Co. v. State*, 3 So.2d 316 (Ala. 1941), the court held that where the federal government has exclusive control over territory such as through the purchase of the land, the state has no power to license activities which take place on that property. Essentially, the court held that this property is no longer part of the state, so the state has no financial or regulatory interest which justifies imposing the license.

What about taxing the state? Or the county? Or another municipality? In *McPheeter*, the court allowed taxing the employee, but pointed out that imposing the tax on an employee did not burden Auburn University or the state or federal government. The court in *Hayes* expressed a similar opinion. The key may depend on whether the action being performed is governmental or proprietary in nature.

Municipalities are not exempt from paying a lodging tax when paying for the accommodations of employees or officers. AGO 1987-077.

And in *Mulga v. Maytown*, 502 So.2d 731 (Ala. 1987), Maytown imposed a license tax on the manufacture or distribution of gas within the municipal limits. Mulga sold gas to customers living in Maytown, but claimed it was exempt from purchasing a license, pointing to Section 91, Alabama Constitution, 1901. Section 91 exempts from taxation real and personal property of the state, counties

and municipalities. The court stated that this section does not prohibit imposing a license tax. Thus, Mulga had to purchase a license. In this case, Mulga was engaging in a corporate and not a governmental function. The rule may be different if a governmental activity is involved.

Distinguishing between governmental and corporate power is not always easy. Governmental purposes are those traditionally performed by local governments which are done for the good of the public as a whole and are not related to a profit motive. Governmental activities include things such as providing police and fire protection, enacting ordinances, protecting the public health through sanitation regulations, preventing nuisances, and constructing and maintaining streets. Corporate activities include operation of utility systems and other activities that may have a public purpose but are not related to the police or legislative power of the municipality.

Note, however, that the rule may be different for state activities. In several opinions, the Attorney General has ruled that municipalities have no power to assess late charges against state agencies for the failure to pay utility bills. Also, property owned by state agencies and departments is not subject to zoning ordinances. Thus, the state is often exempt from municipal regulation. This exemption may extend to the taxing power as well.

Delivery License

Section 11-51-194, Code of Alabama 1975, requires municipalities to establish a special delivery license that allows certain out-of-town taxpayers to make deliveries into the municipality and police jurisdiction. The purchase of the special delivery license permits businesses with no physical presence in the municipality or its police jurisdiction to deliver merchandise into the police jurisdiction or municipality without having to purchase any other license for delivery. The amount of the license cannot exceed \$100.00 for the business, although this amount may be adjusted every five years. A municipality may charge a taxpayer an issuance fee for a business delivery license not to exceed \$10.

In order to qualify for the special delivery license fee, the gross receipts from all deliveries into the municipality or its police jurisdiction must exceed ten thousand dollars (\$10,000) during the preceding license year, and the taxpayer must have no other physical presence within the municipality or its police jurisdiction during the year. If deliveries exceed \$75,000, the taxpayer does not qualify for this special license and would instead, need to purchase a regular business license. The delivery license shall be calculated in arrears, based on the related gross receipts during the preceding license year.

At its discretion, a municipality may, by ordinance,

increase the amount of permitted deliveries up to \$150,000. Again, this figure may be revisited every five years as provided in Section 11-51-194. Common carriers, contract carriers, or similar delivery services making deliveries on behalf of others do not qualify for the delivery license.

Delivery includes any requisite set-up and installation. To be included, set-up or installation must be required by the contract between the taxpayer and the customer or be required by state or local law. In addition, any set-up or installation must relate solely to the merchandise that is delivered. If the taxpayer or the taxpayer's agents perform set-up or installation that does not qualify under this definition, the taxpayer must pay any required license fee rather than the delivery license.

Municipalities may, by ordinance, require the taxpayer to purchase a decal for each delivery vehicle that will make deliveries within the municipality or its police jurisdiction. The charge for such decal cannot exceed the municipality's actual cost.

If the taxpayer fails to meet the criteria that qualify him or her for the special delivery license at any time during the license year, the taxpayer must within 45 days of the failure purchase a delivery license and all other appropriate licenses for the entire license year.

Branch Offices

A taxpayer engaged in business in more than one municipality, shall be permitted to account for its gross receipts so that the part of its gross receipts attributable to one or more branch offices will not be subject to the business license tax imposed on the principal business office required to obtain a business license. Section 11-51-90(b), Code of Alabama 1975. Branch office gross receipts are those receipts that are the result of business conducted at or from a qualifying branch office.

To establish the existence of a qualifying branch office, the taxpayer shall meet all the following criteria:

1. "Demonstrate the continuing existence of an actual physical facility located outside the police jurisdiction of the municipality in which its principal business office is located, such as a retail store, outlet, business office, showroom, or warehouse, to which employees or independent contractors, or both, are assigned or located during regular normal working hours.
2. "Maintain books and records which reasonably indicate a segregation or allocation of the taxpayer's gross receipts to the particular facility or facilities.
3. "Provide reasonable proof that separate telephone listings, signs, or other indications of its separate activity are in existence.

4. "Billing or collection activities, or both, relating to the business conducted at the branch office or offices are performed by an employee or other representative of the taxpayer who has such responsibility for the branch office, whether or not the representative is physically located at the branch office.
5. "All business claimed by a branch office or offices must be conducted by and through the office or offices.
6. "Supply proof that all applicable business licenses with respect to the branch office or offices have been issued."

A business license is not required for a person traveling through a municipality on business if the person is not operating a branch office or doing business in the municipality. Section 11-51-90.2(a)(3), Code of Alabama 1975.

Co-ops

Farmers' cooperatives are authorized by Sections 2-10-90 through 2-10-108, Code of Alabama 1975, and are created to "promote the general welfare of agriculture" in Alabama. The idea is to allow farmers to band together to acquire and market agricultural products and machinery or to finance these activities in order to help the members of the cooperative obtain low-priced supplies.

Section 2-10-105, Code of Alabama 1975, states that cooperatives organized under these sections must pay an annual fee of \$10 to the state. Payment of this fee exempts all goods and articles purchased or acquired by the co-op from taxation. Additionally, permitted co-ops are not required to purchase any license or privilege fee for "engaging in or transacting business or otherwise in this state."

An early opinion from the Attorney General's office held that although co-ops are exempt from obtaining a license for selling goods necessary and useful to the production of agricultural products, the co-op must buy a license to sell items unrelated to agriculture. AGO 1983-472 (to Hon. Howard McWilliams, September 12, 1983). However, in *State v. Franklin County Co-op*, 464 So.2d 120 (1985), the Alabama Court of Civil Appeals held that Section 2-10-105 exempts farmers' cooperatives organized under Chapter 10 of Title 2 from paying any license fees. In this case, the state assessed the co-op for a store license fee. The state alleged the co-op owed the fee because it offered services to non-members as well as members and because it sold items unrelated to agricultural purposes, such as tires and soft drinks. The court refused to accept this argument, holding that the language of Section 2-10-105 which exempts co-ops from all licensing requirements was conclusive.

Interestingly, a few months after the *Franklin County Co-op* case, the Alabama Supreme Court issued an

opinion in *Flav-O-Rich, Inc. v. Birmingham*, 476 So.2d 46 (1985). Here, the court found that Birmingham could assess a license fee from Flav-O-Rich, which argued that it was a valid Alabama cooperative. However, the court specifically found that Section 2-10-105 did not apply in this case because Flav-O-Rich had failed to comply with the provisions of that section. In any event, pursuant to the *Franklin County Co-op* case, co-ops are exempt from municipal licensing. AGO 1992-031.

Farmers

The Alabama Code protects agricultural interests in Alabama in other ways as well. Not only are co-ops sheltered from taxation, farmers themselves are granted an exemption by Section 11-51-105, Code of Alabama 1975. This section states, “It shall be unlawful for any municipality to charge the farmers or others engaged in the production of farm products of whatever nature any license or fee for the sale or other disposition of said articles produced by them at any place.”

In *Flav-O-Rich Inc. v. Birmingham*, 476 So.2d 46 (1985), the court said that this section does not protect a farmer’s co-op which is engaged in selling nonfarm products nor where the co-op purchases products, then processes them and markets them under the name of a subsidiary. Additionally, the Attorney General has ruled that this section does not exempt peddlers of farm products where the peddlers sell for farmers on a commission basis. AGO to Hon. L.B. Davidson, December 12, 1960.

Similarly, the Attorney General has held that a company that supplies baby chickens to farmers, pays the farmers for their service and later collects and processes the chickens to various retailers is not exempt from purchasing a business license under Section 11-51-105 of the Code. AGO 2000-120

Section 11-51-105, however, is usually given a very broad interpretation. In an opinion to Hon. H.L. Callahan, November 17, 1980, the Attorney General ruled that nurseries were protected from taxation as are other farmers. The Attorney General based his opinion, in part, on the definition of the term “farm products” found in Section 2-29-1(2). This definition states:

“(2) FARM PRODUCTS. Except as otherwise provided, such term shall include all agricultural, horticultural, vegetable and fruit products of the soil, meats, marine food products, poultry, eggs, dairy products, wool, hides, feathers, nuts and honey.”

The Attorney General ruled this definition was broad enough to include all horticultural, vegetable or fruit products produced by a nursery. Further, the term “horticultural” was read to include ornamental plants such as decorative shrubs and flowers.

The key, then, to whether someone can validly claim to be a farmer is whether they are selling products that they produce themselves. If they sell the products to someone else for sale at retail, the person who then sells the products must obtain a license, especially if the products are further processed.

As stated above, this is a very broad exemption. In AGO 1990-296, the Attorney General held that “the use of streets by farmers and others producing farm products for the purpose of marketing or delivering their products is merely incidental to the sale or disposition of such products.” Therefore, a municipality may not charge a farmer a delivery license for delivering goods he or she produces. The Attorney General also held that an agricultural or horticultural product ceases to be a “farm product”—and thus is subject to municipal licensing—when it is “not directly produced and sold by a farmer or other person engaged in the production of farm products or when the products have been substantially processed, or commercially bottled, packaged or canned.” This opinion overruled a previous AGO, 1989-246, which held that municipalities may charge farmers a delivery license.

Professionals

Doctors are granted a two-year exemption from obtaining a state license by Section 40-12-126, Code of Alabama 1975. A similar exemption applies to oculists, optometrists and opticians in Section 40-12-135, Code of Alabama 1975, and to osteopaths and chiropractors in Section 40-12-136, Code of Alabama 1975. These sections all apply specifically to the state and do not mention municipalities. Many municipalities, however, follow state law and grant these professionals a temporary exemption in the licensing ordinance.

Attorneys, architects and realtors also present licensing problems for municipalities. Although there are no specific statutory provisions which limit municipal licensing of these professions, the Attorney General has issued several opinions construing this power. In an opinion to Hon. Charles Murphree, March 18, 1980, the Attorney General held that a municipality may not license out-of-town architects for a single project when the architect has no offices in the municipality, unless the facts establish more of a nexus between the architect and the municipality.

What facts might establish this nexus? In an opinion dealing with attorneys, the Attorney General held that a municipality may require an attorney to purchase a license if he or she practices in that municipality on a regular basis. AGO 1986-163 (to Hon. Sam Loftin, February 14, 1986). Even though the Attorney General later modified this opinion to hold that a municipality may not license an attorney who merely has a case pending in municipal

court, but who has no office within the municipality (AGO 1990-399), factors such as a regular presence within the municipality may establish a sufficient nexus. This would have to be determined on a case-by-case basis.

Realtors

Section 11-51-132, Code of Alabama 1975, prohibits the licensing of out of town realtors. Specifically, this section provides that a municipality may only levy or collect a business privilege tax from or require the licensing of a real estate company if the real estate company's place of business is located within the municipality. Further, no municipality may levy any business privilege tax from or require the licensing of a real estate salesperson or broker separate from the privilege tax or license levied upon the company of the salesperson or broker, except that salespersons or brokers who form a legally constituted business organization pursuant to subdivision (11) of subsection (a) of Section 34-27-36 may be subject to such business privilege tax or license.

Auctioneers

Auctioneers are exempt from municipal licensing by Section 34-4-6, Code of Alabama 1975. If an auctioneer is licensed by the state, a municipality may not assess a license fee for operating within the municipality. Auctioneers who engage in other businesses must obtain a license in order to conduct the second business. AGO 1992-026 (licensed auctioneers who are also real estate brokers must purchase a real estate broker's license).

The Attorney General has also held that a municipality may not impose a business license fee on an auctioneer or an auction company licensed by the state. AGO 1998-035.

Internet consignment shops are not acting as auctioneers and are not subject to regulation by the Board of Auctioneers when the Internet consignment shops are merely acting as an intermediary between the seller of goods and an Internet sales or auction website if the Internet sales or auction website does not engage in bid calling or the sale of things of value at public outcry as those terms are used in Sections 34-4-2 and 34-4-27 of the Code of Alabama. Internet consignment shops that hold themselves out as auctioneers are subject to regulation by the Board of Auctioneers. AGO 2008-109.

Financial Institutions

Financial institutions such as banks, credit unions and savings and loan associations are granted special status by the Code of Alabama. Section 11-51-130, Code of Alabama 1975, authorizes municipalities to levy a graduated license fee on banks, based on the institution's capital, surplus and undivided profits. "Undivided profits" is defined as "the

undivided profits as shown by the books of the bank, and all payments shall be based on the report made by the banks to the Superintendent of Banks next preceding January 1."

Section 11-51-131, Code of Alabama 1975, allows municipalities to assess a license tax against savings and loan associations on the same schedule which applies to banks.

Branch banks and savings and loans pay only a \$10 fee. There is no definition in the Code as to what constitutes a branch, and different institutions seem to define the term in different ways. For instance, in some cases financial institutions have one main office in the state and consider all other offices as branches. Other institutions treat the first office in a municipality as the main office and all others in the same city or town as branches. No courts have ever construed this Code section.

Out of an abundance of caution, the League recommends following the definition contained in the institution's by-laws. In other words, municipalities should define these terms in the same manner as does the institution and assess the maximum \$10 fee against offices the institution calls branches and apply the full schedule to all main offices, at least until a court or the Attorney General rules otherwise or until legislation passes defining these terms.

Prior to 1991, only municipalities which were assessing license taxes from financial institutions in 1951 could do so. In 1991, the League was successful in amending the Code to remove this restriction, allowing all municipalities to levy a license tax against banks and savings and loans pursuant to Section 11-51-130, Code of Alabama 1975.

Credit unions are treated differently under the Code. Section 5-17-24, Code of Alabama 1975, states that credit unions are not subject to taxation, except for ad valorem taxation. The Attorney General has ruled that this section also exempts credit unions from purchasing municipal business licenses. AGO 1990-197. Credit unions are also exempt from the financial institutions excise tax.

Financial Institutions Excise Tax

Section 40-16-6, Code of Alabama 1975, provides that each municipality shall receive thirty-three and three tenths percent (33.3%) of the State Financial Institutions Excise Tax, which is levied on banks, savings and loans, and similar institutions located within the municipality. This tax is an income tax levied on the net taxable income of the financial institutions. Beginning with the 2019 municipal financial institution excise tax distribution, each municipality shall receive a percentage share of the total municipal financial institution excise tax revenue equal to its average percentage share to the total municipal financial institution revenue distribution over the five years ending in 2018. The Income Tax Division of the State Revenue Department administers the tax.

The municipal share of the Financial Institutions Excise Tax is received each calendar quarter. Financial institutions are entitled to a deduction for the amount of the license tax they pay to a municipality.

Insurance Companies

Municipal license fees on insurance companies are also limited by state law. Section 11-51-120, Code of Alabama 1975, states that the maximum license collectable from fire and marine insurance companies is four percent on each \$100 and major fraction thereof of gross premiums, less return premiums. Section 11-51-121 establishes a fee for insurance companies other than fire and marine companies based on the population of the municipality. The following chart illustrates this:

Population	License Due
5,000 or less	\$10
5,000-10,000	\$15
10,000-15,000	\$20
50,000 or above	\$50

In addition, each municipality is entitled to \$1 on each \$100 and major fraction thereof of gross premiums, less return premiums.

Several issues arise from these sections. First, how does a municipality differentiate between the various types of insurance companies in order to determine which schedule to apply? The Alabama Supreme Court discussed this question in *Birmingham v. State Farm Mut. Automobile Ins. Co.*, 382 So.2d 1111 (1980).

In this case, State Farm sought to be classified as a casualty company, and thus taxable under Section 11-51-121, rather than Section 11-51-120. Birmingham claimed that because State Farm wrote fire insurance in the city, Section 11-51-120, licensing fire and marine insurance companies, applied. The court found in favor of State Farm, stating that the fact it wrote fire insurance was not determinant. Instead, the court stated that the character of the insurance company itself determined which schedule to apply. The court held that “the nature of the principal business endeavor, as manifested by its charter, its activities and its operations, will control the application of the classifications established by Sections 11-51-120, -121.” Thus, deciding which schedule to apply requires knowing the types of policies the company issues plus an examination of the company’s charter.

In *Alfa Mutual Ins. Co. v. City of Mobile*, 981 So.2d 371 (Ala.2007) the Alabama Supreme Court held that a functionality test determines whether an insurance company is a fire or marine insurer or an insurer other than a fire and marine insurer for purposes of the statutory caps on municipal license fees. In this case, the court found that

the taxpayers were not fire insurance companies, and, thus, one percent, rather than four percent, cap applied to municipal license taxes. The articles of incorporation for the businesses allowed the taxpayers to sell fire insurance, however 65% of the premiums earned by one taxpayer and 55% of the premiums earned by the other taxpayer were attributable to automobile insurance, and the sale of fire insurance was not the principal business endeavor.

Another major issue raised by these sections is the meaning of the phrase “return premiums.” This issue was decided in *Alabama Farm Bureau Mut. Ins. Co. v. Hartselle*, 460 So.2d 1219 (Ala. 1984). In *Hartselle*, Farm Bureau reported and paid tax on the total amount of premiums on new policies actually issued during the year. Farm Bureau did not include premiums on policies which were simply renewed during the year.

The court again agreed with Farm Bureau, stating that renewal policies were not issued during the year. The court stated that:

“A renewal premium which simply continues in effect an existing policy of insurance with no change in coverage is not subject to Hartselle’s municipal license tax. Where a policy is renewed, however, and additional property or persons are insured, then the renewal premium received from such a policy is subject to this tax.”

Thus, amendments to an insurance policy, under this case, subject the policy to the municipal license tax, while a simple renewal based on exactly the same terms as the previous year’s policy does not.

The Code grants insurance companies additional protections. For instance, Section 11-51-123 exempts agents from paying a license fee in addition to that assessed to the company. This is an exception to the general rule that agents may be licensed separately from the company for which they work. *American Bakeries Co. v. Huntsville*, 232 Ala. 612, 168 So. 880 (1936). Also, fire and marine insurance companies have until 60 days after December 31 of each year to pay license fees. Other insurance companies have 60 days after January 1. *See*, Sections 11-51-121 and 11-51-123, Code of Alabama 1975.

Insurance companies which are organized under the Health Care Service Plan Act (Sections 10-4-100 through 10-4-115, Code of Alabama 1975), such as Blue Cross/Blue Shield, are exempt from municipal taxation and licensing by Section 10-4-107.

Payment of a license fee by an insurance company assessed pursuant to Section 11-51-121, Code of Alabama 1975, enables it to do business in the municipality by its agents who are not required to buy an additional license to represent the company. AGO 1998-025.

Utilities

Section 11-51-129, Code of Alabama 1975, limits municipal licenses on street railroads, electric, gas, waterworks companies and other utilities to a maximum of three percent of the company's gross receipts. In *Birmingham v. ALAGASCO*, 564 So.2d 416 (1990), the Alabama Supreme Court held that utilities are entitled to deduct amounts paid to the state under the Utility Gross Receipts Act when computing their municipal license fees.

Waste Grease

Section 11-40-23 grants waste grease handlers, those persons engaged in purchasing, receiving or collecting waste grease and animal by-products for rendering or recycling, a license limitation based on the population of the municipality within which they operate. The annual license fee ranges from \$50 in municipalities with populations over 100,000, to \$5.00 in municipalities with populations of 2,000 and under.

Boards and Authorities

Many publicly created boards and agencies are also exempt from municipal licenses. Any board, agency or entity claiming an exemption should be required to furnish proof of the exemption as well as proof that they qualify for the exemption. Proof of exemption is usually found in the statute under which a board was created.

In *Millbrook v. Tri-Community Water System*, 692 So.2d 866 (1997), the Alabama Court of Civil Appeals held that a corporation which maintains and operates a system to provide water to its members and not to the general public is not a public utility subject to the municipality's business license tax.

A municipality may require a gas district who is doing business within the municipality to purchase a privilege license and/or a franchise. AGO 1997-125.

The municipal utilities board is required to pay a city license tax of three percent of the total revenue collected by the utilities board. AGO 1999-275.

A city may impose a privilege license tax on another municipality's utility board doing business within the city and whether the board passes the tax on to the customer is within the board's discretion. AGO 2003-138. **NOTE:** This opinion applies to utility boards established pursuant to Section 11-50-310 et. seq., of the Code of Alabama 1975.

A County Water Authority organized and existing under section 11-88-1, et seq., is exempt from payment of a gross receipts license tax imposed by a municipality under an ordinance adopted pursuant to section 11-51-129 of the Code of Alabama. Section 11-88-16 of the Code of Alabama, exempts Water, Sewer and Fire Protection Authorities from any license or excise tax imposed on such

authorities with respect to the privilege of engaging in any of the activities authorized by that chapter. AGO 2008-015

Towing Companies

A provision of the Interstate Commerce Act, 49 U.S.C. Section 14501(c)(1), preempts any state or local regulation "related to a price, route, or service of any motor carrier." In *R. Mayer of Atlanta, Inc. v. Atlanta*, 158 F.3d 538 (1998), the Eleventh Circuit Court of Appeals held that this federal law preempts municipal licensing of consensual towing services, although there is an argument that the ordinance in question in this case went far beyond merely assessing a fee against tow truck operators and that merely assessing a license fee would be upheld. In any event, this case clearly does not prevent licensing of non-consensual (those operators chosen by the governmental entity) towing services.

Miscellaneous Limitations and Exemptions

All references are to the Code of Alabama 1975. Railroads (Section 11-51-124), railway sleeping car companies (Section 11-51-125), express companies (Section 11-51-126), telegraph companies (Section 11-51-127), and telephone companies (Section 11-51-128) are all granted express limitations on the amount of license fees a municipality can collect from them. These licenses, for the most part, are based on the population of the municipality and exclude these companies from paying any additional license fee for conducting their protected business.

Additional exemptions exist for blind persons (Section 40-12-330) and for disabled veterans (Section 40-12-343). Blind persons who have filed a certificate with the probate judge are entitled to an exemption from the first \$75 of any municipal license. To claim this exemption, a person must have resided within Alabama for two years and must furnish a vision certificate from a regularly license physician in the county where the exemption is claimed.

Disabled veterans who conduct business in their own name with no more than one employee or helper, are granted an exemption from the first \$25 of the municipal license.

Section 34-14A-13 prohibits municipalities from withholding building permits and certificates of occupancy from contractors simply because the license fees of subcontractors have not been paid. A contractor must, however, submit a list of all subcontractors involved in a project within 15 days of the issuance of the building permit and update this list before the certificate of occupancy is issued.

In addition to the above, municipal licensing officials should be aware that Section 40-9-12 provides a long list of civic, charitable and eleemosynary organizations and

institutions which are exempt from all taxation including license taxation.

Additional Exemptions

Municipalities may grant exemptions to business classifications in addition to those granted by the state. However, a municipality cannot grant an exemption to an individual while not granting the exemption to other persons who fall within the same license classification. Additionally, any exemptions should be granted prospectively only, by a valid amendment to the municipal license ordinance.

35. Due Process Issues in Licensing & Permitting

The Fourteenth Amendment to the United States Constitution guarantees that no person shall be “deprived of life, liberty or property without due process of law.” This amendment applies to state and local governments.

The Due Process Clause accords both procedural and substantive protection from invalid government action. Substantive due process prevents governments from imposing arbitrary restrictions or taking arbitrary actions. In order to defeat a substantive due process claim, governmental actions must be reasonable, not arbitrary or capricious, and must bear a real and substantial relation to a legitimate governmental purpose. Of course, due process requirements do not preclude or interfere with the proper exercise of police power.

The procedural component of due process generally relates to the process by which a government deprives someone of life, liberty or property. Procedural due process challenges generally target whether a person was given adequate notice and a meaningful hearing opportunity. However, if an ordinance or resolution provides the means of giving notice or holding a hearing, the ordinance itself may be challenged on procedural due process grounds. In order to defeat a procedural due process claim, notice must be sufficient to apprise interested parties of the pendency of the action and afford them a swift and fair means to present their objections or views. The hearing does not have to be a formal adversarial process but only a fair opportunity for interested parties to be heard.

Why Permit or License?

Licenses and permits act as official government permission to do what would otherwise be unlawful. Essentially, the license or permit is recognition that the laws relating to an activity have been followed. Permits and licenses provide the government with an opportunity to regulate certain activities for the protection of the public’s health, safety and welfare. Thus, ordinances that impose a license or permit requirement are frequently based on the government’s police power.

Licenses may also be imposed in order to raise revenue. For this reason, licenses are often confused with taxes, which are generally designed solely for the financial support of the government to provide for all public needs. In fact, a license may be construed as a tax when the sole reason for the license is to raise revenue. The regulatory aspects of a license, though, make it different, strictly speaking, from that of a tax. This distinction can often be important when arguing that a permit or license should be upheld by

a court. Courts generally allow a wider discretion regarding the amount of the license when it is imposed for revenue purposes instead of police power purposes. Conversely, to justify a police power prohibition, it must be rationally related to a legitimate governmental purpose.

The Ordinance

Due process guarantees that all ordinances must be clear and apprise all who fall within the parameters of the ordinance of what they must do to comply. This restriction applies to license ordinances as well. As with other ordinances, license and permit ordinances are presumed valid, and are construed as are other legislative actions.

Like other tax laws, however, ordinances and resolutions imposing licenses for revenue purposes are construed liberally in favor of citizens and strictly against the government. Thus, if the terms of the ordinance are not clear, or if it is reasonably open to different interpretations due to the indefiniteness of the provisions, all doubts will be resolved in favor of the taxpayer.

According to *McQuillin, Municipal Corporations*, (3d Ed., Rev.), § 26.04, all license and permit regulations should:

“[S]pecify officials or bodies to issue licenses (under the ordinance), the length of time the licenses will run, the amount of the license fee or tax, and the time and manner of payment ... Ordinances may and usually do prescribe prerequisites and conditions for the obtaining of a license, and conditions upon which it continues in force. Definite rules and terms, or ‘fixed standards,’ for the guidance and protection of applicants and of municipal officials should be prescribed in the law, since an ordinance allowing uncontrolled discretion to licensing officials is void.”

The ordinance may also impose reasonable conditions, including conditions relating to the character and fitness of applicants, on the granting or holding of a license or permit issued under the police power. These requirements should be spelled out in the ordinance itself to avoid confusion. Again, the ordinance will generally be upheld if the conditions imposed rationally relate to a legitimate governmental interest. To be constitutional, however, license and permit ordinances must be enacted pursuant to legislative authority, be definite and certain, reasonable, uniform in operation and not arbitrary or oppressively discriminatory. It’s important to note, however, that courts will not substitute their judgment for that of the

government officials regarding the method used to achieve a governmental objective.

Amount of the License or Permit

To comply with due process requirements, a license fee must be definite in amount or dependent on an established, definite and legal measure. Other than imposing a flat rate, two of the most common methods of determining the amount of a license fee include the gross receipts of a business or inventory the business has on hand.

As noted above, there is a general distinction between taxation and licenses or permits imposed for police power purposes. A license may be a tax, if it is imposed solely for revenue purposes. A license fee is not invalid simply because it exceeds the expense of issuing the license. *Birmingham v. Hood-McPherson Realty Co.*, 172 So. 114 (Ala. 1937).

On the other hand, the fee charged for a regulatory – or police power – license or permit should be related to the cost of regulating the business in question. While license fees may be imposed to raise revenue, most permit fees must be related to the cost to regulate, inspect and permit the activity. When a license fee is levied for revenue alone, the ordinance will be upheld only if based on the power to tax. Additionally, a license fee imposed for regulatory purposes becomes a tax when it is out of proportion to the reasonable cost of regulating the business in question.

Courts usually rule that there must only be a fair, approximate and reasonable comparison between the fee exacted and the cost of regulating the business. Due process does not require exact accuracy in the computation. *Hawkins v. Prichard*, 30 So.2d 659 (1947) overruled on other grounds by *State Dept. of Revenue v. Reynolds Metals*, 541 So.2d 524 (Ala. 1988). As such, municipalities should take into account all expenses of regulating and inspecting a business in arriving at an amount to charge as a license fee.

The authority to levy a license fee does not permit the prohibition of a legitimate business. *Ex parte Burnett*, 30 Ala. 461 (1857). In some cases, however, even the outright prohibition of a business has been upheld. For instance, in *Bridewell v. Bessemer*, 46 So.2d 568 (1950), the Alabama Court of Appeals held that, “fortune telling is denominated as a useless calling, and subject to police regulation. This being so, the City of Bessemer had the right to so combine its police power and taxing power as to levy a license tax which would discourage, and to all practical purposes prohibit, persons from engaging in the hocus pocus of fortune telling.” *Bridewell*, 46 So.2d at 570. Additionally, the amount of the fee generally will only be disturbed in the case of a manifest abuse of power. *American Bakeries Co. v. Huntsville*, 168 So. 880 (Ala. 1936).

Some jurisdictions have ruled that where a taxpayer

is subject to a license tax from two jurisdictions on the same transaction, due process requires the taxing entities to apportion its tax. *See, e.g. Short Brothers (USA), Inc. v. Arlington County*, 244 Va. 520, 423 S.E.2d 172 (Va. 1992). However, in *Tuscaloosa v. Tuscaloosa Vending Co.*, 545 So.2d 13 (1989), the Alabama Supreme Court upheld the right of an Alabama municipality to levy a gross receipts license on the entire receipts of a business located within its corporate limits, despite the fact that some of receipts came from transactions conducted outside the municipal limits.

Classifications

License ordinances may classify persons or businesses and treat them differently for licensing purposes, but the regulations and fees applicable to a given class of licensees must be uniform as to any person or occupation that falls within that class. The licensing scheme cannot discriminate, although reasonable distinctions are allowed. Improper classifications in an ordinance may violate both due process and equal protection.

Municipalities are required to apply the 2002 North American Industrial Classification System (“NAICS”) sectors to define businesses in their municipality – **Each municipality still sets its own rates.** (NOTE: Rates that are restricted under the Code of Alabama for certain businesses are still restricted.). Section 11-51-90.2, Code of Alabama 1975.

The Application Process—Issuance and Denial

As with all other steps in the licensing or permitting process, the application must be reasonable and nondiscriminatory. Section 11-51-90, Code of Alabama 1975, specifies what information must be contained in an application for a municipal business license. Municipalities must accept an application that complies with that section from another taxing jurisdiction even if the municipality has additional application information that it seeks. Additional items requested on the application must be related to the needs of the governing body in determining who is obtaining the license, what the purpose for the license is and for regulating the business as needed.

In order to be entitled to a license, a person must comply with all legitimate conditions imposed by the licensing jurisdiction. In the absence of a requirement for a hearing prior to issuing a license, the individual responsible for issuing the license should do so upon a showing that all other requirements are met. The ordinance may provide for notice and a hearing to interested third parties prior to issuing the license.

Unless prohibited by state law, where legitimate public protection interests exist, a local government may require applicants for a license or permit to pass an examination.

The examination, like the application, must be reasonable and nondiscriminatory as well as related to the occupation for which the license is sought. Examinations may be waived for legitimate reasons, such as for applicants that are licensed in other jurisdictions which require an examination or who have a number of years' experience in the particular occupation.

Local governments may require compliance with other laws, such as franchising or permitting regulations, as conditions to receiving a license. They can, under proper circumstances, place restrictions on the location of a business, such as making sure the business is in the proper zone, or, under certain circumstances, that a business that sells liquor is not within a specified distance of a school or church. An applicant who does not conform to these requirements is not entitled to receive a license.

Where a hearing is required, it is usually conducted before the local governing body. If the licensing ordinance spells out a specific means of providing due process, these steps must be followed. Like all due process hearings, one held to determine whether a license or permit should be given must be fair and impartial and the person must receive adequate notice and an opportunity to be heard.

Municipalities and counties do not have the "irreversible discretion to deny approval" of licenses. *Black v. Pike County Commission*, 360 So.2d 303 (Ala. 1978). In an opinion to Hon. Oscar Tate, February 18, 1977, the Attorney General discussed a situation where a municipality without a zoning ordinance in place wanted to deny a license to a business the municipality felt would adversely affect surrounding property owners. The Attorney General stated that "it has been concluded by the courts that a license or permit must be granted where the applicant is qualified and has complied with all conditions which must be met and where it would be an abuse of discretion to deny the license."

Many of the cases dealing with denial of licenses involve requests for liquor licenses. In *Black v. Pike County*, the plaintiff's application for a liquor license was denied by the county commission. The plaintiff sued, alleging that the county's action was arbitrary and capricious and denied her rights to due process and equal protection.

The Alabama Supreme Court had previously ruled, in *Paulson's Steerhead Restaurant, Inc. v. Morgan*, 139 So.2d 330 (1962), that the Legislature had granted county commissions the irreversible discretion to deny liquor licenses. However, the court in *Paulson's* pointed out that it had not considered constitutional issues in *Paulson's*. Now, confronted with constitutional issues, the court held that the Legislature may not constitutionally grant unbridled discretion to the county commission to determine whether to grant or deny a license.

The court noted that two other persons in the county district in question had been granted liquor licenses, and pointed out that the county had no criteria, either written or unwritten, for determining whether a person is qualified to receive a license. Despite the fact that the Twenty-First Amendment gives states broad powers to regulate the possession and sale of liquor, the court stated that this does not excuse state and local governments from following other constitutional limitations on their powers.

Quoting from the U.S. Supreme Court case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Thus, even in the context of liquor licenses, despite constitutional authority granting states power to regulate liquor, constitutional guarantees of due process still apply to the granting or denial of licenses.

In *Harrelson v. Glisson*, 424 So.2d 591 (Ala. 1982), the court made clear that unsuccessful applicants bear the burden of demonstrating that the denial of a license or permit is done arbitrarily or capriciously. In *Harrelson*, the plaintiff operated a grocery business at an intersection in the Carolina community in Covington County. He applied for a lounge retail liquor license. The council conducted a hearing and then unanimously denied the application.

At trial, members of the council testified as to their reasons for denying the application. Two members said that the intersection in question was busy, and that there had been several serious wrecks. One also testified that school buses operated on the roads and expressed concern about the safety of school children from the increased traffic. Another councilmember was concerned about the safety of youngsters frequenting a skating rink about a mile from the intersection, and another member, who agreed with the others about safety concerns, said that the location was too close to his church.

The hearing on the license application lasted from forty-five minutes to an hour. Several citizens attended the meeting, and at least two had expressed opposition to granting the license. The plaintiff had had an opportunity to refute their concerns.

The court found that, in this case, the plaintiff had failed to show that the council acted improperly. The court stated that the “fact that some of their factual premises might have been erroneous, or that some considerations might have weighed heavier with some of the council members than others, does not make their decision whimsical or unfounded.” The court found merit in the trial court’s ruling that considerations of public safety were significant in the minds of the councilmembers when they denied the application and upheld their decision to deny the license.

Similarly, in *Ex parte Trussville City Council*, 795 So.2d 725 (2001), the Alabama Supreme Court held that the council did not act arbitrarily and capriciously by denying an application for a liquor license to operate a “sports grill” restaurant because they noted that the property was located across the street from single-family detached residential zoning, that the property was close to homes, schools, churches, and parks, and that the applicant was only able to meet the minimum parking space allotment by securing an agreement from a neighborhood property owner to permit a limited number of spaces to be used for off-site parking that was remote and not conveniently accessible.

In *Maddox v. Madison County Commission and Madison County*, 661 So.2d 224 (Ala. 1995), the county commission denied a liquor license due to the location of the plaintiff’s business. The county had adopted a set of procedures it would apply to liquor applications. Part of this procedure stated that the commission would grant a license

only to licensees located in “predominately commercial areas.”

The plaintiff’s attorney made a brief statement at the public hearing on his liquor application. Another attorney, representing citizens in the area, expressed their opposition. Additionally, 17 other residents opposed the application on traffic safety grounds and the fact that the area was not predominately commercial. The court found that the commission’s main objection to the license application was because the property was not sufficiently commercial and upheld their license denial.

In *Sardis v. Wilson*, 465 So.2d 387 (Ala. 1985), however, the court upheld a lower court determination that a denial of a liquor license application was arbitrary and capricious. In this case, the court stated that the plaintiffs had filed four separate license applications, which were denied by the city council. Another applicant, however, who the court found was no more qualified than the plaintiffs, had received a liquor license from the council. Thus, the court found that the plaintiffs had met their burden of showing the decision to deny was improper.

Local governments may also be sued for granting a license or permit. According to *McQuillin, Municipal Corporations* (Third Ed.), § 53.22.50, most of these claims are disposed of under the public duty doctrine. In Alabama, the public duty doctrine is known as the substantive immunity rule.

The Alabama Supreme Court has recognized that in certain circumstances, public policy considerations override the general rule that municipalities are liable for the negligence of their employees. While cases involving the substantive immunity rule deal with alleged negligent inspections, where permits were issued pursuant to those inspections, it would appear, the permitting itself would be protected by substantive immunity in similar circumstances.

In *Baker v. Guntersville*, 600 So.2d 280 (Ala. Civ. App. 1992), however, the city of Guntersville issued a building permit to a cellular telephone company to construct a telecommunications tower on property without notifying adjoining property owners, apparently in violation of a city ordinance. The trial court found that the plaintiff’s due process claims were barred by collateral estoppel. The appellate court disagreed but found that the result was proper because of *res judicata*. The court, though, did not question the right of a member of the public to receive notice of the permit request.

And, in *Ex parte Lauderdale County*, 565 So.2d 623 (Ala. 1990), a county commission disapproved a landfill license after initially approving it. The landfill company (WCI) argued that its due process rights were violated because it was not afforded a hearing. The court stated, “It is interesting to note that in this case WCI received

the initial license without a hearing, but it does not argue that that violated due process. If WCI's due process rights were violated by the subsequent revocation of the license without a hearing, *then certainly the due process rights of the affected citizenry were violated when the license was first issued without a hearing.*" (Emphasis added.)

This issue was also raised in *Brown's Ferry Waste Disposal v. Trent*, 611 So.2d 226 (Ala. 1992). In this case, the Alabama Supreme Court held that:

"It cannot be argued that the interests of the citizens of Limestone County are unaffected by the contract that is the subject of this litigation. The citizens have a vital interest in the disposal of solid wastes within the county, in the site approved for their disposal, and in the contract awarding the right to operate the facility made between the County and a private corporation. Because the Commission failed to supply any notice to the public and totally failed to establish any opportunity for the citizens to be heard, the contract is, as the trial court held, null and void."

Thus, it appears that under certain circumstances, such as where a local rule or regulation requires notice, or where the rights of the public will be affected by the permit in question, the public entity must provide the public with due process prior to acting.

Revocation

Due process requirements may also govern the revocation of a license or permit. In *O'Bar v. Rainbow City*, 112 So.2d 790 (Ala. 1959), the council revoked a nightclub license based on complaints of loud music and other disturbances. The Alabama Supreme Court stated that there is "no contract, vested right or property in a license as against the power of a state or municipality to revoke it in a proper case." The license is a mere privilege extended by the governing body to make lawful certain actions. Thus, no property right exists in the holding of a license. As in the decision to grant or deny the license, courts will generally defer to the judgment of the officials. However, the court went on to point out that the license cannot be arbitrarily revoked.

In *Sanders v. Dothan*, 642 So.2d 437 (Ala. 1994), the city of Dothan revoked a liquor license. The plaintiff had received notice of a public hearing a week prior to the meeting at which the potential revocation would occur. She was informed under which city ordinances the city was pursuing revocation and was informed that she would have a full opportunity to present evidence and call witnesses. The notice also let her know of frequent police calls to her club, complaints with the ABC Board, as well as a shooting

at the club. Following a full hearing, the city informed the plaintiff that the council would make a decision a week later. On that date, the council met and revoked the license.

The trial court granted the plaintiff a temporary restraining order. The city opposed this, arguing that as a result of a recent shooting at the club an individual had died. Additionally, the city complained that it had only received notice of the shooting from the hospital, and not from anyone at the club. As a result, the trial court dissolved the TRO. The trial court then affirmed the council's actions.

On appeal, the plaintiff argued that due process required the city to inform her of the specific items of evidence on which it would rely at the revocation hearing. In particular, the plaintiff argued that she should have received copies of police logs. The court found no support for this contention. Additionally, the court, after reviewing the evidence, determined that the city afforded the plaintiff with a full opportunity to be heard, including allowing her to present a petition of individuals who opposed the revocation. The plaintiff was only told that she could not speak further after the council had voted. Therefore, there was no denial of due process.

The court reached the same conclusion in *Spradlin v. Spradlin*, 601 So.2d 76 (Ala. 1992). Here, a municipality revoked a license for the operation of a junkyard business on the grounds that the plaintiff had failed to maintain a surety bond on the property. The city mailed notice to the plaintiff of the impending revocation, but she either did not receive it or failed to notice it among her other mail. Following the revocation, the plaintiff obtained a surety bond, and applied to have the revocation rescinded. The council refused, citing numerous complaints against the business. The plaintiff requested a hearing, which was continued once when her attorney withdrew. On the day scheduled, the plaintiff failed to appear. However, her husband did attend, requesting another continuance on the grounds that his wife was ill. The council refused to grant the continuance and, after reviewing complaints against the business, denied the request to rescind the license revocation. The court stated that where substantial evidence exists which justifies the license revocation, courts cannot find that the council acted arbitrarily or abused their discretion.

And, of course, to satisfy due process, the officials must be acting within their discretionary authority and must be unbiased. In *Maxwell v. Birmingham*, 126 So.2d 209 (Ala. 1961), the plaintiff was denied a license as a master plumber even though he passed the examination required by the city. The city officials felt that the plaintiff had cheated. City ordinances granted him a hearing on the denial. He claimed that the hearing was inadequate. The court disagreed, finding the notice sufficient, and noting the fact that the plaintiff did not request a continuance, and was

granted the opportunity to testify and examine witnesses.

The plaintiff also alleged that one of the city commissioners should have recused himself, but the plaintiff failed to give any reasons why the commissioner should have stepped aside. The court stated that, the mere fact that the commissioner had some prior knowledge of the facts did not require him to recuse himself.

The plaintiff also questioned the fairness of the mayor, as a part of the city commission, because the mayor had made a statement, prior to the hearing before the commission began, that he was willing to sustain the examining board's decision to revoke the license. The court found this improper but said that the mayor's other statements that he would hear all the evidence and rule on it, cured any defects in due process. With the expansion in due process rights since this case was decided, whether the same result would occur today on these facts is a matter of conjecture.

Conclusion

While Alabama courts apparently still maintain that the holder of a license does not have any contract or vested interest in not having the license or permit revoked, the requirement that the decision to revoke not be done in an arbitrary or capricious manner necessitates giving licensees at least minimal protection from improper governmental actions. Due process protections should be afforded at every stage of the licensing process, from the drafting of the ordinance through any necessary revocation proceedings.

Attorney General's Opinions and Cases

- Substantial evidence supported the city council's revocation of a nightclub's business licenses and rescission of its liquor license and dance permit. *Atlantis Entertainment Group, LLC v. City of Birmingham*, 231 So.3d 332 (Ala.Civ.App. 2017).
- Gas station's allegation that the town denied an application for a liquor license based on the owners' race and national origins stated an equal protection claim. *Minesaha, Inc. v. Town of Webb*, 236 So.3d 890 (Ala.Civ.App. 2017).
- An appeal by a property owner whose application for a liquor license was denied based on the claim that the city failed to provide it with equal protection was moot since it did not include a claim for damages under federal law. *Brazelton Properties, Inc. v. City of Huntsville*, 237 So.3d 209 (Ala.Civ.App. 2017).
- Circuit court lacks jurisdiction via certiorari over denial of liquor license by a local government in a different county. *EMBU, Inc. v. Tallapoosa County Com'n*, 263 So. 3d 731 (Ala.Civ.App. 2018).

36. License Enforcement

The municipal privilege license is one of the most important sources of revenue for Alabama cities and towns. A large percentage of the total revenue upon which Alabama municipalities budget their activities is derived from some form of license tax levied under the authority of Sections 11-51-90 and 11-51-91, Code of Alabama 1975. These levies include the general license tax schedule, the gasoline tax, the tobacco tax, the amusement tax, the gross receipts tax in the nature of a sales tax, the occupational tax, the lodgings tax and others.

In *Van Hooks v. Selma*, 70 Ala. 361 (Ala. 1881), the court stated: "The power of the state to authorize the license of all classes of trades and employments cannot be doubted and there is just as little doubt of the power to delegate this right to municipalities, either for the purpose of revenue, or that of regulation." Numerous subsequent cases have confirmed this authority.

Due to limited personnel, the complexity of modern commerce and borderline questions relating to the taxing power, a municipality is certain to lose some revenue through license escapes. Nevertheless, there are steps which a municipality may take to enforce its privilege licenses that will limit those losses. Strict license enforcement is the fairest license enforcement because it closes the door on the competitive advantage which "escapees" enjoy over others in the same license classification.

The following article reviews the powers which cities and towns have to enforce their license taxes and points out a few steps which may make this job easier.

Job of the Clerk

The municipal clerk is required by statute to issue all licenses unless otherwise provided by ordinance. Any part of this duty may be devolved upon the auditor by ordinance. Section 11-43-103, Code of Alabama 1975. It is the clerk, or officer appointed in his or her stead for this job, who forms the nucleus around which good license enforcement is built. In keeping the license records, if the clerk sets up a cross file on licensees and license classifications, he or she can tell who is licensed in each classification each year, who was licensed in a classification last year but does not hold a current year license, who has been chronically delinquent in procuring licenses in past years, who are the agents representing nonresident firms which do business in the municipality, the amount each licensee paid in each year over past years and other vital information to ensure success in license enforcement.

The clerk is the official custodian of the license ordinance and is the employee who knows if a person

has procured a license to engage in a particular activity classified in the ordinance. Testimony of the clerk is necessary in any action to enforce the license ordinance, both to provide the ordinance and to certify that the defendant has not procured a particular license. Since the clerk will be the principal witness for the municipality, it is essential that all license records be kept as accurately and as securely as possible. Procedures used by the clerk must reveal exactly what licenses have been issued in each category (classification). The records should be maintained for at least a five-year period.

After the final day for payment of licenses, the clerk should compile a list of persons and firms which have procured licenses in each classification to give to the license inspector or police officer charged with the duty of enforcing the license ordinance. Along with this list, the clerk might prepare another list showing persons and firms which procured licenses in past years but have not purchased a license in the current year. This procedure gives the enforcement officer a lead as to possible escapees.

Information from Competitors

It is generally true that local businesses do not object to paying their fair share of the local tax burden provided the program is administered in a nondiscriminatory manner. Businesses do object strenuously to unlicensed competition. A municipality can benefit substantially from information given by licensees about competitors, especially outside competitors who enter the municipality for the first time. License enforcement personnel should encourage such reports which should be carefully investigated. We recommend that a report of successful results be made to licensees.

Enforcement by Prosecution

When a license enforcement officer discovers a person doing business in the municipality without a proper license, several alternatives are available. Section 11-51-93, Code of Alabama 1975 provides: "It shall be unlawful for any person, firm or corporation, or agent of a firm or corporation to engage in businesses or vocations in a city or town for which a license may be required without first having procured a license therefor. A violation of this division or of an ordinance passed hereunder fixing a license shall be punishable by a fine fixed by ordinance, not to exceed the sum of five hundred dollars (\$500) for each offense, and by imprisonment, not to exceed six months, or both, at the discretion of the court trying the same, and each day shall constitute a separate offense."

Most license ordinances contain a provision similar to this statutory license enforcement aid. When the enforcement officer discovers resident businesses doing business without a license, it is customary to cite the proprietor to appear before the clerk on or before a certain day to show cause why the license should not be paid. If the person fails to appear and pay the required license, the enforcement officer should cause an arrest warrant to be issued for doing business without a license, and the case would be tried in the municipal court. When the officer discovers non-residents doing business in the municipality without a license, it is customary to arrest the person for doing business without a license if the person refuses to procure it when confronted with the allegation. Prior to any arrest, the appropriate municipal officials should investigate the matter. In *Tuscaloosa County v. Henderson*, 699 So.2d 1274 (1997), the Alabama Court of Civil Appeals held that a license inspector was not protected by qualified immunity when he had the plaintiff arrested for conducting business without a license without first conducting an investigation.

The agent of a person, firm or corporation may be arrested for doing business for a principal who is not properly licensed. In making arrests for doing business without a license, the license enforcement officer must maintain close contact with the municipal clerk to ensure that, before an arrest is made, the person has not recently procured a license.

This is the simplest method of enforcing the municipal license ordinance. It does not require the services of the municipal attorney. It does not require lengthy, drawn-out litigation. For these reasons, this method of enforcement is used more than the other methods which are discussed below.

Civil Action

At times, a municipal governing body might not wish to make an arrest but would like to ensure collection of the proper license. Occasionally it is learned that a person has been escaping licenses for a number of years. The limitation for arrest and prosecution for license violation is one year. Section 11-51-96, Code of Alabama 1975, states:

“On all property both real and personal, used in any exhibition, trade, business, vocation, occupation, or profession for which a license is or may be required, municipal corporations shall have a lien for such license, which lien shall attach as of the date the license is due and shall be superior to all other liens, except the lien of the state, county and municipal corporations for taxes and the lien of the state and county for licenses. Such lien may be enforced by attachment.”

On the basis of this authority, the municipal attorney may be directed to prepare the necessary complaint and attachment papers for the establishment of the lien and the sale of property for satisfaction of the past due license or licenses. A municipality does not have to provide sureties on its bond filed in an attachment suit. Section 11-43-83, Code of Alabama 1975. Consideration should be given to the court in which an action of this nature will be brought. If the amount to be recovered is small, the action might be brought in an inferior court of the county. Conversely, if the amount is large, it would probably have to be brought in the circuit court because of jurisdictional limitations of inferior courts. The municipal attorney should be consulted on this question.

Enforcement by Injunction

The most comprehensive method of enforcing license ordinances is found in Sections 11-51-150 through 11-51-161, Code of Alabama 1975. Under the procedure authorized by these sections, a municipality may enjoin the further operation of the business within its corporate limits or police jurisdiction, procure an accounting for license payments and penalties due and secure any equitable attachment in aid of the license collection. This procedure requires the services of the municipal attorney since it is brought in a court of equity. Regarded as the most drastic enforcement procedure, an injunction is probably the only procedure which will provide the proper results in cases where an established business adamantly refuses to procure the required license.

Section 11-51-160, Code of Alabama 1975, authorizes equitable attachment in aid of the municipality's suit and no bond is required. However, the bill of complaint must be verified as provided by Section 11-51-150 of the Code.

On a number of occasions, the Supreme Court of Alabama has upheld the results of findings for cities and towns in actions under this authority. Good examples are found in the cases of *Talladega v. Ellison*, 262 Ala. 449, 79 So.2d 551 (Ala. 1955) and *Bush v. Jasper*, 247 Ala. 359, 24 So.2d 543 (Ala. 1946).

Again, adequate license records kept by the clerk are essential. In prosecutions for license enforcement and in civil actions for this purpose, the clerk will have to certify that the defendant has not procured the required license. The license enforcement officer will be required to certify that the defendant did engage in business without the required license within the municipality or its police jurisdiction.

Statute of Limitations

While prosecutions for doing business without a license are quasi-criminal actions subject to the one-year statute of limitations, both of the civil remedies mentioned above

may be brought to recover escaped licenses as provided for in Section 11-51-191, Code of Alabama 1975.

Section 11-51-191(c)(2) provides the following with regard to time frames for preliminary assessments for unpaid license fees:

Any preliminary assessment shall be entered within four years from the due date of the business license form, or four years from the date the form is filed, whichever is later, except as follows:

- a. A preliminary assessment may be entered at any time if no license form is filed as required, or if a false or fraudulent license form is filed with the intent to evade the business license tax.
- b. A preliminary assessment may be entered within six years from the due date of the license form or six years from the date the license form is filed with the taxing jurisdiction, whichever date occurs last, if the taxpayer omits or fails to report an amount in excess of 25 percent of its gross receipts or other applicable business license tax base.
- c. A preliminary assessment may be entered within five years from the due date of the license form, or five years from the date the form is filed, whichever is later, if the taxpayer or its authorized agent fails or refuses to execute and return to the taxing jurisdiction or its agent a written extension of the statute of limitations on issuing preliminary assessments for up to eight months, as requested by the taxing jurisdiction or its agent, within 30 days after receipt of the request for extension by the taxpayer or its authorized agent.

Each situation should be studied and considered to determine the best procedure to be used. A prosecution is much faster, but a civil procedure may result in the collection of more revenue.

Police Jurisdiction Licenses

The same remedies used for the enforcement of licenses within the corporate limits of the municipality apply to the enforcement of licenses due for business operations within the police jurisdiction. *See, Talladega v. Ellison*, supra.

Amount of the Fee

The clerk has no authority to accept a different fee from that established by the council by ordinance for a particular license classification. While the council has the authority to amend the license ordinance at any time relating to fees and regulations for business classifications, the clerk must abide by the license ordinance as established by the council.

Information from the State

Since 1951, cities and towns in Alabama have had access to sales tax information filed by local merchants with the State Department of Revenue in remitting their sales taxes. This authority is found in Section 11-51-181, Code of Alabama 1975, and originated as legislation drawn up by the League to make such information available to municipalities for license enforcement purposes. While this information will not help a city or town find persons who are doing business without a license, it is an invaluable aid in determining if licensees have paid the proper amount to the municipality. For information on how to procure this assistance from the State Department of Revenue, see the article in this publication entitled "The Municipal Sales Tax."

The Attorney General has ruled that municipalities may enter into reciprocal written agreements providing for the exchange of local tax returns and other information similar to that received from the Alabama Department of Revenue. AGO 1995-196. Care must be exercised to ensure that any sales or use tax information provided does not violate the confidentiality provisions of Section 40-2A-10 of the Code.

Caution

License codes should be reviewed from time to time so that new trades and business may be included. Further, ordinances should be carefully drawn to avoid doubtful application or ambiguity. In *Gotlieb v. Birmingham*, 243 Ala. 579, 11 So.2d 363 (Ala. 1943), the court held: "The rule that taxing statutes are to be strictly construed against the taxing power is applicable to municipal ordinances imposing license taxes."

Moratorium

The Attorney General advised that a city could declare a moratorium on the collection of penalties and late fees from city licensees and taxpayers who voluntarily present themselves to the city to pay any outstanding license tax obligations owed to the city during the period in which the moratorium was in effect. However, it was pointed out that interest on such amounts cannot be waived by the city. AGO 1984-276 (to Hon. Arnold W. Umbach, May 10, 1984).

Conclusion

Strict license enforcement is essential both to increase revenue and to avoid unfair competition from escapees. Clerks should keep accurate records and work closely with inspection and enforcement personnel. Clerks can be of invaluable assistance in spotting delinquent taxpayers.

Attorney General's Opinions on License Enforcement

- If the city does not levy and collect license fees in its police jurisdiction, it may seek to collect insurance

proceeds from applicable policies held by individuals who reside in the police jurisdiction pursuant to the costs of fire, emergency management services (“EMS”), hazardous material, and rescue services rendered by the city’s fire department. Because the city levies and collects taxes to fund the services of its fire department, the city may not seek to collect insurance proceeds from applicable policies held by individuals who reside in the corporate limits pursuant to the costs of EMS, hazardous material, and rescue services rendered by the fire department. The city is not allowed to collect insurance proceeds from applicable policies held by commercial/industrial occupants located in the corporate limits pursuant to the costs of hazardous material mitigation or remediation because the city collects taxes and fees to fund these services. If the city does not levy and collect license fees in its police jurisdiction, it may collect insurance proceeds from applicable policies held by commercial/industrial occupants located in the police jurisdiction pursuant to the costs of hazardous material mitigation or remediation. AGO 2019-012.

37. The Commerce Clause and Municipal Taxation

Article I of the United States Constitution provides that: “Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

Interstate commerce embodies any business which operates between two or more states. Individual states may not impede the flow of commerce from other states. The Commerce Clause prevents states from blocking channels of free trade, and, thus, impairing the national market. However, does state or local taxation of interstate commerce block free trade?

The U.S. Supreme Court has been asked to rule on this question several times, with various results. The Court has called its own decisions on state taxation of interstate commerce a “quagmire,” and Justice Scalia has declared that in the years since the Commerce Clause was first applied in this area, the Court’s applications of the doctrine have “made no sense.”

Thus, this is a very confusing area of law, one in which even the courts often reach conflicting conclusions. Therefore, the League urges municipal officials and employees to proceed carefully in areas that involve interstate commerce questions.

This article explores the development of the Commerce Clause in the area of state taxation and examines the future ramifications of recent court decisions on the tax revenues of local governments.

History

In interpreting state taxation of interstate trade, the U.S. Supreme Court has expressed concerns in two areas: first, the Commerce Clause, which mandates that states not interfere with interstate commerce; and second, restrictions on personal jurisdiction imposed by the Due Process Clause.

The Court’s decisions have tended to follow trade developments. In the early history of our country, only rare products were not produced locally. Markets were local and state regulations had little impact on commerce between the states.

In the 1800’s, though, the market shifted. People began congregating more in cities and towns than in widespread rural areas. Transportation improved, and more goods were produced for a national market. During this time, the Court struck down many state regulations on Commerce Clause grounds to protect the fledgling economy and to encourage growth. These rulings placed the power to regulate this national commerce solely in the hands of Congress. Justice Harlan Stone has said that the Court’s interpretation of the

Commerce Clause, more than perhaps any other single element, bound the states into a nation.

Commerce Clause opinions during the 19th century illustrate some of the central concerns that the justices had in trying to establish the proper role of the state and federal governments. The Court sought to preserve the territorial integrity of the states, while simultaneously acknowledging Congress’ power under the Constitution to regulate interstate commerce. Industries challenged many state laws during this period and succeeded in establishing a federal right that only Congress can regulate interstate trade.

One of the results was a ban on local taxation of interstate businesses. Thus, in the early 1800’s, the Court felt that states should not tax interstate commerce.

The late 1800’s, though, witnessed a shift. The Court continued to prohibit direct taxation but allowed indirect taxation. The Court held that each sovereign is supreme within its sphere of influence. A state can exercise its police power, leaving Congress to regulate the commercial aspects of interstate commerce. If a state law operated extraterritorially or unreasonably and burdened the introduction of non-domestic products into a state, the court treated the law as a direct regulation of interstate commerce and a violation of the commerce clause. When the state’s exercise of police power was not aimed at interstate commerce but was instead a police power action and the means of regulation merely affected interstate commerce, the state was free to regulate unless preempted by Congress.

Over time, courts began to feel that interstate commerce merchants, who took advantage of changing technology in both delivery of goods and marketing to reach a broader audience for their products, should share in the costs of providing local services, provided that the tax in question did not constitute a burden on interstate commerce.

What is a “Burden?”

A tax on an interstate business cannot amount to a **“burden on interstate commerce.”** Each situation must be examined on its own circumstances to determine if a tax or license on any particular business constitutes such a burden. Further, each situation must be looked at in light of recent legislative action. Some cities have most of their license fees set on a gross receipts basis while others charge flat amounts for their license each year. Some cases indicate that flat-rate license taxes run the risk of burdening interstate commerce. *See, i.e., West Point Wholesale Grocery Co. v. City of Opelika, Ala., 354 U.S. 390 (1957).*

For instance, representatives of door-to-door firms regularly solicit business within municipalities and then

deliver the products. These companies sometimes refuse to buy a license claiming immunity from the license because they are engaged in interstate commerce. Can a municipality levy and collect a license on this type of activity?

If this city has based its license on a percentage of the gross business, then case law seems to hold that the company would be liable for the license. In *Armstrong v. Tampa*, 118 So.2d 195 (Fla. 1960), a representative of the Avon Company refused to pay the license tax. The court upheld the graduated license on the representative but held that the flat sum license would be invalid as applied to this interstate business activity.

Bellas Hess

Fifty years ago, in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), the United States Supreme Court examined whether states may impose collection duties on remote mail order retailers, and held that this would violate both the Due Process and Commerce Clauses of the U.S. Constitution. *Bellas Hess* was the first major salvo in what has become a multi-pronged and lengthy battle over what constitutes nexus between remote sellers and state and local governments.

In *Bellas Hess*, Bellas Hess, a mail-order company incorporated in Delaware and headquartered in Missouri, was required by the state of Illinois to collect and remit use taxes. The company had no stores, agents, property or telephone numbers in Illinois. Its contacts with Illinois residents consisted of mailing two catalogues each year to past and potential customers, supplemented by occasional flyers. Bellas Hess accepted orders by mail and shipped goods by mail or common carrier. Bellas Hess challenged the use tax requirement on both Commerce Clause and Due Process grounds.

The Court stated that state taxation on interstate businesses is justified only where the tax is necessary to make the commerce bear its fair share of the cost of the government whose protection it enjoys. The Court said that due process requires that the state demonstrate that it has given benefits to the business which justify the tax. The Court found that retailers with stores, solicitors or property within a state received protection and services from the state, while retailers relying solely on mail-order business did not. The Court felt that if the use tax was upheld, every other state would impose similar requirements on mail-order businesses, which would unjustifiably entangle mail-order businesses in an administrative nightmare.

In this case, the Court ignored the nature and depth of the retailer's contacts with the taxing state. Instead, the Court conditioned nexus upon a finding that the retailer was physically present in the state. This bright-line rule, first articulated in this case, continues as the rule today, although

there have been many, many re-interpretations by courts, legislative bodies, and regulators.

Post *Bellas-Hess* Cases

In *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), California sought to impose use tax collection duties on the National Geographic Society. The society sold items to California residents from its offices in Washington, D.C. It had no retail outlets in California. However, the society maintained two offices in California to solicit advertising for its magazine. The Court held that these offices constituted a physical presence in the state which justified imposing the use tax on the mail order business. This decision means that a retailer's physical presence does not have to relate to the portion of business which the state seeks to tax.

In 1977, the Court issued its ruling in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In this case, a transportation services dealer sued over a Mississippi requirement that he collect taxes from his customers. The Court overturned its previous decisions and allowed the state tax to stand. The Court established a four-part test to determine when a state tax is permissible. A state tax will be sustained if:

- a. the tax is applied to an activity with a substantial nexus with the taxing state;
- b. the tax is fairly apportioned;
- c. the tax does not discriminate against interstate commerce; and
- d. the tax is fairly related to some service the state provides.

This test was applied in *T-Mobile South, LLC v. Bonet*, 85 So.3d 963 (Ala.2011), where the Court found that an Emergency 911 service charge applies to prepaid wireless telephone services. The fee did not violate any of the elements of this test. The Court stated that:

“The charge is based upon activity that has a substantial nexus to the State of Alabama in that the customers to whom this charge applies have a primary use in the state. [T-Mobile] has the capacity to ascertain the place of primary use of [its] prepaid wireless customers, and [its] intentional failure to obtain this information cannot relieve [it] of [its] obligation to determine those addresses. The Charge is fairly apportioned because it applies across the board to the beneficiaries of the services which the Charge funds. By limiting its application to customers with a primary use address in Alabama, the Act does not discriminate

against interstate commerce and fairly relates to the benefits provided the customer.”

The *Complete Auto* test remains the standard today. Courts continue to find that interstate commerce must pay a fair share of local taxes. However, taxes and licenses applied to interstate businesses must not constitute a burden. In determining whether a tax meets this test, it is important to understand each of these four elements.

***Complete Auto* Element One: What is Nexus?**

Webster defines “nexus” as a connection, a tie or a link. For taxation purposes, legally speaking, nexus is some activity, relationship or connection which is necessary to subject a person, business or corporation to a jurisdiction’s taxing powers. In other words, there must be a sufficient connection between the business involved and the taxing jurisdiction for a tax to be applied. Physical presence is generally necessary to satisfy nexus requirements under the Interstate Commerce Clause. (Note that nexus for “intrastate” transactions (those that occur completely in Alabama) is treated differently. This concept is discussed further in the article on sales and use taxation in the *Selected Readings for the Municipal Official*.) Case law and legislative efforts to statutorily define nexus have made this a frequent topic of discussion among local revenue administrators.

Interstate commerce cases generally arise from two types of taxes: true sales and use taxes and license taxes.

Business licenses are imposed on businesses of the privilege of selling their goods to local citizens. Section 11-51-90 authorizes all municipalities to collect license taxes on business that is transacted within the municipality and police jurisdiction. These fees are collected from the business itself for the privilege of doing business within the municipality. License fees are generally based on either a flat rate or on the gross receipts of the company. In Alabama, licenses may be assessed on businesses which operate in interstate commerce only to the extent of the business which is transacted within the limits of the state and where the business has an office or transacts business in the city or town imposing the license.

The true sales and use tax is a consumer tax; that is, although the seller collects this tax, he or she serves only as an agent for the taxing jurisdiction. The purchaser is the ultimate taxpayer. The use tax is on tangible personal property which was purchased outside the jurisdiction for use or consumption within the jurisdiction. Interstate Commerce Clause cases frequently challenge whether a jurisdiction can require an out-of-state seller to collect a use tax.

In the sales and use tax context, pursuant to state law, whether a sales tax is due on a transaction depends upon the passing of title between the buyer and seller. *Hamm v. Continental Gin Co.*, 276 Ala. 611, 165 So.2d 392 (Ala. 1964). Section 40-23-1(5) states that “a transaction shall not be closed or a sale completed until the time and place when and where title is transferred by the seller or seller’s agent to the purchaser or purchaser’s agent.”

Thus, delivery is a pivotal issue for determining where title transfers, but it is not conclusive. The determining factor is the intent of the parties, in whatever means it is revealed.

Sales and use taxes comprise a large portion of most state and local revenues. Most economists feel these taxes will increase as states are forced to assume responsibility for more federal programs. Budget shortfalls have made state and local governments increasingly aggressive in enforcement of these taxes.

State laws require retailers to collect sales and use taxes from consumers and remit these amounts to the government. Retailers remain liable for any uncollected taxes. State collection requirements have resulted in challenges based on the interstate Commerce Clause.

In the case of both sales and use taxes and license taxes, courts have focused on the nature of contacts the retailer has with the state. Clearly, physical presence is enough to enable the state to require collection of the taxes. Closer questions arise where the contact is more limited.

In the interstate commerce area, “the ‘substantial-nexus’ requirement . . . limit[s] the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce.” See, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Nexus can only be determined by examining all possible connections the taxpayer has with the taxing jurisdiction. This can only be determined on a case-by-case basis because these factors vary in each individual situation. However, generally speaking for interstate commerce purposes, only a minimal contact is necessary.

Factors Indicating Nexus

Cases have indicated a number of factors relevant to the issue of nexus. For instance, maintaining a legal domicile or principle place of business generally subjects the business to tax liability. Other factors include making deliveries into the jurisdiction, advertising, employing local individuals, maintaining or using a facility, rendering services, taking advantage of the economic benefits of locating near the jurisdiction, and soliciting orders. However, in the case of soliciting orders, 15 U.S.C. Section 381 et seq., prohibits a state or local government from assessing any net income-based tax on an interstate business if the only contact between the business and the taxing jurisdiction is the employment of a representative to solicit orders which are

filled and shipped from a point outside the state. Even in this situation, though, every decision about accepting or rejecting the order must be made outside the state in order to defeat a finding of nexus.

An example might help clarify the issue of nexus. In *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), the State of Washington imposed a business and occupational tax on businesses which operated within the state. The measure of this tax, a wholesale tax, was based upon the gross proceeds of the company's sales within Washington. The U.S. Supreme Court found that sufficient nexus existed to justify imposing the tax against Tyler Pipe, even though the only connection between Tyler Pipe and Washington was hiring an independent contractor to solicit orders within the state. Tyler Pipe maintained no offices in Washington, owned no property, and had no employees within the state, even though it sold large amounts of cast iron and other products within the state. The Court pointed out that the sales representative Tyler Pipe hired acted daily on behalf of the company, calling on customers and soliciting orders. In addition to the goodwill established by the representative, he also kept the company informed on all aspects of their business within Washington, and kept Tyler Pipe up-to-date about the market for its products within the state. Because of the substantial activities of the representative, the Court found sufficient nexus to uphold imposing the tax.

In attempting to define nexus legislatively, in 2003 the Alabama legislature adopted Section 40-23-190, Code of Alabama 1975. The purpose of this legislation is to establish the conditions under which an affiliation between an out-of-state business and an in-state business creates remote entity nexus with Alabama to require the business to collect and remit state and local use tax. Remote entity nexus is established and an out-of-state business to collect and remit state and local use tax if the out-of-state business and the in-state business maintaining one or more locations within Alabama are related parties; and one or more of the following conditions is met:

- The out-of-state business and the in-state business use an identical or substantially similar name, trade name, trademark, or goodwill, to develop, promote, or maintain sales, or
- The out-of-state business and the in-state business pay for each other's services in whole or in part contingent upon the volume or value of sales, or
- The out-of-state business and the in-state business share a common business plan or substantially coordinate their business plans, or
- The in-state business provides services to, or that inure

to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market.

- An out-of-state business and an in-state business are related parties if one of the entities meets at least one of the following tests with respect to the other entity:
- One or both entities is a corporation, and one entity and any party related to that entity in a manner that would require an attribution of stock from the corporation under the attribution rules of Section 318 of the IRC owns directly, indirectly, beneficially, or constructively at least 50 percent of the value of the corporation's outstanding stock; or
- One or both entities is a limited liability company, partnership, estate, or trust and any member, partner or beneficiary, and the limited liability company, partnership, estate, or trust and its members, partners or beneficiaries own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the profits, or capital, or stock, or value of the other entity or both entities; or
- An individual stockholder and the members of the stockholder's family, as defined in Section 318 of the IRC, owns directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of both entities' outstanding stock.

***Complete Auto* Element Two: Fair Apportionment**

The apportionment element of the *Complete Auto* test is concerned with the avoidance of applying multiple taxes to a single interstate transaction. State and local governments cannot exact from interstate commerce more than a fair share of the tax associated with the transaction. This part of the test looks to the structure of the tax to see whether its identical application by every State would place interstate commerce at a disadvantage as compared with intrastate commerce.

M & Associates v. City of Irondale, 723 So.2d 592 (Ala. 1998), provides an Alabama example of the application of the "fairly apportioned" standard. In this case, M & Associates was an Alabama corporation, headquartered in Irondale. The company sold electrical supplies from its Irondale facility as well as from facilities in Mobile, Georgia, Tennessee, Mississippi and Louisiana. The company used a central billing system in Irondale; all gross receipts were transmitted to its headquarters in Irondale. The city sought to assess a gross receipts license against M & Associates' entire interstate business; that is, the city based the business's gross receipts upon its total sales, even where those sales had no connection to Alabama other than the bookkeeping.

The Alabama Supreme Court evaluated this taxing

scheme using the four part test set out by the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady*, discussed above.

In *M & Associates*, the court was particularly concerned with whether the local tax was fairly apportioned. The court quoted the U.S. Supreme Court, stating that:

“[W]e are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. But ‘we have long held that the Constitution imposes no single [apportionment] formula on the States,’ and therefore have declined to undertake the essentially legislative task of establishing a ‘single constitutionally mandated method of taxation.’ Instead, we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. . . . To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.” *Goldberg v. Sweet*, 488 U.S. 252 (1989). (Citations omitted.)

To be externally consistent, the local government must demonstrate that it has taxed only that portion of the revenues from the interstate activity which reasonably reflects the local component of the activity that is being taxed. *Goldberg v. Sweet*, 488 U.S. 252 (1989).

The court also cited *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939), where the U.S. Supreme Court struck down a Washington state statute that assessed a gross receipts privilege tax against a business which marketed fruit shipped from Washington to different places around the country and the world. The State of Washington included in gross receipts even transactions where the fruit was shipped to a location outside Washington, then sold outside the state. The U.S. Supreme Court held that imposition of the state tax violated the federal commerce clause.

Similarly, the Alabama Supreme Court held that the ordinance in *M & Associates* was not internally consistent. The court stated that “if local governments in other states in which M & Associates does business . . . were to impose license taxes based on gross receipts from sales made within their respective jurisdictions, then multiple state taxation of interstate commerce would result. . . . [I]f M & Associates were to sell a certain piece of electrical equipment from its facility in Marietta, Georgia, that one sale would be subject to taxation in both Georgia and Alabama.” Thus, the court held that the ordinance was not fairly apportioned because a single transaction could result in two taxes by separate jurisdictions. It is irrelevant whether other jurisdictions actually apply a tax—the only question is whether the transaction may be reasonably subject to application of a

gross receipts tax by another jurisdiction.

The court did, however, specifically uphold its decision in *City of Tuscaloosa v. Tuscaloosa Vending Co.*, 545 So.2d 13 (Ala. 1989), where the court stated that a city can impose on businesses located inside the corporate limits or police jurisdiction a gross receipts fee that includes transactions from that facility, whether the sale was inside the corporate limits or beyond. Thus, it would be permissible for a municipality to include in the license fee of a business located in the municipality or police jurisdiction any intrastate sales from that location. The court declined to address whether Irondale could include the receipts from M & Associates’ Mobile location when computing the company’s license fee. The question remains, though, can a municipality include the gross receipts from interstate sales by businesses located in the police jurisdiction or corporate limits? In the League’s opinion, the answer is a qualified yes.

Once the court determined that municipalities have the right to include in the license fee the gross receipts of transactions which occur beyond the municipal corporate limits, the issue returns to the court’s earlier analysis; that is, does the imposition of the tax satisfy the four-prong test of *Complete Auto*? Simply stating that the sale occurs in interstate commerce isn’t enough to exempt the sale from municipal gross receipts taxation. Remember that a tax is not fairly apportioned only if another state could impose the same type tax on the same transaction. In many cases, this can’t happen because the other state cannot obtain sufficient nexus to assess the gross receipts tax.

Perhaps an example would help illustrate this point. Look again at the situation in *Tuscaloosa Vending*: a business physically located within a municipality’s taxing jurisdiction ships goods throughout the country. It receives orders at the Tuscaloosa site and ships from that location. In this situation, it is clear that Tuscaloosa is the only jurisdiction so closely aligned with the transaction that it can levy a license tax. If the goods are shipped to Atlanta, Georgia, Atlanta’s only connection to the transaction is the delivery. It would not have sufficient nexus with the business to assess a gross receipts tax against it.

M & Associates is frequently cited for the proposition that it requires municipalities to exclude gross receipts of interstate transactions from the computation of a local business’s license fee. In the League’s opinion, this is not the case. Only where the gross receipts of the same transaction can be taxed both by an Alabama municipality and a municipality in another state does *M & Associates* prohibit including the gross receipts of interstate sales. In other words, each jurisdiction may only tax the taxable portion of the transaction that occurs in its jurisdiction.

Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995), is another case that involved the internal/external consistency prong of the *Complete Auto* test. Jefferson Lines, Inc., a common carrier, did not collect or remit to Oklahoma the state sales tax on bus tickets sold in Oklahoma for interstate travel originating there, although it did so for tickets sold for intrastate travel. The Court found no failure of consistency in this case, because if every state imposed a tax identical to Oklahoma's—that is, a tax on ticket sales within the state for travel originating there—no sale would be subject to more than one state's tax. Additionally, since Jefferson offered no convincing reasons why the tax failed the external consistency test, the Court found that Oklahoma's sales tax on full price of ticket for bus travel from Oklahoma to another state did not violate dormant commerce clause.

In *Goldberg v. Sweet*, 488 U.S. 252 (1989), Illinois passed an Telecommunications Excise Tax Act which imposed a 5% tax on the gross charges of interstate telecommunications originated or terminated in the State and charged to an Illinois service address, regardless of where the call was billed or paid. The Act also provided a credit to any taxpayer upon proof that another State has taxed the same call and required telecommunications retailers to collect the tax from consumers.

The U.S. Supreme Court found that this tax was fairly apportioned. The Court stated that the tax was internally consistent, since it was structured so that if every state imposed an identical tax on only those interstate phone calls which are charged to an in-state service address, only one State would tax each call. Thus, no multiple taxation would result.

The Court also found that the tax was externally consistent even though the tax was assessed on the gross charges of an interstate activity, since the tax was reasonably limited to the in-state business activity which triggered the taxable event in light of its practical or economic effects on interstate activity. Because it was assessed on the individual consumer, collected by the retailer, and accompanied the retail purchase of an interstate call, the tax's economic effect was like that of a sales tax, and reasonably reflected the way consumers purchased interstate calls, even though the retail purchase simultaneously triggered activity in several States, and was not a purely local event.

Further, the Court found that the risk of multiple taxation was low, since only two types of States—a State like Illinois which taxed interstate calls billed to an in-state address and a State which taxed calls billed or paid in state—have a substantial enough nexus to tax an interstate call. Even though this opened the door to possible multiple taxation, actual multiple taxation was precluded by the Act's credit provision.

And, in *American Trucking Associations, Inc. v. Michigan Public Service Com'n*, 545 U.S. 429 (2005), the U.S. Supreme Court refused to invalidate on Commerce Clause grounds Michigan's flat \$100 annual fee imposed on trucks engaged in intrastate commercial hauling. The Court held that the law applied even-handedly to all carriers engaged in intrastate transactions, not just those involved in interstate commerce. Further, the Court seems to have been influenced by the fact that Michigan used this fee to regulate commerce to protect the public, rather than to raise revenue. The Court noted that although this tax did apply to carriers engaged in hauling interstate commerce, and could be subject to numerous taxes by several states, it would be subject to the tax only if it picked up local goods and hauled them within the state, the same as intrastate carriers. *But see*, for comparison purposes, *Boyd Bros. Transp., Inc. v. State Dept. of Revenue*, 976 So.2d 471 (Ala. Civ. App. 2007), where the Alabama Court of Civil Appeals held that a flat-rate two percent use tax on truck tractors that were originally purchased outside Alabama, but later used in Alabama, was not properly apportioned since the tax was not “based upon actual miles traveled in the performance of a contract in Alabama.”

***Complete Auto* Element Three: Discrimination**

The third element of the *Complete Auto* test is that the tax must not discriminate against interstate commerce. This test is designed to prevent taxes which are imposed which provide a commercial advantage to intrastate business. The Court has described the rule as follows:

“[N]o State, consistent with the Commerce Clause, may “impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to a local business.” This antidiscrimination principle “follows inexorably from the basic purpose of the Clause” to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Maryland v. Louisiana*, 451 U.S. 725 (1981).”

For example, a state excise tax on wholesale liquor sales, which exempted sales of specified local products, was held to violate the Commerce Clause in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). And, a state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the State was found discriminatory in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

In *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987), two Pennsylvania statutes which imposed lump-sum annual taxes on the operation of trucks on Pennsylvania's highways were challenged. One statute

required that an identification marker be affixed to every truck over a specified weight, and imposed an annual flat fee (\$25) for the marker. The statute exempted trucks registered in Pennsylvania by providing that the marker fee was part of the vehicle registration fee. The second statute imposed a \$36 annual axle tax on all trucks over a specified weight using Pennsylvania highways. Again, Pennsylvania vehicles registration fees were reduced to offset the axle tax.

The U.S. Supreme Court found that these taxes violated the Commerce Clause. The Court noted that the Clause prohibits a State from imposing a tax that places a much heavier burden on out-of-state businesses that compete in an interstate market than it imposed on its own residents who also engaged in interstate commerce. The challenged taxes do not pass the “internal consistency” test under which a state tax must be of a kind that, if applied by every jurisdiction, there would be no impermissible interference with free trade because the challenged taxes’ inevitable effect is to threaten the free movement of commerce by placing a financial barrier around Pennsylvania. The Court noted that “though ‘interstate business must pay its way,’ a State, consistently with the Commerce Clause, cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power ‘To regulate Commerce with foreign Nations, and among the several States ... [.]’ Nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect.”

A similar Alabama tax was found to violate the Commerce Clause in *Sizemore v. Owner-Operator Independent Drivers Ass’n, Inc.*, 671 So.2d 674 (Ala. Civ. App. 1995).

A Florida municipality’s policy of automatically denying permits for new applicants and automatically renewing permits for existing permit holders discriminated against interstate commerce and violated the dormant Commerce Clause. *Florida Transp. Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012).

A September, 2002, report of the Research Department of the Minnesota House of Representatives notes several important aspects of the discrimination part of the *Complete Auto* test:

- **“Discrimination is determined by economic effect.** It is not necessary that the state or the legislature intend to discriminate, if the provision has the economic effect of discriminating. However, showing intent to discriminate is relevant; a legislative intent to discriminate is nearly conclusive of the tax’s unconstitutionality.”
- **“The tax will be invalidated, even if discrimination is minor or seemingly inconsequential.** The Court has

rejected arguments that the effect of the discrimination is so minor or *de minimus* that it is not of constitutional stature.”

- **“Incentives to encourage local investment or activity may be invalid.** Tax incentives for in-state activity (e.g., investment or exporting) may be invalid, if the net effect is to raise the underlying tax on out-of-state businesses.”

See, Constitutional Restrictions on State Taxation The Prohibition on Discriminating Against Interstate Commerce, Joel Michael, (<http://www.house.leg.state.mn.us/hrd/issinfo/clssintc.pdf> - NOTE: This page has been removed and is no longer available on-line.)

Complete Auto Element Four: Relation to State Services

Finally, in order to be valid under the Commerce Clause, a tax must be “fairly related to some service the state provides.” This element seems to be fairly easily satisfied, provided that there is sufficient nexus to uphold the tax. The test appears to be whether the business has the requisite nexus with the State or local government. If so, the tax probably meets the fourth element simply because the business has enjoyed the opportunities and protections that the government has provided.

Quill

Twenty-five years after *Bellas Hess*, the Court had the opportunity to reexamine the physical presence requirement in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

In this case, North Dakota required its residents to pay a use tax on personal property brought into the state for storage, use or consumption. All retailers maintaining a place of business in North Dakota were required to collect the tax when the property was sold. For purposes of the North Dakota statutes, distribution of catalogues or advertisement in the state on a regular or systematic basis constituted maintaining a place of business. Regular or systematic solicitation was defined as three or more separate transmissions of any ad during a twelve-month period.

In 1989, North Dakota’s tax commissioner filed suit in North Dakota district court requesting that the Quill Corporation be ordered to pay use taxes, interest and penalties on all sales in North Dakota since July 1, 1987. Quill, a Delaware corporation with property in Illinois, California, and Georgia, sold office supplies and equipment to North Dakota residents. Quill mailed catalogues and flyers into the state 62 times a year and supplemented these efforts with telephone solicitation. At the time of the lawsuit, Quill was the sixth largest retailer of office supplies in North Dakota. However, its presence in the state was almost purely economic. It owned no real property and very little

personal property. It had no representatives, facilities, in-state telephone numbers or bank accounts in North Dakota.

The district court, relying on *Bellas Hess*, rejected the commissioner's request. On appeal, the North Dakota Supreme Court reversed, holding that changes in the mass marketing business and in the legal landscape had reduced *Bellas Hess* to an "obsolescent precedent."

The state supreme court stated that the test applied in personal jurisdiction cases should apply in mail-order taxation cases as well. That is, out-of-state retailers are subject to use tax collection duties if they purposefully direct their activities at a state's residents. The court held that a seller's nexus with a taxing state should be evaluated by analyzing the economic realities present in each case. Thus, the court found a substantial nexus in Quill's intentional solicitation and exploitation of North Dakota residents. The court determined that the company's economic presence was substantial, given its market share, level of advertising and annual gross revenues in North Dakota. The court noted that North Dakota regulated financial institutions Quill utilized to verify customer credit. The state also supplied Quill with a benefit the court deemed extremely important: disposal of Quill's advertising. The court reasoned that Quill profited from advertising and benefited from the annual disposal of an estimated 24 tons of discarded advertisements.

The U.S. Supreme Court reversed, holding that *Bellas Hess* was still good law for the proposition that a retailer must have a physical presence in a state in order to establish a substantial nexus under the Commerce Clause. However, the Court removed one barrier to future taxation of direct marketers: The Court held that a physical presence is not necessary to establish nexus under the Due Process Clause. Under a due process analysis, the Court held that a retailer satisfies the nexus requirement when its connections with a state provide fair warning that it may be subject to the state's jurisdiction.

The Court pointed out that the central concern of due process is the fundamental fairness of governmental activity. The Court stated that developments in the law of due process since *Bellas Hess* had rendered the physical presence requirement unnecessary. Thus, as long as an out-of-state retailer purposefully directs its solicitation toward residents of a taxing state, it doesn't matter whether the solicitation is by catalogue or retail stores.

However, the Court held that the Commerce Clause still requires that a retailer have a physical presence in a state before he or she can be required to collect a state tax. The Commerce Clause is primarily concerned with issues of national unity, the Court said, and only a physical presence can satisfy problems of state regulation on the national economy. This requirement, according to the

Court, sets boundaries on the states' authority to impose collection duties, reduces litigation over such imposition and encourages settled expectations and promotes business investment based on those expectations.

In the direct marketing context, though, the Court's decision to remove the due process barrier was important because it opens the door to regulation of the direct marketing business by Congress. The Commerce Clause says that only Congress can regulate interstate commerce. Therefore, Congress has the power to pass a law that less than physical presence will satisfy the Commerce Clause.

Changes in Direct Marketing Since 1967

In the years since *Bellas Hess* and *Quill*, retailers have developed the ability to target customers by lifestyles, life-events, demographics and geographic and previous purchasing characteristics. Orders are no longer taken just through the mail. Retailers now use telemarketers, toll-free numbers, computers, the Internet, FAX machines, interactive television, electronic bulletin boards and e-mail. Technology continues to evolve at a breath-taking pace, leaving courts and legislators scrambling to keep up with developments.

Revenues have grown as well. In 1967, mail order sales totaled \$2.4 billion annually. Worldwide, ecommerce sales topped \$1 trillion in 2012, according to a 2013 on-line report from eMarketer (<http://www.emarketer.com/Article/Ecommerce-Sales-Topped-1-Trillion-First-Time-2012/1009649>).

In the United States, ecommerce sales were projected at 349.06 billion dollars in 2015, and are projected to surpass 600 billion dollars in 2019. Some estimates indicate that on-line retail sales account for up to 20 percent or all retail sales in the U.S. If not for the present interpretations of the Commerce Clause, these sales would be subject to taxation, just like intrastate sales. Several bills are currently before Congress that would close this loophole e-retailers currently enjoy, allowing states and localities to require remote sellers to collect the use tax that is due on these transactions. In 2012, the Alabama Legislature passed Section 40-23-174, Code of Alabama 1975, which requires remote sellers to collect this tax should Congress authorize the collection of a use tax by these remote retailers on these otherwise taxable sales.

Substantial Nexus – Major change in 2018

As previously discussed, physical presence is generally necessary to satisfy nexus requirements under the Interstate Commerce Clause. Case law and legislative efforts to statutorily define nexus have made this a frequent topic of discussion among local revenue administrators. Interstate commerce cases generally arise from two types of taxes: true sales and use taxes and license taxes.

Business licenses are imposed on businesses of the privilege of selling their goods to local citizens. Section 11-51-90 authorizes all municipalities to collect license taxes on business that is transacted within the municipality and police jurisdiction. These fees are collected from the business itself for the privilege of doing business within the municipality. License fees are generally based on either a flat rate or on the gross receipts of the company. In Alabama, licenses may be assessed on businesses which operate in interstate commerce only to the extent of the business which is transacted within the limits of the state and where the business has an office or transacts business in the city or town imposing the license.

The true sales and use tax is a consumer tax; that is, although the seller collects this tax, he or she serves only as an agent for the taxing jurisdiction. The purchaser is the ultimate taxpayer. The use tax is on tangible personal property which was purchased outside the jurisdiction for use or consumption within the jurisdiction. Interstate Commerce Clause cases frequently challenge whether a jurisdiction can require an out-of-state seller to collect a use tax.

In the sales and use tax context, pursuant to state law, whether a sales tax is due on a transaction depends upon the passing of title between the buyer and seller. *Hamm v. Continental Gin Co.*, 276 Ala. 611, 165 So.2d 392 (Ala. 1964). Section 40-23-1(5) states that “a transaction shall not be closed, or a sale completed until the time and place when and where title is transferred by the seller or seller’s agent to the purchaser or purchaser’s agent.”

Thus, delivery is a pivotal issue for determining where title transfers, but it is not conclusive. The determining factor is the intent of the parties, in whatever means it is revealed. Sales and use taxes comprise a large portion of most state and local revenues. Most economists feel these taxes will increase as states are forced to assume responsibility for more federal programs. Budget shortfalls have made state and local governments increasingly aggressive in enforcement of these taxes.

State laws require retailers to collect sales and use taxes from consumers and remit these amounts to the government. Retailers remain liable for any uncollected taxes. State collection requirements have resulted in challenges based on the interstate Commerce Clause. In the case of both sales and use taxes and license taxes, courts have focused on the nature of contacts the retailer has with the state. Clearly, physical presence is enough to enable the state to require collection of the taxes. Closer questions arise where the contact is more limited.

In the interstate commerce area, “the ‘substantial-nexus’ requirement . . . limit[s] the reach of State taxing authority so as to ensure that State taxation does not unduly

burden interstate commerce.” See, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Nexus can only be determined by examining all possible connections the taxpayer has with the taxing jurisdiction. This can only be determined on a case-by-case basis because these factors vary in each individual situation. However, generally speaking for interstate commerce purposes, only a minimal contact is necessary.

By giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes, *Quill*’s physical presence rule limited States’ ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.

Wayfair Physical Presence Is Not Necessary for Substantial Nexus

In *South Dakota v. Wayfair, Inc.*, 138 S.Ct 2080 (2018), the United States Supreme Court overruled the longstanding rule that a state cannot require an out-of-state seller with no physical presence in the state to collect and remit sales taxes on goods the seller sells and ships to consumers in the state. The case dealt specifically with a South Dakota statute requiring internet sellers with no physical presence in the state to collect and remit sales tax applied to activities with a substantial nexus with the State, as required to satisfy the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; SDCL § 10-64-2.

The court held that an out-of-state seller’s physical presence in taxing state is not necessary for state to require seller to collect and remit its sales tax, overruling *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91; *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505. The Court reasoned that although physical presence “ ‘frequently will enhance’ ” a business’ connection with a State, “ ‘it is an inescapable fact of modern commercial life that a substantial amount of business is transacted ... [with no] need for physical presence within a State in which business is conducted.’ ” *Quill*, 504 U.S., at 308, 112 S.Ct. 1904.

Further, the requirement that a state tax on interstate commerce must apply to an activity with a substantial nexus with the taxing State is established when the taxpayer or collector avails itself of the substantial privilege of carrying on business in that jurisdiction. U.S.C.A. Const. Art. 1, § 8, cl. 3.

In a 5-4 decision, the Court concluded that Wayfair’s “economic and virtual contacts” with South Dakota were enough to create a “substantial nexus” with the state allowing it to require collection and remittance. Before state and local governments rush to start requiring collection of sales taxes it’s important to understand that

although *Wayfair* overturned long standing precedent, it is not without Commerce Clause limitations. In 1977 in *Complete Auto Transit v. Brady* the Supreme Court held that interstate taxes may only apply to an activity with a “substantial nexus” with the taxing State in order to be constitutional. So while physical presence is no longer required, the “substantial nexus” requirement remains. In *Wayfair*, the Court found a “substantial nexus” because in its view a business could not do \$100,000 worth of sales or 200 separate transactions in South Dakota “unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”

The Court acknowledged that questions remain about whether other commerce clause principals might invalidate” South Dakota’s law. Ideally, the Court would have said that South Dakota’s law is constitutional in every respect and that if a state passes a law exactly like South Dakota’s it will pass constitutional muster; But it didn’t do that. Instead, the Court cited to three features of South Dakota’s tax system that “appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement.”

Simplified Sellers Use Tax (SSUT) Information for Local Governments

The “Simplified Sellers Use Tax Remittance Act”, codified at Sections 40-23-191 to 199.3, Code of Alabama 1975, allows “eligible sellers” to participate in a program to collect, report and remit a flat 8 percent Simplified Sellers Use Tax (SSUT) on sales made into Alabama. An “eligible seller” is one that sells tangible personal property or a service into Alabama from an inventory or location outside the state and who has no physical presence and is not otherwise required by law to collect tax on sales made into the state. The term also includes “marketplace facilitators” as defined in Section 40-23-199.2(a)(3), Code of Alabama 1975, for all sales made through the marketplace facilitator’s marketplace by or on behalf of a marketplace seller.

The proceeds from the SSUT 8 percent tax are distributed as follows:

- 50% is deposited to the State Treasury and allocated 75 percent to the General Fund and 25% to the Education Trust Fund.
- The remaining 50% shall be distributed 60% to each municipality in the state on the basis of the ratio of the

population of each municipality to the total population of all municipalities in the state as determined in the most recent federal census prior to distribution and the remaining 40% to each county in the state on the basis of the ratio of the population of each county to the total population of all counties in the state as determined in the most recent federal census prior to distribution.

The department of revenue will provide a list of SSUT account holders on the website disclosing the start and cease date of participants in the program, as applicable. This list is provided so that the local governments are aware of the taxpayers who fall under the protection of the SSUT Act.

38. The Special Federal Census

Alabama municipalities have the authority under state law to arrange for the United States Census Bureau to conduct, at certain intervals, special federal population enumerations. This authority for Alabama municipalities to obtain a special census is set forth in Sections 11-47-92 and 11-47-93, Code of Alabama 1975.

Section 11-47-92 states: “Any city or town may by ordinance provide for a census of all persons residing within the corporate limits of such city or town to be taken by the bureau of the census of the United States Department of Commerce ...” This statute provides the legal basis for municipalities to enter into agreements with the U.S. Census Bureau and thereby makes it lawful for the governing body of a municipality to spend municipal funds to pay for the cost of a special census.

Section 11-47-92 does place one limitation on the taking of a special census by providing that “... no such census may be conducted more often than every five years.” This is not a serious limitation, however, since it is not usually necessary or desirable for a municipality to have a census more often than every five years. If a special census was taken more frequently, it is likely that the advantages accruing from it would not offset the cost involved.

The Attorney General advised the mayor of Fairfield on December 4, 1953 that Section 11-47-92 would not prevent a municipality from having two special censuses in the 10 years between regular federal decennial censuses, provided that the two special censuses are at least five years apart.

Effects of the Special Federal Census

Section 11-47-93, Code of Alabama 1975, states: “Any census taken under the provisions of Section 11-47-92 shall be used only as the basis for any law which provides for the levy or collection of license taxes where such levy or collection of license taxes is based on population and as the basis for any law which provides for the distribution of state-collected or county-collected licenses, excises, revenues or funds, where such distribution is administered or distributed on a population basis.”

The Attorney General has ruled that the most recent census, not necessarily the last federal decennial census, is to be used for the distribution of Alcoholic Beverage Control Board profits. 131 Quarterly Report of the Attorney General 8. Therefore, if a special federal census shows that the municipality has increased in population, the municipality should notify the ABC Board of this increase so that the city or town can begin to receive the proportionate increase in ABC Board revenues. Section 28-3-74, Code of Alabama 1975.

A special federal census taken pursuant to these sections will have no effect on the form of the city’s government because Section 11-47-93 provides that **a special federal census can be used only for revenue purposes**. A special federal census will have no effect on the amount of revenue a municipality receives from state shared revenue based on the municipality’s population according to the last federal decennial census. However, specific provisions relating to specific subjects control general provisions relating to general subjects. Thus, if a special federal census is taken for the purpose of determining population for the levy or collection of license taxes, the census may also be used for the purposes of determining population for school purposes under Section 16-11-2, Code of Alabama 1975. Section 16-11-2 authorizes the use of a special federal census in the specific area of establishment of a city school system. AGO 2007-003

A special federal census will affect the amount of the privilege license fee that a municipality can levy on businesses **only** where those licenses are based on population according to the last federal census. If the amount of the license is based on the population of the municipality according to the last federal decennial census, then a special federal census will have no effect on that particular license.

A special census will affect the license fees levied against telegraph companies, telephone companies, insurance companies other than fire and marine, express companies and railroads. A municipality cannot charge the increased license fees on the above mentioned businesses until the governing body has amended its license schedule to reflect the new fees. The governing body can amend its license code at any time. If a code is amended prior to July 1, the municipality can collect the entire fee from the businesses to which it applies. However, if the license code is amended after July 1, the municipality may only collect one-half of the total amount of the new fee for the business. Sections 11-51-92, Code of Alabama 1975.

Section 40-17-359, Code of Alabama 1975, provides that the municipal share of the state gasoline tax is to be distributed among municipalities on the basis of population according to the “then next preceding federal decennial census.” Therefore, a special federal census will not affect the amount of revenue a municipality receives from the state gasoline tax. The general distribution provisions set forth in this section do not apply to municipalities located in Jefferson, Montgomery, Madison, Mobile, Etowah, Barbour, Russell, Calhoun, Dale and Morgan Counties or other counties which are under special local acts. For

municipalities in these counties, the local act applicable to the county must be examined to learn if a special federal census will affect their share of the county gasoline tax.

Distinguished from Other Special Censuses

The procedure for a special **federal census** is codified at Section 11-47-92 and 11-47-93, Code of Alabama 1975. Provision is also made in Sections 11-47-90, 11-47-91, 11-47-94 and 11-47-95 for the taking of a special **municipal census** by a municipal governing body. These two procedures are entirely separate and should not be confused because of the way they are codified. The provisions found in Sections 11-47-90, 11-47-91, 11-47-94 and 11-47-95 cannot be used or read together with Sections 11-47-92 and 11-47-93 or vice versa.

How to Obtain a Special Federal Census

The Special Census is typically on hiatus two years before and two years after the Decennial Census. During this time program materials and systems are updated. The Decennial Census is comprised of a very complex series of operations that demand a significant amount of work and staff resources. As a result, staffing critical to the success of the Special Census Program are unavailable during the two years immediately before and after a Decennial Census.

The U.S. Census Bureau will conduct a special census on a reimbursable agreement with a local government subject to the following conditions:

- The community agrees to pay all necessary expenses. Expenses may exceed original estimates particularly if the number of persons enumerated exceeds the expected population on which the cost estimate was based.
- The community agrees to provide suitable office space equipped with furniture, telephone, typewriters and other equipment necessary for the successful completion of the census.
- The community should make available qualified, mature persons who are able and willing to work full time as enumerators in the special census.
- The census supervisor will interview and test these people. Selections for employment will be based on the results of the test.
- The individual returns from the special census remain the property of the Bureau of the Census.
- Special tabulations at additional cost are available in the form of statistical summaries, provided that no information is released which might disclose the identity of any person. Special tabulations must be requested within three months of the date on which the special census count is finalized.

When a local government desires to have a special census taken, an authorized official should write a letter to Office of Special Censuses, Bureau of the Census, 4600 Silver Hill Road, RM5H023, Washington, D.C., 20233 to request a cost estimate. Since the bureau receives no appropriations for special censuses, it must charge a fee for the preparation of the cost estimate. As of September 2016, the fee for the preparation of a cost estimate was \$200 for a special census. A special census cost estimate request package can be obtained from the Census Bureau's website at <http://www.census.gov/programs-surveys/specialcensus.html> or by calling 301-763-1429 or emailing SpecialCensusProgram@census.gov.

Once a community sends the initial payment to the bureau, maps of the area will be sent to the community for updating. Normally the census will be scheduled in 90 to 120 days after the updated maps are returned. A cost estimate, which has not been accepted within 90 days by local officials, is subject to revision to take into account any changes in wage rates or other costs that may have occurred.

The enumeration is conducted under the same rules as those which govern the federal decennial census. Members of the armed forces living and stationed in the community are included in the enumerations but persons who have entered the armed forces from that particular city or town and who are now stationed elsewhere are not included. Visitors who are staying in the area for the summer only or the winter only are not enumerated unless they are working in the area or have no usual residence elsewhere. Persons enrolled in colleges or universities are enumerated at the place where they live while attending college. Unlike the decennial census, response to a special census is voluntary.

The special census supervisor, who will be an experienced employee of the Bureau of the Census, will select, appoint and train the staff and conduct the enumeration. At the conclusion of the enumeration, a preliminary count will be made by the supervisor and the results will be submitted to the local officials requesting the census. The census supervisor may also release these counts to officials in the political subdivisions of the area enumerated, to the news media and to others who are interested.

The standard questionnaire includes the name of each resident of the special census area, relationship status, age, sex, color or race. In addition, occupancy/vacancy status, number of units in a structure and tenure are collected for housing units.

Summary data for all special censuses are published in semiannual reports issued by the Bureau. Additional unpublished data can also be made available for an extra charge. Under certain circumstances, questions may be added to the census, provided that additional lead time is allowed to prepare a new questionnaire and additional estimated costs are agreed upon.

39. Municipal Franchises

A franchise is a form of a contract or agreement. As used in this article, a franchise is a special privilege not belonging to the citizens by common right but conferred by a government (municipality, in this case) upon an individual or corporation. It is essential to the character of a franchise that it should be a grant from the sovereign authority. In this country, no franchise can be held which is not derived from a law of the state. It is a privilege of a public nature which cannot be exercised without a legislative grant.

The Alabama Supreme Court has held that cities derive their authority to grant franchises from the Legislature and it may or may not require them to be revocable. The court has also ruled that a franchise grant is the creation of a property right and is more than mere legislation. Such property rights are subject to the terms and limitations of the grant.

Constitutional Provisions

Section 220, Alabama Constitution, 1901, reads: “No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village.”

Construction of Section 220

Section 220 is a constitutional guaranty that no corporation can use municipal streets for private enterprise without consent from the city or town. It is in the nature of a bill of rights for municipalities, and its purpose is to control the use of the streets. It gives municipalities the right to veto the use of its streets for business purposes. *Montgomery v. Montgomery City Lines*, 49 So.2d 199 (Ala. 1949). Thus, a municipality may withhold its consent to use the streets and public ways. *Montgomery v. Orpheum Taxi Co.*, 82 So. 117 (Ala. 1919).

In construing this section, the Alabama Supreme Court has held that the power of a city to grant a franchise is by virtue of legislative authority, and Section 220 is not a grant of such power but the reservation of a restriction on legislative authority. *Phenix City v. Alabama Power Co.*, 195 So. 894 (Ala. 1940). However, in *Dixie Electric Cooperative v. Citizens of the State of Alabama*, 527 So.2d 678 (1988.), the Alabama Supreme Court upheld the power of the Legislature to require a municipality to either grant a franchise to a particular operator or not offer that service within the municipal limits. The court stated that this did not violate a municipality’s veto power under Section 220,

because a municipality maintains its authority to veto the Legislature’s choice of operator. The result of this denial, however, would result in certain services being withheld from the citizens of the municipality.

The court has also held that in granting a franchise, as authorized under this section, a city is not lending its credit within the meaning of Section 94 of the Constitution. In other words, Section 94 does not prevent a city from granting a franchise. *Andalusia v. Southeast Alabama Gas District*, 74 So. 2d 479 (1954). See, Section 10-5-6, Code of Alabama 1975.

The court, in the *Orpheum* case, stated that consent of the local authorities is necessary “for the conduct of any public utility or private enterprise.” Thus, cities and towns may regulate private taxi companies, cable television operations and other businesses that depend on the public ways or rights of way. In *Birmingham v. Holt*, 194 So. 538 (Ala. 1940), the court enjoined the use of sidewalks for advertising purposes. Similarly, in *McCraney v. Leeds*, 194 So. 151 (Ala. 1940), the court prevented the maintenance of gasoline pumps on a sidewalk of the city. Unless prohibited in the franchise agreement, a utility board is required to pay a franchise fee to a municipality. A utility board organized under section 11-50-310, et seq., of the Code of Alabama is required to use its revenues to pay the fee in addition to outstanding bonds. AGO 2016-003.

Time Limitations - Section 228

Section 228 limits the duration of franchises granted by cities with populations of more than 6,000 to 30 years.

“No city or town having a population of more than six thousand shall have authority to grant to any person, firm, corporation, or association the rights to use its streets, avenues, alleys, or public places for the construction or operation of water works, gas works, telephone or telegraph line, electric light or power plants, steam or other heating plants, street railroads, or any other public utility, except railroads other than street railroads, for a longer period than thirty years.” Section 228, Alabama Constitution, 1901.

It has no application to cities with populations of less than 6,000. In *Montgomery v. Montgomery City Lines*, 49 So.2d 199 (Ala. 1949), the court stated:

“Section 228, Constitution, is a limitation on the duration of franchises granted by cities of a certain population.”

Section 22

Section 22, Alabama Constitution, 1901, must also be remembered in connection with franchises. This section states:

“That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.”

In *Andalusia v. Southeast Alabama Gas District*, *supra*, the court declared that franchises executed by cities of over 6,000 in population shall not have operation longer than 30 years from the date when granted.

The court, in *Bessemer v. Birmingham Electric Co.*, 40 So.2d 193 (Ala. 1949), found that a franchise granted before the effective date of the Constitution of 1901 was not subject to the imposed limitation of this section. It thus appears that the population of the municipality on the date of the grant is one controlling factor and, further, that the constitutional provisions in effect on that date must be considered.

A telecommunications service provider that obtained a statewide franchise under the predecessor of section 23-1-85 of the Code of Alabama and prior to the enactment of the 1901 Alabama Constitution, may, under state law, use and/or modify its existing transmission facilities or install new transmission facilities within a municipality's rights-of-way (absent municipal approval) for the purpose of providing new services, such as high speed internet access, video services, video programming, voice-over-internet services, or like services, that are technological advancements of communication services and which facilitate the transmission of intelligence and are consistent with the existing servitude. AGO 2008-021.

Construction of Section 22 Exclusive Grants

The limitations embodied in Section 22 are not for the protection of individuals but for the protection of municipalities and the public generally. *Decatur v. Meadors*, 180 So. 551 (Ala. 1938). An exclusive grant was struck down as early as 1885 in *Birmingham & Pratt M. St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465 (Ala. 1885), where the court held that the forerunner of this section prevented a city from making any irrevocable grants of special privileges or immunities.

In *Alabama Power Co. v. Guntersville*, 177 So. 332 (Ala. 1937), the court stated that: “the City, under constitutional limitations, is denied the right to grant to any person or corporation any exclusive franchise.”

And, in *Franklin Solid Waste Services, Inc. v. Jones*, 354 So.2d 4 (1977), the Alabama Supreme Court held that a five-year contract renewable for five years upon fulfillment of contractual obligations does not violate Section 22.

The Alabama Supreme Court provides additional guidance on exclusive franchises in *Beavers v. County of Walker*, 645 So.2d 1365 (1994). The principle announced in this case seems to indicate that when a municipality will grant an exclusive right to a private business that will result in a benefit to the private business in excess of the bid law amount (currently \$15,000), then the right to conduct that exclusive business within the corporate limits must be bid.

Other opinions on this issue include:

- *Kennedy v. Prichard*, 484 So.2d 432 (1986), the Alabama Supreme Court held an exclusive contract for wrecker service which failed to comply with the bid law was void as an unconstitutional grant of a special privilege.
- *Franklin Solid Waste, Inc. v. Jones*, 354 So.2d 4 (1977), the Alabama Supreme Court considered an appeal from a declaratory judgment holding that a contract entered into between Franklin and Montgomery County for solid waste collection violated Section 22, which prohibits the state or its political subdivisions from awarding exclusive franchises. The court reversed and remanded the case to the Montgomery County Circuit Court. The Alabama Supreme Court held that the contract in question was not an award of an exclusive franchise in violation of Section 22. Pursuant to Section 11-47-21 of the Code of Alabama, if a town considers the space at the top of a water tower to be surplus real property, the town may lease this space for fair market value to a commercial interest. If the town determines that the property is not real property and the lease would be a grant of an exclusive franchise, the town may lease the space at the top of the tower by taking competitive bids. AGO 2009-028
- An agreement for the naming rights of facilities of a separately incorporated board or authority is not subject to the competitive bid law. The granting of an exclusive contract or a franchise that does not comply with the competitive bid law constitutes an exclusive grant of special privileges in violation of Section 22, Alabama Constitution of 1901, however a separately incorporated board is a “separate entity from the state and from any local political subdivision, including a city or county within which it is organized” and therefore, it is “not one of the governmental entities within the contemplation of the prohibition of Section 22 of our State Constitution.” AGO 2010-054.
- The Morgan County Emergency Management Communications District may enter into an exclusive contract for ambulance service within the county for emergency and non-emergency dispatches. Incorporated municipalities within Morgan County

may, by ordinance, elect to enter a joint agreement with the Morgan County Emergency Management Communications District to competitively bid a contract for exclusive ambulance service within their respective jurisdictions. AGO 2015-014.

Impairing Obligations of Contracts

A valid contract (franchise) entered into by a municipality cannot be repudiated at the whim of the governing body of the municipality. In *Weller v. Gadsden*, 37 So. 682 (Ala. 1904), the city had entered a 30-year contract with the plaintiff to permit construction of a water works system. A subsequent council, before construction on the system began, passed an ordinance repealing the franchise ordinance. The court upheld the franchise under authority of this section of the Constitution. A later decision, in *Gadsden v. Mitchell*, 40 So. 557 (Ala. 1906), approved the first finding of the court but condemned the attempted effort to write an exclusive franchise.

In *Sweet v. Wilkinson*, 40 So.2d 427 (Ala. 1949), the court stated that Section 22 “does not simply inhibit the State from impairing the obligations of contract between individuals, but with like force and effect the provision applies to contracts made by the State or one of its agencies when authorized by law.”

And, in *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 F. 523 (S.D. Ala. 1907), the court noted that a franchise is an easement and thus is a property right entitled to all the constitutional protection afforded other property. Therefore, the city cannot revoke a franchise except by due process of law.

Statutory Provisions

No person, firm, association, or corporation shall be authorized to use the streets, avenues, alleys, and other public places of cities or towns for the construction or operation of any public utility or private enterprise without first obtaining the consent of the proper authorities of the city or town. Section 11-49-1, Code of Alabama 1975.

Franchises are normally granted by the execution of an ordinance of the governing body. Section 11-40-1, Code of Alabama 1975, confers powers on municipalities of this state to “contract and be contracted with.” Section 11-45-8, Code of Alabama 1975, requires publication of ordinances of a general or permanent nature and states that “all ordinances granting a franchise shall be published **at the expense of the party or parties to whom the franchise is granted.**” Many municipalities, which are organized under special acts of the legislature, are bound, in granting franchises, to comply with specific sections of the act establishing their government.

Section 11-43-62, Code of Alabama 1975, authorizes the regulation of the use of streets for the erection of telegraph, telephone, electric and other systems of wires and conduits and, “generally to control and regulate the use of streets for any and all purposes.” This section continues: “The council may sell or lease in such manner as it has power to grant, and the moneys received therefor shall be paid into the city treasury.”

Taxing Authority

Cities and towns have authority, under Section 11-51-90, Code of Alabama 1975, to fix and collect licenses for any business, trade or profession. This general authority has been sustained many times by the courts.

Section 11-51-129 of the Code limits the maximum amount of privilege or license taxes to three percent of annual gross receipts which municipalities may annually assess and collect from persons operating a street railroad, electric light and power company, gas company, water works company or pipe-line company. Licenses on telephone companies are limited by Section 11-51-128 and on telegraph companies by Section 11-51-127. *See*, Section 11-51-124 for license rates on railroads; Section 11-51-126 for express companies; and Section 11-51-125 for sleeping car companies. In the police jurisdiction, the license must be no greater than one-half of the basic rate. Section 11-51-91, Code of Alabama 1975.

It should be noted that the authority to assess a license is separate from the power to require a franchise and that both a license and a franchise may be assessed against the same business entity. In *Montgomery v. Montgomery City Lines*, 49 So.2d 199 (Ala.1949), the court dealt with the effect of Title 62, Section 563, Alabama Code of 1940, a section affecting franchises in the city of Montgomery. This section required that the city obtain adequate compensation for granting a franchise. The court observed the consideration paid for the privilege had no relationship to the right and power of the city conferred by Section 11-51-129. The court stated:

“The amount of the compensation for the franchise as provided in Section 563, *supra*, is over and above and has no connection with or relation to the license tax authorized by Sections 745 and 733 (now Sections 11-51-129 and 11-51-91), *supra*.”

The ability to collect a franchise fee on certain electric suppliers has been limited by a 2009 amendment to Section 11-49-1, Code of Alabama 1975 which reads as follows:

- a. No person, firm, association, or corporation shall be authorized to use the streets, avenues, alleys, and other public places of cities or towns for the construction or operation of any public utility or private enterprise

without first obtaining the consent of the proper authorities of the city or town.

- b. No electric supplier, as defined in Section 37-14-31(1), which has an assigned service territory established by general law enacted by the Legislature and which is subject to payment of a privilege or license tax or other tax or fee established by general law enacted by the Legislature to a city or town which authorizes a levy not to exceed three percent of the gross receipts of the business done by the electric supplier in the municipality during the preceding year, and which authorizes a levy not to exceed one and one-half percent of the gross receipts of the business done by the electric supplier in the police jurisdiction of the municipality during the preceding year, shall be subject to any separate fee, charge, tax, or other payment to the city or town in connection with the consent required under subsection (a) or any consent required otherwise by law.
- c. Nothing herein shall affect any franchise fee, charge, tax, or other payment being currently paid by an electric supplier under a franchise agreement in effect on April 28, 2009, or any extension, assignment, or renewal at the same rate.
- d. The provisions of subsection (b) shall not be construed to affect the application of: (1) health, safety, and welfare rules and regulations to electric suppliers, including, without limitation, payment of reasonable permit fees designed to recover the costs of processing and administering permits generally applicable to all other businesses holding permits issued by the cities or towns; (2) payment of publication costs associated with approval of a franchise as required by statute; (3) any requirements stated in the franchise that the electric supplier repair and remediate property of the municipality damaged by the electric supplier's operation and maintenance of its facilities and that the electric supplier indemnify the municipality for negligence or wrongful conduct of the electric supplier, or the electric supplier's officers, agents, employees, or independent contractors, in the construction, operation, and maintenance of its facilities installed pursuant to the franchise; or (4) any tort, contract, or other civil liability that would exist independently of the franchise. The provisions of this subsection are intended to be examples of municipal powers that are unaffected by subsection (b) and shall not be construed as limitations on the rights and powers of municipalities.
- e. Nothing in subsections (b) to (d), inclusive, shall affect the right of cities or towns to charge electric suppliers, which have an assigned service territory, franchise fees

for their use of the streets, avenues, alleys, and other public places of the cities or towns to provide services to the public such as cable, voice, data, video, or other non-electric services for which other providers are required to pay franchise fees.

- f. Should any of subsections (b), (c), (d), or (e) be declared unconstitutional or invalid by a final decision of any court of competent jurisdiction, the remaining subsections (b), (c), (d), and (e) shall become null and void and without effect. Nothing in this section shall be deemed to amend, modify, or otherwise affect in any manner Chapter 14 of Title 37.

General Comments

As noted above, cities with populations in excess of 6,000 are limited in granting franchises of longer than 30 years. The character of the use is an important factor and some franchises are granted for considerably less periods of time. Original franchises are normally of lengthy duration so utilities can realize a return on investments. But on renewals, if the original investment has probably been recovered, a municipality might be wise to reduce the length of time of the franchise grant. In cities under 6,000 population, no constitutional limitations exist but the comments above are applicable. **It is strongly recommended that all franchises specify a definite termination date.**

No officer of any municipality shall, during his term of office, be an officer nor be employed in a managerial capacity, professionally or otherwise, by any corporation holding or operating a franchise granted by the city or the state involving the use of the streets of the municipality. This section shall not apply to or affect any attorney or physician employed by the municipality, and any municipality incorporated or organized under any general, special, or local law of the State of Alabama may employ an attorney or physician or attorneys or physicians employed by a public utility. Section 11-43-11, Code of Alabama 1975.

Termination

Franchises, being contracts, can only be terminated according to the law of contracts. A contract expires, on its own terms, at the end of the period of duration stipulated. Also it may be terminated by mutual consent of the parties. Many franchises have incorporated in them conditions of purchase; the exercise of such right ends the grant of the selling party. If the company holding the franchise fails to abide by the terms, the franchise may be revoked in a proper judicial proceeding.

Forfeiture

Franchises, being contracts, can be forfeited. As a general rule, the terms of the franchise govern the

proceedings controlling forfeiture.

Assignments and Sales

Sections 37-4-40 through 37-4-44, Code of Alabama 1975, cover sales and leases of property of a utility and the sale of the capital stock of a corporation owning and operating a utility. If the corporation operates in a single municipality, the transfer must be consistent with the public interest, as determined by the governing body of the municipality and the Public Service Commission.

A franchise, like any other contract, is subject to assignment or sale unless the terms of the grant restrict such assignment or sale. Thus, a municipal governing body should consider this fact when terms of the franchise are being considered and should include a provision giving the council power to approve a transfer of a franchise before making the initial grant.

Annexations and Incorporations

A frequent question concerning franchises relates to how municipalities should treat existing utility lines in areas that are either annexed or incorporated. In *Prichard v. Alabama Power Co.*, 175 So. 294 (Ala. 1937), the court held that where the power company had erected power lines along a public road and those roads later became part of a newly incorporated municipality, the new town could not require a franchise for the existing lines. The court did note, though, that the municipality, upon being incorporated, assumed all the rights and powers of the county to regulate the use of streets.

If a county was in control of and maintained county roads and rights-of-way in the corporate limits of a municipality on July 7, 1995, it is to continue the maintenance and upkeep of these roads unless the procedures of section 11-49-80(a) and 11-49-81 of the Code of Alabama have been followed.

A county, by virtue of its exclusive authority to maintain and control its roads, is under a common-law duty to keep its roads in repair and in reasonably safe condition for their intended use. A county has a statutory obligation to maintain the safety of its roadways pursuant to §22-1-80 of the Code of Alabama. See *Holt v. Lauderdale County*, 26 So.3d 401 (Ala.2008). If a municipality has not accepted roads for maintenance under the procedure set out in Sections 11-49-80 and 11-49-81 of the Code of Alabama, nor has it assumed responsibility by exercising sole authority over those roads, then the municipality is not responsible for the material costs of maintenance, paving, and scraping of roads within its corporate limits. See AGO 2003-034.

The annexation of unincorporated territory into a municipality, after July 7, 1995, shall result in the municipality assuming responsibility to control, manage, supervise, regulate, repair maintain, and improve all public

streets or parts thereof lying within the territory annexed, if such public streets or parts thereof were controlled, managed, supervised, regulated, repaired, maintained, and improved by the county for a period of one year prior to the effective date of the annexation.

Additionally, it is the League's opinion that any attempt to extend existing lines into new areas would require municipal approval as a franchise.

Statute of Limitations

Section 6-2-35(2), Code of Alabama 1975, sets out the statute of limitations for the enforcement of franchises. This section generally establishes a five-year statute for the recovery of amounts claimed for licenses, franchise taxes or other taxes.

Franchises for Other Municipalities

In AGO 2004-063, a municipality sought to condemn property within the corporate limits of another municipality to assist with the operation of its sewer system. The Attorney General pointed out that nothing prohibits one municipality from condemning property inside another municipality in this instance but that the municipality seeking to condemn property for a utility purpose must first have a franchise in place authorizing them to operate inside the other municipality if they will use public rights of way.

40. Municipal Debt Financing

Every municipality, from time to time, must borrow money for various municipal uses. This article will give officials a general knowledge of the legal authority for municipal financing, but it should not be construed as specific instructions in this field. Municipalities should always seek the advice of municipal financing professionals, such as bond counsel, when looking for specific guidance and assistance with financing.

The threshold question municipalities must answer is who will borrow the money and issue the securities? Will the municipality do it directly or will it work through a separate public agency, authority or corporation? Once it is determined who will borrow the money, it is then necessary to determine what legal authority there is to borrow the money and what, if any, limitations exist.

Authority to Finance: Municipalities

Section 11-81-51, Code of Alabama 1975, begins with the following language: "All municipalities shall have full and continuing power and authority within the limits of the Constitution now in effect or that may be hereafter provided to issue and sell bonds ... for the following named purposes ..." The purposes enumerated (herein greatly condensed) are for work on public buildings, sanitary and storm sewers, streets, alleys, bridges, schools; or for building or purchasing utility systems; purchasing needed real estate; equipping and furnishing buildings; building garbage and disposal plants; building hospitals, prisons and police stations; providing for marketplaces, auditoriums, water works, lighting plants, cemeteries, libraries, public baths, wharves and levees, parks, fire houses and equipment, water storage facilities, and abattoirs.

Under this statute, the Legislature gave municipalities a broad and almost all-inclusive range of public projects, which could be financed through the issuance of bonds. This statute should be examined carefully to ensure that the contemplated use is included. Section 11-81-51, Code of Alabama 1975.

Sections 11-81-3 and 11-81-4, Code of Alabama 1975, authorize municipalities to issue, without an election, securities to fund or refund outstanding certificates of indebtedness, warrants or notes of such municipality issued under the provisions of Article 5 of Chapter 81 of Title 11, as amended, or a predecessor statute or combination thereof, whether the same are due at the time of such funding or refunding or at a later date. Such securities may also be issued to refund or discharge any judgment or judgments based upon such obligation. Such securities shall mature at the time or times as the governing body may determine, not

exceeding 30 years from the respective dates of issuance. Taxes, licenses or certain other revenues may be pledged to payment of same.

Under the provisions of Section 11-47-1, municipalities have the right to borrow money and may issue notes or non-negotiable warrants. These debts must be payable within 12 months of issue and may be renewed. Section 11-47-1, Code of Alabama 1975. License taxes, ad valorem taxes or other revenues due or to become due within 12 months from the date of the note or warrant, may be pledged to secure their payment. Section 11-47-1, Code of Alabama 1975.

Alabama law provides that money may be borrowed for temporary or any other lawful purpose or use. Sections 11-47-1 and 11-47-2, Code of Alabama 1975. Warrants and notes may be issued as evidence of such indebtedness under the provisions of Sections 11-47-2 and 11-47-3, Code of Alabama 1975. These loans must not be for a period of time exceeding 30 years. Section 11-47-2, Code of Alabama 1975. A municipality may agree to levy annually any special tax or license authorized to be levied and to apply the proceeds of same to the payment of the notes or warrants. Section 11-47-2, Code of Alabama 1975.

The city council may also contract for the construction, extension or repair of municipal buildings, water and electric plants or systems, execute notes and warrants secured by mortgages or deeds of trust on the buildings or systems. No election is required. Section 11-47-3, Code of Alabama 1975. Warrants issued under Sections 11-47-2 and 11-47-3 may be general obligations or they may be payable solely from the rents or revenues of the project financed or improved. *State v. Mobile*, 229 Ala. 93, 155 So. 872 (Ala. 1934).

Constitutional Debt Limit

Amendment 268 (Section 225) of the Alabama Constitution of 1901, states that no municipality shall become indebted in an amount, including present indebtedness, exceeding 20 percent of the assessed value of the property therein. The amendment exempts from the debt limit those obligations issued for certain specified purposes. This amendment does not apply to the cities of Sheffield and Tuscumbia. Additional exemptions from the debt limit are found in Amendments 107 (Section 222.01 - revenue bonds), 108 (Section 222.02 - bonds issued by incorporated municipal boards), 126 (Section 225.01 - utilities in municipalities with less than 6,000 people), and 228 (Section 224.04 - industrial development). Amendment 268 (Section 225) Alabama Constitution, 1901. If the securities to be issued are chargeable to the debt limit, an

investigation is required to determine if the new debt will fall within allowable constitutional limits.

Education warrants issued by the county to fund a grant program for local school districts to fund capital improvements or retire debt were not chargeable against the county's constitutional debt limit, where the county secured the warrants with a pledge of education taxes, which was a new source of funding that was not available to the general fund. School buildings that were to be acquired with proceeds of the education warrants were "public facilities" within the meaning of the statute authorizing counties to issue warrants for acquisition of public facilities, even if the county did not ultimately own the buildings. The Legislature included school buildings in the definition of public facilities, the legislature knew that school buildings were operated by local school boards, and the statute permitted the county to acquire public facilities not only for itself, but also for general benefit of the public. *Chism v. Jefferson County*, 954 So.2d 1058 (Ala. 2006).

Although this opinion was issued to a county, the ruling would apply to municipalities as well. Bonds issued by a municipality of 6,000 or more for the construction of a school building do not count against the municipality's debt limit. AGO 1998-181.

Under Amendment 126, municipalities with a population under 6,000 can issue warrants to finance school improvements without it counting against their Section 225 debt limit, so long as they pledge a tax as security for the payment of the bonds.

Necessity for Election

In certain cases, an election must be held to authorize the issuance of securities. Section 222 and Amendment 107 (Section 222.01) and various special and local amendments to the Alabama Constitution of 1901, control. Generally, all general obligation bonds, other than assessment and refunding bonds must be voted upon, whereas most revenue bonds do not require prior approval by the electorate. Warrants, as distinguished from bonds, do not require approval by election. *See, Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448 (Ala. 1916) and *O'Grady v. Hoover*, 519 So.2d 1292 (Ala. 1987), for distinctions and definitions of warrants and bonds.

Election Procedures

All elections, other than those held in Class I municipalities, whether regular or special, are conducted pursuant to the general municipal election laws codified at Sections 11-46-20 through 11-46-74, Code of Alabama 1975, as amended. Section 11-46-22, states that special elections shall be held on the second or fourth Tuesday of any month. The mayor is required to publish notice of any

such special election at least two months prior to the date of the election in any municipality organized under the mayor-council form of government. In *Bouldin v. Homewood*, 174 So.2d 306 (1965), the Alabama Supreme Court held that the notice provisions of Sections 11-46-22 and 11-46-93, must be given primacy and full effect in considering whether proper notice was given of any municipal election, notwithstanding other Code provision. In *Ex parte Scrushy*, 262 So.3d 638 (Ala., 2018), the Alabama Supreme Court has also held that a circuit court could void a special election for failure to be held in strict compliance with state's election laws.

Municipal bond elections should, as much as possible, conform to municipal election laws found in Chapter 46 of Title 11, Code of Alabama 1975, and to the election provisions relating to the issuance of bonds found at Sections 11-81-50 through 11-81-68, Code of Alabama 1975. The Attorney General reached a similar conclusion in AGO to Hon. W. M. Bouldin, dated May 3, 1968.

Revenues

The city council must also consider the availability of funds needed to pay and retire the bonded debt as installments become due. Always an individual local problem, this decision requires planning by responsible officials. Naturally, the availability of funds, the certainty of collecting such funds and the amount which can be devoted to debt retirement are among the factors considered when deciding upon the amount of money to be borrowed.

Bonds or Warrants?

Bonds are negotiable promises to pay which may be sued upon directly. Warrants are nonnegotiable orders upon the city treasury. Generally, a general obligation bond issue must be approved by municipal voters. Warrants and revenue bonds are not subject to voter approval as a general rule. Both general obligation bonds and warrants are chargeable against the municipal debt limit.

If bonds are issued they may be sold at public or private sale as the governing body determines. If the bonds are sold at public sale, the public sale shall be either by sealed bids or at auction. The notice of the public sale must recite the proposed method of sale, the amounts to be sold, maturities, data on interest, etc. *See*, Section 11-81-11, Code of Alabama 1975, for details on the contents of notice and the manner of publication. Other exceptions may be found in specific enabling statutes authorizing the issuance of bonds for specified purposes.

Specific statutory requirements as to maturities are found in Section 11-81-6, Code of Alabama 1975. Generally, bonds, with the exception of those dealing with revenue, must be payable in 30 years. Revenue bonds

must be payable in 50 years. If bonds are issued to acquire property or to make improvements, then the last installment shall be payable within the period of usefulness of the improvement.

Warrants may be issued under the authority of Sections 11-47-1 through 11-47-4 and Section 11-81-4, Code of Alabama 1975. Warrants may be sold at a negotiated price without meeting the statutory requirements of a public sale. The maturity of warrants sold under provisions of Sections 11-47-2 and 11-47-3 is 30 years. The maturity of refunding warrants authorized by Section 11-81-4 is limited to 30 years.

Temporary Financing

Municipalities are authorized under Section 11-47-1 through 11-47-4, Code of Alabama 1975, to borrow money for temporary use. The purpose of the loan and the size of the municipality determines whether the debt is chargeable to the debt limit. *See*, Amendments 268 (Section 225) and 126 (Section 225.01), Alabama Constitution, 1901. Typically, the City's financials for the preceding fiscal year and the total revenues from all sources are reviewed, and if the loan amount is less than 1/4th of the city's annual revenues, it will not count against the debt limit. If the loan is for 12 months or less and on a promissory note, no election is required. If the evidence of the loan is in the form of a warrant, no election is required. Bond attorneys recommend that all temporary loans be evidenced by warrants instead of a note if due dates exceed 12 months.

Frequently, municipalities will borrow money on a temporary basis and, before repaying all of it, will issue refunding warrants maturing over a period of time. No election is required for this type of financing. The chargeability of such debts against the debt limit is determined by the constitutional provisions mentioned before.

Bond Anticipation Notes

After bonds have been favorably approved, the governing body may issue negotiable notes for the purpose for which the bonds were authorized but not exceeding the maximum authorized amounts of the bonds. Such notes shall be general obligations and shall be payable in 12 months. The notes may be refunded by the issue of new negotiable notes as long as the final date of payment shall not be longer than three years from the date of the original borrowing. The notes may be sold at public or private sale and such notes may be repaid out of the proceeds of the sale of the bonds. Authority for such notes is found in Section 11-81-28, Code of Alabama 1975.

Authority to Finance: Public Agencies, Authorities or Corporations

The governing body may decide to finance through one of the local public agencies which has statutory power to issue securities. Many municipalities have already organized such agencies, but if none exists, then the initial step is to organize the agency. Statutory provisions exist for the organization of municipal utility boards, municipal public housing authorities, municipal industrial development boards, municipal public building authorities, hospitals, libraries, medical clinic boards, recreation boards and other similar incorporated entities. See the article titled "Municipal Boards in Alabama" in this publication for information on procedures for forming boards and authorities in Alabama.

Effect on Constitutional Debt Limit

Amendment 108 (Section 222.02) of the Alabama Constitution states that each public authority organized by any municipality shall, for the purposes of Sections 225, 222 and 224 of the Alabama Constitution, be deemed a separate entity and bonds issued shall not be deemed to constitute an indebtedness of the municipality. Thus, bonds issued by incorporated municipal boards generally do not have to be voted upon and are not chargeable to the debt limit of the parent municipality.

Advantages and Disadvantages

Clearly, avoiding the depletion of a city's borrowing capacity is a major advantage of using a public agency to finance needed projects. Management may be selected for special talents and on a nonpolitical basis. The governing body can be insulated, to an extent, from the responsibility of making unpopular decisions. That being said, a governing body cannot exercise complete control and surplus reserves are not unconditionally available for general municipal use. Also interest rates may be higher under this system of financing.

Plan of Financing

The authority, not the town or city, issues the securities and builds the project. If the project is a utility such as a water, gas, sewer or electric system, the authority will own and operate the system. If the project is a public building, the authority may lease the project to the "parent" city or lease it to authorized lessees other than the parent city. Leases to the parent city are on an annual basis but may be renewed. Lease rentals are fixed in an amount sufficient to retire the bonds. The bonds do not have to be voted on and may be sold at negotiated sale without offering the bonds for public sale.

Tax-Exempt Status

Whether financing is done by the municipality or by another public agency, it is important to remember that after the Tax Reform Act of 1986, private activity bonds are no longer exempt from the federal income tax, except when the proceeds are utilized to finance an industrial activity. Congress created two classes of bonds in the Tax Reform Act. 26 USCA §§ 141-150:

- public purpose bonds, which are still tax-exempt; and
- activity bonds, which are tax-exempt provided that no more than 10 percent of the bond issue is used for a private activity.
- In addition, bonds for certain activities are declared to be tax-exempt in the act.
- The constitutionality of congressional authority to tax the interest on publicly-offered long term bonds was upheld in *South Carolina v. Baker*, 485 U.S. 505 (1988).

Securities in Registered Form

Congress has adopted legislation to require that all tax exempt or municipal securities be issued in registered form. Section 41-1-7, Code of Alabama 1975, states that public entities which are authorized by law to issue bonds, warrants, notes, certificates of indebtedness or other securities are fully authorized to issue any such securities in fully registered form without coupons.

41. Sale or Lease of Unneeded Municipal Property

The League receives numerous inquiries from municipal officials and employees concerning the procedures for the sale or lease of unneeded municipal property. This article explains the state laws governing such sales and leases. Sample ordinances and resolutions for a governing body to adopt when authorizing sales and leases are included.

Sale of Unneeded Real Property

The Alabama Legislature has adopted a simple method for municipalities to dispose of real property not needed for public or municipal purposes. This can be found in Section 11-47-20, Code of Alabama 1975, which reads as follows:

“The governing body of any city or town in this state may, by ordinance to be entered on its minutes, direct the disposal of any real property not needed for public or municipal purposes and direct the mayor to make title thereto, and a conveyance made by the mayor in accordance with such ordinances invests the grantee with the title of the municipality.”

In enacting this statute, the legislature did not intend to authorize the sale of property held by a city in trust, such as property subject to a common law dedication for use by the public as a park. The intent was to authorize Alabama cities and towns to dispose of property which is not dedicated. *Moore v. Fairhope*, 171 So.2d 86 (Ala. 1965). A municipality has no implied power to dispose of property **dedicated** to public use, but ordinarily its property abandoned from public use or not devoted thereto may be disposed of by the managing authorities when acting in good faith and without fraud. *O’Rorke v. Homewood*, 237 So.2d 487 (Ala. 1970).

Before real property may be sold, Section 11-47-20, Code of Alabama 1975, requires an ordinance finding that the property is no longer needed for public purposes. *Jones v. Dothan*, 375 So.2d 462 (Ala. 1979). However, the fact that a city adopts an ordinance to the effect that a certain piece of property is no longer needed for public purposes will be of no avail as long as the property is being used for public purposes. Section 11-47-20 of the Code of Alabama prohibits a municipality from disposing of real property while such property is being currently used by the municipality. AGO 2012-091.

For example, Section 11-47-20 of the Code does not give a municipal governing body the authority to declare property used for a public cemetery to be unneeded municipal property subject to being sold for industrial expansion. *Anderson v. Adams*, 283 So.2d 416 (Ala. 1973). In *Tuskegee v. Sharpe*, 288 So.2d 122 (Ala. 1973), the Alabama Supreme Court held that Section 11-47-20 does not give a municipality

the power to grant an option to purchase real estate owned by the municipality. Property must be **declared** surplus even when it is being transferred to another public entity. *Vestavia Hills Board of Education v. Utz*, 530 So.2d 1378 (Ala. 1988). However, a municipality may not purchase property that it has already determined will not be used for a municipal purpose. AGO 2015-056. The ordinance adopted by the municipal governing body should:

- describe the property to be sold;
- recite that in the opinion of the governing body of the municipality the property is not needed for public or municipal purposes; and
- direct the mayor to execute a deed to the purchaser.

The Alabama Supreme Court held that neither Section 11-47-20 nor Section 11-47-21, Code of Alabama 1975, requires that the ordinance contain a detailed recitation of facts supporting the statement that the land is no longer used for public purposes. *Dothan Area Chamber of Commerce, Inc. v. Shealy*, 561 So.2d 515 (Ala. 1990)

In directing the mayor to make title to the property, the ordinance should recite the circumstances under which the mayor is to execute the deed – whether it is to a particular individual, after the ordinance becomes permanent or whether he or she should execute a deed to the highest bidder in the event bids are called for.

Ordinances adopted pursuant to sections 11-47-20 or 11-47-21 of the Code of Alabama, which authorize the disposal or leasing of real property, should be considered ordinances “intended to be of a permanent nature” because both affect the general public and operate as definitive, long-term actions. Section 11-47-21 of the Code specifically authorizes a city to enter into a lease term for a maximum of 99 years. Section 11-47-21, Code of Alabama 1975. Therefore, such ordinances should be adopted pursuant to the requirements specifically enumerated within section 11-45-2(b) of the Code. Before such ordinance can become effective, it must be published as required by Section 11-45-8 of the Code of Alabama 1975. AGO 2011-069.

The law does not require a municipality to advertise for bids on the property before it can be sold, yet there is no prohibition against receiving bids. The governing body may determine the manner in which the property may be disposed of, bearing in mind the interest of the municipality. A municipality cannot sell any property owned by it for less than adequate consideration. Nominal consideration will not suffice. However, a city may sell real estate for less than adequate consideration to a private entity only if

the city determines that a public purpose is served. AGO 2003-008; AGO 2016-016.

Further, a municipality may sell surplus property to a mayor or councilmember as long as the mayor or council member do not participate in the discussion of the consideration of the sale and the council receives adequate consideration for the surplus property. The best public policy is to sell such property by competitive bidding. AGO 2014-076.

The Land Sales Act, codified at Sections 9-15-70, *et seq.*, of the Code of Alabama, provides for the competitive bidding process for sales of state (not municipally-owned) land. Section 9-15-70 to 9-15-84, Code of Alabama 1975. The act excepts a transfer to a municipal governing body on the condition that a subsequent transfer to a “private person, firm or corporation” must be competitively bid. Section 9-15-82, Code of Alabama 1975. Pursuant to Section 11-54-186 of the Code of Alabama, the transfer from a municipality to a commercial development authority, of land acquired from the state, and the subsequent transfer of the land by the authority, is exempt from the competitive bid requirements of the Land Sales Act, codified at Section 9-15-70 *et seq.* AGO 2007-131.

Sample Ordinance

A sample ordinance dealing with the sale of unneeded real property is printed below.

AN ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF _____, ALABAMA, AS FOLLOWS:

SECTION 1. It is hereby established and declared that the following described real property of the City of _____, Alabama, is no longer needed for public or municipal purposes, to-wit:

[HERE DESCRIBE THE PROPERTY]

SECTION 2. That the mayor and the city clerk be, and they hereby are, authorized and directed to execute and attest, respectively, for and on behalf of the city of _____, Alabama, a warranty deed, a copy of which is on file in the office of the city clerk, whereby the city of _____, Alabama, does convey the premises described in Section 1, hereof to _____ for and in consideration of the sum of _____ dollars (\$_____).

ADOPTED AND APPROVED THIS THE ____ DAY OF _____, 20__.

Presiding Officer

ATTEST:

City Clerk

Lease of Unneeded Real Property

Section 11-47-21, Code of Alabama 1975, which deals with the leasing of unneeded real property states:

“The governing body of any city or town in this state may, by ordinance to be entered on its minutes, lease any of its real property not needed for public or municipal purposes, and a lease made by the mayor in accordance with such ordinance shall be binding for the term specified in the lease, not to exceed a period of 99 years; provided, that in counties having a population of not less than 225,000 and not more than 400,000 inhabitants according to the most recent federal decennial census, such limitation of the term to a period of 99 years shall not apply to any oil, gas or mineral lease made in accordance with such ordinance.”

Such ordinances should be adopted and published in the same manner as other ordinances. Except for land obtained from the state, there is no requirement that bids be taken before the municipality allows such property to be leased. However, the consideration for the lease must be adequate and not nominal. The Land Sales Act excepts a transfer to a municipal governing body on the condition that a subsequent lease to a “private person, firm or corporation” must be competitively bid. Section 9-15-82, Code of Alabama 1975.

Sample Ordinance

A sample ordinance for the leasing of unneeded municipal real estate is printed below.

AN ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF _____, ALABAMA, AS FOLLOWS:

SECTION 1. It is hereby established and declared that the following described real property of the city of _____, Alabama, is no longer needed for public or municipal purposes, to-wit:

[HERE DESCRIBE THE PROPERTY]

SECTION 2. The city of _____, Alabama, having received an offer from _____ to lease that real property described in Section 1, above, it is hereby declared to be in the best interest of the public and the city of _____, Alabama, to lease said real property to _____ under the following terms and conditions, to-wit:

[HERE SET OUT THE TERMS OF THE LEASE, NOT EXCEEDING 99 YEARS, THE _____ CONSIDERATION OR RENTAL AND ANY SPECIAL CONDITIONS DEEMED BEST.]

SECTION 3. Pursuant to the authority granted by Section 11-47-21 of the Code of Alabama of 1975, the mayor of the city of _____, Alabama, is hereby directed to execute said lease agreement in the name of the city of _____, Alabama.

SECTION 4. This ordinance shall become effective immediately upon its adoption and publication as required by law.

ADOPTED AND APPROVED THIS THE ____ DAY OF _____, 20__.

_____ Presiding Officer

ATTEST:

_____ City Clerk

Sale of Unneeded Personal Property

Section 11-43-56, Code of Alabama 1975, has been interpreted as giving authority to a municipal governing body to dispose of personal property which is no longer needed for public purposes. Although not required by law, a resolution may be adopted by the governing body describing the property to be sold, reciting that the property is no longer needed for public purposes and directing the mayor to sell the property in the manner specified by the council. Bids are not required. However, a municipal governing body should set up procedures to ensure that the municipality receives a fair price for its unneeded personal property. A resolution of this type does not have to be published.

Sample Resolution

A sample resolution authorizing the sale of unneeded personal property belonging to the city is printed below.

A RESOLUTION

WHEREAS, the city of _____, Alabama, has certain items of personal property which are no longer needed for public or municipal purposes; and

WHEREAS, Section 11-43-56 of the Code of Alabama of 1975 authorizes the municipal governing body to dispose of unneeded personal property;

NOW, THEREFORE, BE IT RESOLVED BY THE

CITY COUNCIL OF _____, ALABAMA, AS FOLLOWS:

SECTION 1. That the following personal property owned by the city of _____, Alabama, is not needed for public or municipal purposes:

[DESCRIBE PERSONAL PROPERTY TO BE SOLD]

SECTION 2. That the mayor and city clerk be, and they hereby are, authorized and directed to dispose of the personal property owned by the city of _____, Alabama, described in Section 1, above, to wit:

[HERE SET OUT THE TERMS OF THE SALE or INSERT THE FOLLOWING LANGUAGE: By receiving bids for such property. All such property shall be sold to the highest bidder, provided, however, that the council shall have the authority to reject all bids when, in its opinion, it deems the bids to be less than adequate consideration for the personal property.]

ADOPTED AND APPROVED THIS ____ DAY OF _____, 20__.

_____ Presiding Officer

ATTEST:

_____ City Clerk

Sale of Abandoned and Stolen Property

Section 11-47-116, Code of Alabama 1975, authorizes a municipality to sell abandoned and stolen property found inside the corporate limits of the municipality or the police jurisdiction. Section 11-47-116 requires a municipality to adopt an ordinance listing the date each piece of property was taken, the place where the property was found and a description of the property. The property must be stored for three months or more in a suitable place to protect it from deterioration. If the property is perishable, it may be sold at once without notice, in which case the proceeds must be held for six months for the account of the owner. If not recovered within that time, the proceeds must be converted into the general fund.

The police chief must sell the abandoned or stolen property every six months at a public auction to the highest bidder for cash. Online auction sites that are open to the public constitute public auctions as it relates to Section 11-47-116 of the Code of Alabama. AGO 2011-095. However, internet auctions that do not involve bid calling present in traditional crying auctions do not constitute auction

businesses under Section 34-4-2(6), Code of Alabama 1975. AGO 2018-040.

The municipality must give notice of the time and place of the public auction at least 20 days before the sale. The notice must be published once a week for two successive weeks in a newspaper of general circulation published in the city or town in question. In cities and towns in which no newspaper is published, the notice must be posted in a conspicuous place at the city hall or police station.

The owner of any of the property taken up and stored may redeem the property at any time prior to its sale by paying the reasonable expense of taking the property in charge, its maintenance and storage and a pro rata of the cost of publication.

Each article must be sold separately and a notation in the storage record book must be made of the amount received for each article. The person making the sale has the right to reject any and all bids if the amount bid is unreasonably low. If no bidders are present the municipality has the right to continue the sale from time to time. After deducting and paying all expenses incurred in the taking up, storing, maintaining and selling of the property, the balance, if any, must be paid into the general fund of the municipality making the sale. The city's municipal court does not have authority to condemn unclaimed weapons in the possession of the city's police department. The city must follow the procedure provided in Section 11-47-116, Code of Alabama 1975 for disposal of such weapons. AGO 1991-036.

Sale of Seized or Forfeited Property Including Guns

A police department may sell or trade forfeited property including guns seized in violation of the Alabama Uniform Controlled Substances Act under Section 20-2-93, Code of Alabama 1975. Section 20-2-93 provides that the state, county, or municipal law enforcement agency may retain seized and forfeited property for official use or sell that which is not required to be destroyed by law and which is not harmful to the public.

The proceeds from the sale must be used, first, for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of or custody, advertising, and court costs; and the remaining proceeds from such sale must be awarded and distributed by the court to the municipal law enforcement agency or department, and/or county law enforcement agency or department, and/or state law enforcement agency or department, following a determination of the court of whose law enforcement agencies or departments are determined by the court to have been a participant in the investigation resulting in the seizure, and such award and distribution shall be made on the basis of the percentage as determined by the court, which the respective agency or department

contributed to the police work resulting in the seizure.

Any proceeds from sales authorized by this section awarded by the court to a county or municipal law enforcement agency or department must be deposited into the respective county or municipal general fund and made available to the affected law enforcement agency or department upon requisition of the chief law enforcement official of such agency or department. Section 20-2-93, Code of Alabama 1975; AGO 2011-070.

The police chief is not required to obtain the approval from the city council before making expenditures from state forfeiture proceeds. The chief and council should cooperate in planning for such expenditures. The council may disapprove a specific request made by the chief for the expenditure of federal forfeiture proceeds but lacks the authority to expend the proceeds in a manner not proposed by the chief. Expenditures from state and federal forfeiture proceeds are required to be made by competitive bidding. The purchase of law enforcement equipment with forfeiture proceeds does not violate Section 94 of Article IV of the Recompile Constitution of Alabama. The use of forfeiture proceeds to benefit private persons or entities does not violate Section 94 if a valid law enforcement purpose is served. Forfeiture proceeds may be used to purchase law enforcement equipment in the ordinary course of business. The council may not use federal forfeiture funds to reduce the amount of funds appropriated to the police department. AGO 2019-029.

A police department must obtain a court order, through the district attorney, to forfeit property, including guns, seized in violation of the controlled substances law under Section 20-2-93 of the Code of Alabama. Forfeited property may be used or sold by the department as provided in Section 20-2-93. A police department must obtain a court order, through the district attorney, to destroy property, including guns, seized under Section 20-2-93. Proceeds from sales under Section 20-2-93 must be deposited in the municipal general fund. Proceeds from Section 20-2-93 must be used as determined by the police department. AGO 2009-090.

A police department has the authority to exchange condemned firearms given to the police department, pursuant to Section 20-2-93 "to be used for law enforcement purposes pursuant to the Code of Alabama," if the firearms would be exchanged with a licensed gun dealer for firearms that the police department could use. The proposed exchange for credit is not subject to Alabama's Competitive Bid Law. The police department must obtain a court order allowing the sale or trade of any component parts remaining after firearms are destroyed or dismantled pursuant to a court order under Section 13A-11-84(b) or other authority. AGO 2003-182.

The police department may not sell condemned guns seized under Section 13A-11-84(b) or the parts thereof. A

police department must obtain a court order, through the district attorney, to use or destroy condemned guns seized under Section 13A-11-84(b) of the Code of Alabama. AGO 2009-090. The sheriff cannot sell parts of condemned weapons which have been used for law enforcement purposes without a court order. The sheriff cannot dispose of abandoned weapons without a court order. The sheriff cannot dispose of confiscated property held as possible evidence in a prosecution without a court order. AGO 1992-137.

Guns in the possession of the police department which were not involved in weapons violations, must be disposed as provided in Section 11-47-116, Code of Alabama 1975. If such weapons were involved in violations of Section 13A-11-71 through Section 13A-11-73, they must be disposed under the procedure found at Section 13A-11-84(b). AGO 1991-059.

42. Authority to Expend Municipal Funds

Section 94 of the Alabama Constitution, 1901, as amended by Amendment 112, reads as follows: “The Legislature shall not have power to authorize any county, city, town or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in any such corporation, association or company, by issuing bonds or otherwise. It is provided, however, that the legislature may enact general, special or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration, public parks and playgrounds or other public recreational facilities and public housing projects, conditional upon the approval of a majority of the duly qualified electors of the county, city, town or other subdivision affected thereby, voting at an election held for such purpose.”

Purpose

The purpose of Section 94 is to prevent abuses resulting from the unwise and reckless use of power. In the absence of a special constitutional grant of power (a few Alabama cities have such grants), a municipality has no power to donate money, issue bonds, subscribe to stock, or otherwise aid a private corporation even though a municipality may be incidentally benefited by the location of the company in the municipality. This prohibition includes aid to railroad companies, steamship lines, manufacturing plants, etc.

In *Opinion of the Justices*, 49 So.2d 175 (Ala. 1950), the court said: “It has been pointed out that the evil to be remedied is the expenditure of public funds in aid of private individuals or corporations, regardless of the form which such expenditures may take, and that Section 94 prohibits, in the words of the decision in *Garland v. Board of Revenue of Montgomery County*, 6 So. 402 (Ala. 1889), ‘any aid ... by which a pecuniary liability is incurred’.”

In *Garland*, the court said: “... the cause giving birth to this section of the Constitution was the recognized fact that the ‘trustees of government are and have always been amenable to’ the subtle influence of anticipating that by establishing and promoting a new industry or institution in a community, though established for private gain, it brings to the community where established, some public benefits, and that such influence encourages the improvident expenditure of public money and the incurring of governmental liabilities that must be taken care of by taxation.”

In 1994, the Supreme Court decided *Slawson v. Alabama Forestry Commission*, 631 So.2d 953 (Ala. 1994). In *Slawson* the court changed the application of

Section 94 to appropriations and expenditures of municipal governments by holding that a public entity such as a city may give money or something of value to non-public entities and organizations if the public entity determines that the appropriation will serve a public purpose. *Slawson* at 956. The court went on to define a public purpose as one that promotes the health, safety, morals, security, prosperity, contentment and general welfare of the community. *Id.* Further, the court held that the decision as to whether an expenditure serves a public purpose or confers a public benefit is wholly within the discretion of the legislative body making the decision or the municipal governing body in the case of municipalities. *Id.*

Since *Slawson* the Attorney General has consistently held that the determination of whether an expenditure is for a public purpose is a factual one and can only be made by the governing body of the local government making the expenditure. AGO 2003-074.

The League recommends the creation of a contractual relationship before the municipal governing body approves an expenditure of appropriation to a private individual, corporation or association.

Cater Act

In 1949, the Legislature passed Act 648 (Sections 11-54-80 through 11-54-101, Code of Alabama 1975), now generally known as the Cater Act, to aid the citizens of Alabama in their efforts to induce the location of new plants and factories in this state. An industrial board, organized under the act, normally constructs a building and leases it to the manufacturer for use as a factory. The board finances the building from the sale of bonds payable from revenues from the lease and secured by the mortgage on the building.

After passage of this Act and at a time when municipalities were beginning to use it, Governor Jim Folsom, Sr. asked the Alabama Supreme Court for its opinion on the constitutionality of the Act in view of Section 94 of the Constitution. In *Opinion of the Justices*, 49 So.2d 175 (Ala. 1950), the court stated: “We think that Act No. 648 involves no expenditure of public money and the incurring of no liability that must or can be taken care of by taxation. Under the Act, a municipality is not authorized to spend public funds.”

May a municipality appropriate funds or perform services for a board organized under this Act? The Attorney General has held, in general, that a city may, but the League urges that an opinion be obtained in each individual case as a matter of protection.

A 1983 amendment to the Cater Act included in the

list of permissible projects any commercial enterprise providing hotel or motor inn services. The Supreme Court of Alabama upheld the constitutionality of this amendment in *Smith v. Industrial Development Board of Andalusia*, 455 So.2d 839 (Ala. 1984). The court stated that hotels “provide incentive for industry and business to locate in or near the municipality. They provide accommodations for guests and traveling employees of industries and businesses, provide facilities for conventions, exhibitions, and meetings, and use the ‘agricultural products and natural resources of this state’ in their construction and maintenance.”

Wallace Act

The Supreme Court was requested to advise on the constitutionality of the Wallace Act (Act 756, 1951 Acts; Sections 11-54-20, et seq., Code of Alabama 1975,) in view of Section 94. Again the answer was favorable. *See, Re Opinion of the Justices*, 53 So.2d 840 (Ala. 1941). The court, in this opinion, stated that a review of the cases in which statutes were held void because of the provisions of Section 94 reveals that each of these cases has involved a municipality incurring a pecuniary liability.

In *Newberry v. Andalusia*, 57 So.2d 629 (Ala. 1952), the court upheld the Wallace Act against a contention that Section 94 was violated. The decision reads in part: “The opinion has been heretofore expressed that Section 94 applies to cases where a municipality or a county incurs a pecuniary liability and does not apply in cases where the entire cost of the project is financed by issuance of municipal revenue bonds payable solely from income or rentals of the project ... a lease of public property without consideration is certainly a violation of Act 94, but we do not have such a case ... we hold, therefore, that there is no constitutional interdiction which inhibits the city, through its governing body, acting in good faith, from determining that this contract is a fair and reasonable rental for the prescribed period.”

Economic and Industrial Development

In 2004 Amendment 772, Alabama Constitution, 1901, was ratified and added to the Constitution as Section 94.01. This Amendment grants specific authority to counties and municipalities to lend credit to or grant public funds and things of value to any individual, firm, corporation, or other business entity, public or private, for the purpose of promoting the economic or industrial development of the county or municipality.

However no such action should be taken unless prior thereto the governing body approves the action, at a public meeting, by resolution stating that the expenditure of public funds for the purpose specified will serve a valid and sufficient public purpose notwithstanding any incidental

benefit accruing to any private entity or entities. Also the governing body must give at least seven days notice of this meeting, to be published in the newspaper having the largest circulation in the county or municipality as the case may be, describing in reasonable detail the action proposed to be taken, a description of the public benefits sought to be achieved by the action, and identifying each individual, firm, corporation, or other business entity to whom or for whose benefit the county or the municipality proposes to lend its credit or grant public funds or thing of value. *See*, Amendment 772(c) Alabama Constitution, 1901.

Court Decisions Approving Expenditures

There is little question about expenditures made for a purpose which is specifically authorized by legislative acts. For example, Section 31-2-129, Code of Alabama 1975, authorizes the governing body of a municipality to appropriate money for various uses to assist National Guard units located therein. Sections 11-91-1 through 11-91-8, Code of Alabama 1975, grant municipalities the authority to appropriate funds to purchase group insurance policies for municipal officers and employees. *See, Opinion of the Justices*, 30 So.2d 14 (Ala. 1947).

The court has approved donations and appropriations to a public corporation which exercises a public function as an agency of the city or town. *See, Opinion of the Justices*, 48 So.2d 757 (Ala. 1950), relating to redevelopment projects authorized in Sections 24-2-1 through 24-2-10, Code of Alabama 1975, and *Andalusia v. Southeast Alabama Gas District*, 74 So.2d 479 (Ala. 1954), in which the court held that Section 94 does not prevent a city from rendering assistance to a public corporation.

In *Carey v. Haleyville*, 161 So. 496 (Ala. 1935), the court held that public funds could be used to erect a school building even though title was vested in another public agency. But this case seems to restrict a municipality to the use of its surplus funds.

In *Alabama State Bridge Corporation v. Smith*, 116 So. 695 (Ala. 1928), the court sustained an act establishing a corporation whose objects provided for the construction of bridges. With references to Section 94, the court stated: “The objection is obviated by the consideration that this section related to private corporations only.” A similar holding is found in *State v. Mobile*, 28 So.2d 177 (Ala. 1946), a case involving a payment of \$350,000 by the City of Mobile to the State Docks and Terminals.

Following these principles, the court has sustained payment of “moral” claims, stating: “Also, the constitution (Section 94) is not infringed when the appropriation by the Legislature is to pay an honorable and righteous claim, though legally unenforceable, if for a public purpose.” *See, Board of Revenue of Mobile County v. Puckett*, 149

So.2d 850 (Ala. 1933), and *State v. State*, 6 So.2d 603 (Ala. App. 1942).

The court has approved the donation of funds for redevelopment of slum areas, projects done in conjunction with the federal government. *Opinion of the Justices*, 48 So.2d 757 (Ala. 1950).

This section was designed to prevent the expenditure of public funds to aid private individuals or corporations. This section does not apply to a transaction between a municipality and an agency of the state. *Rogers v. Mobile*, 169 So.2d 282 (Ala. 1964).

In *Fitts v. Birmingham*, 141 So. 354 (Ala. 1932), the Supreme Court of Alabama held that a city has authority to protect and to promote its wellbeing before the Legislature and to incur and pay reasonable compensation to persons for such services.

Attorney General's Opinions Approving Expenditures

Section 36-15-18, Code of Alabama 1975, requires the Attorney General to give an opinion, in writing or otherwise, as to any question of law connected with the duties of the following municipal officers when requested so to do in writing: mayor or chief executive officer of any incorporated municipality, city council or like governing body of any incorporated municipality, or any other officer required to collect, disburse, handle or account for public funds. Section 36-15-19, Code of Alabama 1975, provides that the written opinion of the Attorney General, secured by any officer entitled to such opinion, shall protect such officer and the members of such board, local governing body or agency to whom it is directed or for whom the same is secured, from liability to either the state, county or other municipal subdivisions of the state because of any official act or acts performed as directed or advised in such opinion. The courts have ruled that such opinions are not controlling or binding on the court but are merely advisory. *Hill Grocery Co. v. State*, 159 So. 269 (Ala. 1935). Advice by the Attorney General does not protect an officer against claims of individuals which result from erroneous construction of the law affecting his duties. *Curry v. Woodstock Slag Corp.*, 6 So.2d 479 (Ala. 1942).

Section 36-15-20, Code of Alabama 1975, requires any mayor, city council or like governing body of an incorporated municipality to submit, with the request for an opinion, a resolution adopted by the governing body of the municipality, setting forth the facts showing the nature and character of the question which makes the advice or opinion sought necessary to present performance of some official act that such officer or governing body must immediately perform.

The Attorney General has been called upon often to rule on the legality of the expenditure or appropriation of

public funds. The following opinions list expenditures that have been **approved** by the Attorney General:

- Municipalities may purchase liability insurance for city vehicles. AGO to W. A. Gayle, January 14, 1957.
- Municipalities may reimburse employees who have purchased liability insurance to protect themselves while driving municipal vehicles. AGO to B. R. Winstead, July 14, 1964.
- Mobile has legal authority to become a member of the National Rivers and Harbors Congress. 37 Quarterly Report of the Attorney General 79.
- Birmingham may employ an association to work as liaison agent with the federal government. AGO to B. R. Winstead, October 27, 1965.
- Municipalities may appropriate funds to recreation boards organized under Act 350, 1945 Acts of Alabama. 70 Quarterly Report of the Attorney General 18.
- A city may use funds to construct a swimming pool on land owned or leased to a municipality. AGO to Cecil White, April 30, 1965.
- A city may donate to a public ball club and to public schools. AGO to D. B. Smith, September 14, 1977.
- A city may appropriate funds to a county school attended by city residents. AGO to William P. Stokes, December 8, 1969.
- A city may contribute to a county hospital board which operates an ambulance service. AGO to Dennis Porter, August 29, 1969.
- A city may appropriate funds to a local civil defense rescue squad. AGO to Hugh Herring, Jr., August 1, 1969.
- A town may reimburse the mayor for expenses incurred in connection with the incorporation of the town. AGO to W. S. Turpen, January 9, 1974.
- A municipality may legally pay the attorney fees in defense of an action brought against the mayor for acts done by the mayor on behalf of the municipality in pursuit of his official duties. AGO to William H. Robertson, November 16, 1973.
- A city can appropriate funds for the research and writing of a municipal history. AGO to Hon. Guy Roberts, January 18, 1965.
- Municipalities may appropriate funds to recreation boards organized under Act 218, 1967 Acts of Alabama. AGO to E. G. Rickarby, July 11, 1969.
- Gadsden may donate funds to a halfway house. AGO to Kenneth W. Gilchrist, April 22, 1970.

- A city may appropriate funds to an industrial development board for the purchase of real estate. AGO to Phillip L. Green, March 25, 1974, and others. **Note:** Due to the language of Section 94, the League suggests that any municipality interested in making such an appropriation secure its own opinion.
- A municipality and county may jointly appropriate funds to purchase a brochure to promote industrial development. AGO to L. R. Driggers, May 31, 1972.
- A city may purchase hospital insurance for its own employees. AGO to Hon. J. M. Breckenridge, October 17, 1972. However, a city cannot pay premiums on hospital insurance for its officers until the beginning of the new administration. AGO to James P. Nix, January 1, 1977.
- Auburn can legally pay for the cost of radio spots broadcast in connection with announcing a public meeting relating to a bond election. AGO to James K. Haygood, Jr., August 31, 1967.
- A city can spend public funds to make improvements in a water main for a shopping center. AGO to Willard Pienezza, December 8, 1977.
- A city may fill sink holes on private property when it constitutes a health and safety hazard. AGO 1979-285 (to Hon. William B. Parrett, September 10, 1979). **Note:** Any city wishing to do this should obtain its own opinion.
- A municipality may, for adequate consideration, contract with a Boy's Club and a Girl's Club to provide services to the citizens of the town. AGO 1980-214 (to Hon. George Chard, February 13, 1980).
- A city can donate uniforms, building rentals, travel expenses, coaches' salaries and transportation costs for the city boxing team. AGO 1980-358 (to Hon. M. G. Temme, May 8, 1980).
- A city may perform work on city property as well as adjoining private property where necessary to protect the city property. The city should obtain written permission from the owner of the abutting property before beginning the work. AGO 1980-494 (to Hon. Maurice C. West, August 6, 1980).
- A municipal board may award longevity pins, if and only if, the pins are awarded pursuant to an established policy and the value of such pins is nominal. AGO 1981-401 (to Hon. J. Robert Miller, June 2, 1981).
- Municipal funds may be used to provide meals or refreshments for an advisory committee meeting when work done at the meeting is clearly related to the achievement of a municipal purpose. AGO 1982-168 (to Hon. Thomas R. Elliott, Jr., February 5, 1982).
- A city may furnish clothing or clothing allowances to detectives but not to general office workers. AGO 1983-082 (to Hon. Herman Cobb, November 18, 1982).
- A city may contribute to its volunteer rescue squad and fire department under Section 9-3-18, Code of Alabama 1975, as amended. AGO 1983-156 (to Hon. Clarence F. Rhea, January 31, 1983). **Note:** If the rescue squad or fire department is not associated with the municipality, the municipality should enter into a written contract with the squad or department for services as consideration for the contribution made.
- A city may provide emergency medical treatment to citizens within the county at no charge. AGO 1985-431 (to Hon. Thomas B. Norton, M.D., July 9, 1985).
- A municipality may expend funds to purchase pipe to be placed on the state right-of-way to support the driveway of a new business. AGO 1985-457 (to J. D. Falkner, July 30, 1985).
- A city may use municipal funds to advertise and promote retail trade within its corporate limits and police jurisdiction. **Note:** Such services must be bid unless they fall into one of the exceptions in Section 41-16-61, Code of Alabama 1975. AGO 1986-374.
- A city may construct a building to honor the heritage of the town and establish a board to operate the facility, provided that the structure is to be used for one of the purposes enumerated in Section 11-47-16, Code of Alabama 1975. AGO 1987-060.
- A city may establish a program of giving cash awards to city employees for recommendations which result in savings to the city without violating Section 68, Constitution of Alabama, 1901, if the payments are for prospective services to be rendered. AGO 1987-083.
- A municipality may appropriate funds to purchase a park in the police jurisdiction. AGO 1991-201.
- A county may maintain driveway bridges and install pipe on the street right of way, if necessary for the convenience of the public. AGO 1991-251.
- A municipality may use its employees and equipment on private property to remove a hazard which affects the general public or to remove a public nuisance. The cost of removing the hazard is to be assessed against the property owner unless the problem was created by the municipality. AGO 1991-097 and AGO 1991-098.
- Under the facts presented, it appears that the municipality

would have the authority to make improvements to leased property. AGO 1990-157.

- A municipality may appropriate funds to its industrial development board. AGO 1990-174.
- As part of its regular road maintenance, a county may routinely clean drainage areas located on private property if the county has an easement on the property. AGO 1990-317.
- A municipality may donate funds and property to the State Department of Veterans Affairs for the purpose of building a nursing home. AGO 1992-177.
- A municipality may appropriate funds to its medical clinic board and the county hospital association to purchase equipment which will be sold or leased to a doctor. AGO 1992-286.
- A municipality may contract with a private school to expend municipal funds in return for the right to use the school's facilities for municipal purposes. AGO 1992-413.
- Pursuant to Section 11-47-19, Code of Alabama 1975, a municipality may hold a public picnic and expend municipal funds for food, entertainment, supplies, reimbursement for travel in connection with picking up food and supplies and for remote broadcasts by local radio station to promote the event. AGO 1993-013.
- A municipality may, by appropriate resolution of its governing body, transfer and convey without consideration to a hospital authority organized under Section 22-21-310, Code of Alabama 1975, a parcel of land large enough to construct suitable office facilities for lease to physicians. AGO 1993-138.
- A municipality may contract with a domestic violence agency, provided the organization provides sufficient services to the citizens of the municipality as adequate consideration for the amount of money the city appropriates or expends under the contract. AGO 1993-190.
- A municipality should make a reasonable effort to sell unneeded dirt from an excavation project. If it cannot sell the dirt, the city may provide the dirt to its citizens at no cost upon certification by a knowledgeable party, such as the city engineer, that this is the most economical and beneficial way of disposing the dirt. City equipment and labor can be used to load the dirt. AGO 1993-299. **Note:** City officials should exercise caution in applying this opinion to their own situations.
- A city may appropriate public funds to aid in the maintenance and operation of ambulance services

organized pursuant to Section 11-87-2, Code of Alabama 1975. AGO 1994-004.

- A city has the authority to expend funds for educational purposes. Any funds paid to the county board of education must be made by appropriation and not as tuition for individual students. AGO 1994-016.
- Whether a person can be paid in a lump sum pursuant to a contract with a municipality is a question of fact which must be resolved by the parties involved. AGO 1994-055.
- The city council may expend public funds for membership dues in professional organizations related to their public duties and may pay the actual expenses incurred by councilmembers in attending official functions of those organizations. AGO 1994-060.
- A municipality may lease a trencher and backhoe to private citizens only where the following conditions are met: (1) The service or property must not be available in the area through private enterprise; (2) The equipment can be leased only when not needed by the city; (3) The amount paid to the city must be comparable to what it would cost to rent the equipment from private sources; (4) The lease agreement should mandate municipal approval of operators of the machinery in order to assure that only qualified persons be allowed to operate it; and (5) Town employees can only be allowed to operate the machinery when not on duty at their municipal jobs. AGO 1994-134.
- A city may go upon private property, with permission of the owners or by obtaining an easement and where the drainage problem was not caused by the property owner, expend public funds to repair or maintain portions of the municipal drainage system which are on the property. AGO 1994-154.
- A city may appropriate funds to a county health department. In certain instances, cities may contract with nonprofit organizations to provide services. AGO 1994-168.
- While a city may pay dues for its officers to belong to organizations, the purposes of which are to increase or maintain the professional abilities of their members, the chamber of commerce is a civic organization and cities do not have the authority to pay dues to the chamber for the mayor and councilmembers. AGO 1994-220.
- A county commission may perform work on private property to correct a health and erosion problem caused by the county incorrectly installing a culvert. AGO 1994-221.
- A county commission may, in its discretion, purchase

and maintain automobiles for members of the commission to use in the performance of their official duties and permit home garaging of the vehicles. AGO 1994-243.

- Provided that a gasoline credit card is issued without a fee and the bid law is complied with, a city may purchase gasoline with a credit card. AGO 1994-263.
- Under the facts of this opinion, a city may work on private property where damage to the property resulted from municipal construction work. AGO 1995-018.
- While a city may donate funds to public schools that its residents attend, expenditure of funds cannot be left up to a board created by the municipality. AGO 1995-021.
- A city may install culverts on rights of way to allow property owners access to their property and may seek reimbursement of the costs from the property owners. AGO 1995-026.
- An incorporated water board may provide ditching services to water customers on private property and charge a fair compensation. The board may also rent its equipment to another board for fair compensation. AGO 1995-041.
- Pursuant to a contract, a city may furnish materials or cash to a private developer in exchange for a drainage easement. AGO 1995-078.
- A county commission may appropriate funds to a private organization as long as the funds are used for a public purpose. A contract would ensure proper use of the funds. The private organization would not be subject to the bid law. AGO 1995-112.
- A municipal utility board set up under Section 11-50-13, Code of Alabama 1975, may contribute surplus funds to a county hospital board. AGO 1995-143.
- A city may donate surplus police vehicles to a public junior college for use as security vehicles if town residents attend the college. AGO 1995-144.
- A municipal council may authorize the police chief to escort local school organizations, even if this requires travel outside the police jurisdiction. AGO 1995-148.
- Except for state-appropriated funds designated for salaries, local boards of education may transfer funds between budgeted line items up to 40 percent of the amount appropriated for each line item. AGO 1995-194.
- A city may convey public property to a nonprofit corporation if there are benefits flowing to both parties which promote a public purpose. AGO 1995-204.
- Conveyances of public property to a private corporation at no cost where there is no public purpose, violate Section 94, Constitution of Alabama, 1901. AGO 1995-281.
- A county commission may transfer real property to a nonprofit corporation if the commission determines the transfer serves a public purpose. AGO 1995-299.
- A city may appropriate funds to a county board of education which provides public school facilities and teachers to educate children of the municipality. AGO 1995-320.
- Separately incorporated gas districts may provide new customers with gas water heaters. AGO 1995-333.
- A municipal utilities department cannot give away appliances nor provide discounts as customer incentives without violating Section 94, Constitution of Alabama, 1901. AGO 1995-259.
- A city may haul gravel for its citizens if there is class legislation allowing the work and providing for reimbursement to the city for labor, materials and equipment used, or if the property in question creates a public health or safety problem. AGO 1996-087.
- State agencies may purchase equipment such as refrigerators, microwave ovens, ice makers and coffee makers for the use of their employees. AGO 1996-092.
- A private driveway is not considered a public road simply because school buses and mail carriers use it. The driveways must be dedicated to public use, accepted by a public entity with authority to accept dedications, and convey some benefit to the public entity before the entity can maintain it. AGO 1996-214.
- A county commission may authorize the sheriff to spend funds to establish a disaster relief team which will respond to areas declared disaster areas throughout Alabama. AGO 1996-186.
- An industrial development board may only spend funds within the parameters established by statute. After determining that board obligations are met, the board may, under Section 11-54-93, Code of Alabama 1975, appropriate unneeded funds to the municipality to purchase signs and for other nonindustrial projects. AGO 1996-248.
- A separately incorporated water board may appropriate funds to a nonprofit corporation to be used for activities consistent with the purposes of the board. AGO 1996-279; AGO 1996-280.
- A municipality may lease idle equipment only under strict guidelines. AGO 1996-282.

- A municipality may appropriate funds to a nonprofit corporation which will oppose expansion of a landfill, if the council determines the expenditure is in the public interest. However, the better practice would be for the municipality to contract with the organization for these services. AGO 1996-281.
- Employees of a county may not load chert onto private vehicles. AGO 1997-001.
- A county may provide office space to a private, nonprofit corporation if the county determines that the corporation serves a public purpose. AGO 1997-097. **Note:** The League recommends entering into this arrangement only pursuant to a valid contract.
- A municipality may provide office space to a private, nonprofit corporation if the governing body determines the corporation serves a public purpose. AGO 1997-099. **Note:** The League recommends entering into this arrangement only pursuant to a valid contract.
- Local boards of education may hire lobbyists and enter into cooperative agreements for this purpose. AGO 1997-288.
- A county may spend public funds to prosecute a civil suit only if there is a justiciable controversy involving a proper corporate interest of the county. AGO 1997-137.
- A private group may conduct a nonbinding referendum for a municipality. The municipality may not participate other than as private citizens. The council cannot agree to be bound by the referendum. AGO 1997-257.
- A municipality may pave a driveway adjacent to a municipal ball park only if the property is dedicated to the municipality or the municipality obtains an easement. AGO 1997-145.
- Pursuant to an agreement between a county commission and the Alabama Department of Agriculture and Industries, a county commission may appropriate grant money obtained from the department for any purpose that furthers and promotes agriculture in the county. AGO 1997-268.
- A county commission may donate money or property to a municipal industrial development board within the county to attract industry. A municipality or county has no control over the expenditure of funds by an industrial development board. AGO 1998-094.
- A county commission may purchase and renovate a building and lease the building to the Alabama Veterans Museum and Archive if the commission determines there is a public purpose for this and that the public purpose is served. AGO 1998-219.
- A local act authorizing a county to work on private property provides that these services are to be made available only when the citizens cannot obtain the services from private enterprise at a reasonable cost. AGO 1998-150.
- A municipality may convey public property to a nonprofit corporation if there are benefits flowing to both parties and a public purpose is served. AGO 1998-111.
- A municipality may make appropriations to a county nonprofit cattlemen's association to assist in the construction of a convention and exposition center if the council determines that the appropriation is for a public purpose. AGO 1999-052. **Note:** The League recommends using a contract for services.
- The Morgan County Commission may enter into an agreement with the Princess Theater where the commission agrees to give the theater money in return for the theater making cultural facilities available to the public. AGO 1998-142.
- Section 11-80-4.1 of the Code authorizes municipalities to appropriate funds to a community action agency such as the 11th Area Community Action. AGO 1998-129.
- A municipality may appropriate the proceeds of a one-cent municipal sales tax to a county school attended by residents of the municipality. AGO 1999-155.
- A municipality may donate or lend municipal funds to its airport authority created pursuant to Section 4-3-40 of the Code to construct a speculative building in the industrial park. The municipality may also borrow funds pursuant to Section 4-3-80 of the Code for this purpose. AGO 1999-156.
- A municipality may enter into a lease agreement with a youth center where the youth center will provide services to the youth of the municipality in return for space in a municipal building, if the council determines the services constitute adequate consideration. AGO 1999-093.
- If a municipal council determines that a public purpose is served, the municipality may appropriate funds to a local children's museum for the renovation of a building located on property leased by the municipality. The municipality may then sublease the building to the museum for a nominal consideration. The Attorney General recommends a written contract permitting this. AGO 2000-071.
- If a municipality determines the construction of an emergency sand berm on a private beach serves a public

purpose, the municipality may contribute public funds to pay part of the cost. AGO 1999-152.

- Pursuant to Section 38-1-6 of the Code, a municipality may appropriate funds to an incorporated senior citizens service, and may allow the organization to use a municipal building and may provide utilities to the organization. AGO 1999-227.
- The city of Decatur, through its personnel board, may adopt a personnel policy that provides for the reimbursement of travel expenses for select candidates for employment with the city and for reimbursement of moving expenses for select new employees, subject to restrictions to prevent abuse and promote fiscal responsibility. AGO 1999-278.
- If a city determines that stocking a lake owned by the Alabama Power Company will serve a “public purpose,” i.e., the promotion of tourism, the city may expend municipal funds for this purpose. The better practice would be for the city to contract with Alabama Power Company regarding the use of the lake. AGO 2000-121
- The Association of Retarded Citizens may pay the Winston County Commission the cost of repairing a private driveway so that it is accessible for school buses transporting handicapped students. AGO 2000-235.
- Whether a city may expend public funds for food and drinks at certain events is a factual determination. If the city council determines that an event serves a public purpose, public funds may be expended by inaugural events, banquets, picnics and other such functions. AGO 2003-049.
- If a city determines that cooperation with a private subdivision and any third party contractors in an effort to remove siltation from a private lake would serve a public purpose, a city may contribute funds or in-kind services to the siltation removal effort without violating Section 94, Constitution of Alabama, 1901. AGO 2002-211.
- A city may lease municipal property at no charge if a public purpose is served. The city council must determine if a public purpose is to be served by the corporation in leasing the municipal property. AGO 2003-083.
- The cost of private cellular telephones used by election officials is not included within the definition of expenses reimbursable by the state but a county may pay these costs from county funds if the county finds that these are reasonable costs of conducting the election. AGO 2004-058.
- A municipality may contract with the chamber of commerce to collect contributions on behalf of the chamber in exchange for services that benefit the city and the public. Further, a city may collect contributions and donate those contributions to an industrial development board so long as the board uses the funds for purposes that are consistent with the statutory authority granted to the board. AGO 2004-067.
- If a city determines that an expenditure of municipal funds serves a public purpose, the city may expend municipal funds for the benefit of a nonprofit corporation formed for the purpose of developing, promoting, and protecting the property rights of city citizens, businesses, and other property owners. AGO 2004-147.
- If a city council determines that expending funds for the acquisition of a monument to memorialize the former existence of a public educational institution serves a public purpose, such expenditure is consistent with Section 94, as amended by Amendment 558, of the Constitution of Alabama, 1901. AGO 2005-021.
- A town may expend public funds to pay for debris and tree removal following a hurricane, even if it involves work on private property, if the town council makes a determination that the work done served a legitimate public purpose. Absent such a finding, the council may assess individual property owners for any cleanup and tree removal performed where the debris constituted a health hazard and where the owners were unable to secure a private source to perform the cleanup service. AGO 2005-029.
- The determination of whether a city may expend funds to improve drainage on private property must be made by the city governing body based on whether the improvement will serve a public purpose, and the city must have an easement on the land. A public purpose is served if the expenditure confers a direct public benefit of a reasonably general character, and this must be determined by the governing body on a case-by-case basis. AGO 2005-073.
- A County Board of Education (“Board”) may enter into contractual arrangements with a City (“City”) as long as the school board receives fair and adequate consideration for these transactions and the Board determines that its actions serve a public purpose. The City may enter into the contractual arrangements with the Board as long as any funds expended by the City serve a public purpose and the arrangement does not bind future councils. AGO 2008-101.

- A Health Care Authority (“Authority”) can contract with the governmental entity
- responsible for maintaining the public road between a Hospital and a Medical Park to widen the road if the Authority’s board of directors determines the improvement would accomplish a purpose of the Authority. The Authority can donate property to be used as the location of a senior citizens facility to the City if the property does not constitute a material part of the assets of the Authority and the disposition will not significantly reduce or impair the level of health care services. AGO 2008-115.
- Under Section 94.01 of the Alabama Constitution, a town may borrow money and grant
- public funds to a private corporation or other private entity to aid the corporation with the expense of installing a center turn lane for the purpose of promoting economic development in the town, if the town determines a public purpose will be served. Local Constitutional Amendments may also authorize the expenditure of funds by the town. If public funds are transferred to a private entity, such funds are not subject to Alabama’s laws regarding competitive bidding or public works bidding. AGO 2009-086.
- A city may transfer property to an Electrical Cooperative for less than adequate consideration if the city determines that the transfer serves a public purpose. AGO 2010-102.
- A county commission may appropriate funds to a local university, which is a state
- institution of higher learning, to be utilized in support of its football program, if the commission determines that the appropriation serves to promote economic development within the county. AGO 2010-010.
- A municipality, through the operation of its city gas and electric utility department, may
- institute a voluntary donation program whereby the city helps meet local needs by allowing utility customers the option of donating money through the bill payment process and the city may use these donations to provide funds to the utility department to assist low-income families having difficulty paying their utility bills if the governing body determines that a public purpose is served by such action. AGO 2010-014.
- A municipality, for less than adequate consideration, may convey real property owned by
- the city to the industrial development board for the board’s use for the promotion of industry within the city, if the city council complies with the conditions of Section 94.01 (Amendment 772) of the Alabama Constitution, including a determination that a public purpose is served by the transfer. AGO 2011-051.
- To determine whether a public purpose is served, the governing body must look to the
- statutes setting forth the powers of the governmental entity. If within such powers, there exists the authority to promote the action at issue, then the governing body need only decide whether the appropriation will help accomplish that purpose. AGO 2012-002.
- The Baldwin County Commission may, in its discretion, pay the legal costs of defending county commissioners and employees during a pending investigation and in litigation if the county commission determines that a proper corporate interest is involved and the actions do not involve a willful or wanton personal tort or a criminal offense. AGO 2012-029.
- A city may pay to have buildings demolished on land owned by a nonprofit entity in exchange for a land swap if the city determines that there are benefits flowing to both parties and a public purpose is served. Such an arrangement should be memorialized in a contract or some other written agreement. AGO 2012-041.
- The Choctaw County Commission (“Commission”) may improve a private road if the Commission determines that a public purpose is served. The Commission or the volunteer fire department association should obtain an easement from the private property owner(s) before making any improvements. AGO 2013-033.
- If the Town of Beatrice determines that a public purpose is served by the relocation of unneeded light fixtures, then the town should enter into a contract to memorialize the agreement. Conversely, if the town determines there are mutual benefits to both parties and consideration on both sides regarding the relocation of unneeded light fixtures, the Town of Beatrice should enter into a commercial contract with the charitable foundation. AGO 2013-035.
- The Calhoun County Water Authority may lawfully place a water line upon private property at the expense of the property owner for the purpose of installing a fire hydrant and monitoring the system. AGO 2013-055.
- A town may lease surplus real property to a non-employee, or to an employee who does not participate in the discussion of the consideration of the lease by the town council, for rent in an amount determined by the council to be adequate consideration. AGO 2013-067.

- The City of Eufaula may enter into an agreement with the U.S. Army Corps of Engineers (“Corps”) to provide trash removal, janitorial services, mowing, landscaping, nominal maintenance, and surveillance for a park and campground that is owned by the Corps and is located in the city’s police jurisdiction. AGO 2014-001.
- The Conecuh County Commission (“Commission”) may appropriate funds to the Town of Repton to complete a highway beautification project, purchase land for a farmer’s market, and complete a welcome center for the purpose of promoting economic development if the Commission complies with the conditions of Section 94.01(c) of the Recompiled Constitution of Alabama. AGO 2014-038.
- The City of Tuskegee may appropriate funds to a private property owner where damage to the property resulted from city work on a drainage easement. AGO 2014-062.
- The City of Roanoke may donate funds to the Rotary Club of Roanoke, a nonprofit organization, for the purpose of assisting with “The Theatre Project.” AGO 2014-094.
- The City of Dadeville (“City”) may convey property and improvements to the Community Action Committee, Inc. of Chambers, Tallapoosa, Coosa (“Community Action Committee”) for less than adequate consideration, only if the City determines that a public purpose is served by the benefits provided to the general public by the Community Action Committee and the property is not needed by the City for municipal purposes. AGO 2016-016.
- The City of Wetumpka is authorized to lease property for a maximum term of 99 years, pursuant to Section 11-47-21 of the Code of Alabama. The city is authorized to enter into a long-term lease with the Elmore County Health Care Authority for less than adequate consideration and allow the Authority to sublease the property to a private entity for use as a medical clinic and medical office complex. AGO 2016-022.
- The City of Daphne may guarantee the mortgage of a nonprofit organization to support the construction of soccer fields for the purpose of promoting economic development if the city council complies with the conditions of Section 94.01(c) of Article IV or Section 3 of the Local Amendments for Baldwin County of the Recompiled Constitution of Alabama. AGO 2017-006.
- City officials and employees can expend municipal funds to solicit donations for a charity benefitting a park if the donations are voluntary, the donor knows that the charity is the recipient, and the town council determines that a public purpose is served. (AGO Note: This question should be submitted to the Ethics Commission.) AGO 2017-007.
- The municipality may reimburse a public utility for the costs of relocating utility lines for the purpose of promoting economic development if the city council complies with the conditions of Section 94.01(c) of Article IV of the Recompiled Constitution of Alabama. In the alternative, the municipality may donate funds to a downtown redevelopment authority which may use the funds to reimburse a public utility for the costs of relocating utility lines. AGO 2017-025.
- A city may engage in a fundraising campaign for charities and assign employees to work on such campaign, if the donations are voluntary, the donor knows that the charity is the recipient, and the city council determines that the campaign is being conducted for a public purpose consistent with its statutory authority. The campaign may solicit donations from employees and include donation of goods and services. AGO 2019-027.
- A city may engage in fundraising activities for disaster relief both in and outside the state if the council determines that a public purpose is served. A city official can lend his or her name and title to an event hosted by a private charity only if the event is official business and the council determines that a public purpose is served. (AGO Note: This question should be submitted to the Ethics Commission.) AGO 2019-027.
- A city may hold a charity golf tournament only if the council determines that a public purpose is served, and donations are solicited for charities for which a statutory basis has been identified. (AGO Note: This question should be submitted to the Ethics Commission.) AGO 2019-027.
- The purchase of law enforcement equipment with forfeiture proceeds does not violate Section 94 of Article IV of the Recompiled Constitution of Alabama. The use of forfeiture proceeds to benefit private persons or entities does not violate Section 94 if a valid law enforcement purpose is served. AGO 2019-029.
- The City of Brewton may expend public funds and allow its employees, agents, or contractors to enter private property with the owner’s consent to remove any unsightly and damaged trees if the city council determines that the work promotes economic and industrial development for the city and the council complies with the conditions of Section 94.01(c) of the Recompiled Constitution of Alabama. AGO 2019-040.

Court Decisions Denying Use of Public Funds

In *Garland v. Board of Revenue of Montgomery County*, *supra*, the court condemned a plan to construct a bridge to be used, in part, as a railroad bridge.

In *Sou. Ry. Co. v. Hartshorne*, 50 So. 139 (Ala. 1909), the court held that a city cannot purchase land with public funds and convey it to a railroad company, in consideration of which the company will construct a depot on the land.

A county may not contribute money from its general fund to a local bar association for the establishment of a library because of the provisions of Section 94. *Rogers v. White*, 70 So. 994 (Ala. 1916).

In *Swindle v. State*, 143 So. 198 (Ala. 1932), a county should not be compelled by mandamus to pay out of its general fund to the wife and children of a convict hired to the state where the county received no earnings from the employment.

The court decided that an appropriation to a radio station was invalid since it found that a contract between the county and the broadcasting company was made to induce the company to establish the station. *Stone v. Mobile Broadcasting Corp.*, 136 So. 727 (Ala. 1931).

Attorney General's Opinions Denying Use of Public Funds

The Attorney General has ruled that public funds may **not** be spent for the following purposes:

- A county may not appropriate public funds for the purpose of locating and promoting a canning plant or factory in the county. Quarterly Reports of the Attorney General, October-December 1944.
- A county may not fund an abattoir. Reports of the Attorney General, April-June 1943.
- A county may not contribute public money to a medical scholarship fund. AGO 1979-041 (to Charles V. Ford, January 23, 1979).
- A county or municipality is not authorized to perform work on private roads. AGO 1979-047 (to Tom Young, January 19, 1979).
- A city may not appropriate funds for a private ball club. AGO to D. B. Smith, September 14, 1977.
- Section 94 prohibits a municipality from digging graves for its residents. AGO to Nelson Arnold, October 24, 1973.
- A municipality cannot expend public funds for street lighting of private property even where the property was used for public parking. AGO to L. H. Gunter, July 9, 1973.
- Cities cannot contribute to private hospitals. AGO to Mayor of Headland, January 31, 1953.
- Cities cannot lend public funds to a private civic club. AGO to Clerk of Trafford, March 17, 1950.
- Cities cannot contribute to a community center unless the city has control of the project. AGO to Clerk of Oak Hill, April 28, 1953.
- Municipalities have no statutory authority to become members of the chamber of commerce. **Note:** Municipalities may enter into contracts with the chamber of commerce to appropriate funds to the chamber in return for services provided by the chamber of commerce to the city. AGO to James K. Haygood, Jr., June 13, 1969; Oris E. Davis, January 11, 1973; and William M. Bouldin, August 2, 1977.
- Cities may not donate funds to volunteer ambulance and rescue squads. AGO to Joe Stringer, March 20, 1970.
- A city cannot do grade work for a church beyond the street right of way. AGO to George Sizemore, March 19, 1971.
- A city cannot pay for the repair of a building owned by the home demonstration club. AGO to B. A. Rogers, April 12, 1971.
- A city cannot make unrestricted appropriations to its medical clinic board. AGO to Oliver E. Young, Jr., May 24, 1973.
- A municipal governing body may not spend public money for a weather wire to be located in and used by a local radio station. AGO to W. T. Lockard, March 13, 1975.
- A city cannot donate to the band boosters club. AGO to C. H. Roberts, December 28, 1973.
- A city cannot donate to the Y.M.C.A. AGO to William H. Key, August 29, 1974.
- A city cannot donate to the Red Cross. AGO to Fred Purdy, October 20, 1967.
- Cities cannot spend public money for holiday greeting cards. AGO to Ralph P. Eagerton, November 8, 1967.
- A city cannot contribute to a Girl Scout reunion. AGO to Bill Brigham, February 25, 1977.
- A city cannot appropriate funds to a private museum. AGO to Ed Porter, May 31, 1977.
- Municipalities cannot give their employees Christmas bonuses. AGO to Hoover Moore, April 16, 1974.
- Cities cannot pay expenses of official's wives at conventions or pay civic club dues for officials or

employees. A city cannot furnish a telephone at an official's home or business. AGO to John M. Anthony, Jr., December 2, 1974.

- Cities cannot do work in private cemeteries. AGO 1979-235 (to Fred W. Purdy, June 29, 1979).
- Sections 68 and 281 of the Alabama Constitution, 1901, prohibit payment to elected officials for lost time from their regular jobs while attending court hearings involving city business. AGO 1980-318 (to Hon. Clarence F. Rhea, April 8, 1980).
- A municipality cannot purchase coffee for its employees or visitors to city hall. AGO 1981-334 (to Hon. Larry H. Barton, April 10, 1981).
- A municipality may not buy ads in a high school annual nor make donations to the band booster's club. AGO 1981-379 (to Ms. Rosa H. St. John, May 11, 1981).
- A municipality may not spend public funds to hold an advisory referendum. AGO 1982-198 (to Hon. George A. Monk, February 16, 1982).
- A municipality may not use its equipment and labor to prepare a site for the expansion of a private plant. AGO 1983-228 (to Hon. Ted Boyette, March 14, 1983).
- A county may not sell pipe to private individuals at the cost of the pipe. AGO 1984-028 (to Judge F. R. Albritton, Jr., October 24, 1983). **Note:** The same opinion would apply to municipalities.
- A municipality may not purchase land in order to develop a commercial enterprise. AGO 1987-191.
- Section 94, Constitution of Alabama, 1901, prohibits a municipality from contributing funds to a private, non-profit organization, even if it serves the public good. AGO 1988-030.
- Municipalities may not appropriate funds to individual firefighters who are not organized into a volunteer fire department. AGO 1991-157.
- Municipalities may not give potted plants to private businesses located in the municipality. AGO 1991-294.
- A county commission may not provide free office space to the local chapter of the American Red Cross. AGO 1991-116.
- Individual city councilmembers may not supervise and control municipal departments. The city council must approve expenditures of municipal funds. AGO 1991-147.
- Section 94, Alabama Constitution, 1901, prohibits a county commission from granting public money to private, nonprofit corporations, even though such

corporations may serve the public good. AGO 1990-139.

- A county governing body cannot donate funds to the National Right to Vote Celebration, Inc. While the county may contract for the performance of services, the services must be those that the county could legally provide for its citizens. AGO 1990-206.
- A city may not contribute funds to a privately sponsored baseball league but may contract with the league to provide a baseball program and tournament for the city. AGO 1990-227.
- A county may not perform work on private roads or property. AGO 1990-257.
- Counties may not work on private property in the absence of either legislation permitting the work in question or a request from the state board of health. AGO 1991-333.
- A city may not lend money to an industrial development board for the purpose of housing a business that does not fit the definition of a project into which the industrial development board may enter. AGO 1990-396.
- A city may use CDBG funds but not money from the municipal general fund, to install sewer lines on private property. AGO 1991-406.
- A county may not maintain private driveways used by county school buses. AGO 1992-172.
- A city may not give property to a private, nonprofit organization but may contract with the organization for services to be provided to the city in exchange for the property, as long as the city itself has the authority to provide the services. AGO 1992-231.
- A local act of the Legislature authorizing a county to perform work on private property without compensation would violate Section 94, Constitution of Alabama, 1901. AGO 1993-139.
- A county has no authority to perform work at no cost on a private ditch owned by a church. The county may not sell pipe to the church unless there is a need to dispose of it as surplus property. AGO 1993-145.
- County and city boards of education may not spend public funds for advertisements to continue or renew an existing ad valorem tax. AGO 1993-234.
- Public funds may not be expended for the purchase of plaques or framed certificates for employees. AGO 1993-294.

- A city cannot pay for paving around a building leased by the town from the county and presently used as a funeral home. AGO 1993-311.
- A county cannot donate property to a nonprofit corporation. It must sell the property to the organization for the fair market value of the property. If the organization contracts to perform services for the county which the county itself may legally perform, then a portion of the consideration for the property may include repairs and renovations to the property, which will benefit the county and its citizens and services furnished by the organization to the citizens of the county. AGO 1993-325.
- An unincorporated municipal utility board is an agency of the city which created it and is bound by the same restrictions relating to the expenditure of public funds as the city itself. AGO 1994-242.
- A county may not contribute public funds to a private medical clinic board. AGO 1994-256.
- A city may not perform work on that portion of water and sewer lines that are located on private property. AGO 1995-029.
- A city may not give property to a private, nonprofit organization but may contract with the organization for services to be provided to the city in exchange for the property, as long as the city itself has the authority to provide the services. AGO 1992-231.
- Where a local act establishing a municipal personnel system does not authorize the city to expend funds to pay an expense allowance for personnel board members, the city has no authority to do so. AGO 1995-048.
- A municipal electric distribution system cannot give electric heaters to customers as an incentive for them to remain with the system. AGO 1995-115.
- A municipal utilities department cannot give away appliances nor provide discounts as customer incentives without violating Section 94, Constitution of Alabama, 1901. AGO 1995-259.
- A county may not give property to a manufacturing company because the appropriation does not serve a public purpose. AGO 1995-167.
- A municipality may not pave church parking lots. AGO 1996-037.
- A city may not spend funds to assist a church in hosting a convention. AGO 1996-103.
- A city may not provide free utility taps for Habitat for Humanity projects. AGO 1996-233.
- A private driveway is not considered a public road simply because school buses and mail carriers use it. The driveway must be dedicated to public use, accepted by a public entity with authority to accept dedications and convey some benefit to the public entity before the entity can maintain it. AGO 1996-214.
- A municipality may not use municipal equipment or employees to dig graves in a cemetery not owned by the municipality even if full reimbursement is made. A municipality may, under certain guidelines, lease idle municipal equipment to local citizens for the digging of graves. These guidelines are:
 1. The service must not be available in the area through private enterprise;
 2. The equipment can be leased by the municipality only when it is not needed by the municipality;
 3. The amount paid to the municipality must be comparable to the rental cost of the equipment through private sources;
 4. The lease contract must mandate municipal approval of operators of the machinery in order to assure that only qualified persons are allowed to operate the machinery; and
 5. Town employees may operate the equipment only when not on duty in their municipal jobs. AGO 1997-061.
- A municipality may not purchase an ad in a souvenir booklet published by a political organization if the ad does not serve a public purpose and the booklet is not a recognized medium of advertising. AGO 1997-220.
- A municipality may not, during normal working hours, use city equipment and employees to open and close graves, even where there is full reimbursement. The municipality may, however, lease idle equipment under certain guidelines. AGO 1998-130.
- A gas district organized pursuant to Sections 11-50-390, et seq., Code of Alabama 1975, may not purchase gas generators and equipment for a privately owned radio station to broadcast emergency and weather bulletins when electrical service is interrupted. AGO 1998-187.
- A county department of human resources does not have the authority to buy gifts of appreciation, such as flowers, cards and awards. AGO 1999-112.
- A municipal utilities board may not pay one-half the cost of a water storage tank that will be placed on private property and used for the exclusive benefit of a private corporation. It may, however, take steps to provide water service to the customer. AGO 2000-060.

- A water and fire protection authority organized under Sections 11-88-1 through 11-88-21, Code of Alabama 1975, does not have the power to donate funds to an elementary school for restoration of its playground. AGO 1999-215.
- An incorporated board may not appropriate funds to a nonprofit organization if the appropriation exceeds the board's corporate powers. AGO 1999-129.
- Section 94 of the Alabama Constitution prohibits a municipality from providing lighting for a private church. AGO 1999-249.
- Courts in the state of Alabama have held that, as a matter of law, an increase in tax revenue, or the creation of tax revenues does not serve a public purpose. AGO 2001-187.
- A town may not perform work on or repair a water or sewer line that is on private property unless there is legislation that permits such work to be done, the damage constitutes a health hazard, the cost is assessed against the private property owner or the town caused the damage. AGO 2001-188.
- Municipal funds may not be expended to provide cake and coffee at monthly meetings of city employees with birthdays in the respective month, even if the work done at these meetings is clearly related to the achievement of one or more municipal purposes. AGO 2002-049.
- The appropriation of city funds for the purpose of awarding college scholarships is neither expressly nor impliedly authorized by the state, nor is the authority essential to the operation of the City of Anniston. The City cannot make appropriations directly or indirectly to the Anniston City Schools Foundation for the purpose of awarding college scholarships to graduates of Anniston High School unless the voters in Anniston vote to levy a special tax for a scholarship program and the city council determines such a program would serve a public purpose. AGO 2007-074.
- Public funds cannot be used to pay legal fees incurred by an elected official in the defense of an election. Since a candidate who is an incumbent is not acting in his official capacity when he runs for re-election, a city does not have a proper interest in an election contest between the incumbent and his opponent. AGO 2008-020.
- Absent statutory authority to promote the general welfare and development of citizens who are mentally and developmentally disabled, the Geneva County Commission may not use and appropriate county funds to the Geneva County Association for Retarded Citizens ("Association" or "ARC") for the payment of fire and hazard insurance on a building owned by the Association. AGO 2012-044.
- The City of Montgomery may not pay compensation to a private citizen that is not for a public purpose authorized by a local act or other law. AGO 2013-005.
- The Town of Sylvan Springs ("Town") may not accept a gift of undeveloped lots from a limited liability company in exchange for an agreement from the Town to complete and repair roads within a subdivision developed by the limited liability company where the Town intends to sell the undeveloped lots to offset the cost to complete and repair the roads. AGO 2015-056.
- An electric utility board established under Section 11-50-490, et seq., of the Code of Alabama may not enter into loan agreements with customers for the purchase of a new heating, ventilation, and air conditioning system without violating Section 94 of Article IV of the Recompiled Constitution of Alabama. AGO 2018-035.
- The City of Irondale may not expend municipal funds or lend its credit for the repair and/or replacement of private roads and bridges in a private gated community located in the city. AGO 2019-034.

Summary

Traditionally Section 94 of the Alabama Constitution has been interpreted to specifically prohibit municipalities from giving away their property or funds to individuals and private corporations. However, the Alabama Supreme Court has held that municipalities may give away anything in aid or value to another person, corporation or association if the municipal governing body determines that the expenditure or appropriation will serve a public purpose. Ratified in 2004, Amendment 772, Alabama Constitution, 1901 (Also cited as Section 94.01) grants specific authority to counties and municipalities to lend credit to or grant public funds and things of value to any individual, firm, corporation, or other business entity, public or private, for the purpose of promoting the economic or industrial development of the county or municipality, after a properly noticed public meeting.

Further, the League recommends creating a contractual relationship if a municipality plans to appropriate money or gift property to a non-public agency or association.

The Cater and Wallace acts have been upheld by the courts but we recommend that the Attorney General's approval be obtained before donating to a corporation organized under these Acts.

The decisions of the court and of the attorney general are liberal in construing this section but nevertheless we suggest that a ruling be obtained in each appropriation unless there is specific existing authority.

43. The Public Purpose Doctrine

In pertinent part, Section 94, Alabama Constitution, 1901, states: “The Legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association. . . .”

Section 94 is designed to prevent expenditure of public funds in aid of private individuals and corporations. *See, Opinion of Justices*, 319 So.2d 682 (Ala. 1975). In *Opinion of the Justices*, 49 So.2d 175 (Ala. 1950), the Court said: “It has been pointed out that the evil to be remedied is the expenditure of public funds in aid of private individuals or corporations, regardless of the form which such expenditures may take, and that Section 94 prohibits, in the words of the decision in *Garland v. Board of Revenue of Montgomery County*, 6 So. 402 (Ala. 1889), ‘any aid ... by which a pecuniary liability is incurred’.”

This is similar to the rule followed by most municipalities throughout the country. According to *McQuillin, Municipal Corporations* Section 39.19 (3d Ed. Rev.), “a municipality has no power ... to donate municipal moneys for private uses to any individual or company not under the control of the city and having no connection with it, although a donation may be based on a consideration.” Section 94 carries this prohibition into effect and prevents municipalities from giving anything of value to a private person or entity. There are, of course, exceptions to this prohibition, and there are a number of cases and Attorney General’s Opinions that have approved expenditures to private persons. For a more thorough examination and a list of these decisions, see the article “Authority to Expend Municipal Funds,” *Selected Readings for the Municipal Official*

Section 94 is not violated where compensation is exchanged for services and benefits rendered. *See, Taxpayers & Citizens of Foley v. Foley*, 527 So.2d 1261 (Ala.1988). Thus, municipalities may contract for services with private persons (as long as the municipality itself has the authority to perform the service being contracted for), but cannot simply give away public money, goods or services.

Additionally, courts have held that expenditures that serve a “public purpose” do not violate Section 94. The public purpose standard was made part of the Alabama Constitution in 2004, when Section 94.01 (Amendment 772) was added to give municipalities (and counties) more flexibility to encourage economic development. Section 94.01 permits local public governments to, among other things, use public funds or other items of value in “aid of or to any individual, firm, corporation, or other business entity, public or private, for the purpose of promoting the

economic and industrial development of the county or the municipality.” Section 94.01 specifically exempts public agencies from the restrictions of Section 94.

A recent AGO, to Jimmy Calton, August 6, 2007, interprets Section 94.01, and notes two conditions a municipality must comply with before giving aid pursuant to this provision. As noted in the Attorney General’s Opinion, “subsections (c)(1) and (c)(2) require that the proposed action serve a valid public purpose and that notice and a meeting be held regarding the proposed action.” AGO 2007-122.

Specifically, subsection 94.01(c)(1) requires the passage of “a resolution containing a determination by the governing body that the expenditure of public funds for the purpose specified will serve a valid and sufficient public purpose, notwithstanding any incidental benefit accruing to any private entity or entities.” Thus, in order to use public funds, equipment, facilities or any other public item of value to encourage economic development, the public entity must still justify the action by determining that a public purpose exists.

The public purpose test establishes a somewhat confusing standard for municipal officials to follow when they make decisions about the expenditure of public funds. Instead of a bright-line test where the only important fact an official must know is whether the entity or person requesting funds is public or private, officials are left to determine for themselves whether the purpose the funds will be used for is, in fact, public in nature. Clearly, this will be difficult in many cases.

This article examines some of the issues surrounding the public purpose doctrine in the hopes of clarifying what constitutes a public purpose.

The Standard of Review

In some cases, a request for municipal funds obviously does not serve a public purpose. In these situations, officials will be expected to decline the request. For example, if a church asks the municipality to pave its parking lot, this expenditure is designed only to benefit those who attend that church. But what if a municipality is facing a severe parking crisis in its downtown area and the church offers to open the lot for public use every day except Sunday? Does the public need for parking override the prohibitions of the Alabama Constitution?

There is no clear-cut answer to that question (*But see, Guarisco v. Daphne*, 825 So.2d 750 (Ala.2002), discussed below). The interpretation of what constitutes a public purpose will, of course, vary from official to official. What

one councilmember sees as a benefit to the public will be seen by others as a detriment. Officials will have to resolve these issues by debate and should rely heavily on the advice of their attorneys.

There will be times, though, when the attorney cannot provide a definitive answer and can only offer guidance. In those instances, it is important to remember the standard of review that generally applies to discretionary actions of municipal officials. In those instances, courts usually defer to the decisions of a governing body unless that decision is clearly incorrect.

In *Opinion of the Justices No. 269*, 384 So.2d 1051 (Ala.1980), the Court stated that, “[T]he question of whether or not an appropriation was for a public purpose [is] largely within the legislative domain, rather than within the domain of the courts.” Quoting *Board of Revenue of Mobile County v. Puckett*, 149 So. 850 (Ala. 1933), the Court noted that, “The Legislature (or council) has to a great extent the right to determine the question, and its determination is conclusive when it does not clearly appear to be wrong, assuming that we have a right to differ with them in their finding. Taken on its face, it is our duty to assume that the Legislature (or council) acted within constitutional limits and did not make a donation when such construction is not inconsistent with the recitals of the act.” (Parentheses added).

Basically, courts defer to the legislative body’s determination that a public purpose exists. A court will overturn this decision, though, if it feels that the stated public purpose is improper or insufficient. For instance, in *Brown v. Longiotti*, 420 So.2d 71 (Ala.1982), the Alabama Supreme Court refused to find that a public purpose existed when the local government wanted to construct a commercial retail facility. The Court held that the sale of the bonds was designed to benefit a private, rather than public, purpose by lowering rents paid by the individual lessees.

What is a Public Purpose?

Black’s Law Dictionary states that a public purpose “... is synonymous with governmental purpose ... [It] has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents with a given political division ...”

In *Slawson v. Alabama Forestry Commission*, 631 So.2d 953 (Ala.1994), the Alabama Supreme Court stated that, “The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit ... The trend among the modern courts is to give the term ‘public purpose’ a broad expansive definition.”

As McQuillin notes in his treatise on municipal corporations, “What is a public purpose cannot be precisely defined, since it changes to meet new developments and conditions of the times.” While it does not have to serve the needs of the municipality as a whole, “Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.” *McQuillin, Municipal Corporations* Section 39.19 (3d Ed. Rev.).

In *Opinion of the Justices No. 269*, the Alabama Supreme Court declined to provide a specific definition, stating, “What is ‘a public purpose’ depends in part upon the time (age), place, objects to be obtained, modus operandi, economics involved, and countless other attendant circumstances. Generally speaking, however, it has for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community.”

The Court went on to say that:

“The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit.”

“There is no fixed static definition of ‘public purpose.’ It is a concept which expands with the march of time. It changes with the changing conditions of our society. What today is not a public purpose may to future generations yet unborn be unquestionably a public purpose. ‘Public purpose’ is a flexible phrase which expands to meet the needs of a complex society even though the need was unheard of when our State Constitution was adopted.”

In *WDW Properties v. Sumter*, 535 S.E.2d 631 (S.C. 2000), the South Carolina Supreme Court pointed out that:

“[A]ll legislative action must serve a public rather than a private purpose. In general, a public purpose has for its objective the promotion of the public health, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division ... It is a fluid concept which changes with time, place, population, economy and countless other circumstances. It is a reflection of the changing needs of society.

Legislation may serve a public purpose even though it (1) benefits some more than others and, (2) results in profit to individuals: Legislation

does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose merely because some individual makes a profit as a result of the enactment.”

The court followed a four-part test to determine when expenditures serve a public purpose:

“The Court should *first* determine the ultimate goal or benefit to the public intended by the project. *Second*, the Court should analyze whether public or private parties will be the primary beneficiaries. *Third*, the speculative nature of the project must be considered. *Fourth*, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.”

What is Required?

Although Section 94 doesn’t require passage of a resolution setting out the public purpose to be served, a public agency must still be able to specify the public purpose served by an appropriation to a private group or entity. In some cases, this may require setting out specific findings of fact on the minutes of the meeting that justify the expenditure.

On the other hand, as noted above, in order to comply with Section 94.01, the public entity must pass a resolution at a public meeting stating that the desired use of public funds or materials furthers a public purpose. A notice of the public meeting must be published in the newspaper having the largest circulation in the county or municipality, as the case may be, describing in reasonable detail the action proposed to be taken, a description of the public benefits sought to be achieved by the action, and identifying each individual, firm, corporation, or other business entity to whom or for whose benefit the county or the municipality proposes to lend its credit or grant public funds or thing of value. This notice must be published at least seven days prior to the public meeting.

The action proposed to be taken should be approved at the public meeting of the governing body by a resolution containing a determination by the governing body that the expenditure of public funds for the purpose specified will serve a valid and sufficient public purpose, notwithstanding any incidental benefit accruing to any private entity or entities. At a minimum, then, the governing body should be able to articulate some legitimate, objective public purpose that is furthered by the action. It wouldn’t be sufficient to simply state that an expenditure is made “to accomplish a public purpose” without expressly stating the nature of the benefit to the public.

Remember that in *Opinion of the Justices No. 269*, the

Alabama Supreme Court stated that the determination of what constitutes a public purpose is within the discretion of the governing body. The Court also noted that the appropriation should be upheld when it is, essentially, consistent with the purpose articulated by the governing body. So, this discretion is not without limits. The governing body must still be able to explain how an appropriation benefits some significant portion of the public, and this public purpose should be in mind before the appropriation is made, rather than articulated after the fact.

Slawson, in More Detail

In *Slawson*, the Alabama Forestry Commission used state personnel and equipment to organize, promote and support a private nonprofit corporation known as the Stewards of Family Farms, Ranches and Forests. The purpose of the Stewards, according to its bylaws, was to promote stewardship among private landowners, to protect landowner’s private property rights “by confronting environmental and political extremism in the public and/or political arena,” and to develop and implement “a national strategy designed to confront actions which threaten private property rights of family farm, ranch, and forest owners.” Stewards opposed certain state and federal laws, such as estate taxation laws and numerous federal environmental laws that it felt interfered with private property rights.

The plaintiffs sued the Forestry Commission, arguing that its support of the Stewards violated Sections 93 and 94 of the Alabama Constitution. The court examined its prior decisions on the public purpose doctrine and then turned its attention to the purpose behind the commission’s support of the Stewards. The commission had, by resolution, found that the goals of the Stewards were compatible with the commission’s objectives. In its defense, the commission argued:

“All the actions of the Forestry Commission are designed to promote the public good by maintaining healthy forests. One way we do this is by helping private landowners to develop and maintain environmentally healthy and economically sound forests. We are convinced that activities of Stewards of Family Farms, Ranches and Forests will complement, and in no way conflict with, this mission.”

Based on this, and applying what the court acknowledged was a “broad, expansive definition of ‘public purpose,’” the Court affirmed the trial court’s ruling upholding the appropriations to the Stewards.

Other Selected Cases and Attorney General’s Opinions on Public Purpose

- *Guarisco v. Daphne*, 825 So.2d 750 (Ala.2002), the issuance of warrants to allow a municipality to acquire land to construct a parking lot adjacent to a retail

shopping center served a valid public purpose. The Court noted that the general public is not excluded from using the parking lot, so that “persons who shop, eat, or work in the area of the parking lot” could use it. A strong dissent argued that the expenditure did not serve a public purpose because the primary purpose of the expenditure was to benefit the private retail company and its tenants.

- *Gober v. Stubbs*, 682 So.2d 430 (Ala. 1996): The fact that a taking of property results in a financial benefit to a private person does not mean that the taking is not for a public purpose.
- *Ex parte Birmingham*, 624 So.2d 1018 (Ala.1993): Contract for services of city attorney is a public purpose under Section 94.
- *Smith v. Industrial Dev. Bd.*, 455 So.2d 839 (Ala.1984): The Legislature’s designation of the acquisition and construction of hotels and motor inns for industrial development as promoting a public purpose is not clearly wrong because these facilities provide incentive for industry and business to locate in or near the municipality.
- *Florence v. Williams*, 439 So.2d 83 (Ala.1983): The taking of property for a parking lot where a small number of the spaces will be reserved for the use of a private company while the remaining spaces will be open to the public serves a public purpose.
- *Brown v. Longiotti*, 420 So.2d 71 (Ala.1982): A local constitutional amendment did not authorize the municipality to issue revenue bonds to construct a commercial retail establishment. The Court held that the sale of the bonds was designed to benefit a private company not to serve a public purpose.
- *Montgomery v. Collins*, 355 So.2d 1111 (Ala.1978): A municipality can justify payment of legal defenses for officials and employees as a public purpose.
- *Board Of Revenue & Rd. Com’rs Of Mobile County v. Puckett*, 149 So. 850 (Ala. 1933): A statute appropriating county funds for payment of compensation to a widow for a county employee’s death held not unconstitutional as mere donation of public funds to individual without public purpose.
- A county commission may appropriate funds to a private organization as long as the funds are used for a public purpose. A contract would ensure proper use of the funds. The private organization would not be subject to the bid law. AGO 1995-112.
- The city of Hartselle may donate land or lease land for less than adequate consideration to private businesses

only if the city determines that a public purpose is served. The courts have held, as a matter of law, the creation or increase of tax revenues for the city does not serve a public purpose. The city has determined that a public purpose would be served, which is economic stimulation and increased tax and license revenue to fund city services. AGO 2001-187.

- A county may not give property to a manufacturing company because the appropriation does not serve a public purpose. AGO 1995-167.
- A municipality may convey public property to a nonprofit corporation if there are benefits flowing to both parties which promote a public purpose. AGO 1995-204 and AGO 1998-111.
- A county commission may transfer real property to a nonprofit corporation if the commission determines the transfer serves a public purpose. AGO 1995-299.
- Conveyance of public property to a private corporation at no cost where there is no public purpose violates Section 94, Constitution of Alabama, 1901. AGO 1995-281.
- A county may provide office space to a private, nonprofit corporation if the county determines the corporation serves a public purpose. AGO 1997-097 and AGO 1997-099. **Note:** The League recommends entering into this arrangement only pursuant to a valid contract.
- A municipality may not purchase an ad in a souvenir booklet published by a political organization if the ad does not serve a public purpose and the booklet is not a recognized medium of advertising. AGO 1997-220.
- A county commission may purchase and renovate a building and lease the building to the Alabama Veterans Museum and Archive if the Commission determines that there is a public purpose for this and that the public purpose is served. AGO 1998-219.
- If a municipality determines that the construction of an emergency sand berm on a private beach serves a public purpose, the municipality may contribute public funds to pay part of the cost. AGO 1999-152.
- A municipality may convey real property to its Industrial Development Board for immediate resale at less than fair market value without violating Section 94 of the Alabama Constitution, 1901, if it determines that the conveyance furthers a public purpose. AGO 1999-150.
- If a municipal council determines that a public purpose is served, the municipality may appropriate funds to a

local children's museum for the renovation of a building located on property leased by the municipality. The municipality may then sublease the building to the museum for a nominal consideration. The Attorney General recommends a written contract permitting this. AGO 2000-071.

- If a city determines that stocking a lake owned by the Alabama Power Company will serve a "public purpose," i.e., the promotion of tourism, the city may expend municipal funds for this purpose. The better practice would be for the city to contract with Alabama Power Company regarding the use of the lake. AGO 2000-121.
- If the municipal governing body finds that appropriating funds to provide expenses for the Homewood High School band to participate in the presidential inaugural parade is a public purpose, the city may expend public funds for this purpose. Whether a contribution by the City of Homewood, to offset the costs of a banquet to honor the Homewood High School football team, is for a public purpose is ultimately a factual determination that can only be made by the city council. AGO 2001-064.
- If a municipal council determines that an awards banquet will serve a public purpose, the police department may use public funds for the meals of the employees, plaques, seminars and cash awards. Section 11-40-22(b) of the Code of Alabama requires that the governing body of the municipality approve each cash or non-cash award given to an employee for exemplary performance or for innovations that significantly reduce costs. AGO 2001-088.
- A city board of education may not purchase flowers for the families of deceased students, public officials, officials' relatives or the general public. Furthermore, the board may not provide refreshments prior to or after a board meeting unless the gathering serves a distinct public purpose. However, the board may generally provide food and nonalcoholic refreshments at a reception to meet applicants for employment and at receptions attended by members of the city government, legislators, and members of the community if the board determines that such expenditure serves a public purpose. AGO 2001-129.
- A county commission may contribute to a nonprofit firefighters' organization if the county determines that the contribution serves a public purpose. AGO 2001-270.
- A town may not perform work on or repair a water or sewer line that is on private property unless there

is legislation that permits such work to be done, the damage constitutes a health hazard, the cost is assessed against the private property owner or the town caused the damage. AGO 2001-188.

- Municipal funds may not be expended to provide cake and coffee at monthly meetings of city employees with birthdays in the respective month, even if the work done at these meetings is clearly related to the achievement of one or more municipal purposes. AGO 2002-049.
- Whether a city may expend public funds for food and drinks at certain events is a factual determination. If the city council determines that an event serves a public purpose, public funds may be expended by inaugural events, banquets, picnics and other such functions. AGO 2003-049.
- If a city determines that cooperation with a private subdivision and any third party contractors in an effort to remove siltation from a private lake would serve a public purpose, a city may contribute funds or in-kind services to the siltation removal effort without violation Section 94, Constitution of Alabama, 1901. AGO 2002-211.
- A city may lease municipal property at no charge if a public purpose is served. The city council must determine if a public purpose is to be served by the corporation in leasing the municipal property. AGO 2003-083.
- The cost of private cellular telephones used by election officials is not included within the definition of expenses reimbursable by the state, but a county may pay these costs from county funds if the county finds that these are reasonable costs of conducting the election. AGO 2004-058.
- If a municipality determines that a public purpose will be served, the municipality may transfer municipal property and adjoining land to a private historical preservation organization by following Section 11-47-20 of the Code of Alabama 1975, relating to the disposition of real property owned by a municipality. AGO 2004-078.
- If a city determines that an expenditure of municipal funds serves a public purpose, the city may expend municipal funds for the benefit of a nonprofit corporation formed for the purpose of developing, promoting, and protecting the property rights of city citizens, businesses, and other property owners. AGO 2004-147.
- If a municipal governing body determines that the expenditure of municipal funds serves a public purpose,

it may expend municipal funds for the activities of the Alabama Silver-Haired Legislature. AGO 2004-157.

- If a city council determines that expending funds for the acquisition of a monument to memorialize the former existence of a public educational institution serves a public purpose, such expenditure is consistent with Section 94, as amended by Amendment 558, of the Constitution of Alabama of 1901. AGO 2005-021.
- A town may expend public funds to pay for debris and tree removal following a hurricane, even if it involves work on private property, if the town council makes a determination that the work done served a legitimate public purpose. Absent such a finding, the council may assess individual property owners for any cleanup and tree removal performed where the debris constituted a health hazard and where the owners were unable to secure a private source to perform the cleanup service. AGO 2005-029.
- The determination of whether a city may expend funds to improve drainage on private property must be made by the city governing body based on whether the improvement will serve a public purpose, and the city must have an easement on the land. A public purpose is served if the expenditure confers a direct public benefit of a reasonably general character, and this must be determined by the governing body on a case-by-case basis. AGO 2005-073.
- Under Section 11-3-11(a) (19), Code of Alabama 1975, a county commission can perform industrial development work for a municipality on property owned, leased, or under option to the municipality if the county commission determines the work serves a public purpose. AGO 2006-137.
- The appropriation of city funds for the purpose of awarding college scholarships is neither expressly nor impliedly authorized by the state, nor is the authority essential to the operation of the city of Anniston. The city cannot make appropriations directly or indirectly to the Anniston City Schools Foundation for the purpose of awarding college scholarships to graduates of Anniston High School unless the voters in Anniston vote to levy a special tax for a scholarship program and the city council determines such a program would serve a public purpose. AGO 2007-074.
- A County Board of Education (“Board”) may enter into contractual arrangements with a City (“City”) as long as the school board receives fair and adequate consideration for these transactions and the Board determines that its actions serve a public purpose. The City may enter into the contractual arrangements with

the Board as long as any funds expended by the City serve a public purpose and the arrangement does not bind future councils. AGO 2008-101.

- A Health Care Authority (“Authority”) can contract with the governmental entity responsible for maintaining the public road between a Hospital and a Medical Park to widen the road if the Authority’s board of directors determines the improvement would accomplish a purpose of the Authority. The Authority can donate property to be used as the location of a senior citizens facility to the City if the property does not constitute a material part of the assets of the Authority and the disposition will not significantly reduce or impair the level of health care services. AGO 2008-115.
- Under Section 94.01 of the Alabama Constitution, a town may borrow money and grant public funds to a private corporation or other private entity to aid the corporation with the expense of installing a center turn lane for the purpose of promoting economic development in the town, if the town determines a public purpose will be served. Local Constitutional Amendments may also authorize the expenditure of funds by the town. If public funds are transferred to a private entity, such funds are not subject to Alabama’s laws regarding competitive bidding or public works bidding. AGO 2009-086.
- A county commission may appropriate funds to a local university, which is a state institution of higher learning, to be utilized in support of its football program, if the commission determines that the appropriation serves to promote economic development within the county. AGO 2010-010.
- A municipality, through the operation of its city gas and electric utility department, may institute a voluntary donation program whereby the city helps meet local needs by allowing utility customers the option of donating money through the bill payment process and the city may use these donations to provide funds to the utility department to assist low-income families having difficulty paying their utility bills if the governing body determines that a public purpose is served by such action. AGO 2010-014.
- A city may transfer property to an Electrical Cooperative for less than adequate consideration if the city determines that the transfer serves a public purpose. AGO 2010-102. NOTE: The publication and resolution requirements found in Section 94.01 (Amendment 772) of the Alabama Constitution of 1901, may apply.
- A municipality, for less than adequate consideration, may convey real property owned by the city to the

industrial development board for the board's use for the promotion of industry within the city, if the city council complies with the conditions of section 94.01 (Amendment 772) of the Alabama Constitution, including a determination that a public purpose is served by the transfer. AGO 2011-051.

- To determine whether a public purpose is served, the governing body must look to the statutes setting forth the powers of the governmental entity. If within such powers, there exists the authority to promote the action at issue, then the governing body need only decide whether the appropriation will help accomplish that purpose. AGO 2012-002.
- Absent statutory authority to promote the general welfare and development of citizens who are mentally and developmentally disabled, a county or municipality may not use and appropriate government funds to a nonprofit corporation such as a County Association for Retarded Citizens for the payment of fire and hazard insurance on a building owned by the Association. AGO 2012-044.
- Public funds may not be expended for the purchase of distinctive clothing for employees of a public entity where there is no specific law authorizing the use of public funds for the purchase of such clothing, and where employees therein are not tasked with duties that would impliedly require such distinctive clothing such as performing compliance, regulatory or enforcement duties. AGO 2013-060.
- A city may establish a tuition assistance program for the employees of the city provided that the city determines that courses of study provided for therein are related to the duties of the employee seeking assistance and that the expenditure serves a public purpose. The city may establish, by ordinance, a tuition assistance program for employees whose compensation is not otherwise fixed by statute. AGO 2014-057.
- A city may appropriate funds to a private property owner where damage to the property resulted from city work on a drainage easement. The city utilities board may make a similar expenditure if the Board determines it is within its corporate powers to make the expenditure. AGO 2014-062.
- A city may donate funds to the Rotary Club, a nonprofit organization, for the purpose of assisting with "The Theatre Project" if the city council determines that the project is a cultural or related facility open to public use. AGO 2014-094.
- Because the town has the authority to make expenditures to provide a fire department, the town may expend municipal funds to raise money for the fire department if the town council determines the expenditure serves a public purpose. AGO 2015-058.
- A city may convey property and improvements to a Community Action Committee for less than adequate consideration, only if the city determines that a public purpose is served by the benefits provided to the general public by the Community Action Committee and the property is not needed by the city for municipal purposes. AGO 2016-016.
- The City of Wetumpka is authorized to lease property for a maximum term of 99 years, pursuant to Section 11-47-21 of the Code of Alabama. The city is authorized to enter into a long-term lease with the Elmore County Health Care Authority for less than adequate consideration and allow the Authority to sublease the property to a private entity for use as a medical clinic and medical office complex. AGO 2016-022.
- The City of Daphne may guarantee the mortgage of a nonprofit organization to support the construction of soccer fields for the purpose of promoting economic development if the city council complies with the conditions of Section 94.01(c) of Article IV or Section 3 of the Local Amendments for Baldwin County of the Recompiled Constitution of Alabama. AGO 2017-006.
- City officials and employees can expend municipal funds to solicit donations for a charity benefitting a park if the donations are voluntary, the donor knows that the charity is the recipient, and the town council determines that a public purpose is served. (AGO Note: This question should be submitted to the Ethics Commission.) AGO 2017-007.
- The municipality may reimburse a public utility for the costs of relocating utility lines for the purpose of promoting economic development if the city council complies with the conditions of Section 94.01(c) of Article IV of the Recompiled Constitution of Alabama. In the alternative, the municipality may donate funds to a downtown redevelopment authority which may use the funds to reimburse a public utility for the costs of relocating utility lines. AGO 2017-025.
- An electric utility board established under Section 11-50-490, et seq., of the Code of Alabama may not enter into loan agreements with customers for the purchase of a new heating, ventilation, and air conditioning system without violating Section 94 of Article IV of the Recompiled Constitution of Alabama. AGO 2018-035.
- A city may engage in a fundraising campaign for

charities and assign employees to work on such campaign, if the donations are voluntary, the donor knows that the charity is the recipient, and the city council determines that the campaign is being conducted for a public purpose consistent with its statutory authority. The campaign may solicit donations from employees and include donation of goods and services. AGO 2019-027.

- A city may engage in fundraising activities for disaster relief both in and outside the state if the council determines that a public purpose is served. A city official can lend his or her name and title to an event hosted by a private charity only if the event is official business and the council determines that a public purpose is served. (AGO Note: This question should be submitted to the Ethics Commission.) AGO 2019-027.
- A city may hold a charity golf tournament only if the council determines that a public purpose is served, and donations are solicited for charities for which a statutory basis has been identified. (AGO Note: This question should be submitted to the Ethics Commission.) AGO 2019-027.
- The purchase of law enforcement equipment with forfeiture proceeds does not violate Section 94 of Article IV of the Recompiled Constitution of Alabama. The use of forfeiture proceeds to benefit private persons or entities does not violate Section 94 if a valid law enforcement purpose is served. AGO 2019-029.
- The City of Irondale may not expend municipal funds or lend its credit for the repair and/or replacement of private roads and bridges in a private gated community located in the city. AGO 2019-034.
- The City of Brewton may expend public funds and allow its employees, agents, or contractors to enter private property with the owner's consent to remove any unsightly and damaged trees if the city council determines that the work promotes economic and industrial development for the city and the council complies with the conditions of Section 94.01(c) of the Recompiled Constitution of Alabama. AGO 2019-040.

44. Paying Legal Expenses of Officers and Employees

From time to time the League receives questions concerning the payment of legal expenses for the defense of its officers or employees involved in civil suits or criminal actions. The officer or employee may be the subject of a suit by or against the municipality or may be defending a suit for actions rendered on behalf of the municipality. The officer or employee might be the subject of a criminal action for actions taken in his or her official position.

The overriding question is whether the council has the power to pay such legal expenses when requisitioned to do so by the officer or employee. Also, what are the steps or procedures involved to approve the payment of such legal expenses? And then there is always the question of whether the city must pay the expenses or whether the city has merely the discretion to pay such expenses.

These issues become very complicated when the officials being sued are members of the governing body that has to decide whether to pay the charges.

The Three Part Test

This issue was first examined in the case of *City of Birmingham v. Wilkinson*, 194 So. 548 (Ala. 1940), where the question was raised of whether a city was obligated to employ an attorney to defend two members of the governing body against charges of fraud, corruption and graft. The charges were never proved and the complaint was dismissed at trial.

The Alabama Supreme Court set out a three-part test as to when a municipality can pay legal expenses. The court held that a municipal corporation has the implied power to employ counsel to render services in: (1) matters of proper corporate interest, including the prosecution or defense of suits by or against the corporation, (2) and the defense of suits against municipal officers or employees for acts done on behalf of the corporation (3) while in the honest discharge of their duties. *Id.* at 552.

The court stated that members of the governing body cannot employ legal counsel to shield themselves from the consequences of their own unlawful and corrupt acts. However, the city has the power and the duty to defend the members of its governing body against unfounded and unsupported charges of corruption and fraud. If a proper corporate interest is found and the officer or employee acts on behalf of a municipality in the line and scope of his or her duties and furthermore the duty was discharged in honest and good faith, then the city has the power and discretion

to pay the legal expenses involved. *Id.* at 552.

The court in *City of Birmingham* pointed out that a difficult situation arises when the officials charged with fraud and corruption are members of the governing body who must decide whether to defend the suit at public expense while the suit is still pending. The court points out that while the suit is still pending, it is questionable whether the city can pay the legal fees. *Id.* at 552.

The officials being accused are called upon as members of the governing body to act on the propriety of defending the suit at public expense. Little guidance is provided by the court as to whether such fees can be paid while the suit is pending, so it puts the burden on municipalities to determine on their own the truthfulness of the accusations. Of course, where the suit ends favorably to the city and its officers – and the legal fees are then requisitioned – there is no problem with the city paying the expenses if it wishes to do so and if it meets the test for paying such expenses.

In the end, the *City of Birmingham* court cast doubt upon the payment of expenses while a suit is pending. It suggests that a city wait until the outcome of the suit to determine whether to pay the legal expenses. But, the court never states that a city is prohibited from paying legal expenses while a suit is pending. Arguably, as long as there are matters of proper corporate interest involved and the officer or employee is being sued for actions done on behalf of the municipality while in the honest discharge of his or duty, a municipality can pay for legal counsel expenses while the case is still pending. *Id.*

Of course, it is a difficult task for a municipality to come to the conclusion of whether or not the allegations are true. The governing body should make this determination as to the three-part test before any expenses are paid and such findings should be put into the minutes. Is the city, however, *required* to pay the expenses? What if the municipality determines there is a corporate interest involved, and the officer or employee is being sued for actions taken on behalf of the municipality while in the honest discharge of his or her duty? Nowhere does the *City of Birmingham* court state it is mandatory that the cities pay such expenses. Therefore, it should be remembered that a city retains the discretion to pay the expenses or not to pay them. Further, the Alabama Supreme Court has held that a former city councilor's claim against city for bad-faith failure to pay legal expenses was precluded by local-governmental immunity. *Ex parte City of Bessemer*, 142 So.3d 543 (Ala.2013).

What Is Proper Corporate Interest?

The phrase “proper corporate interest” was interpreted in the case of *City of Montgomery v. Collins*, 355 So.2d 1111 (Ala. 1978). In that case, city taxpayers brought a class action to enjoin the city of Montgomery from expending municipal funds to defend city police officers indicted for perjury.

In looking at the issue, the Alabama Supreme Court had to decide whether it was in the proper corporate interest for the city to defend its police officers who were not only accused but indicted for the crime of perjury. The court held that it was in the proper corporate interest for the city to do so. *Id.* at 1114-5.

The initial charges against the police officers included a claim of conspiracy by the officers to violate the civil rights of the plaintiffs. The court reasoned that a claim of violation of civil rights might also later include the city as a defendant under agency principles. It would be within the reasonable scope of proper corporate interest for the municipality to then attempt to protect itself and its officers against future civil litigation brought under agency principles by defending their agents against criminal charges arising out of the same general circumstances in order to gain their acquittal. *Id.* at 1114-5.

The city’s stake in gaining the officers’ acquittal was high, since a judgment of conviction in a criminal case against its officers could be later admissible in a civil action brought against the city based on the officers’ conduct on behalf of the city.

Therefore, the *City of Montgomery* court concluded that a matter of “proper corporate interest” might depend upon the existence of a risk of litigation against the city itself should the perjury prosecutions have proved successful. Moreover, the *City of Montgomery* court saw that the officials in charge of the administration of the city could reasonably conclude that defending the officers was necessary to the good morale of the police department or for recruitment and retention purposes. *Id.*

There may exist other equally compelling reasons that fall within the proper corporate interest. Even though the *City of Montgomery* court did not give a clear definition of the phrase “proper corporate interest,” it gave good examples of situations in which it considered the phrase applicable. *Id.*

Even if Indicted?

The fact that the officer was indicted in the *City of Montgomery* case made no difference to the court. It held that an indictment casts not a single pebble of guilt in the scale against a criminal defendant. Its function is merely to inform the accused of the crime with which he is charged. *Id.* at 1115.

Since an indictment is merely informational, the court held that a city retains the discretion to determine whether the city’s interests required a defense to the charges against the officers. The court stated that whether the city’s decision is wrong in these types of cases is for their constituency to decide. The Attorney General’s officer has ruled along the same lines. *Id.* at 1115.

In an Attorney General’s Opinion (AGO) to Hon. Willard Pienezza, February 1, 1978, that office decided that the city of Tallassee had the discretion to pay for the legal defense of an employee, the driver of a city ambulance, which crashed into and killed two women. That the driver was indicted in a criminal action arising from the crash made no difference in the opinion of the Attorney General. The opinion stated that the discretion to pay the legal expenses of the employee, as long as the three part test set out in the *City of Birmingham* is met, does not cease when city officials or employees are indicted for the commission of a crime.

During a Pending Investigation?

In AGO 2012-029, the Attorney General opined that a county commission may, in its discretion, pay the legal costs of defending county commissioners and employees during a pending investigation and in litigation if the county commission determines that a proper corporate interest is involved and the actions do not involve a willful or wanton personal tort or a criminal offense.

What Is Not Proper Corporate Interest?

In *Greenough v. Huffstutler*, 443 So.2d 886 (1983), the Alabama Supreme Court touched on the issue of proper corporate interest when it looked at a case in which a civil action was brought in order to determine the eligibility of two newly appointed board members to the personnel board of the city of Mobile. The suit sought to enjoin the personnel board from holding meetings or acting unless and until replacements were appointed.

The essential allegations charged a lack of legal qualification to hold the positions on the board. The trial court found that the two members lacked the qualifications to hold the positions and removed them from the board. When the board requisitioned the city of Mobile for the payment of expenses incurred in defending the two men, the city refused to pay. *Id.* at 890.

The court held that a municipality cannot provide funds for the defense of an official in a criminal action or even in a civil action where there is no benefit to the municipality. Thus, a city has no such interest in a suit exclusively directed against its officers, charging lack of legal qualifications to hold office. In fact, the *Greenough* court states that paying such expenses would not only be

outside the power of the city to do, it would offend Section 94 of the Alabama Constitution of 1901, which prohibits the grant of public funds for any individual purpose. *Id.* at 890.

So Section 94, which most city officials will recognize as a factor in many municipal problems, is also a factor to consider when deciding to pay legal expenses for officers and employees and should be a consideration in determining whether a proper corporate interest exists.

In AGO 2008-020, the Attorney General determined that public funds cannot be used to pay legal fees incurred by an elected official in the defense of an election. Since a candidate who is an incumbent is not acting in his official capacity when he runs for re-election, a city does not have a proper corporate interest in an election contest between an incumbent and his or her opposition.

It is important to note that with regard to proper corporate interest, the Ethics Commission has concluded that a public official charged with violating the Ethics Law and who was cleared of wrongdoing could not obtain reimbursement for legal expenses from the State because no proper corporate interest was involved. See Alabama Ethics Commission Advisory Op. No. 97-15.

Other Decisions

In other situations the Attorney General's office has ruled that the payment of legal expenses is not within the proper corporate interest.

In an AGO to Hon. Perry C. Roquemore, January 11, 1978, the city of East Brewton attempted to dismiss the police chief. At the termination hearing, the police chief attended the hearing with his attorney and the council decided to retain the services of the chief. The city asked the Attorney General's office if it could pay the attorney's bill in the matter. That office replied that there is no authority for the expenditure of such funds in circumstances where the council institutes the action against which the officer or employee is to be defended.

In AGO 89-00048, the City of Sumiton asked whether it could pay all legal expenses incurred on behalf of two incumbent candidates as a result of election contests. The Attorney General's opinion replied that the city did not have a proper interest in an election contest between the incumbent and his opponent because a candidate who is an incumbent is not acting in his official capacity when he runs for reelection.

In AGO 1992-073, the Pike County Commission asked whether it must pay the legal expenses for three Pike County commissioners who were sued by the county district attorney as a result of an overpayment of salary compensation. The Attorney General's opinion replied that no corporate interest could possibly be served by the county's payment of legal fees spent defending an action filed on behalf of the county.

In AGO 2001-210, a municipality was not required to pay the legal expenses incurred by an employee to appeal a disciplinary action to the personnel board; however, a municipality may pay the legal fees if the city council determines that: (1) the city has a proper corporate interest in the action; (2) the actions allegedly committed were done in the discharge of official duties; and (3) the official acted honestly in good faith. A city may also pay the legal expenses in anticipation of litigation if the city council determines that it is in the best interests of the city to settle the anticipated litigation. *See also*, AGO 2006-116.

AGO 2002-274 opined that a municipality may, but is not required to, reimburse the municipal clerk for legal fees incurred by the clerk when he or she is suspended without pay from his or her position, but is later restored and reimbursed for lost pay by the council.

In AGO 2008-020, the Attorney General's Office opined that county funds could not be used to pay the legal fees incurred by a county commissioner in the defense of an election contest because a proper corporate interest did not exist.

Conclusion

Municipal officials should be extraordinarily cautious before deciding to pay the legal expenses of its officers and employees. Not only is it difficult to decide whether allegations are true but whether the actions taken were in the line and scope of their duties or whether there is a proper corporate interest in paying the bills. This can be extremely difficult where allegations are against officials who are members of the governing body deciding whether to pay the bills.

It is important for officials making such determinations to remember the three-part test outlined in *City of Birmingham*. A determination based upon the three-part test must be made by the council and put into the minutes. Since Section 94 is yet again a factor that must be considered in these types of problems, a council must make sure it is not just individual interests that are being served and that a proper corporate interest is found and written into the minutes.

As always, care must be taken in making these determinations as a council would not want the liability of making unauthorized expenditures coming back to haunt them.

45. The Competitive Bid Law

The competitive bid law is codified at Sections 41-16-50 through 41-16-63, Code of Alabama 1975. This article summarizes the major portions of the competitive bid law and incorporates the interpretations and constructions given the law by the courts and the Attorney General. In addition, Chapter 1, Title 39, Code of Alabama 1975, governing contracts related to public buildings, streets or public works, is discussed. For detailed information on the public works bid process, see the article titled Public Works Bidding in this publication.

At the outset, it is important to note that Alabama law requires governing bodies of municipalities to establish and maintain such purchasing facilities and procedures as may be necessary to carry out the intent and purpose of the competitive bid law by complying with the requirements for competitive bidding in the operation and management of such municipalities and the instrumentalities and boards of such municipalities. For a sample purchasing procedure please contact the League.

DOES THE BID LAW APPLY?

The competitive bid law provides that all expenditures of funds of whatever nature for labor services, work, or for the purchase or lease of materials, equipment, supplies or other personal property, involving \$15,000 or more, or for the lease of materials, equipment, supplies or other personal property where the lessee is or becomes legally and contractually bound under the terms of the lease, to pay a total amount of \$15,000 or more, made by or on behalf of ... city boards of education, the governing bodies of municipalities of the state and the governing boards of instrumentalities of municipalities ... including waterworks boards, sewer boards, gas boards and other like utility boards and commissions, except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder. Section 41-16-50, Code of Alabama 1975.

Cannot Divide Up Contract to Avoid Bid Law

The law forbids the division of a purchase or contract of \$15,000 or more into parts to avoid competitive bidding thereon. Such partial contracts are declared to be void. Section 41-16-54(f), Code of Alabama 1975. Further, according to the Attorney General, a local government may not be broken into districts, divisions or otherwise to evade competitive bidding. 128 Quarterly Report of the Attorney General 15.

Joint Purchasing

Section 41-16-50, Code of Alabama 1975, states that two or more contracting agencies may provide, by joint agreement, for the purchase of labor, services, work, or for the purchase or lease of materials, equipment, supplies or other personal property, for use by the respective agencies. Such agreement shall be entered into by similar ordinances, in the case of municipalities or by resolutions, in the case of other contracting agencies, adopted by each of the participating governing bodies, which shall set forth the categories of labor, services or work or for the purchase or lease of materials, equipment, supplies or other personal property to be purchased, the manner of advertising for bids and of awarding of contracts, the method of payment by each participating contracting agency, and other matters deemed necessary to carry out the purposes of the agreement.

This section further provides that each contracting agency's share of expenditures for purchases under any such agreement shall be appropriated and paid for in the manner set forth in the agreement and in the same manner as for other expenses of the contracting agency.

Contracting agencies entering into such an agreement may designate a joint purchasing agent. Any purchases made pursuant to such an agreement are subject to the bid law.

Reverse Auctions

Rather than using traditional competitive bid procedures when the bid law applies, Section 41-16-54 provides that local awarding authorities can use reverse auction procedures. A reverse auction procedure includes either of the following:

1. A real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location, in which multiple anonymous suppliers submit bids to provide the designated goods or services.
2. A bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled Internet location, in which multiple anonymous suppliers submit bids to provide the designated goods or services

The Department of Examiners of Public Accounts has established procedures for letting contracts through a reverse auction. <https://examiners.alabama.gov/PDF/Guides/RAP.pdf>

Items can be purchased through the use of a reverse auction only if either 1) the item is not available through the state purchasing program for the same terms and conditions,

or 2) if the item is purchased for a price equal to or less than that available on the state bid list.

EXEMPTIONS FROM THE COMPETITIVE BID LAW

Section 41-16-51, Code of Alabama 1975, provides for specific exemptions from the bid law. Specifically, it provides that competitive bids shall not be required for utility services, the rates for which are fixed by law, regulation, or ordinance. It further provides that bid law requirements shall not apply to the following:

1. The purchase of insurance.
2. The purchase of ballots and supplies for conducting any primary, general, special, or municipal election.
3. Contracts for securing services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accountants, public accountants, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part.
4. Contracts of employment in the regular civil service.
5. Contracts for fiscal or financial advice or services.
6. Purchases of products made or manufactured by the blind or visually handicapped under the direction or supervision of the Alabama Institute for Deaf and Blind in accordance with Sections 21-2-1 to 21-2-4, inclusive.
7. Purchases of maps or photographs from any federal agency.
8. Purchases of manuscripts, books, maps, pamphlets, periodicals, and library/research electronic data bases of manuscripts, books, maps, pamphlets, periodicals and library/research electronic data bases of manuscripts, books, maps, pamphlets, or periodicals.
9. The selection of paying agents and trustees for any security issued by a public body.
10. Existing contracts up for renewal for sanitation or solid waste collection, recycling, and disposal between municipalities or counties, or both, and those providing the service.
11. Purchases of computer and word processing hardware when the hardware is the only type that is compatible with hardware already owned by the entity taking bids and custom software.
12. Professional services contracts for codification and publication of the laws and ordinances of municipalities and counties.
13. Contractual services and purchases of commodities for which there is only one vendor or supplier and contractual services and purchases of personal property which by their very nature are impossible to award by competitive bidding.
14. Purchases of dirt, sand, or gravel by a county governing body from in-county property owners in order to supply a county road or bridge project in which the materials will be used. The material shall be delivered to the project site by county employees and equipment used only on projects conducted exclusively by county employees.
15. Contractual services and purchases of products related to, or having an impact upon, security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or infrastructures.
16. Subject to the limitations in this subdivision, purchases of goods or services, other than voice or data wireless communication services, made as a part of the purchasing cooperative sponsored by the National Association of Counties, its successor organization, or any other national or regional governmental cooperative purchasing program. Such purchases may only be made if all of the following occur:
 - a. The goods or services being purchased are available as a result of a competitive bid process conducted by a governmental entity and approved by the Alabama Department of Examiners of Public Accounts for each bid.
 - b. The goods or services are either not at the time available to counties on the state purchasing program or are available at a price equal to or less than that on the state purchasing program.
 - c. The purchase is made through a participating Alabama vendor holding an Alabama business license if such a vendor exists.
 - d. The entity purchasing goods or services under this subdivision has been notified by the Department of Examiners of Public Accounts that the competitive bid process utilized by the cooperative program offering the goods complies with this subdivision.
17. Purchase of goods or services, other than wireless communication services, whether voice or data, from vendors that have been awarded a current and valid Government Services Administration contract. Any purchase made pursuant to this subdivision shall be under the same terms and conditions as provided in the Government Services Administration contract. Prices

paid for such goods and services, other than wireless communication services, whether voice or data, may not exceed the amount provided in the Government Services Administration contract.

The Alabama Department of Examiners of Public Accounts maintains a listing of approved purchasing cooperatives which can be accessed at: <https://examiners.alabama.gov/purchase-coop.aspx>.

Other exemptions include:

1. Any purchases of products where the price of the products is already regulated and established by state law.
2. Purchases made by individual schools of the county or municipal public-school systems from moneys other than those raised by taxation or received through appropriations from state or county sources.
3. The purchase, lease, sale, construction, installation, acquisition, improvement, enlargement, or expansion of any building or structure or other facility designed or intended for lease or sale by a medical clinic board organized under Sections 11-58-1 to 11-58-14, inclusive.
4. The purchase, lease, or other acquisition of machinery, equipment, supplies, and other personal property or services by a medical clinic board organized under Sections 11-58-1 to 11-58-14, inclusive.
5. Purchases for public hospitals and nursing homes operated by the governing boards of instrumentalities of the state, counties, and municipalities.
6. Contracts for the purchase, lease, sale, construction, installation, acquisition, improvement, enlargement, or extension of any plant, building, structure, or other facility or any machinery, equipment, furniture, or furnishings therefor designed or intended for lease or sale for industrial development, other than public utilities, under Sections 11-54-80 to 11-54-99, inclusive, or Sections 11-54-20 to 11-54-28, inclusive, or any other statute or amendment to the Constitution of Alabama authorizing the construction of plants or other facilities for industrial development or for the construction and equipment of buildings for public building authorities under Sections 11-56-1 to 11-56-22, inclusive.
7. The purchase of equipment, supplies, or materials needed, used, and consumed in the normal and routine operation of any waterworks system, sanitary sewer system, gas system, or electric system, or any two or more thereof, that are owned by municipalities, counties, or public corporations, boards, or authorities

that are agencies, departments, or instrumentalities of municipalities or counties and no part of the operating expenses of which system or systems have, during the then current fiscal year, been paid from revenues derived from taxes or from appropriations of the state, a county, or a municipality.

8. Purchases made by local housing authorities, organized and existing under Chapter 1 of Title 24, from moneys other than those raised by state, county, or city taxation or received through appropriations from state, county, or city sources.

Repair and Lease of Heavy-duty, Off-highway Equipment Exempt

All expenditure of funds of whatever nature for repair parts and repair of heavy-duty, off-highway construction equipment and of all vehicles with a gross vehicle weight rating of 25,000 pounds or greater, including machinery used for grading, drainage, road construction and compaction for the exclusive use of county and municipal highway, street and sanitation departments, involving not more than \$22,500 made on behalf of the municipality or the governing boards of its instrumentalities shall, at the option of the governing body or board, be exempt from bid law coverage. The foregoing exemption shall apply to each incident of repair as to any such repair parts, equipment, vehicles or machinery. The amount of such exempted expenditure shall not be construed to be an aggregate of all such expenditures per fiscal year as to any individual vehicle or piece of equipment or machinery. This option shall not be exercised by any employee, agent or servant unless done so after having received official prior approval of the respective governing body or board unless exercised pursuant to a formal policy adopted by such governing body or board setting out conditions and restrictions under which such option shall be exercised.

All expenditures of funds of whatever nature for the leasing of heavy-duty, off-highway construction equipment and all vehicles with a gross vehicle weight rating of 25,000 pounds or greater, including machinery for grading, draining, road construction and compaction, for the exclusive use of counties and municipalities, highway, street and sanitation departments, involving a monthly rental of not more than \$5,000 per month per vehicle or piece of equipment or machinery but not exceeding \$15,000 per month for all such vehicles and equipment, made by or on behalf of any municipality or the governing boards of its instrumentalities shall be made, at the option of the governing body or board, without regard to the provisions of the bid law. Section 41-16-52, Code of Alabama 1975.

The State Bid List and GSA Contracts

State contracts made for the benefit of counties, school boards and municipalities may be utilized by such agencies without further bidding. These state contracts are maintained on what is known as the “State Bid List” and can be accessed through the Alabama Department of Finance’s purchasing division at purchasing.alabama.gov. However, if the state has awarded a contract to a vendor strictly for its own needs and not for the benefit of a county or a municipality, then the municipality or county would be bound to purchase pursuant to the competitive bid law. Most state contracts are currently let for the benefit of municipalities and counties.

The state bid should state in writing that the contract was let for the benefit of counties and municipalities as well as the state. AGO to Hon. Barry McCrary, April 23, 1974. Local governments cannot use the state bid price where the amount to be purchased as set out in the bid specifications has been fulfilled. AGO to Hon. Jesse J. Lewis, July 8, 1976.

In addition to the state bid price considerations discussed, Section 41-16-51.1 provides that if there is a state contract for services let by a non-statewide agency, a municipality may contract for those same services for an amount not exceeding the non-statewide agency’s contract amount. A city is not required to use the same vendor as the non-statewide agency.

Municipalities may also make certain purchases off a Government Services Administration (GSA) contract. Prior to 2016 there was no authority to avoid bid law procedures by purchasing goods or services from vendors with valid GSA contracts. When the bid law was amended in 2016 it specifically authorized the purchase of goods and services, other than wireless communication services, whether voice or data, from vendors having current and valid GSA contracts.

Sales of Municipal Property – No Requirement to Competitively Bid

The competitive bid law only applies to the purchase of goods and services, it DOES NOT apply to the sale of municipal property – real or personal. Nothing, however, prohibits a municipality from using a bid process for the sale of unneeded municipal property and many municipalities do utilize a sealed bid process for selling municipal property. For more information on selling or leasing municipal property, see the article titled “Sale or Lease of Unneeded Municipal Property” in this publication.

Emergency Purchasing

In the case of an emergency affecting public health, safety or convenience, so declared in writing by the awarding authority setting forth the nature of the danger

that would be caused by delay, contracts may be let without public advertisement to the extent necessary to meet the emergency. Such actions must be made public immediately by the awarding authority. Generally, the term “emergency” signifies a situation which has suddenly and unexpectedly arisen which requires speedy action. 128 Quarterly Report of the Attorney General 40.

Under provisions of the competitive bid law, an emergency must be declared by the municipal purchasing officer prior to the performance of any work by the contractor. The municipal council may not declare an emergency after the work has been performed by the contractor. However, after the contract has been performed, the council may provide funds to pay the contractor if the purchasing officer properly authorized the contract to be made on a negotiated basis because of an emergency. AGO to Hon. Carl H. Kilgore, May 12, 1975.

SOLICITING BIDS

Notice Requirements and Specifications

Unlike the public works bid law under Title 39, the competitive bid law does not require notice or advertisement in a newspaper. All proposed purchases in excess of \$15,000 shall be advertised by posting notice thereof on a bulletin board maintained outside the purchasing office and in any other manner and for such lengths of time as may be determined, provided however, that sealed bids shall also be solicited by sending notice by mail to all persons, firms or corporations who have filed a request in writing that they be listed for solicitation on bids for such particular items as set forth in such request. The law does not specify the length of time a bid has to be advertised by posting or any other way. Failure of a firm or person to submit a bid after three solicitations shall be reason for discontinuing special notice to such person or firm.

For advertising requirements on public improvement contracts, *see* Section 39-2-2, Code of Alabama 1975.

Restrictive specifications and brand names should be reasonably related to the work or job to be performed and the quality or purpose of the product to be obtained and may not be used to prevent or restrict full and free competition on the open market. Specifications contained in bids written around a certain product must be justified prior to taking bids. Other bidders must be permitted to submit bids with their own specifications showing that their products are equal to those requested by the awarding authority. AGO 1988-001. *See also*, AGO 2006-098. It is no objection that the material required can be furnished by one party provided it is readily obtainable on the open market. 130 Quarterly Report of the Attorney General 15. *See also*, *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So.2d 121 (Ala. 1971).

Bonds

The law provides that faithful performance bonds may be required by the awarding authority from all bidders. Whether to require a bid bond is optional on the part of the awarding authority, provided that 1) bonding is available, 2) the requirement applies to all bidders, and 3) is included in the written specifications for the bid.

The bid bond required by Section 41-16-50(c), Code of Alabama 1975, should be for an amount which would protect the municipality against a change of status involving substantial damages, loss or detriment. A bid bond remains in effect until the contract is made. AGO 1982-220 (to Hon. Herman Cobb, March 3, 1982).

According to the Attorney General, irrevocable letters of credit may be accepted instead of a bid bond. AGO 1992-053. If required, bid bonds must be properly executed before a bid can be considered. AGO 1990-140.

For bonding requirements on public works contracts, see Section 39-1-1, Code of Alabama 1975.

Life Cycle Costs

Section 41-16-57 permits local awarding authorities to take life cycle issues in consideration when letting bids, if these standards can be acquired from industry recognized and accepted sources. Life cycle costs are costs associated with acquisition, use, maintenance and other costs associated with ownership or use of the product being let over the expected life cycle of the product. The awarding authority must notify potential bidders at the time of issuing specifications that it will consider life cycle costs when letting the bid. The awarding authority must identify which sources it is using in making this determination.

The Department of Examiners of Public Accounts has established procedures for using life cycle costs. <https://examiners.alabama.gov/PDF/Guides/LCCA.pdf>

OPENING AND AWARDING BIDS

Bids are to be opened at the time stated in the request for bids by the person or persons designated by the awarding authority. The law requires that all bids must be sealed and must be opened in public at the hour stated in the notice. Section 41-16-54(b), Code of Alabama 1975.

Bids may be requested by telephone but they cannot be accepted or received by telephone. AGO to Hon. Charles C. Rowe, October 8, 1975, and AGO 1983-199 (to Hon. F. R. Albritton, Jr., February 22, 1983). Further, bids submitted by fax are not to be accepted. AGO 1991-016. However, a written proposal on the outside of a sealed envelope, in which a bid is contained, made prior to the opening of the bid may be considered as a part of the bid proposal. AGO to Hon. Thomas M. Galloway, May 2, 1974; AGO 2005-160.

The person or persons responsible for opening the bids

shall tabulate the bids and present the results to the awarding authority at its next meeting. AGO 1980-495 (to Hon. A. R. McVay, August 6, 1980). The law does not require that the bids be opened at a meeting of the entity asking for bids. However, acceptance of a bid can only be made by the adoption of a resolution by the entity that asked for bids at a public meeting of that entity. While some municipalities choose to open bids at a council meeting, it is worth noting that the competitive bid law does not require that bids be opened at a council meeting but merely that they be opened publicly. There may be practical reasons why its better to open bids outside of a council meeting. If there are problems with a bid, or if there is a concern about whether the low bidder is a responsible bidder, the city employee charged with opening, tabulating and presenting the bids may need time to prepare information for the city council so that it can make an informed decision about who the lowest responsible bidder is before formally awarding the bid.

Awarding the Contract – Basis of Decision

Awards shall be made to the lowest responsible bidder taking into consideration the qualities of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges and the dates of delivery. Provided there is no loss of price or quality, a preference shall be given to commodities produced in Alabama or sold by an Alabama bidder. However, preference may not be given to American products where foreign products of the same quality may be purchased at a lower price. 128 Quarterly Report of the Attorney General 14.

A “low bid” is the lowest unit price of an article. Warranty and repurchasing agreements should not be used in computation of a low bid, but these items may be used in determining the lowest responsible bidder, as these terms affect quality. 141 Quarterly Report of the Attorney General 8

If the low bid does not meet specifications, the awarding authority may award the contract to the next lowest bidder. *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So.2d 121 (Ala. 1971). The reasons for not awarding the contract to the lowest bidder must be stated on the successful award and left open to public inspection. AGO to Hon. Douglas Rudd, November 4, 1976.

Public agencies have discretion to determine which bidder is the lowest responsible bidder. A court will not interfere in that discretion unless it is exercised arbitrarily or capriciously or unless it is based on a misconception of the law or is the result of improper influence. *Crest Construction Corporation v. Shelby County Board of Education*, 612 So.2d 425 (Ala. 1992). In determining whether the low bidder is a responsible bidder, the council

can consider factors such as whether or not they've had problems with the bidder on previous contracts, can they deliver the goods promised in a reasonable period of time and is the council aware that other entities that have had problems with this bidder in the past. The fact that a bidder has not qualified to do business in Alabama is sufficient to support a determination that the bidder is not a responsible bidder. AGO to Hon. Fred Collins, August 20, 1976. Further, under the Competitive Bid and Public Works Laws, a conviction and debarment by a federal agency are factors that a local government may use to determine if a bidder is responsible, including in the prequalification procedure. AGO 2007-063.

When determining that the low bidder is not a responsible bidder, the key is to document the reasons for making the determination that the low bidder is not the lowest responsible bidder.

Alternative Bidding

Section 41-16-57 provides a procedure for awarding a contract to the second lowest bidder when the lowest bidder defaults. This provision allows the municipality to cancel the contract following a default by the lowest bidder and award it to the second lowest bidder. The contract with the second lowest bidder must be let on the same terms and conditions contained in the original bid specifications and must be awarded for no more than the second lowest bidder originally bid.

Rejection of Bids

The awarding authority may reject any bid if the price is deemed excessive or if the quality of the product is inferior. Each record, with the successful bid indicated thereon and with the reasons for the award, if not awarded to the lowest bidder, shall be open to public inspection. The awarding authority may reject any bid and negotiate in the event that only one bid is submitted and may further reject any bid if the price is deemed excessive or the quality of the product is deemed inferior.

In the event all bids are equal in price and the quality of the products is the same, the awarding authority may reject all bids and negotiate for price, or reject and solicit new bids or contract with any low bidder of its choice. 128 Quarterly Report of the Attorney General 40. In such circumstances, negotiations may be with any provider of such product or service. In the event all bids are rejected on a project, the project must be re-bid. AGO 1980-047 (to Ralph Smith, Jr., October 29, 1979).

A city may not negotiate with the low bidder where the price exceeded the funds available. New bids must be sought on the basis of specifications which are new. AGO to Hon. Jess Lanier, May 14, 1971. An awarding authority

may negotiate a lower contract amount with the successful bidder provided there is no change in the specifications. AGO 1995-002.

Preference Allowed for a Resident Bidder

If a contract is for the purchase of an item of personal property and the municipality or a board of the municipality receives a bid from a person, firm or corporation deemed to be a responsible bidder and having a place of business in the county or the Core Based Statistical Area (CBSA) and the bid is no more than five percent greater than the bid of the lowest responsible bidder, the municipality or municipal board may award the contract to such resident responsible bidder. Section 41-16-50, Code of Alabama 1975. In the event the lowest bid for an item of personal property or services to be purchased or contracted for is received from a foreign entity, where the county, a municipality, or an instrumentality thereof is the awarding authority, the awarding authority may award the contract to a responsible bidder whose bid is no more than 10 percent greater than the foreign entity if the bidder has a place of business within the local preference zone or is a responsible bidder from a business within the state that is a woman-owned enterprise, an enterprise of small business, as defined in Section 25-10-3, Code of Alabama 1975, a minority-owned business enterprise, a veteran-owned business enterprise, or a disadvantaged—owned business enterprise. “Foreign entity” means a business entity that does not have a place of business within the state of Alabama.

Other Preference Statutes

Section 41-16-57, Code of Alabama 1975, provides that in the purchase of or contract for personal property or contractual services, the awarding authority shall give a preference to commodities produced in Alabama or sold by Alabama persons, firms or corporations, provided there is no sacrifice or loss in price or quality. However, no awarding authority may specify the use of materials or systems by a **sole source** unless:

- The governmental body can document that the sole-source goods or services are indispensable and that all other viable alternatives have been explored and it has been determined that only these goods or services will fulfill the function for which the goods or services are needed;
- No other vendor offers substantially equivalent goods or services that can accomplish the purpose for which the goods or services are required; and
- All information substantiating the use of the sole-source

product or service is documented in writing and is filed into the project file.

Where One or Less Bids Are Received

Where only one bidder responds to the invitation to bid, a municipality or municipal board may reject the bid and negotiate the purchase or contract, provided the negotiated price is lower than the bid price and there is no change to the specifications. AGO to Hon. Larry E. Brewer, December 13, 1973. If the awarding authority advertises for bids and receives none, the price may be negotiated with any contractor without advertising for bids a second time provided there is no change to the specifications. AGO to Hon. L. R. Driggers, November 25, 1969.

VIOLATIONS & PENALTIES

Conflicts of Interest - Municipal Officers or Board Members

Section 41-16-60, Code of Alabama 1975, declares that no member or officer of a municipal governing body or municipal board shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for, any personal property or contractual services. It further provides that a violation of this section shall be deemed a misdemeanor and any person who violates this section shall, upon conviction, be imprisoned for not more than 12 months or fined not more than \$500 or both. Further, upon conviction, any person who willfully makes any purchase or awards any contract in violation of this section shall be removed from office.

Notwithstanding any statute or law to the contrary, any municipality in Class 7 or Class 8 (under 12,000 inhabitants) may legally purchase from any of the elected officials, employees or board members of such municipality, any personal service or personal property under the competitive bid law procedures established by Article 3, Chapter 16, Title 41, Code of Alabama 1975. Such elected officials, employees or board members may legally sell such personal service or personal property to such municipality under the procedures of said statutes.

If an elected official proposes to bid, the official shall not participate in the decision-making process determining the need for, or the purchase of, such personal service or personal property or in the determination of the successful bidder. The governing body shall affirmatively find that the elected official, employee or board member, from which the purchase is to be made, is the lowest responsible bidder as required by said statutes. It shall be the duty and responsibility of the municipality to file a copy of any contract awarded to any of its elected officials with the State

Ethics Commission and all awards shall be as a result of original bid takings.

Advance Disclosure of Terms of Bid Submitted Renders Proceeding Void

Section 41-16-56, Code of Alabama 1975, declares that any advance disclosure of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and re-advertisement shall be required.

Collusive Bidding

Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition, by agreement to bid at a fixed price, to refrain from bidding or otherwise, shall render the bids of such bidder void and shall cause such bidders to be disqualified from submitting further bids to the awarding authority on future purchases. Whoever knowingly participates in a collusive agreement in violation of this law involving bids of \$15,000 or less shall be guilty of a Class A misdemeanor. Whoever knowingly and intentionally participates in a collusive agreement in violation of this law involving bids of more than \$15,000 shall be guilty of a Class C felony. Section 41-16-55, Code of Alabama 1975, as amended.

Statute of Limitations on Competitive Bid Law Violations

A prosecution for any offense in violation of the competitive bid law must be commenced within six years after the commission of the offense. Section 41-16-2, Code of Alabama 1975.

Contracts in Violation of the Act Declared Void

The bid law states that contracts entered into in violation of its provisions shall be void. Anyone who violates the provisions of the bid law shall be guilty of a Class C felony. Section 41-16-51(d), Code of Alabama 1975. Class C felonies are punishable by a prison sentence of not more than 10 years or less than one year and one day.

MISCELLANEOUS PROVISIONS

Maintaining Records Open to Public Inspection

All documents pertaining to the award of a contract by a public agency are public records. AGO 1995-010. All original bids together with all documents pertaining to the award of the contract shall be retained for a period of seven years from the date the bids are opened and shall remain open to public inspection. Section 41-16-54(e), Code of Alabama 1975.

In 2004, the Legislature amended several Sections 13A-14-2, 36-12-40, 39-2-2, and 41-16-51, Code of Alabama 1975, relating to the Open Records Law, the Sunshine Law,

the Competitive Bid Law, and the Public Works Law, to codify existing case law and to exempt records, information, or discussions concerning security plans, procedures, or other security related information from the purview of those laws.

Contracts Limited

Contracts for the purchase of personal property or contractual services shall be let for periods not greater than three years. "Lease purchase" contracts for capital improvements and repairs to real property shall be let for periods not greater than 10 years and all other lease-purchase contracts shall be let for a periods not greater than 10 years. Section 41-16-58, Code of Alabama 1975. A contract that is exempt from the competitive bid law is not subject to the three-year limitation on public contracts for purchases of personal property or contractual services in Section 41-16-57(e) of the Code. AGO 2000-152.

Note: Act 2016-298 amended section 16-13B-7, relating to school boards, to increase the allowable length of contracts for goods and services from 3 to 5 years.

Contracts Not Assignable Without Consent of Awarding Authority

No contract awarded to the lowest responsible bidder shall be assignable by such successful bidder without written consent of the awarding authority. In no event may a contract be assigned to an unsuccessful bidder who was rejected because he or she was not a responsible bidder. Section 41-16-59, Code of Alabama 1975.

Supplemental Contracts or Change Orders

Supplemental contracts or change orders for new and additional work are subject to competitive bid in the same manner as the original contract. Exceptions to this general rule are (a) minor changes for a total monetary amount less than that required for competitive bidding; (b) changes for matters relatively minor and incidental to the original contract necessitated by unforeseeable circumstances arising during the course of the work; (c) emergencies arising during the course of work on the contract; and (d) changes of alternates provided for in the original bidding and original contract. 142 Quarterly Report of the Attorney General 47.

Change orders, that is, modifications to existing contracts, must be handled with care. Alabama statutory law provides little guidance regarding when change orders are permitted

The Attorney General, though, has provided guidelines setting forth the circumstances in which a change order would be appropriate. Those circumstances are:

- Minor changes for a total monetary value less than required for competitive bidding.
- Changes for matters relatively minor and incidental to the original contract necessitated by unforeseen circumstances arising during the course of the work.
- Emergencies arising during the course of the work on the contract.
- Changes or alternatives provided for in the original bidding where there is no difference in price of the change order from the original best bid on the alternate.
- Changes of relatively minor items not contemplated when the plans and specifications were prepared and the project was bid which are in the public interest and which should not exceed 10 percent of the contract price. In subsequent opinions the attorney general has ruled that the 10 percent rule may not apply in extraordinary circumstances and emergency situations. See AGOs 93-00105, 92-00388, 92-00363, 92-00049, 91-00279 and 87-00197.
- According to the attorney general, these are the criteria under which a change order will be allowed. Further, the attorney general requires that the change order be supported by a signed statement from the architect (engineer) and/or owner containing the following:
- A statement of what the change order covers and who instituted the change and why.
- Statement regarding the reasons for using the change order method rather than competitive bid.
- Statement that all prices have been reviewed and found reasonable, fair and equitable and recommending approval of the same.
- The owner either endorses the statements and recommendations or submits a separate statement covering the item.

Finally, the attorney general has emphasized that the foregoing are *guidelines*, that the final determination of the legality rests with the legal advisor to the various awarding authorities, and that the most important ingredient in the approval of negotiated change orders is the good faith of the officials executing the same. Citing *White v. McDonald Tractor Company*, 248 So. 2d 121 (1971).

SELECTED CASES AND ATTORNEY GENERAL OPINIONS

Contracts Covered and Who Must Comply:

- The purchase of used equipment is subject to the competitive bid law. AGO 1981-481 (to Hon. Ted Boyette, July 30, 1981), and AGO 1989-185.

- Lease-purchase arrangements are also subject to the bid law. AGO 1982-051 (to Hon. W. W. Burns, October 29, 1981), and AGO 1982-474 (to Hon. William C. Gullahorn, July 26, 1982). A good rule to follow in determining whether or not lease arrangements must be bid is to bid any lease arrangement the terms of which bind the governmental entity to spend \$7,500 (now \$15,000) or more.
- The purchase of gasoline is subject to the bid law. AGO 1982-526 (to Mr. G. R. Craft, August 30, 1982).
- Municipal and county airport authorities created under the provisions of Sections 4-3-1 through 4-3-24, Code of Alabama 1975, are subject to the provisions of the competitive bid law. AGO to Hon. Edward Jackson, May 22, 1975.
- Bids are required on a contract for janitorial services. AGO 1980-392 (to Hon. Brady Baccus, June 11, 1980).
- A local governing body must comply with the bid law in letting contracts for the installation of data processing programs. AGO to Hon. Charles Boswell, January 22, 1976.
- Although a city's mechanics are trained only to work on a particular brand of vehicle, such training and past purchases from that vendor cannot justify a failure to take bids on future purchases. AGO to Hon. Fred Collins, March 14, 1978.
- Contracts for the purchase of voting machines are subject to the competitive bid law. Counties having only one type of machine may restrict purchase to the type possessed, but counties having none or more than one type of voting machine must accept bids from all voting machine manufacturers bidding. 130 Quarterly Report of the Attorney General 57.
- A contract for services to publish a list of qualified voters as required by law must be let on a competitive bid basis. 138 Quarterly Report of the Attorney General 36.
- Water authorities created pursuant to Section 11-81-1, et seq., Code of Alabama 1975, are subject to the bid law. AGO 1991-159. Hospital boards organized under Section 22-21-1, Code of Alabama 1975, are also subject to the bid law (AGO 1991-344) as are E-911 Boards (AGO 1991-171).
- A municipality may solicit bids for the purchase of an indefinite number of an item based on unit prices, provided the contract will be limited to a definite period of time. AGO 1993-123.
- The bid law does not apply to purchases from other governmental agencies. AGO 1991-131 and AGO 1994-183.
- The three-year limit found in Section 41-16-57(e) of the Code of Alabama on public contracts for contractual services applies only to contracts that are competitively bid. AGO 2001-048.
- If payment for emergency medical services by a nonprofit ambulance service exceeds \$7,500 (now \$15,000) annually, the Competitive Bid Law applies. AGO 2002-086.
- A mental health board incorporated pursuant to Section 22-51-2 of the Code of Alabama 1975, is a public corporation subject to the Competitive Bid Law and the Public Works Law. AGO 2003-017.
- An E-911 board must comply with the Competitive Bid Law when determining which ambulance providers receive dispatch calls. Such boards should work with municipalities and ambulance service providers to ensure the most efficient service to persons in their districts. AGO 2004-009.
- Mental Health Authorities created pursuant to Section 22-51-1 et seq. of the Code of Alabama 1975, are not exempt from the Competitive Bid Law. AGO 2006-004.
- Section 11-89A-5 of the Code of Alabama allows a county solid waste disposal authority to amend its certificate of incorporation to become a municipal solid waste disposal authority that would qualify for the exemption from the Competitive Bid Law found in section 11-89A-18. AGO 2007-059.
- Volunteer fire departments and organized rescue squads are public entities. A contract between a municipality and nonprofit volunteer fire departments and/ or organized rescue squads is not subject to the Competitive Bid Law. AGO 2012-040.
- Any modification of a renewable contract for residential solid waste collection, transfer, and disposal that includes an increase in the amount charged for services, beyond that contemplated by the original contract, requires competitive bidding. AGO 2015-032.
- A backhoe is not a piece of equipment that is needed, used, and consumed in the normal and routine operation of a utility system. Thus, the purchase of a backhoe, even a used one, is subject to the Competitive Bid Law. AGO 2016-009.

Division of Contracts

- The law does not require a municipality to contract for the construction of a new building in a single contract. Separate contracts may be awarded for plumbing,

heating, electricity and similar portions of the building process as long as the contract is not divided merely to avoid the law. AGO to Hon. J. W. Oakley, Sr., November 22, 1967.

- Payment of monthly bills for ambulance services are not subject to the competitive bid law if the monthly bills are under the amount subject to the bid law. AGO to Hon. B. R. Winstead, Jr., October 25, 1967.
- Although the competitive bid law prevents division of purchase orders into parts to avoid the law, it does not prevent the division of invitations to bid. AGO to Hon. Thomas A. Dujanovic, September 13, 1973.

Exemptions to the Bid Law:

The Attorney General has issued the following rulings related to bid law exemptions:

- The purchase of insurance is exempt from the bid law. AGO to Hon. Thomas R. Bell, February 7, 1975.
- Contracts for the purchase of personal property for a community mental health center are exempt from the bid law. 130 Quarterly Report of the Attorney General 17.
- Contracts for the design, operation and supervision of a sanitary landfill are exempt from the bid law. 136 Quarterly Report of the Attorney General 47.
- Contracts with fiscal agents who represent investment banks are exempt from the bid law. 128 Quarterly Report of the Attorney General 29.
- Investment of surplus funds in certificates of deposit are exempt from the bid law. AGO to Hon. John M. Crane, May 11, 1970.
- Contractual services rendered by one state political subdivision to another or by the state to a political subdivision are exempt from the bid law. AGO's to Hon. Maury Friedlander, June 4, 1969; Hon. Lloyd Tippet, March 15, 1968; Hon. A. A. Chandler, May 28, 1969; Hon. Leonard E. Clements, Jr., April 6, 1973; 1982-174 (to Hon. William C. Gullahorn, Jr., February 5, 1982).
- Purchases of compatible computer equipment are exempt from the bid law. AGO to Hon. Gary L. Rigney, February 12, 1976; AGO 1982-143 (to Hon. Steve Means, January 19, 1982).
- A contract with an engineering consultant firm for aerial maps is exempt from the bid law. AGO to Hon. Cliff Evans, September 26, 1973.
- A contract with a golf professional for a municipal golf course is exempt from the bid law. AGO to Ms. Mary Nell Baxter, May 6, 1974.
- Contracts for antique furniture restoration are exempt from the bid law. AGO to Mr. Warner Floyd, August 21, 1975.
- Contracts for the rebuilding and restoring of a musical instrument are exempt from the bid law. AGO to Dr. Kermit A. Johnson, November 19, 1975.
- Construction of buildings by a medical clinic board is not subject to the bid law. AGO to Mr. John E. Adams, November 21, 1979.
- If the purchase of equipment is incidental to the provision of professional services which are exempt from the bid law, the equipment purchase is exempt as well. However, if the services which will be rendered are incidental to the purchase of equipment, the bid law applies. AGO 1996-046.
- Contracts for fiscal advice, including advice and assistance in the collection of local taxes, are exempt from the bid law. AGO 1994-076.
- A criminal investigator is a professional for purposes of the competitive bid law; therefore, the procurement of the services of an investigator need not be competitively bid. AGO 2002-164.
- When it is known or contemplated that like item purchases, including automotive parts not exempted by Section 4-16-52(a) of the Code of Alabama 1975, involving \$7,500 (now \$15,000) or more will be made during a fiscal year, these items must be procured through competitive bid. The responsibility for determining which items are like or similar in nature rests with the municipality. AGO 2003-098.
- Purchases of custom software as well as purchases of computer and word processing hardware when the hardware is the only type compatible with hardware already owned by the entity taking bids. Custom software is software that requires substantial creative work by a professional/vendor to comply with the unique specifications required by the entity making the purchase. AGO 1994-023.
- Purchases made by individual city or county schools from moneys other than those raised by taxation or received through appropriations from state or county sources.
- The purchase, lease or other acquisition of machinery, equipment, supplies and other personal property or services by a medical clinic board organized under the provisions of Sections 11-58-1 through 11-58-14, Code of Alabama 1975.
- The purchase, lease, sale, construction, installation, acquisition, improvement, enlargement or expansion

of any building or structure or other facility designed or intended for lease or sale by a medical clinic board organized under Sections 11-58-1 through 11-58-14, Code of Alabama 1975.

- Contracts relating to industrial development.
- The purchase of equipment, supplies or materials needed, used and consumed in the normal and routine operation of any waterworks system, sanitary sewer system, gas system or electric system or any two or more thereof, that are owned by municipalities, counties or public corporations, board of authorities that are agencies, departments or instrumentalities of municipalities or counties and no part of the operating expenses of which system or systems have, during the then current fiscal year, been paid from revenues derived from taxes or from appropriations of the state, a county or a municipality. The requirements of the Competitive Bid Law do not apply to purchases of equipment, supplies or materials needed, used and consumed in the normal and routine operation of the county water and sewer authority. However, if the authority's purchase of equipment, supplies or materials exceeds \$50,000 and is included in a contract for the construction, renovation, repair or maintenance of the sewer and waterworks, it is subject to the provisions of the Public Works Law. AGO 2001-139 and AGO 2002-152.
- Purchases made by local housing authorities from moneys other than those raised by state, county or municipal taxation or received through appropriations from state, county or municipal resources.
- Alternative bidding does not violate the bid law. *Ericsson GE Mobile Communications, Inc. v. Motorola Communications, Inc.*, 657 So.2d 857 (Ala. 1995).
- A school board may enter into a joint commercial venture with a company that will provide and maintain a profit-making website with profits to be realized through the sale of advertisement space on the website whereby students would offer the ads for purchase to local businesses, create the ads and place them on the website and as a result the students would gain experience with computers and web design and a large portion of the revenue would be returned to the school; provided, however, that if the proposed project amounts to an exclusive franchise, it must be competitively bid. AGO 2005-17.
- A contract proposed by a city for engineering and professional management services is exempt from the competitive bid law if the non-professional services included in the contract are incidental to and integrated with the professional services. AGO 2005-192.
- The purchase of a voting system and related professional services does not have to be competitively bid if the professional services provided by the vendor are inextricably intertwined with the particular voting system purchased. AGO 2005-197.
- Based on Section 41-16-50(a) of the Code of Alabama, 1975, the governing bodies of instrumentalities of counties and municipalities must comply with the Competitive Bid Law. Because Section 41-16-51(a) (15) exempts contractual services related to security plans and procedures and the security of individuals from bidding, a board does not have to bid contracts for these services. The purchase of other services that are inextricably intertwined with the security services is also exempt. If not inextricably intertwined, these services are subject to bid. AGO 2009-081
- An agreement for the naming rights of facilities of a separately incorporated board or authority is not subject to the competitive bid law. The granting of an exclusive contract or a franchise that does not comply with the competitive bid law constitutes an exclusive grant of special privileges in violation of Section 22, Alabama Constitution of 1901, however a separately incorporated board is a "separate entity from the state and from any local political subdivision, including a city or county within which it is organized" and therefore, it is "not one of the governmental entities within the contemplation of the prohibition of Section 22 of our State Constitution." AGO 2010-054
- A public corporation, such as a municipal water board, may make purchases from the state bid list without further bidding if the purchase is made from the vendor to whom the state awarded the contract and the state bid included political subdivisions and instrumentalities of political subdivisions on the state bid. AGO 2011-011.
- Contracts between public entities are not required to be competitively bid. Solid waste disposal contracts between the County and municipalities are not required to be let by competitive bidding. AGO 2008-093.
- The city waterworks and sewer board may purchase equipment through the National Joint Powers Alliance ("NJPA") without violating the competitive bidding requirement of section 41-16-50 of the Code of Alabama, provided the board complies with all of the requirements of section 41-16-51(a)(16) of the Code. AGO 2014-050.
- The County 911 Board of Commissioners may enter a contract for software, hardware, and training to enhance its existing mapping system without competitive bidding if the Board determines that the purchase is

for custom software; hardware that is the only type compatible with the existing system; contractual services that are impossible to award by competitive bidding; or contractual services having an impact on the security or safety of person, structures, facilities, or infrastructures. AGO 2015-044.

- A proposed contract with a vendor that will provide software development, installation, project management, equipment, information security, testing support, resources, supplies, and delivery and maintenance service to comprehensively manage/operate a county Board of School Commissioners may be exempt from requirements of the Competitive Bid Law if the Board determines the contract fits within an exemption found in Section 16-13B-2 of the Code of Alabama. AGO 2016-015. (NOTE: this opinion is specific to the competitive bid law for certain boards of education, however, the exemption at issue is also found in Section 41-16-51(a)(3) of the Code of Alabama.).
- A contract between a public agency and a professional services company is exempt from the competitive bid law. If the professional services are merely incidental to the purchase of equipment, the purchase must be bid. AGO 2000-152.
- The professional services exemption in the Competitive Bid Law does not apply to consultants providing administrative, secretarial, accounting and clerical services. AGO 2002-078. The purchase of services to convert records from the Banner/Oracle database to the Alliant Microsoft/SQL platform base, and the purchase and installation of the custom Campus Key ERP software, would be exempt from the Competitive Bid Law if the services involve a high degree of professional skill, custom software, or there is only one vendor for the software. AGO 2016-052.
- The purchase of electronic poll books is exempt from the requirements of the Competitive Bid law pursuant to sections 41-16-51(a)(3) and (a)(13) of the Code of Alabama. AGO 2017-044.
- Changing the consumer price index for a renewal term of a waste disposal contract constitutes a material change rendering the exemption in section 41-16-51(a)(10) of the Code of Alabama inapplicable. AGO 2018-054.
- The Department of Examiners of Public Accounts (“Examiners”) may approve any competitive bid process, related to goods and services, that is utilized by a cooperative of the National Association of Counties, its successor organization, or any other national or regional governmental cooperative, as long as the process complies with the bid law requirements

applicable to the governmental entity conducting the process. Examiners may only approve a cooperative’s bid process, related to heating and air conditioning units or systems, if the process complies with the provisions of Alabama’s bid law. AGO 2019-038.

Emergency Purchasing

- When a county jail has been severely damaged by fire, there is an emergency which could affect the public health, safety or convenience. Therefore, the county governing body can award a contract for repairs without public advertisement under the authority of Section 41-16-53, Code of Alabama 1975. AGO to Hon. Dave Headrick, October 30, 1975.
- In certain limited circumstances such as those that existed during the energy crisis of the mid-1970s, emergency procedures may be employed to purchase critical materials. *See*, AGO’s to Howard L. White, November 29, 1973; James T. Sowell, January 11, 1974; and Hon. William Roy Williard, February 7, 1974.
- A purchase previously made by a city cannot be treated as an emergency purchase at the present time in order to save a contract which would be void for non-compliance with the bid law. AGO 1983-426 (to Hon. Frank A. Hickman, August 10, 1983).
- A municipality need not seek bids on a garbage truck if an emergency situation is declared and the provisions of Section 41-16-53 of the Code are complied with. AGO to Hon. Frank T. Ferrire, February 14, 1974.
- A municipal council is given authority to let contracts without advertisement in emergency situations when public health, safety or convenience is involved in the delay of acquiring needed equipment. AGO to Hon. Frank T. Ferrire, February 14, 1974.

Sales of Municipal Property – No Bid Required

- A municipality may sell real estate when it is no longer needed for public purposes. Such a sale is not required to be made under the competitive bid law. 143 Quarterly Report of the Attorney General 21.
- City automobiles may be sold without competitive bid. AGO to Hon. John Starnes, April 3, 1975.
- Pursuant to Section 11-14-2 of the Code of Alabama, a County does not have to use the bid process when selling real estate that is owned by the county that may be lawfully disposed. AGO 2009-031.

Contracts by Municipal Officers or Board Members – Conflicts of Interest

- This section does not prohibit a municipality or county from dealing with incorporated firms which have as their officers or shareholders officials of the local government. 128 Quarterly Report of the Attorney General 30.
- This section does not prohibit a municipal official from bidding on real property being sold by the municipality. 129 Quarterly Report of the Attorney General 48.
- A councilmember may bid for the rights to construct a building for the city. However, if the bid is accepted, the councilmember must resign from office. AGO to Hon. William H. Tuck, January 30, 1968.
- A municipality may deal with a corporation in which a councilmember owns an interest as long as he does not own controlling interest in the corporation. AGO to Hon. Wayne Harrison, December 6, 1973.
- A councilmember may be an employee of a corporation which sells automobiles to the municipality on a competitive bid basis. AGO to Hon. Robert S. Milner, April 4, 1975.
- Section 41-16-60, Code of Alabama 1975, prohibits the awarding of a contract on a water works project to the water works superintendent. AGO to Hon. George W. Gibbs, September 30, 1975.
- A municipal official's son is not prohibited from bidding on a municipal contract because of kinship, as long as the father has no financial interest in his son's business. AGO to Hon. James C. Wood, September 10, 1975.
- A municipal employee may not enter into a contract with the municipality he works for even though the contract is won, under competitive bid, by a firm he owns. AGO to Hon. Fred G. Collins, May 8, 1975.
- A municipality may not deal with a family-held corporation where a member of the municipal governing body is also a member of the family that owns the corporation. AGO to Hon. Hubert G. Hughes, August 9, 1968.
- A company owned by the son or daughter of a council member can contract with the city if the son or daughter is the apparent low bidder, provided the council member does not reside in the same household as his or her child and is not financially dependent on the son or daughter. If a council member abstains from voting on a matter in which he or she previously had a financial interest, and in which his or her child now has a financial interest, there is no violation of Sections 11-43-12, 11-43-53, and 11-43-54 of the Code of Alabama. AGO 2000-215.
- A city council member may not successfully bid, under the Competitive Bid Law, for any contract or service with the city he or she represents if he or she has any direct financial interest in the company bidding. AGO 2002-065.
- Under Section 11-43-12.1 of the Code of Alabama 1975, a class 8 municipality may do business with a company owned by a municipal officer when that company is the only domiciled vendor of that personal property or service within the municipality and the cost of the personal property or service does not exceed \$3000 annually. AGO 2005-118.
- Section 11-43-12.1, Code of Alabama 1975, provides that a Class 7 or 8 municipality may enter into a contract with a business owned by a municipal officer or employee if the officer or employee is the only domiciled vendor of the personal property or service within the municipality, the officer or employee does not participate in the decision-making process, and the cost does not exceed \$3000. If the cost exceeds \$3000, the municipality may contract with the municipal officer or employee under the Competitive Bid Law, provided the official or employee does not participate in the decision-making process, is the lowest responsible bidder, and makes a full disclosure of the extent of his or her ownership in the business. *See* Section 11-43-12.1, Code of Alabama 1975. The municipal officer or employee may act as a subcontractor on city work exceeding \$3000 if the official or employee does not participate in the decision-making process and makes a full disclosure of the extent of his or her ownership in the business. AGO 2008-092.
- Members and officers of a separately incorporated municipal board are no longer
 - specifically prohibited by the competitive bid law from submitting a bid or contract on a board project in which the board member has a financial interest. Whether such action may be prohibited pursuant to the State Ethics Law is a matter that should be submitted to the Ethics Commission. AGO 2011-081
- Pursuant to section 41-16-60 of the Code of Alabama, a member of a city or county board of education may contract with the board of education for personal property or services if: (1) the contemplated contract was in existence before a person was elected or appointed to the board, or (2) the individual does not participate in the deliberation or vote on the proposed contract. Section 41-16-60 is not applicable to contracts subject to the Public Works Law. Members of city and county boards of education may be subject to the Ethics

Law and should submit these questions directly to the Ethics Commission. AGO 2012-017 and AGO 2012-018. Section 11-43-12, Code of Alabama 1975, prohibits a city council member from engaging in business contracts with the municipality for which the council member serves. Section 11-43-12.1(a) authorizes a council member of a Class 7 or 8 municipality to contract with the municipality that council member serves when the council member's business is the only domiciled vendor of that personal property or service within the municipality and the amount to be expended does not exceed \$3000. This provision is inapplicable when the business is located outside of the municipality. Pursuant to section 11-43-12.1(b) and (c) of the Code, the business of a council member of a Class 7 or 8 municipality may contract with the municipality if the council member fully discloses his or her relationship in the business, the council member does not participate in the decision-making process, the municipality uses the Competitive Bid process, and the council member is the lowest responsible bidder. AGO 2013-028.

- A town may sell real property to a company that has a councilman as a member of that company, if the councilman does not participate in the discussion of the consideration of the sale by the town council, for an amount determined by the council to be adequate consideration. The best public policy is to sell such property by competitive bidding. AGO 2014-076.
- Section 11-43-12.1 of the Code of Alabama permits Class 8 municipality to do business with a shop owned by a municipal officer when that shop or vendor is the only domiciled vendor within the municipality and the cost of the personal property or service offered by the vendor does not exceed \$3000 yearly. If the vendor is not the only one of its kind domiciled within the town limits, or the service will exceed \$3000 yearly, the elected official or municipal employee may bid on providing service to the town pursuant to Section 11-43-12.1(b) and in accordance with Section 41-16-50 of the Code. AGO 2015-051.

Contracts Limited

- The three year limit found in Section 41-16-57(e) of the Code of Alabama on public contracts for contractual services applies only to contracts that are competitively bid. AGO 2001-048.
- The three-year limitation on public contracts for the purchase of personal property or contractual services, found in Section 41-16-57(e) of the Code of Alabama 1975, applies only to contracts that are competitively bid. AGO 2005-192.

46. Public Works Bidding

Public works contracts, as defined in Section 39-2-1 of the Code of Alabama 1975, are not covered by the regular competitive bid law found in Title 41 of the Code and discussed in detail in the article titled The Competitive Bid Law in this publication. This article reviews and summarizes the public works bid law found in Title 39 of the Code of Alabama 1975.

What is a Public Work Contract?

Section 39-2-1, Code of Alabama 1975, defines public works as:

“The construction, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, repaired, renovated, or maintained on public property and to paid, in whole or in part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.”

Two points need to be made about this definition. First, the activities specifically listed should be used as examples of the type municipal projects that are subject to the public works bidding procedures. Second, direct municipal purchases are not the only kind controlled by Title 39. If the municipality plans to finance a project and pay off the loan, bond issue, etcetera, with public funds, the project must be bid as well.

All public works projects involving a public expenditure of \$50,000 or more are controlled by the procedures in Title 39. Because public works projects are specifically exempt from the regular bid law in Title 41, public works projects involving expenditures of less than \$50,000 do not have to be bid. Section 39-2-2(b)(1), Code of Alabama 1975.

The contracts for cutting grass in public cemeteries in the city should be bid pursuant to the Competitive Bid Law if the costs exceed now \$15,000. Contracts for the construction, repair, and maintenance of markers, headstones, and walls are “public works” subject to bid under the Public Works Law if the costs are in excess of \$50,000. AGO 2007-030.

A contract by the Water and Sewer Authority to install a main sewer outfall line must be bid under section 39-2-2 of the Code of Alabama 1975, where the project in question will be paid for with public funds by waiving the fees to which the Authority is entitled. AGO 2007-007.

Painting contracts of \$50,000 or less entered into by the Alabama Department of Postsecondary Education qualify as “public works” under section 39-2-2(b)(1) of the Code of Alabama and may be let with or without advertising or sealed bids. AGO 2007-089.

Advertising/Notice Requirements

For public works contracts between \$50,000 and \$500,000, the municipality must publish notice of the request for bids at least once in a newspaper of general circulation published in the municipality. Section 39-2-2(a), Code of Alabama 1975. Although the term “published” is not defined, it probably has the same meaning as when used in Section 11-45-8 of the Code of Alabama 1975 and the Attorney General has ruled that a newspaper is published where it is entered into the post office and first put into circulation. AGO 1995-127. If there is no newspaper published in the municipality, then the municipality must simply post the request for bids on a bulletin board maintained outside the purchasing office (which in many municipalities is the clerk’s office or city hall).

Whether the notice is published in a newspaper or posted, the municipality must send *also* a notice by mail to all persons who have filed a request in writing to be notified of a solicitation for bids for the type public works project in the request. If the person listed fails to respond to three solicitations for bids, the listing may be canceled.

For contracts involving expenditures of more than \$500,000, the municipality must satisfy the above advertising requirements *and* must also advertised for sealed bids at least once in three newspapers of general circulation throughout the state. The law does not explain what qualifies as a newspaper with statewide circulation.

An awarding authority may let a contract for public works if a newspaper to which an advertisement for sealed bids for the contract was submitted by the awarding authority did not publish the advertisement, and the authority can provide proof that it in good faith submitted the advertisement to the newspaper. Section 39-2-2(b)(2), Code of Alabama 1975.

Advertisements for bids must:

1. Contain a brief description of the improvement;
2. State that plans and specifications are on file for examination in a designated office of the municipality;
3. State how to obtain plans and specifications;
4. State when and where bids will be received and opened; and
5. Identify whether prequalification is required and where all written prequalification information can be reviewed.

All bids must be opened publicly at the time and place stipulated. No public work project for over \$50,000 can be split to avoid bidding requirements. Contracts that violate the bid law are void. Willful violations of the public works

bidding procedures are Class C felonies, which carry a potential punishment of between one year and a day to 10 years, and/or a fine of up to \$5,000 or double the pecuniary gain to the defendant or loss to the victim.

If any pre-bid meetings are held, they must be held at least seven days prior to the bid opening, except when the project is declared an emergency. No modification of bid specifications can be made within 24 hours of the opening of a bid.

Exceptions

Contracts for architectural, engineering, construction management, program management or project management services in support of the public works, where the services rendered do not involve actual construction, repair, renovation or maintenance of the public work, either by their own forces or by subcontract, lease or otherwise, do not have to be bid.

In 2018, the legislature passed Act 2018-199 which allows the Department of Transportation to enter into contracts for road construction or road maintenance projects that do not involve more than two hundred fifty thousand dollars (\$250,000) without advertising for sealed bids, provided the project is listed on the department website for at least seven calendar days before entering into the contract. The total cost of all projects not subject to advertising and sealed bids pursuant to this subsection may not exceed one million dollars (\$1,000,000) in the aggregate per year. Section 39-2-2(j).

In 2018, the legislature passed Act 2018-413 which provides an exception to the public works bid law for contracts for the purchase of any heating or air conditioning units or systems by any awarding authority subject to Chapter 13B of Title 16, or Article 3, commencing with Section 41-16-50, of Chapter 16, Title 41, provided the contract is entered into with an Alabama vendor who has been granted approved vendor status for the sale and installation of heating or air conditioning units or systems as a part of the purchasing cooperative sponsored by the National Association of Counties and the National League of Cities, or their successor organizations, and each of the following a purchasing cooperative, and each of the following occur:

- a. The heating or air conditioning unit or system being purchased and installed is available as a result of a competitive bid process conducted by a local governing body which has been approved by the Department of Examiners of Public Accounts.
- b. The purchase and installation of the heating or air conditioning unit or system is not available on the state purchasing program at the time or the purchase

and installation under the purchasing cooperative is available at a price that is equal to or less than that available through the state purchasing program.

- c. The entity entering into the contract for the purchase and installation of the heating or air conditioning unit or system has been notified by the Department of Examiners of Public Accounts that the competitive bid process utilized by the cooperative program offering the goods and installation complies with state competitive bid laws.
- d. The exemption from the requirement to utilize sealed bids for the purchase of heating or air conditioning units or systems authorized by this amendatory act shall not serve to exempt any public works project from the remaining provisions of this article, including, but not limited to, design and review requirements, compliance with all applicable codes, laws, specifications, and standards, and the compensation of engineers, architects, or others as mandated by state law or rule.

Emergencies

All emergencies must be declared in writing by the municipality, setting forth the nature of the danger to the public health, safety, or convenience. Contracts may be let to the extent necessary to meet the emergency without public advertising. Actions taken and the reasons for the action must be immediately made public by the municipality upon request.

Sole Source Bidding

No sole source vendors may be used on any public works project unless the following criteria are met:

1. Except for contracts for public roads, bridges, and water and sewer facilities, the municipality must document to the state building commission that the sole source product or services is indispensable to the improvement, that there are not viable alternatives and that this product or service is the only one that fulfills the function for which it is needed;
2. The architect or engineer has recommended the item or service;
3. All information substantiating the use of the sole source item – including the recommendation of the architect or engineer – is documented and made available for examination in the office of the municipality at the time of the advertising for sealed bids.

Bidding Documents

Municipalities must maintain an adequate number of sets of bid documents that may be obtained by prime

contractor bidders upon payment of a deposit for each set. The municipal governing body has the authority to determine what constitutes an adequate number of sets for each project and to determine the amount of the deposit. However, the deposit shall not exceed twice the cost of printing, reproduction, handling and distribution of each set.

The deposit must be refunded in full to each prime contractor bidder upon return of the documents in reusable condition within 10 days after the bid opening. Prime contractor bidders, subcontractors, vendors, or dealers may obtain additional sets by paying the same deposit. If the additional sets are returned in reusable condition within 10 days after the bid opening, the deposit must be refunded; however, the municipality may deduct the cost of printing, reproduction, handling, and distribution. All refunds are due from the municipality within 20 days after the bid opening.

Bid Bonds and Prequalification

All public works bidders must file with their bids either a cashier's check drawn on an Alabama bank or a bid bond executed by a surety company duly authorized and qualified to make bonds in the state of Alabama. This bond or check must be made payable to the municipality. The governing body has the authority to set the amount, which is limited to a range of not less than five percent of either the municipality's estimated cost or of the contractor's bid, up to a maximum of \$10,000. The bid guaranties constitute all of the qualifications or guaranties required of contractors as prerequisites to bidding for public works, except as required by the state licensing board for general contractors and any prequalification procedures required by the municipality.

Section 39-2-4(b) restricts the type of prequalification procedures that can be used on public works projects. First, these procedures must be written. Additionally, any prequalification criteria must:

1. Be published sufficiently in advance of any affected contract so that a bona fide bidder may seek and obtain prequalification prior to preparing a bid for that contract;
2. Be related to the purpose of the contract or contracts affected;
3. Be related to contract requirements or the quality of the product or service in question;
4. Be related to the responsibility, including the competency, experience and financial ability of a bidder; and
5. Permit reasonable competition at a level that serves the public interest.

The prequalification publication may run concurrently

with the publication of the notice requesting bids, provided this produces the required advance notice.

Within the bounds of good faith, the municipality retains the right to determine whether a contractor satisfies these prequalification procedures and criteria. Any bidder who satisfies the prequalification criteria is deemed "responsible" for purposes of award unless the municipality revokes the prequalification under the following procedures:

1. No later than five working days or the next regular meeting after the opening of bids, the municipality issues written notice to the bidder of its intent to revoke prequalification and the grounds therefore;
2. The bidder is provided an opportunity to be heard before the municipality on the intended revocation;
3. The municipality makes a good faith showing of a material inaccuracy in the prequalification application of a bidder or of a material change in the responsibility of the bidder since submitting its prequalification application; and
4. The revocation of prequalification is determined no later than 10 days after written notice of intent to revoke, unless the bidder whose qualification is in question agrees in writing to an extension in time.

If the municipality does not establish prequalification procedures, the act specifically authorizes the rejection of bidders who are determined not responsible and the inclusion of criteria in the bid documents which limit contract awards to responsible bidders.

All bid guaranties (bonds or checks), except those of the three lowest bona fide bidders, shall be returned immediately after bids have been checked, tabulated and the relation of the bids established. The bid guaranties of the three lowest bidders shall be returned as soon as both the contract bonds and the contract of the successful bidder have been properly executed and approved. When the award is deferred for a period of time longer than 15 days after the opening of the bids, all bid guaranties, except those of the potentially successful bidders, shall be returned. If no award is made within 30 days after the opening of the bids or such other time as specified in the bid documents, all bids shall be rejected and all guaranties returned, except for any potentially successful bidder that agrees in writing to a stipulated extension. In this case, the municipality may permit the potentially successful bidder to substitute a satisfactory bidder's bond for the cashier's check submitted with its bid as a bid guaranty. The act does not define who qualifies as a "potentially successful bidder."

Awarding the Contract

The contract shall be awarded to the lowest responsible

and responsive bidder, unless the municipality finds that all the bids are unreasonable or that it is not in the interest of the municipality to accept any of the bids. A responsible bidder is one who, among other qualities determined necessary for performance, is competent, experienced and financially able to perform the contract. A responsive bidder is one who submits a bid that complies with the terms and conditions of the invitation for bids. Minor irregularities in the bid do not defeat responsiveness.

The bidder to whom the award is made must be notified by telegram, confirmed fax or letter as soon as possible. If the successful bidder fails or refuses to sign the contract, to make bond as required by Title 39, or to provide evidence of insurance as required by the bid documents, the municipality may award the contract to the second lowest responsible and responsive bidder. If the second lowest bidder fails or refuses to sign the contract, make bond as provided in this chapter or to provide evidence of insurance as required by the bid documents, the municipality may award the contract to the third lowest responsible and responsive bidder. If the third lowest bidder fails to execute the contract, the act is unclear as to whether the municipality may then accept a bid from the fourth bidder.

If no bids or only one bid is received at the time stated in the advertisement for bids, the municipality may advertise for and seek other competitive bids or the municipality may direct that the work shall be done by force account under its direction and control or may negotiate for the work through the receipt of informal bids not subject to the requirements of Title 39. Any negotiation for the work must be for a price lower than that bid.

If the municipality finds that all bids received are unreasonable or that it is not to the interest of the municipality to accept any of the bids, the municipality may direct that the work shall be done by force account under its direction and control.

Force account work is defined by Section 39-2-1 as, "Work paid for by reimbursing for the actual costs for labor, materials, and equipment usage incurred in the performance of the work, as directed, including a percentage for overhead and profit, where appropriate." "The force account method ... merely means that the city will act as its own contractor using labor and material employed or bought by the city to perform various phases of construction." AGO 1988-205.

On any construction project where the municipality has determined to let a contract through negotiation or force account work, it must make available the plans and specifications, an itemized estimate of cost and any informal bids for review by the Department of Examiners of Public Accounts. Upon completion of the project, the municipality must also send to the Department of Examiners of Public Accounts the final total costs together with an itemized list

of cost of any and all changes made in the original plans and specifications. Section 39-2-6(d), Code of Alabama 1975. This information must also be made public by the municipality upon request. Upon the approval of the municipality, its duly authorized officer or officers may, when proceeding upon the basis of force account, let any subdivision or unit of work by contract on informal bids.

The public works bid law does not require advertising for sealed bids on projects that will be done through "force account" work. AGO 1998-039.

When work is performed by force account, there is no contract to be signed and the bid requirement in Section 39-2-2, Code of Alabama 1975, has no effect. All equipment, materials and supplies used in the project must be obtained pursuant to the general competitive bidding requirements in Title 41, Chapter 16 of the Code. When a municipality uses the force account method, it must obtain engineering drawings, plans, specifications, and estimates prepared by a professional engineer, and the construction must be executed under the direct supervision of a professional engineer. Additionally, if architectural work beyond work incidental to the engineering, is involved, a licensed professional architect is required. AGO 1999-065.

It is clear that the public works bid law does not apply to projects where the municipality will perform the work with its own employees. For example, the Attorney General has ruled that the construction of a municipal golf course is subject to the public works bid law, not the competitive bid law. But, if the municipality constructs the course itself, it does not have to bid the project. AGO 1999-056. As noted in AGO 1999-065, cited above, though, the purchase of the material used in the project may be subject to the general competitive bid law. But, if the purchase of materials is part of a public works contract itself, rather than a separate agreement, the public works bid law controls the purchase. AGO 2000-099.

Where the municipality is not performing the work itself, it may require a successful bidder to:

1. Enter into a written contract on any form included in the proposal, plans and specifications;
2. Furnish a performance bond and payment bond executed by a surety company duly authorized and qualified to make such bonds in the state of Alabama in the amount required by Section 39-1-1(a); and
3. Provide evidence of insurance as required by the bid documents within a specified period. If no period is specified, evidence must be submitted within 15 days after the prescribed forms have been presented to him or her for signature.

Under extenuating circumstances, the municipality may

grant an extension of up to five days for the return of the contract, required bonds and required evidence of insurance.

The municipality must approve the contractor's bonds, if they meet the requirements of Section 39-2-8 and the contractor's evidence of insurance, if it meets the requirements of the bid documents and must execute the contract within 20 days after their presentation by the contractor unless the successful contractor agrees in writing to a longer period.

The municipality must issue a "proceed order" within 15 days after final execution of the contract by the municipality, unless both parties agree in writing to a stipulated extension in time for the issuance of a proceed order.

Should the successful bidder or bidders fail to execute a contract and furnish acceptable contract securities and evidence of insurance as required by law within the period allowed, the municipality shall retain from the proposal guaranty, if it is a cashier's check or recover from the principal or the sureties, if the guaranty is a bid bond, the difference between the amount of the contract as awarded and the amount of the proposal of the next lowest bidder. If no other bids are received, the full amount of the proposal guaranty shall be so retained or recovered as liquidated damages. Any sums so retained or recovered shall be the property of the municipality.

Failure by the municipality to execute a contract and to issue a proceed order as required shall be just cause, unless both parties agree in writing to a stipulated extension in time for issuance of a proceed order, for the withdrawal of the contractor's bid and contract without forfeiture of the certified check or bond.

Assignment of the Contract by the Successful Bidder

No contract awarded to the lowest responsible and responsive bidder shall be assignable by the successful bidder without written consent of the municipality and in no event shall a contract be assigned to an unsuccessful bidder whose bid was rejected because he or she was not a responsible or responsive bidder.

Violations and Penalties

Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition to bid at a fixed price or to refrain from bidding or otherwise shall render the bids void and shall cause the bidders or prospective bidders to be disqualified from submitting further bids to the municipality. Any bidder or prospective bidder who willfully participates in any agreement or collusion in restraint of freedom of competition shall be guilty of a felony and, on conviction thereof, shall be fined not less than \$5,000 nor more than \$50,000 or, at the

discretion of the jury, shall be imprisoned in the penitentiary for not less than one nor more than three years.

Any advance disclosure of the terms of a bid shall render the proceedings void and require re-bidding. Section 39-2-2(c), Code of Alabama 1975, provides that anyone who willfully violates the public works bid law is guilty of a Class C felony.

No civil action shall be brought or maintained by a contractor in any court in this state to require any municipality to pay out public funds for work and labor done, for materials supplied or on any account connected with performance of a contract for public works, if the contract was let or executed in violation of or contrary to any provision of law.

An action shall be brought by the Attorney General or may be brought by any interested citizen, in the name and for the benefit of the awarding authority to recover paid public funds from the municipality, contractor, its surety or any person receiving funds under any public works contract let in violation of or contrary to this title or any other provision of law, if there is clear and convincing evidence that the contractor, its surety or such person knew of the violation before execution of the contract. The action must be commenced within three years of final settlement of the contract.

The Attorney General, a bona fide unsuccessful or disqualified bidder, or any interested citizen may maintain an action to enjoin the letting or execution of any public works contract in violation of or contrary to the provisions of this title or any other statute and may enjoin payment of any public funds under any such contract. In the case of a successful action brought by a bidder, reasonable bid preparation costs shall be recoverable by that bidder. The action shall be commenced within 45 days of the contract award.

The act specifically requires strict competitive bidding on public works contracts and prohibits the use of quantum meruit, estoppel or any other legal or equitable principle which would allow recovery for work and labor done or materials furnished under any contract let in violation of competitive bidding requirements as prescribed by law.

Tender of ownership of waterlines by developer to a city water utility pursuant to a contract between developer and utility was rendered invalid by judicial finding that the contract was entered into in violation of statute mandating that all public-works contracts in excess of \$50,000 be advertised for sealed bids. Therefore, developer held ownership of waterlines, where contract was sole basis for transfer of ownership of waterlines and judicial finding rendered contract invalid. The city water utility was not entitled to recover any money it paid to the developer under the agreement. *Lake Cyrus Development Co., Inc. v. Attorney*

Requirement of Licensing

Section 34-8-8, Code of Alabama 1975, requires municipalities preparing plans and specifications to include enough of Chapter 8, Title 34, to inform prospective bidders for which a contractor's license is required that they must show evidence of their license before their bid is considered. Failure to do this is a Class B misdemeanor.

Additionally, municipalities receiving bids from contractors must require prospective bidders to include a current license number on the bid. All bids that do not contain the license number must be rejected. A violation of this provision is a Class C misdemeanor.

Mistakes in Bidding

If the low bidder discovers a mistake in its bid rendering a price substantially out of proportion to that of other bidders, the low bidder may withdraw its bid without forfeiture upon written notice to the awarding authority within three working days after the opening of bids whether or not award has been made. If the low bidder offers clear and convincing documentary evidence as soon as possible but no later than three working days after the opening of bids, that it made such a mistake due to calculation or clerical error, an inadvertent omission or a typographical error, the municipality shall permit withdrawal without forfeiture. The decision of the municipality must be made within 10 days after receipt of the low bidder's evidence or by the next regular meeting of the municipality. In no event shall a mistake of law, judgment or opinion constitute a valid ground for the withdrawal of a bid without forfeiture. Upon withdrawal of bid without forfeiture, the low bidder shall be prohibited from:

1. Doing any work on the contract, either as a subcontractor or in any other capacity, and
2. Bidding on the same project if it is readvertised.

Bonding Requirements

Any person entering into a public works contract with a municipality shall, before commencing work, execute a performance bond, with penalty equal to 100 percent of the amount of the contract price. In addition, another bond, payable to the municipality letting the contract, shall be executed in an amount not less than 50 percent of the contract price, with the obligation that the contractor or contractors shall promptly make payments to all persons supplying labor, materials or supplies for or in the prosecution of the work provided in the contract and for the payment of reasonable attorneys' fees incurred by

successful claimants or plaintiffs in civil actions on the bond.

Any person that has furnished labor, materials or supplies for or in the prosecution of a public work where payment has not been made may institute a civil action upon the payment bond. However, a civil action shall not be instituted on the bond until 45 days after written notice to the surety of the amount claimed to be due and the nature of the claim. The civil action shall be commenced not later than one year from the date of final settlement of the contract. The giving of notice by registered or certified mail, postage prepaid, addressed to the surety at any of its places of business or offices shall be deemed sufficient under this section. In the event the surety or contractor fails to pay the claim in full within 45 days from the mailing of the notice, then the person or persons may recover from the contractor and surety, in addition to the amount of the claim, a reasonable attorney's fee based on the result, together with interest on the claim from the date of the notice.

Every person having a right of action on the bond shall, upon written application to the municipality under the direction of whom the work has been prosecuted, indicating that labor, material, foodstuffs or supplies for the work have been supplied and that payment has not been made, be promptly furnished a certified copy of the additional bond and contract. The claimant may bring a civil action in the claimant's name on the bond against the contractor and the surety, or either of them, in the county in which the work is to be or has been performed or in any other county where venue is otherwise allowed by law.

In the event a civil action is instituted on the payment bond, at any time more than 15 days before trial begins, any party may serve upon the adverse party an offer to accept judgment in favor of the offeror or to allow judgment to be entered in favor of the offeree for the money or as otherwise specified in the offer. If within 10 days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service and the clerk of the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence of the offer shall not be admissible. If the judgment finally obtained by the offeree is less favorable than the offer, the offeree shall pay the reasonable attorney's fees and costs incurred by the offeror after making the offer. An offer that is made but not accepted does not preclude a subsequent offer. When the liability of one party to another party has been determined by verdict, order or judgment but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial if the offer is made no less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Nothing requires taking a bond to secure contracts in an amount less than \$50,000.

Retainage

Retainage is defined as: “That money belonging to the contractor which has been retained by the awarding authority conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor.” Retainage helps ensure that a project is completed to the satisfaction of the municipality.

Unless otherwise provided in the specifications, the municipality must make partial payments as the work progresses at the end of each calendar month but in no case later than 35 days after acceptance by the awarding authority that the estimates and terms of partial payments have been fulfilled. The contract must designate a person to review the progress of completed work and to review the documents submitted by the contractor. The designated person must within 10 days review the submission and request for payment and accept or request payment in writing. In preparing estimates, the material delivered on the site, materials suitably stored and insured off-site, and preparatory work done may be taken into consideration.

The awarding authority may not offer a contract for bidding unless confirmation of any applicable grant has been received and any required matching funds have been secured by or are available to the awarding authority. Section 39-2-2(i), Code of Alabama 1975. Should the source of funds for the payment be a grant, award, or direct reimbursement from the state, federal government, or other source which will not become available until after the execution of the contract, this shall be disclosed in the bid document and contract and the provisions regarding prompt payment shall not apply until the awarding authority is in receipt of the funds as provided in the contract. Upon such receipt, the contracting agency shall process payment within 10 days. Section 39-2-12(l), Code of Alabama 1975.

In making these partial payments, the municipality may retain not more than five percent of the estimated amount of work done and the value of materials stored on the site or suitably stored and insured off-site. After the project is 50 percent completed, the municipality may not withhold any more retainage. The retainage shall be held until final completion and acceptance of all work covered by the contract unless an escrow or deposit arrangement is used.

The Attorney General has ruled that a municipality may not, in bid specifications, provide for withholding more than five percent retainage on the first 50 percent of a public works project, nor may it provide that retainage shall continue to be withheld after the project is 50 percent complete. AGO 1997-256.

On completion and acceptance of each separate building, public work or other divisions of a contract on which a price is stated separately in the contract or can be separately ascertained, payment may be made in full, including the retained percentage thereof, less authorized deductions. However, nothing requires a municipality to make full payment on an item of work when such item of work is an integral part of a complete improvement.

In addition to other requirements, a nonresident contractor must satisfy the municipality that he or she has paid all taxes due and payable to the state of Alabama or any political subdivision thereof prior to receiving final payment for contract work.

In lieu of the retainage, the municipality may provide in the specifications or contracts for the maintenance of an escrow account, or the depositing of security. The act lists in detail the requirements for an escrow account and the acceptable types of security.

All material and work covered by partial payments made shall become the sole property of the municipality. However, this does not relieve the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made, and for the restoration of any damaged work.

Change Orders

Change orders, that is, modifications to existing contracts, must be handled with care. Alabama statutory law provides little guidance regarding when change orders are permitted.

The Attorney General, though, has provided guidelines setting forth the circumstances in which a change order would be appropriate. Those circumstances are:

- Minor changes for a total monetary value less than required for competitive bidding.
- Changes for matters relatively minor and incidental to the original contract necessitated by unforeseen circumstances arising during the course of the work.
- Emergencies arising during the course of the work on the contract.
- Changes or alternatives provided for in the original bidding where there is no difference in price of the change order from the original best bid on the alternate.
- Changes of relatively minor items not contemplated when the plans and specifications were prepared and the project was bid which are in the public interest and which should not exceed 10 percent of the contract price. In subsequent opinions the attorney general has ruled that the 10 percent rule may not apply in extraordinary circumstances and emergency situations.

See AGOs 93-00105, 92-00388, 92-00363, 92-00049, 91-00279 and 87-00197.

According to the attorney general, these are the criteria under which a change order will be allowed. Further, the attorney general requires that the change order be supported by a signed statement from the architect (engineer) and/or owner containing the following:

- A statement of what the change order covers and who instituted the change and why.
- Statement regarding the reasons for using the change order method rather than competitive bid.
- Statement that all prices have been reviewed and found reasonable, fair and equitable and recommending approval of the same.
- The owner either endorses the statements and recommendations or submits a separate statement covering the item.

Finally, the attorney general has emphasized that the foregoing are *guidelines*, that the final determination of the legality rests with the legal advisor to the various awarding authorities, and that the most important ingredient in the approval of negotiated change orders is the good faith of the officials executing the same. Citing *White v. McDonald Tractor Company*, 248 So. 2d 121 (1971).

Completion of the Public Work

Section 39-1-1(f) provides that the contractor shall, immediately after the completion of the contract, give notice of the completion by an advertisement in a newspaper of general circulation published within the city or county in which the work has been done, for a period of four successive weeks. A final settlement shall not be made upon the contract until the expiration of 30 days after the completion of the notice. Proof of publication of the notice shall be made by the contractor to the authority by whom the contract was made by affidavit of the publisher and a printed copy of the notice published. If no newspaper is published in the county in which the work is done, the notice may be given by posting at the courthouse for 30 days, and proof of same shall be made by the judge of probate, sheriff and the contractor. This subsection shall not apply to contractors performing contracts of less than \$20,000 in amount. The governing body of the contracting agency, to expedite final payment, shall cause notice of final completion of the contract to be published one time in a newspaper of general circulation, published in the county of the contracting agency and shall post notice of final completion on the agency's bulletin board for one week, and shall require the contractor to certify under oath that all bills have been paid in full. Final settlement with the

contractor may be made at any time after the notice has been posted for one entire week.

The purpose of this section is to provide security for those who furnish labor and material in performance of government contracts as a substitute for unavailable lien rights, and is liberally construed to accomplish this purpose. *Headley v. Housing Authority*, 347 So.2d 532 (Ala. Civ. App. 1977). A public contractor is charged with knowledge of this section requiring bond of public contractors. *Universal Electric Construction Co. v. Robbins*, 239 Ala. 105, 194 So. 194 (Ala. 1940).

Upon the contractor's completion and the awarding authority's acceptance of all work required, the awarding authority shall pay the amount due the contractor upon the contractor's presentation of the following items:

- a. A properly executed and duly certified voucher for payment.
- b. A release, if required, of all claims and claims of lien against the awarding authority arising under and by virtue of the contract, other than such claims of the contractor, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.
- c. Proof of advertisement as provided by law. *See*, Section 39-1-1(f) for advertising requirements.

Payments are due and owing 40 days after all the above requirements are fulfilled. If the awarding authority fails to make payment, as required, interest on the amount will accrue and be due and owing to the contractor. The interest rate shall be the legal amount currently charged by the Alabama Department of Revenue. Interest shall accrue on the day following the later date described above and shall be paid from the same fund or source from which the contract principal is paid.

Additional Regulations

A municipality may prepare and promulgate rules and regulations governing public works bids as it deems proper. However, these regulations may not conflict with state law.

Use of Domestic Products and Steel

The act requires contract provisions requiring the use of domestic products and steel. If this provision is breached, the contract price must be adjusted downward in an amount equal to the savings realized by the contractor.

Certification of Contract

A municipality must, prior to the execution of final contracts and bonds, certify that the contract to be awarded is let in compliance with Title 39 and all other applicable provisions of law. For purposes of a civil action, the

issuance of the certificate by the municipality constitutes a presumption that the contract was let in accordance with law. The presumption may be rebutted only by a showing with clear and convincing evidence that the certification is false or fraudulent and that the contractor knew that the certification was false or fraudulent before execution of the contract.

Any municipality or its agents issuing a willfully false or fraudulent certificate is guilty of a felony and, on conviction thereof, shall be fined not less than \$5,000 nor more than \$50,000 or, at the discretion of the jury, shall be imprisoned in the penitentiary for not less than one nor more than three years.

Fair and Open Competition

Act 2014-107, codified as Chapter 8 of Title 39 of the Code of Alabama 1975, created the Fair and Open Competition in Governmental Construction Act. The Act applies to a “public agency,” which is defined as the “State of Alabama, and any county, city, town, school district, or other political subdivision of the state, any public trust, any public entity specifically created by the statutes of the State of Alabama or as a result of statutory authorization therefor, and any department, agency, board, bureau, commission, committee, or authority of any of the foregoing public entities.”

Section 4 of the Act (see Section 39-8-4, Code of Alabama 1975) contains the following specific prohibition:

A public agency awarding any contract for the construction, repair, remodeling, or demolition of a public improvement, or obligating funds pursuant to such a contract, shall ensure that neither the awarding public agency nor any construction manager acting on behalf of the public agency, in its bid specifications, project agreements, or other controlling documents shall include any of the following:

1. A term that requires, prohibits, encourages, or discourages bidders, contractors, or subcontractors from entering into or adhering to agreements with a collective bargaining organization relating to the construction project or other related construction projects.
2. A term that discriminates against bidders, contractors, or subcontractors based on the status as a party or nonparty to, or the willingness or refusal to enter into, an agreement with a collective bargaining organization relating to the construction project or other related construction projects.

Furthermore, a public agency shall not award a grant,

tax abatement, or tax credit that is conditioned upon a requirement that the awardee include a term as described in Section 4 above in a contract document for any construction, improvement, maintenance, or renovation to real property or fixtures that are the subject of the grant, tax abatement, or tax credit. See Section 39-8-5, Code of Alabama 1975.

A public agency or a construction manager or other contracting entity acting on behalf of a public agency shall not place any of the terms described in Section 4 in bid specifications, project agreements, or other controlling documents relating to the construction, repair, remodeling, or demolition of a public improvement. Any such included term shall be void and of no effect. See Section 39-8-6, Code of Alabama 1975.

A public agency may exempt a particular project, contract, subcontract, grant, tax abatement, or tax credit from the requirements of Section 4 if the public agency finds, after public notice and hearing, that special circumstances require an exemption to avert an imminent threat to public health or safety. A finding of special circumstances under this act shall not be based on the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are non-signatories to, or otherwise do not adhere to, agreements with one or more collective bargaining organizations, or concerning employees on the project who are not members of or affiliated with a collective bargaining organization. See Section 39-8-7, Code of Alabama 1975.

Selected Cases and Attorney General’s Opinions on Public Works Bidding

- Engineering services to plan the construction of a public works contract are not subject to the bonding requirements in Section 39-1-1, Code of Alabama 1975. AGO 1995-183.
- The public works bid law, Section 39-1-1, et seq., Code of Alabama 1975, applies to renovation projects of municipal housing authorities. AGO 1998-031.
- Incorporated industrial development boards are exempt from the public works bid law. Grant funds, however, may require that a project using those funds be bid. AGO 1998-051.
- The public works bid law, Title 39, Chapter 2, Code of Alabama 1975, does not require bidding in-kind services performed by municipal employees that will serve as a match for ADECA grant funds. AGO 1998-052.
- Section 39-1-4 of the Code prohibits agencies that are subject to the public works bid law from providing insurance other than builder’s risk insurance and

owner's protective insurance on projects it lets for bid. AGO 1999-142.

- Public building authorities organized pursuant to Sections 11-56-1 through 11-56-22 of the Code are not subject to the Public Works Bid Law. AGO 1999-218.
- The purchase of lights by a municipality for a ballpark is considered a purchase of equipment and subject to the Competitive Bid Law if the cost is \$7500 or more. If the purchase of lights is included in a contract for the construction or renovation of the ballpark, it is subject to the Public Works Bid Law. AGO 2000-099.
- Construction contracts, absent statutory authority, cannot be renewed without compliance with the competitive bid law or, where applicable, the public works bid law. AGO 2000-078.
- If a city determines that a change order in excess of 10 percent is necessary for the proper completion of a project, where a grant can be retained by this method, the city can find that the circumstances are extraordinary and justify a change order in excess of 30 percent without violating the Competitive Bid Law or the Public Works Law. AGO 2000-098.
- Under Section 39-2-1 of the Code of Alabama 1975, waterworks boards are subject to the Public Works Law when building construction costs exceed \$50,000. Section 41-16-51(b)(7), Code of Alabama 1975, exempts waterworks boards from the competitive bid law when purchasing supplies, equipment or materials needed, used and consumed in the normal operation of the water board. If the purchase of the equipment, supplies or materials exceeds \$50,000 and is included in the construction contract, it is subject to the Public Works Law. AGO 2002-152.
- A city has met the "substantial compliance" standard set forth by Alabama's appellate courts if it inadvertently advertises for a public works contract in one newspaper that is not of statewide general circulation and has let the contract before determining that the advertisement ran in error. AGO 2004-018. **Note: This opinion involves a very specific set of facts and should be examined carefully before being relied upon.**
- Works to be performed on public property or property that will become public property, that are paid for entirely with private funds are not public works and contracts to perform such works are not subject to the competitive bidding requirements of the Public Works Bid Law. AGO 2004-026. **Note: It is the League's opinion that if private funds are disbursed by the city or through the city, they would become public**

funds and thus subject to any applicable bidding procedures.

- The use of asphalt obtained through the award of a public works contract is restricted for use on public works projects. Further, no public works project, the total of which would exceed \$50,000, may be split into parts involving sums of less than \$50,000 in order to avoid bidding. However, in those situations involving the use of public employees, the portion of the project attributable to those public employees would not be subject to the public works bid law. AGO 2004-083.
- Under federal law and regulations, a city may not require a general contractor, submitting a bid on a public works project funded, in part, by federal transportation monies received by the state, to provide the contractor's license number on bid documents before submission of the bid or before the bid is considered for an award of a contract. However, a city may require proof of a license upon or subsequent to the award of a contract. AGO 2004-099.
- If the project on city property will be paid for entirely with private funds, it will not be subject to the requirements of competitive bidding under the Public Works Bid Law. AGO 2004-223.
- If a town obtained a good-faith estimate that the project was less than \$500,000, it was not required to advertise in three newspapers of general circulation throughout the state. If the town substantially complied with the Public Works Bid Law the town may proceed with the executed contract. AGO 2008-106.
- A contract that exceeds \$50,000 for the construction of a water line to a public school is subject to the bidding requirements of the Public Works Law. AGO 2009-022
- Contracts for the repair, improvement, and maintenance of a water storage tank are subject to the bidding requirements of the Public Works Bid Law. A tank contract that exceeds \$50,000 must be bid. AGO 2009-100.
- The preference to resident contractors over out-of-state contractors, found in section 39-3-5(a) of the Code of Alabama, applies if (1) the contract is under the Public Works Law, (2) the contract utilizes any state, county, or municipal funds, except if funded in whole or in part with federal funds, and (3) the law of the state of the out-of-state contractor gives preference to its resident contractors. A County Commission may not give preference to Alabama contractors over Florida contractors because Florida law does not provide a

preference to resident contractors in public works contracts. AGO 2010-040.

- The purchase and placement of sod by a contractor for the construction of a softball complex is a public works project. AGO 2010-048.
- A project for maintenance of multiple water tanks that exceeds \$50,000 is subject to the Public Works Law. The project may not be divided into parts. The tank maintenance contract cannot be renewed without competitive bidding. AGO 2015-008.
- A newspaper meeting the requirements of Section 6-8-60 of the Code of Alabama is a newspaper of general circulation in the county for purposes of the Public Works Law. AGO 2015-046.
- Because the city will possess a contractual right to purchase the property upon which the City Hall Complex will be built, the construction thereof is a public works project subject to bidding pursuant to Sections 39-2-1 through 39-2-14 of the Code of Alabama 1975. AGO 2015-019.
- A county board may purchase real property upon which the successful bidder will construct or remodel a building by bidding in compliance with the Public Works Law. Upon completion of the transaction, the county board should comply with the Section 9-15-100, Code of Alabama 1975, disclosure requirements concerning the purchase of real property by the state, county, municipality, or any other governmental entity or quasi-governmental entity after the purchase. AGO 2015-064.
- If the Alabama Department of Transportation determines that the failure to obtain approval to bid as a joint venture and omission of a contractor identification number assigned to the joint venture in the bid, as required in the department's administrative rules, are minor irregularities not defeating the responsiveness of the lowest bidder, it may award the contract to that bidder. AGO 2016-006.
- The Jefferson County E-911 Board ("Board") may enter into a contract to allow a private company to erect a cell tower on a fire station so long as the tower is used for dispatch services. The contract between the Board and the company must be competitively bid under the Public Works Law. AGO 2020-015.
- The renovation of a municipal court's administrative offices is subject to the **Public Works** Law and must be competitively **bid** if the project cost exceeds \$50,000. AGO 2019-042.
- The purchase of radio equipment, which includes

transmitters, receivers, antennas and related items that are to be installed on completed radio towers, as well as the construction of radio towers and small buildings to complete the infrastructure for the dispatch system, are subject to the Public Works Law. AGO 2018-004

- A contract for a Supervisory Control and Data Acquisition System is a public work under section 39-2-1(6) of the Code of Alabama. The contract is not exempt from the Public Works Law. There is no term limitation on a public works contract. AGO 2017-026.
- The Water Works Board of the City of Vincent may not divide the installation of new water meters into multiple contracts for payments of less than \$50,000 to evade the Public Works Law. If the Board can demonstrate, based on several specified factors, that it is not evading the Public Works Law by spreading out its meter purchases over several years as funds become available, then it will not violate section 39-2-2(a) of the Code of Alabama. AGO 2017-010.

47. Municipalities and the First Amendment

The First Amendment to the United States Constitution protects individual liberties, granting freedom of religion, speech and peaceful assemblage from intervention by the federal government. These individual liberties are protected from invasion by state and local governments by the Fourteenth Amendment.

The language of the First Amendment is broad, making it subject to a wide range of interpretation. It states that “Congress shall make no law respecting an establishment of religion, or the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for the redress of grievances.” The Attorney General’s office has held that a determination regarding whether a municipal ordinance is constitutional can only be made by the courts. AGO 2000-104.

Municipal officials must be aware of the latest interpretations of the First Amendment. The parameters of the amendment are constantly being redefined by the courts. This article surveys the First Amendment as it relates to municipalities and provides an overview of the major areas involving problems for municipal regulation.

Freedom of Religion

For many individuals, no personal freedom is more important than the freedom to worship. Wars continue to be fought in many parts of the world to secure this freedom. Every child is taught that this desire was one of the principal reasons the original colonies sought independence from England.

The First Amendment guarantees that every person has the right to worship, or refuse to worship, as he or she chooses. The First Amendment also ensures that government, on any level, will not become involved in establishing one religion over another.

The Establishment Clause was intended to erect a “wall of separation between the church and the state.” *Illinois v. Board of Education*, 333 U.S. 203 (1948). The goal was not only to stop the intrusion of government into private affairs of religion, but also to prevent the intrusion of the church into the affairs of state. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The goal is governmental neutrality where religion is concerned. Municipalities must exercise care to avoid either improperly endorsing or burdening religious activities.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the United States Supreme Court set out a three-part test for determining whether a governmental act violates the Establishment Clause by endorsing a religion.

First, the act must reflect a clearly secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. And, third, it must avoid excessive governmental entanglement with religion. If these three criteria are met, a governmental act does not violate the Establishment Clause.

The Supreme Court has also formulated a test for determining whether a governmental act unconstitutionally burdens the free exercise of religion. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972) the Court stated that first a court must determine whether the regulation in question constitutes such a burden. Then, a court must decide whether the governmental objective can be achieved by a less restrictive method, regardless of whether the governmental interest is of a greater magnitude. Ordinances are to be construed, if possible, to remove any possible danger that might be used to restrain or burden freedom of worship. *See, People v. Barber*, 46 N.E.2d 329 (1943).

Prayer at public meetings is often a source of friction involving the First Amendment. In *Town of Greece v. Galloway*, 134 S.Ct. 1811, 572 U.S. ____ (2014), the U.S. Supreme Court held that local governments may open their meetings with prayers that are explicitly religious. Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. So long as the town maintained a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The town’s prayer practice did not violate the Establishment Clause because it did not compel its citizens to engage in a religious observance.

The 11th Circuit Court of Appeals has held that when determining whether a governmental body’s prayer violates the Establishment Clause of the First Amendment, the content of the prayer is not of concern if there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other faith or belief. The impermissible motive standard for determining whether a government action violates the Establishment Clause of the First Amendment does not require that all faiths be allowed the opportunity to pray, but instead prohibits purposeful discrimination. *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, (11th Cir.2013).

At Christmas, many municipalities want to display nativity scenes. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court ruled that a nativity scene displayed at Christmas is permissible. It should be noted that the display at issue in this case was merely one part of a much

larger display of figures and traditions associated with the Christmas season. Taken in this light, the majority in this case was willing to permit the display. It is still undecided whether a display of just a nativity scene would be interpreted as a violation of the Establishment Clause. It has been held that allowing the unattended privately-sponsored display of a 15-foot menorah in the rotunda of a state capitol that is designated a public forum does not violate the Establishment Clause. *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993).

In two cases, the Supreme Court further elaborated on the issue of endorsement of religion. In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court held that chapter 2 of the 1981 Education Consolidation and Improvement Act, which channels federal funds to local education agencies to acquire, for use in public and private schools, instructional and educational materials, has a secular purpose and does not have the effect of advancing religion and therefore does not violate the First Amendment's Establishment Clause.

At the same time, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court held that a public school district's policy authorizing high school students to vote on whether to include a student delivered "invocation" or "message" at football games, and, if so, to elect a student to deliver it, involves state sponsored religious speech, rather than private speech, and results in coerced participation of those present at games in religious exercise and violates the First Amendment's Establishment Clause. The distinction appears to be that in this case, the activity took place at a school sponsored event.

However, in a case released a year later, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Court seemed to contradict this holding. There, a group of students were refused permission to use the school facilities after school hours for meetings. The school did make allowances for other student groups to meet during this time for social and recreational activities. The Court held that this refusal violated the First Amendment because it amounted to viewpoint discrimination. The key appears to be that this was not a school sponsored activity – instead, the school merely allowed students with similar interests time to meet together on school property. The fact that this particular student group's interest was prayer-related did not matter.

Two other U.S. Supreme Court cases have further examined the issue of public endorsement of religion. In *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court held that evidence that displays of framed copies of the Ten Commandments in county courthouses accompanied by copies of secular documents allegedly significant to the foundation of the American government were installed for a predominantly

religious purpose demonstrates that the displays violate the First Amendment's Establishment Clause under the "secular purpose" prong of the test promulgated in *Lemon v. Kurtzman*.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), though, the Court ruled that the display of a monument inscribed with the Ten Commandments on the grounds of the state capitol amid other monuments and markers reflecting a state's history does not violate the First Amendment's Establishment Clause.

Municipalities frequently confront First Amendment issues when they attempt to regulate solicitation because many entities involved in soliciting funds are religious in nature. These entities frequently challenge municipal authority to regulate their activities. A city ordinance, which required anyone conducting a "large group feeding" within a downtown park district to obtain a permit first and which limited the maximum number of permits that a person or organization could obtain to two per year per park, was, as applied to an organization of political activists, a reasonable time, place, or manner restriction. The city neither attempted to ban large group feedings generally nor to ban them everywhere in the parks. The ordinance left open ample channels of communication and furthered the city's substantial interest in managing its parks and spreading the burden of large group feedings. *First Vagabonds Church of God v. City of Orlando, Fla.*, 638 F.3d 756 (11th Cir.2011).

It must be noted that Congress has passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) that prohibits municipalities from taking any action that constitutes a significant burden on religious activities. Additionally, Alabama voters passed Amendment No. 622, Alabama Constitution, 1901, the "Alabama Religious Freedom Amendment", which prohibits government from taking any action that constitutes a burden on religion. These actions will have a tremendous impact on the relationship between municipal governments and religious institutions. The goal of avoiding governmental endorsement of religion does not require eradication of all religious symbols in the public realm. The Establishment Clause does not oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework. *Salazar v. Buono*, 130 S.Ct. 1803 (U.S.2010).

Freedom of Speech

The First Amendment also provides that Congress shall make no law abridging the freedom of speech or freedom of the press. This ban, likewise, is made applicable to state and local governments by the Fourteenth Amendment.

In construing municipal legislation which restricts

freedom of speech, a court must examine the effect of the legislation and weigh the circumstances and the substantiality of the reasons advanced favoring the regulation. An ordinance is to be construed, if possible, to remove any danger of its impairing free speech. *See, People v. Barber*, 46 N.E.2d 329 (1943). Any doubt as to whether an ordinance unconstitutionally infringes upon freedom of speech should be resolved against the ordinance.

In analyzing the free speech rights granted by the First Amendment, it is important to know the context, manner or place in which the speech is to be expressed. Case law makes a distinction between a public forum, a limited public forum or a non-public forum. When a First Amendment free speech challenge arises from a restriction on speech on government owned or controlled property, the classification of the forum as a traditional public forum, designated public forum, or limited public forum determines the contours of the First Amendment rights that a court recognizes when reviewing the challenged governmental action. A council meeting is generally a limited public forum for which regulation of speech is required only to be viewpoint-neutral and reasonable. Even if a limitation on speech in a limited public forum is a reasonable time, place, and manner restriction, there is a First Amendment violation if the defendant applied the restriction because of the speaker's viewpoint. *Galena v. Leone*, 638 F.3d 186 (3rd Cir.2011).

A public forum is one which, by long tradition or by governmental declaration, has been devoted to public assembly and debate. The right of a government to regulate speech in these areas is sharply limited.

Public forums are places, like city parks and sidewalks, which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used to purposes of assembly, communicating thoughts between citizens, and discussing public questions. For the government to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations on the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication." *Perry Educational Assoc. v. Perry Local Educators Assoc.*, 460 U.S. 37 (1983) (citations omitted).

A limited public forum is one that has been set aside by a government for expressive activity. The government may limit the length of time the forum will remain open or limit discussion to specific topics. As long as the forum remains open, however, the government is bound by the same standards that apply to a public forum.

The First Amendment does not guarantee public access

to a non-public forum, even when the forum is owned or controlled by the government. A non-public forum is one that is not traditionally open for public communication, or that has never been set aside by the government for this purpose. In these areas, the government may reserve the use of the property for its intended use, and may regulate speech, as long as the regulation is reasonable and is not an effort to suppress speech merely because public officials oppose the viewpoint.

Freedom of speech does not prevent the exercise of police or other sovereign powers in many circumstances. For instance, even though streets and parks are recognized as traditional gathering places for the dissemination of ideas and the communication of thoughts, a municipality may require a permit to use the park, provided the permit is not subject to unguided official discretion. *Jamison v. Texas*, 318 U.S. 413 (1943). In order to be valid, a permit requirement must provide standards officials are to follow in issuing the permit. Officials cannot have unbridled discretion in whether to award a permit, or the cost or conditions under which a permit will be awarded. For instance, in *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), the Supreme Court held that an ordinance which required applicants for a parade permit to pay in advance a fee of up to \$1,000, adjustable by the county administrator on a case-by-case basis, violated the First Amendment. More information on parade regulation is included below.

The use of sound trucks, loudspeakers or amplifiers is subject to reasonable regulation, provided there is no arbitrary discretion vested in an official to permit or refuse the use of such equipment.

Reasonable time, place and manner restrictions will be upheld as long as the restriction is narrowly tailored to serve a significant government interest and provided alternative channels of communication exist. *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983).

The Eleventh Circuit Court of Appeals has held that a municipal ordinance that bans barkers from distributing handbills in certain districts is designed to reduce litter and sidewalk congestion and does not violate the First Amendment. *Sciarrino v. Key West, Fla.*, 83 F.3d 364 (11th Cir. 1996). Commercial speech is subject to more regulation than political or religious speech. In addition, the protection of the First Amendment does not extend to conduct which is not associated with the communication of speech. *See, City of Chattanooga v. McCoy*, 645 S.W. 2d 400 (Tenn. 1983). The United States Supreme Court held in *Hartman v. Moore*, 547 U.S. 250 (2006), that a plaintiff who alleged that he was criminally prosecuted for exercising his First Amendment rights must prove that there was no probable cause to support the criminal charge.

Speech at a public place on a matter of public concern cannot be restricted simply because it is upsetting or arouses contempt, because if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Speech of church members who picketed near a funeral of a military service member was of public concern and therefore was entitled to special protection under the First Amendment. *Snyder v. Phelps*, 562 U.S. 443 (U.S. 2011). A protester who belongs to a church that believes that war casualties are God's punishment of America for tolerance of homosexuality and who pickets at military funerals is entitled, under the First Amendment, to a preliminary injunction against Missouri statutes prohibiting picketing at a funeral site within an hour before or after the scheduled service. *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007). A statute regulating protests at funerals was predominantly content-neutral, qualifying for First Amendment analysis under intermediate scrutiny standard, even though statute was admittedly enacted in reaction to single church's practice of harassing funeral attendees with messages insulting homosexuals or homosexuality; statute applied to protests advancing speech of any kind, and had content-neutral goal of preventing interference with funerals and protecting attendees from hearing any unwanted messages. *McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D. Ky. 2006).

A city policy requiring all persons wishing to participate in a protest near a military base to submit to a mass metal detector screening at a checkpoint blocks away from the actual protest site violates the protestor's right to be free from unreasonable searches and seizures under the Fourth Amendment and their First Amendment free speech rights. *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004).

Employees

The U.S. Supreme Court has established the *Pickering-Connick* four-stage analysis for examining retaliatory treatment cases involving a public employee's exercise of First Amendment rights, that requires a trial court to determine (1) whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern, and if that is established; (2) whether, under the balancing test, the interests of the employee outweigh the interest of employer, considering the context and circumstances of the employee's speech, and if first two stages are satisfied, the fact-finder must determine; (3) whether the identified protected speech played a substantial part in the employment decision, and, if so; (4) whether the employer has proven that it would have reached the same decision even in the absence of the protected speech. See

Pickering v. Board of Education, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).

In *Smith v. State Dept. of Public Safety*, 716 So.2d 693 (Ala. Civ. App. 1998), the Alabama Court of Civil Appeals held that although a letter to the editor written by a police officer addressed a matter of public concern, the potential disruption to the department and on-going investigations outweighed the officer's right to free speech. Therefore, termination of his employment was proper.

The United States Supreme Court has held that a public employee who makes a statement as part of his official duties (in this case, an assistant district attorney who wrote an official memo objecting to pursuing a prosecution) is not speaking as a citizen and thus is not protected by the First Amendment from employer discipline for his statement. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In another case the Eleventh Circuit Court of Appeals held that even if an employee's tasteless and vulgar personal attack on a county commissioner during the public comment time of a meeting of the board of county commissioners was protected speech under the First Amendment, the county's termination of the employee for directly insulting and showing contempt for a county commissioner did not violate the First Amendment. The First Amendment does not require a public employer to tolerate an embarrassing, vulgar, vituperative, personal attack, even if such an attack touches on a matter of public concern; if the manner and content of an employee's speech is disrespectful, demeaning, rude, and insulting, and is perceived that way in the workplace, the public employer is within its discretion to take disciplinary action. *Mitchell v. Hillsborough County*, 468 F.3d 1276 (11th Cir. 2006).

The Eleventh Circuit has also held that speech of a former assistant fire chief who served on city's pension board regarding his disagreement with city's handling of budget and pension issues was made in furtherance of his job responsibilities, and thus, did not constitute protected speech, as required to support employee's First Amendment retaliation claim arising from his termination. The city's interest in avoiding dissention and discord within the fire department outweighed the interests of a city employee. *Moss v. City of Pembroke Pines*, 782 F.3d 613, 2015 WL 1423662 (C.A.11 Fla.2015).

When a public employee sues a government employer for retaliation under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern. Even if a public employee speaks as a citizen on a matter of public concern, his or her speech is not automatically privileged, since the First Amendment interest of the employee must be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its

employees. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (U.S.2011).

Cable Television Franchises

In *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, (1986), a unanimous Supreme Court held that First Amendment rights to freedom of speech are implicated when a city refuses to permit a second cable television company to operate within the city limits. In this case, Los Angeles held an auction to decide which of several cable television companies would be granted an exclusive franchise to provide cable television services to the city's residents. Preferred Communications, Inc. did not participate in the auction, either because it chose not to or because it did not know about the auction. When Preferred Communications requested permission from the Los Angeles Department of Water and Power to lease space on its utility poles in order to run its cables, the department stated that it would not lease the space unless the company could obtain a franchise from the city. Los Angeles refused to grant the franchise because Preferred did not participate in the auction.

Preferred Communications sued, arguing that the furnishing of cable service was a First Amendment right and because the Los Angeles area was large enough to support more than one cable company, the city had violated the company's right to free speech by denying the franchise. The city admitted that Los Angeles was large enough to support more than one cable company, but contended that the physical scarcity of available space on public utility structures and the limits of economic demand for cable service justified the city's decision to restrict access to its facilities.

The Supreme Court held, if the facts as alleged proved to be true, that the First Amendment rights of Preferred Communications had been violated. The Court noted that because cable operators exercise editorial control over what programming they will air, cable television "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers and book publishers, public speakers and pamphleteers."

However, the Court stated that the city could still legally restrict the company's right to free speech if the interests of society, when balanced against the First Amendment right implicated, outweighed the right to free speech, because, in this case, speech is combined with conduct. The Court declined, though, to formulate a standard for the city to use in deciding whether to grant a cable franchise. A concurring opinion stated that such a standard could only be formulated after factual information concerning the case was gathered at trial.

In *Warner Communications, Inc. v. Niceville*, 911 F.2d 634 (11th Cir. 1990), the Eleventh Circuit Court of Appeals

upheld the right of a municipality to operate its own cable company, in part holding that the operation of a municipal cable company did not violate the private provider's First Amendment rights.

Regulation of Adult Businesses

Another First Amendment area in which cities must be careful is the regulation of adult businesses. First Amendment challenges are given priority by the courts. The First Amendment of the United States Constitution requires that a licensing scheme for adult businesses provide applicants challenging a denial of a license with a "prompt judicial determination" of the constitutionality of the denial, as opposed to mere prompt access to judicial review. *Littleton, Colo. v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004). In *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the Supreme Court upheld a zoning ordinance designed to restrict adult businesses to a particular area of the city. However, adult businesses are still protected by the First Amendment which would prohibit a total ban.

The Supreme Court, though, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), concluded that the First Amendment's guarantee of free expression only "marginally" protects nude dancing, and that such expressive conduct is "within the outer perimeters of the First Amendment." In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court noted that an adult use regulation is narrowly tailored "so long as the... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Provided "the means chosen are not substantially broader than necessary to achieve the government's interests, the regulation will not be invalid simply because a court concludes that the government's interest could have been adequately served by some less-speech-restrictive alternative." *Ward* thus seems to expressly reject a requirement that the government utilize the "least restrictive means" or the "least restrictive alternative" in order to meet the narrowly tailored requirement.

Municipalities attempting to regulate adult business generally do so in one of two ways. Either they attempt to control the location and use of these businesses through zoning power, or they use a public nudity ordinance. Each of these ordinances requires meeting different standards to be valid. Although the cases are confusing and somewhat complicated, certain principles can be drawn, at least here in the Eleventh Circuit.

In *Peek-a-boo Lounge of Bradenton v. Manatee County, FL.*, 337 F.3d 1251 (11th Cir. 2003), the Eleventh Circuit Court of Appeals identified a three-part test that must be answered before a zoning adult-use ordinance can be upheld: "first, the court must determine whether

the ordinance constitutes an invalid total ban [which would be impermissible] or merely a time, place and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.”

The court found that a four-part test applies to public nudity ordinances. “According to this test, public nudity ordinances that incidentally impact protected expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government’s interest.”

To pass either type of ordinance, a city must demonstrate, by a record of findings, that such businesses cause some secondary effect, such as increased crime, which requires city regulation. These findings may be based on the experiences of other cities. It is not necessary that the city choose the same method of regulation as was used by the city that made the survey.

In *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), though, the Court stated that this does not mean:

“... that a municipality can get away with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality’s rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.”

Thus, there must be evidence showing what secondary effects the municipality is attempting to avoid. In *Peek-a-boo Lounge*, for instance, the Eleventh Circuit Court of Appeals held that a zoning ordinance that imposed requirements on the physical layout of adult dancing establishments and allowed the county sheriff to search such premises without a warrant violated the First Amendment. The court held that even if the ordinance was a valid time, place and manner regulation that was properly subject to intermediate

scrutiny, the county, when enacting the ordinance, failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the county’s interest in combating secondary effects. While the public entity does not have to conduct its own studies, it must rely on evidence it reasonably believes relevant that is before the entity *at the time the ordinance is enacted*. This evidence must be relevant to the problem the municipality seeks to eliminate.

To accomplish this goal, the ordinance must be “content neutral.” That is, it must be designed to eliminate the secondary effect without unnecessarily limiting alternative avenues of expression. The goal must be to regulate the time, place and manner of expression rather than to completely eliminate adult businesses from the community. As long as the ordinance is content neutral, however, the actual intent of the municipal governing body is irrelevant.

For instance, in *Trop, Inc. v. City of Brookhaven*, --- S.E.2d ---, 2014 WL 4958232 (Ga.2014), the Georgia Supreme Court held that a City’s sexually-oriented business ordinance did not unconstitutionally infringe on sexually-oriented entertainment club’s free speech rights. The ordinance was content-neutral in light of the city council’s goal of combatting pernicious secondary effects coupled with a lack of evidence to establish improper motive on the part of city council. The ordinance furthered an important governmental interest of attempting to preserve the quality of urban life and reducing criminal activity which was unrelated to any desire to suppress speech, any incidental restriction on speech caused by the ordinance was no greater than essential to further the governmental interests, and the ordinance’s application was narrowly tailored to modes of expression implicated in the production of negative secondary effects, those establishments that provided alcohol and entertainment that required an adult entertainment license.

Newsbox and Newsrack Regulations

In *New York Times v. Lakewood*, 791 F.2d 934 (6th Cir. 1986), and in *Plain Dealer Publishing Co. v. Lakewood*, 794 F.2d 1139 (6th Cir. 1986), two challenges were filed against an ordinance of the city of Lakewood, Ohio, which prohibited the installation of newspaper boxes on city property without paying rent and which forbade the installation of such boxes on private property without the consent of the owner. The city also passed a zoning ordinance designed to prevent the installation of newspaper boxes on residential property.

The court in *Plain Dealer* held that a newspaper does not secure any property rights on city property because of the First Amendment. In addition, the court ruled that newspaper boxes are subject to reasonable zoning ordinances and that placing such boxes on city property without paying rent amounts to a taking of city property. The court felt, however,

that Lakewood's ordinance gave unbridled discretion to the mayor to grant and deny rental permits, and that requiring insurance for the boxes, as Lakewood's ordinance did, was unconstitutional. The Supreme Court affirmed. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

Municipal regulation of news racks is also subject to First Amendment concerns. In *Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993), the Supreme Court held that a city's ban on the distribution of commercial publications through news racks located on public property, while permitting such distribution of noncommercial publications, violated the First Amendment for lack of a reasonable fit between the city's legitimate interests in maintaining safety and aesthetics and its selective method of achieving those interests. The distinction between news racks distributing commercial and noncommercial speech bears no relationship to the city's asserted interests and thus cannot be justified by the lesser First Amendment protection afforded commercial speech. The ban was based on the content of the publications distributed and thus cannot be upheld as a valid time, place or manner restriction on protected speech.

Protection of traffic appears to be a valid governmental interest. In a case similar to news box regulations, the Eleventh Circuit Court of Appeals upheld a municipal ordinance banning tables from public sidewalks as a narrowly-tailored, content neutral regulation. *International Caucus of Labor Committees v. Montgomery, Ala.*, 111 F.3d 1548 (11th Cir.1997).

Sign Ordinances

A town's content-based sign code which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, did not survive strict scrutiny and thus violated the First Amendment. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (U.S.2015). The Court noted that "[t]he Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem." A speech regulation targeted at specific subject matter (i.e. ideological, political, temporary) is content based, and thus subject to strict scrutiny, even if it does not discriminate among viewpoints within that subject matter.

Following *Reed*, the Fourth Circuit Court of Appeals held that a city sign ordinance exempting governmental or religious flags and emblems, but applying to private and secular flags and emblems, and exempting works of art that were unrelated to a product or service but applying to art that referenced product or service was content-based speech restriction, and thus was subject to strict scrutiny in

commercial property owner's action against city challenging ordinance on First Amendment free speech grounds. The ordinance was on its face content based because it applied or did not apply as result of content, that is, topic discussed or idea or message expressed. *Central Radio Co., Inc. v. City of Norfolk, Va.*, 811 F.3d 625 (C.A.4 Va. 2016).

The placement and purpose of signs can also raise concerns. In *McLean v. City of Alexandria*, 106 F.Supp.3d 736, 2015 WL 2097842 (E.D.Va.2015), a federal district court held that a city ordinance prohibiting parking vehicle on any city street for the purpose of displaying the vehicle for sale unconstitutionally restricted commercial speech, as applied to truck owner who wished to park his truck on a city street with a "For Sale" sign in the window. Owner's "For Sale" sign accurately informed the public about lawful activity, and there was no evidence that the ordinance directly advanced city's purported substantial interest in promoting traffic and pedestrian safety and regulating aesthetics.

The *Reed* case has called all previous First Amendment cases regarding sign regulation into question. In a case before the Supreme Court, *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), the Court struck down an ordinance seeking to prohibit all outdoor signs other than on-premise advertising signs.

The ordinance provided certain exceptions, permitting some speech in areas where other speech was prohibited. The Court stated that insofar as the ordinance regulated commercial speech, there was no problem. The ordinance proposed to improve safety and the appearance of the city, which were substantial government interests and directly served those goals. However, under certain specified exceptions, the city chose to allow some noncommercial speech while banning others. This, the Court ruled, is not a permissible time, place and manner regulation.

In a second case before the U.S. Supreme Court, *Member of the City Council of the Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the ordinance prohibited the posting of signs on public property. Taxpayers for Vincent, a group supporting a candidate running for election to the city council, placed campaign ads on utility poles and other public property. City workers routinely removed these signs. The taxpayers filed suit, alleging that the ordinance abridged their freedom of speech.

The Court held that the ordinance was silent concerning any speaker's point of view and evidence revealed that it was applied in an evenhanded manner. The Court stated that the accumulation of signs on public property presented a substantial government interest which was within the power of the city to prohibit.

Further, the Court found no merit in the argument that the property covered by the ordinance should be considered a public forum subject to special First Amendment protection. The Court stated that the mere fact that the government property could be used as a means for communication does not require this use be permitted.

In examining these two cases, it seems clear that an ordinance which proposes to ban all advertising, both commercial and noncommercial, on public property which does not constitute a public forum, is valid. A city ordinance banning signs that displayed electronically-changeable messages that continuously scrolled or flashed was upheld because it was a content-neutral regulation, served substantial government interests, was narrowly tailored and left open reasonable alternative channels of communication. *Naser Jewelers, Inc., v. City of Concord, New Hampshire*, 538 F.3d 17 (1st Cir. 2008). Further, restriction of commercial advertising to specifically enumerated areas of town also seems permissible. The Department of Transportation is prohibited by statute from issuing permits for outdoor advertising signs within 500 feet of one another on the same side of a state highway, as this would be in violation of Section 23-1-274, Code of Alabama, 1975. *State Dept. of Transportation v. Sanford*, 970 So.2d 784 (Ala.Civ.App. 2007)

However, when a city provides an exception for certain types of speech, then it is possible that the ordinance is not content neutral and is invalid. This appears to be the major distinction between these two cases. So, to ban signs, a city must, as in all areas of First Amendment speech, be content neutral not only in the wording of the ordinance, but in the enforcement of it as well.

This point is exemplified in the case of *Ladue, Mo. v. Gilleo*, 512 U.S. 43 (1994), where the Supreme Court held invalid a municipal ordinance designed to protect valid governmental interests in aesthetics by barring homeowners from displaying any signs on their property except identification, for sale and safety warning signs, while permitting businesses, churches and nonprofit agencies to erect signs not permitted at residences. Again, the ordinance was not content neutral and, therefore, was unconstitutional.

In another case from the Eighth Circuit Court of Appeals, it was held that an ordinance imposing durational limits on political signs and holding the candidates liable for violations violates the First Amendment. *Whitton v. Gladstone, Mo.*, 54 F.3d 1400 (8th Cir. 1995).

While these conclusions appear to still be consistent with the *Reed* decision, the League urges municipal officials to correct provisions of their sign ordinances that might be construed as content-based, and be consistent in their application.

Parades

Parades, rallies and marches are concerns for municipal officials. They may require closing streets, erecting decorations and clean up. Security is always an issue. Municipal officials frequently must confront the conflicting issues of allowing a specific group to present possible unpopular views in a public arena versus protecting the public safety. While many parades are peaceful, the prospects of a planned neo-Nazi or Ku Klux Klan rally raises security problems that aren't present at most Christmas and homecoming parades.

A case in point is *Handley v. Montgomery*, 401 So.2d 171 (Ala. Crim. App. 1981), *cert. denied*, 401 So.2d 185 (Ala. 1981). In this case, a Klan group planned a march from Selma to Montgomery. In order to comply with Montgomery's parade ordinance, a permit had to be issued by the city council. The group missed the deadline for placing their request on the council agenda. Federal courts refused to grant a temporary restraining order to allow the parade to proceed.

Despite the fact that no permit was issued, a group of marchers entered the city's police jurisdiction on Saturday, August 11, 1979. They were stopped by police and told that they could not march without a permit. They were allowed to disperse. The next day, 200 marchers began parading. The defendants were arrested.

According to the stipulated facts presented at trial, Montgomery required the issuance of parade permits to "provide for the safety of its citizens, not only those who parade, but also those along the parade route." In order to make plans for traffic and crowd control, and for general public safety, the city needed advance notice of parades. Therefore, the city required parade applicants to request permission to appear on the agenda by noon, Friday, preceding the next regular council meeting on Tuesday. The city contended that it was not trying to control the content of speech, pointing to the fact that two other Ku Klux Klan groups had been issued parade permits during the year.

The city also noted that the police needed advance notice of Klan marches because weapons may be involved. Advance police intelligence reports of the planned march indicated there would Klansmen with "ax handles, pick axes, hoe handles, bows and arrows, shotguns, and rifles." Also, a Klansman had been quoted as saying, "We will destroy the enemy on our march to the capitol of Montgomery, Alabama."

The defendants argued that the ordinance was an unconstitutional prior restraint. The court disagreed, stating, "It is uncontroverted that a municipality must rightfully exercise a great deal of control in the use of its public streets and sidewalks in the interest of traffic regulation and public safety." The court noted that parade regulations are

not per se unconstitutional, even though they impinge on First Amendment rights. The government, though, bears the burden of justifying its restrictions.

The court felt that Montgomery had ample reasons for requiring potential marchers to timely request a parade permit. The court noted that the ordinance did not invest officials with unbridled discretion, and that the council was required to issue a permit upon receiving a proper application. Additionally, the ordinance in question required the council to “administer this section ... free from improper or inappropriate considerations and from unfair discrimination with a systematic, consistent and just order of treatment ...” Therefore, the court held that the ordinance was not facially invalid.

After disposing of this question, though, the court next had to address whether the ordinance had been properly applied under the facts of this particular case. A facially valid ordinance may still be applied in an unconstitutional manner. Because of the potential for violence, the court held that application of the ordinance to these facts was proper. The court stated that “arrangements had to be made to prevent jeopardizing public safety and welfare; any contrary evaluation would demonstrate a reckless indifference to the value of human life and public property.” Montgomery’s ordinance required a minimum notice of four day’s before a planned demonstration. The maximum time that might elapse would be 11 days. The court, therefore, felt that the time required by the city for issuing the permit and preparing for the parade was reasonable.

How much advance notice of a planned parade or march may a municipality require? In a presentation to the 1994 New York State Conference of Mayors and Municipal Officials titled “Use of Municipal Property: First Amendment Implications,” Barbara J. Samel points out that “The notice required to get the permit cannot be excessive; a 24-hour notice period and a 10-day notice period have been upheld by the courts. A law which required 20 day notice was held unconstitutional.”

Selected Court Decisions

Note: These summaries are not intended as a substitute for reading the decision itself.

- The United States Supreme Court has held that a municipal government may not retaliate against independent contractors or regular suppliers of products for their campaign stances or opinions. In this case, a wrecker company was removed from a city rotation list because the owner of the company refused to contribute to the mayor’s re-election campaign. *O’Hare Truck Service, Inc. v. Northlake*, 518 U.S. 712 (1996).
- In *Boerne, Texas v. Flores*, 521 U.S. 507 (1997),

the Supreme Court held that the Religious Freedom Restoration Act of 1993 exceeds Congress’ power, thus allowing a municipality to deny a building permit to a church based on historic preservation grounds.

- In *Duffy v. Mobile*, 709 So.2d 77 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals held that a noise ordinance which prohibited noise that was plainly audible from a distance of 50 feet was unconstitutionally broad.
- In *Mobile v. Weinacker*, 720 So.2d 953 (Ala. Civ. App. 1998), the Alabama Court of Civil Appeals held that Mobile’s sign ordinance was unconstitutional because it was vague and ambiguous and provided review boards with unbridled discretion.
- In *Moore v. Montgomery*, 720 So.2d 1030 (Ala. Crim. App. 1998), the Alabama Court of Criminal Appeals upheld the City of Montgomery’s distance-based noise ordinance against a constitutional challenge that the ordinance was vague, unreasonable, and overly broad.
- The Supreme Court held that a public indecency ordinance that makes it a summary offense to knowingly appear in a public place in a “state of nudity,” defining a “public place” to include “places of entertainment, taverns, restaurants, [and] clubs,” is a content neutral regulation that does not violate the First Amendment. *Erie, Pa. v. Pap’s A.M.*, 529 U.S. 277 (2000).
- The Supreme Court held that Chapter 2 of the 1981 Education Consolidation and Improvement Act, which channels federal funds to local education agencies to acquire, for use in public and private schools, instructional and educational materials has a secular purpose and does not have the effect of advancing religion, and therefore does not violate the First Amendment’s Establishment Clause. *Mitchell v. Helms*, 530 U.S. 793 (2000).
- The Supreme Court held that a public school district’s policy authorizing high school students to vote on whether to include a student delivered “invocation” or “message” at football games, and, if so, to elect a student to deliver it involves state sponsored religious speech rather than private speech and results in coerced participation of those present at games in religious exercise is in violation of the First Amendment’s Establishment Clause. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
- The Eleventh Circuit Court of Appeals held that a public school does not violate the establishment clause when it allows high school seniors to vote on whether to have opening and closing messages at a graduation ceremony.

Additionally, it is acceptable for the students to elect a student speaker whose message may not be reviewed by school officials, because this lacks state control over content, and therefore does not foster state sponsored religious speeches in violation of the Establishment Clause of the U.S. Constitution, First Amendment. *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001).

- The Eleventh Circuit Court of Appeals has held that a residence equipped with cameras through which paying Internet subscribers can view the activities of the residents who are paid to live in the house is not subject to a zoning ordinance that defines adult businesses as those which offer adult entertainment “to members of the public.” *Voyeur Dorm LC v. Tampa, Fla.*, 265 F.3d 1232 (11th Cir. 2001).
- A lower court decision invalidated, at the summary judgment stage, a municipal ordinance that prohibited more than one adult entertainment business in the same building or structure, on the grounds that the city failed to present evidence upon which it could reasonably rely on to demonstrate a link between multiple-use adult establishments and negative secondary effects, is reversed and remanded for further findings. *Los Angeles v. Alameda Books Inc.*, 535 U.S. 425 (2002).
- A municipal ordinance that makes it unlawful to engage in noncommercial door-to-door solicitation without a permit violates the First Amendment. *Watchtower Bible & Tract Society of New York v. Stratton, Ohio*, 536 U.S. 150 (2002).
- The city’s policy of not allowing pawnshops and other types of business to advertise on city bus benches was reasonable, and therefore, did not violate the pawnshop’s First Amendment rights; the city feared that allowing “less desirable” businesses to advertise on bus benches might inhibit “more desirable” business from buying advertising on the benches, thus negatively affecting revenue, and pawnshop had numerous other avenues in which to advertise. *Uptown Pawn and Jewelry v. Hollywood, Fl.* 337 F.3d 1275 (11th Cir. 2003).
- The definition of the term “weed” in a municipal ordinance making it a public nuisance to have weeds over 12 inches in height on private property was not unconstitutionally vague nor did the ordinance violate due process. Further, the defendant’s garden did not have sufficient communicative elements to bring it within the protections afforded by the First Amendment. Finally, enforcement of the ordinance did not constitute

an unlawful taking. *Montgomery v. Norman*, 816 So.2d 72 (Ala. Crim. App. 1999).

- A municipal ordinance banning commercial advertising on a city’s navigable waters did not violate advertising a boat owner’s First Amendment rights where the city passed the ordinance to preserve the natural beauty of the coastline and to prevent the creation of a carnival-type atmosphere; although the advertising was protected commercial speech, the aesthetic value of the coastline for a city that is heavily dependent on tourism could not be overstated and there was no narrower ban on waterfront advertising that would effectively avoid the problem. *Ex parte Walter v. Gulf Shores*, 829 So.2d 186 (Ala. 2002).
- A governmental entity, when acting in a proprietary capacity under a statutory mandate to be self-sufficient, may, without violating the First Amendment, charge fees for speakers’ use of distribution facilities in a non-public forum that exceed administrative costs tied to such use. *Atlanta Journal & Constitution v. Atlanta Dept. of Aviation*, 322 F.3d 1298 (11th Cir. 2003).
- A city policy requiring all persons wishing to participate in a protest near a military base to submit to a mass metal detector screening at a checkpoint blocks away from the actual protest site violates the protestor’s right to be free from unreasonable searches and seizures under the Fourth Amendment and their First Amendment free speech rights. *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004).
- A municipal ordinance prohibiting political demonstrations by five or more persons without a permit and requiring permit applicants to furnish indemnification in a form satisfactory to the municipal attorney violates the First Amendment to the United States Constitution both as a content based speech restriction that is not narrowly tailored to advance a legitimate interest and as a measure that confers standardless discretion on the municipal attorney to accept or reject indemnification agreements. *Burk v. Augusta-Richmond Co., Ga.*, 365 F.3d 1247 (11th Cir. 2004).
- A state law requiring public disclosure of the names and addresses of signers of referendum petitions in general does not facially violate the First Amendment freedoms of speech or association. *John Doe No. 1 v. Reed*, 130 S.Ct. 2811 (U.S. 2010)
- A statute restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors and forbidding drug manufacturers from using such information to market

their products violates the First Amendment's Free Speech Clause. The First Amendment directs courts to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (U.S. 2011).

- A law prohibiting the sale or rental of “violent video games” to minors was unconstitutional where the state failed to show either that the law was justified by a compelling government interest or that law was narrowly drawn to serve that interest. While states no doubt possess legitimate power to protect children from harm, that power does not include a free-floating power to restrict ideas to which children may be exposed. Constitutional limits on governmental action apply, even when protection of children is the object. *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729 (U.S. 2011).
- Lies about having received military awards may be speech protected by the First Amendment. *U.S. v. Alvarez*, 132 S.Ct. 2537 (U.S. 2012).
- A Montana state law providing that a “corporation may not make an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party” violated First Amendment political speech rights. *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (U.S. 2012).
- A state campaign finance law requiring groups who spent money to influence elections to form political committees subject to disclosure requirements did not violate the First Amendment in ballot issue elections. *Worley v. Florida Secretary of State*, --- F.3d ----, 2013 WL 2659408 (11th Cir.2013).
- Alabama’s ballot access laws did not violate First Amendment associational rights. *Stein v. Alabama Secretary of State*, 774 F.3d 689 (C.A.11 2014)
- A municipal employee’s subpoenaed testimony regarding fraudulent activity by another employee is inherently citizen speech protected by the First Amendment. *Lane v. Franks*, --- S.Ct. ----, 2014 WL 2765285 U.S. 2014.
- Business of tattooing is protected by the First Amendment as speech, to the same extent that the tattoo itself is protected. City’s denial of the tattoo artist’s application for special-use zoning permit to open a tattoo parlor violated the First Amendment. First Amendment protection of tattoos, as speech, does not mean that cities and states cannot regulate tattoo

parlors with generally applicable laws, such as taxes, health regulations, or nuisance ordinances. *Jucha v. City of North Chicago*, --- F.Supp.2d ----, 2014 WL 4696667 (N.D.Ill.2014).

- A municipal ordinance prohibiting picketing or protesting within 50 feet of any dwelling unit did not, on its face, violate free speech rights, but an ordinance allowing city officers to enforce a “no loitering” sign posted by a person residing in a dwelling unit on which the sign was posted violated, on its face, free speech rights. *Bell v. City of Winter Park, Fla*, 745 F.3d 1318, (C.A.11 Fla. 2014).
- Protesters were not likely to succeed on claim that city ordinance designed to create an area surrounding health care facilities that was quiet and free from shouting or other amplified sound violated their First Amendment right to free speech, and thus preliminary injunction barring enforcement of the ordinance was not warranted, where ordinance was content neutral, city had a substantial interest in protecting citizens and the area surrounding health care facilities from unwelcome noise, ordinance was narrowly tailored to target only loud, raucous, or unreasonably disturbing noise, and ordinance left open robust alternative channels of communication. *Pine v. City of West Palm Beach, FL*, 762 F.3d 1262 (C.A.11 Fla. 2014).
- Massachusetts statute establishing buffer zone at abortion clinics violated free speech guarantees. *McCullen v. Coakley*, 573 U.S. 464 (U.S. 2014)
- North Carolina statute making it a felony for registered sex offenders to access social networking websites was not narrowly tailored to serve significant government interest in protecting children from abuse, and therefore, violated First Amendment speech rights of offenders; various social networking websites were principal sources for knowing current events and checking advertisements for employment, such websites were the modern public square, and convicted criminals could receive legitimate benefits in accessing the websites. *Packingham v. North Carolina*, 137 S.Ct. 1730 (U.S. 2017).

48. Control of Solicitors and Peddlers

In 1933, in the case of *Green River v. Fuller Brush Co.*, 65 F.2d 112 (1933), the U. S. Court of Appeals for the Tenth Circuit upheld the validity of the following ordinance:

“The practice of going in and upon private residences in the City [Town] of _____ by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited to do so by the owner or owners, occupant or occupants of said private residence for the purpose of soliciting orders for the sale of goods, wares, and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.”

The court held that the municipalities in Wyoming had the power to determine what activities constitute nuisances and to punish perpetrators.

Following this decision, many municipalities around the country, including here in Alabama, adopted Green River type ordinances to regulate solicitors within the municipal limits. Many of these ordinances tended to draw a distinction between commercial and noncommercial speech, though, based on court rulings that noncommercial solicitation generally involved the promotion of religious or political ideas and was therefore protected by the First Amendment to the U.S. Constitution. In some cases, all noncommercial solicitation was allowed, while commercial speech was prohibited.

Commercial speech carried with it the baggage of merely promoting a business objective as opposed to attempting to advance a political or religious purpose. Courts which analyzed commercial speech regulations generally refused to extend First Amendment protection. *See, e.g., Breard v. Alexandria*, 341 U.S. 622 (1951). Thus, municipalities enjoyed greater latitude when regulating purely commercial speech, including regulations placed on commercial solicitors.

In recent years, views on the First Amendment and commercial speech have changed, however. *See, e.g., Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993). For example, in *Central Hudson Gas & Electric v. Public Services Commission of New York*, 447 U.S. 557 (1980), the U.S. Supreme Court held that commercial speech is protected by the First Amendment if it concerns lawful activities and is not misleading. To regulate commercial speech, a government must assert a substantial governmental interest in the regulation and show that its regulation

materially advances that interest. Some courts have gone even further and held that a municipality must use the least restrictive means of achieving the governmental objective.

But does this mean that solicitation cannot be regulated by a municipality? Transient solicitors often travel in groups under the guidance of a glib leader who is armed with a legal-looking document which says that they are not subject to local regulation. Often these documents quote Supreme Court cases in such a manner as to mislead and confuse the reader. In some cases, local officials are led to believe that they will be subject to civil liability for enforcing any ordinance designed to regulate such activity.

Attempts by solicitors to challenge the right of municipalities to regulate solicitation are misguided, however. All types of solicitation, whether commercial, religious or political, are subject to reasonable regulation by municipalities. *Larsen v. Valente*, 456 U.S. 228 (1982). It is fairly clear, though, that courts now consider any solicitation ordinance as a restriction on First Amendment rights. This means that any regulation must meet certain criteria in order to be valid.

This article examines a number of court decisions regarding solicitation and provides guidance on how to properly draft an ordinance regulating this activity. Recent developments in this area may require officials to re-examine their ordinances and consider amendments in order to bring them into compliance with constitutional requirements.

Legitimate Goals

Although courts have recognized substantial First Amendment protection for door-to-door solicitors, *Martin v. Struthers*, 319 U.S. 141 (1943), the U.S. Supreme Court has upheld the right of a local jurisdiction to regulate solicitation so long as the regulation is in furtherance of a legitimate municipal objective. *See, e.g., Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

Municipal officials should be able to clearly articulate the objective behind the ordinance if it is questioned. Peddling, soliciting and door-to-door canvassing raise legitimate public protection concerns for municipal citizens and officials. In the interest of public protection, municipalities have the power to regulate persons engaged in these activities. To be valid, though, regulations must be substantially related to furthering some legitimate governmental objectives.

The two most frequently cited goals of solicitation ordinances are protecting the privacy of citizens, including the quiet enjoyment of their homes, *Carey v. Brown*, 447

U.S. 455, 471 (1980), and the prevention of crime, *Wisconsin Action Coalition v. Kenosha*, 767 F.2d. 1248 (7th Cir. 1985). In the right circumstances, courts have generally upheld solicitation ordinances on these grounds. While other legitimate municipal objectives, such as protecting citizens from fraud and other deceptive practices, may well exist, the two mentioned here are perhaps most frequently relied upon by municipal officials seeking to justify a properly drafted solicitation ordinance.

Courts have upheld ordinances requiring solicitors to register with the city, to obtain identification cards, and allowing citizens to forbid solicitation at their residences by posting a sign, at least where the ordinances leave ample alternative channels of communication for solicitors by allowing them to have contact with those residents who want to hear their message. When a city goes beyond this, though, by outlawing noncommercial solicitation altogether or by being overly restrictive in terms of the hours during which solicitation is allowed (e.g., 9 a.m. to 5 p.m.) some courts have invalidated the ordinances. Part of the rationale for overturning these ordinances is that the city has unnecessarily substituted its judgment for that of its citizens. *See, Citizens for a Better Environment v. Village of Olympia Fields*, 511 F.Supp. 104 (N.D. Ill. 1980).

Many of the challenges to municipal solicitation ordinances have come from religious groups claiming their right to freely exercise their religion has been taken away. The general rule is that regulation in this area “must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly.” *Thomas v. Collins*, 323 U.S. 516, 540-541 (1945).

For instance, in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the United States Supreme Court was presented with a state statute requiring all groups desiring to solicit or distribute materials at a state fair to do so only from a fixed location. Space at the fairgrounds was rented on a first-come, first-served nondiscriminatory basis. The Krishnas sought to have this ordinance struck down so they could mingle with the crowd at the fair and distribute their literature. The state argued that its interest was in safety and ensuring the orderly movement of patrons at the fair. The Court upheld this statute as a valid time, place and manner regulation because it did not discriminate against the Krishnas. In addition, the Court noted that the statute allowed members of groups to talk with patrons at the fair as long as no funds or literature changed hands.

When these ordinances have been struck down, they generally censored a group or allowed one person in the government absolute discretion to decide which groups received permits to solicit and which groups did not. *See, International Society for Krishna Consciousness of*

Houston, Inc. v. Houston, 689 F.2d 541 (5th Cir. 1982). Even where funds are being solicited for a religious purpose, if the government has a compelling interest in the reasonable regulation of a protected First Amendment activity, a narrowly-drawn regulation that furthers that interest will be upheld. However, not all regulations will be upheld. For example, a resolution of an airport commission banning all First Amendment activities within the airport terminal was held facially unconstitutional in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). And, in *International Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), the U.S. Supreme Court held that a regulation banning repetitive solicitation of funds inside a terminal was reasonable.

The U.S. Supreme Court re-examined the issue of municipal regulation of solicitation in *Watchtower Bible & Tract Society of New York v. Stratton, Ohio*, 536 U.S. 150 (2002). In this case, the Court struck down a permit requirement for door-to-door solicitation and muddled the waters surrounding this already murky issue. The Court recognized that door-to-door solicitation is entitled to full First Amendment protection and that this type of solicitation is important for the dissemination of ideas, especially for those with little or no money. The Court found that to withstand a First Amendment challenge, a solicitation ordinance must find the appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve. The Court held that the ordinance in this case did not further those interests. Here, the government sought to prevent crime and fraud. The Court found that this ordinance did not accomplish these goals, at least so far as noncommercial communication was concerned. The Court also found that the ordinance overly burdened noncommercial communication.

The impact of this case on local governments remains to be seen. Lower court cases since *Watchtower Bible* have found ways to distinguish this case.

For instance, in *Association of Community Organizations for Reform Now v. Town of East Greenwich*, 453 F. Supp. 2d 394 (D. R.I. 2006), a federal district court in Rhode Island upheld a municipal ordinance requiring door-to-door solicitors to obtain a permit and comply with a 7:00 p.m. curfew, arguing that the ordinance in this case was more narrowly drawn than the one in *Watchtower Bible* largely on the grounds that the regulation in question applied only to money solicitors. The court was also persuaded by other factors, including the fact that grant was automatic once the requested information was provided; the requirement that background of solicitors and their sponsoring group be provided furthered important municipal interest in protecting residents from fraud, as it helped uncover solicitors with criminal records; the ordinance discouraged prospective

burglars posing as canvassers; and the regulation imposed delays in grant of permit that were not burdensome.

City's anti-panhandling ordinance, which prohibited oral requests for immediate payment of money, but permitted signs requesting money and oral requests to send money later, was content-neutral, and thus did not violate free speech rights. Ordinance did not regulate speech by pitch used, and it was indifferent to requester's stated reason for seeking money, or whether requester stated any reason at all. *Norton v. City of Springfield, Ill.*, 768 F.3d 713 (C.A.7 Ill.2014).

Likewise, a city's ordinances prohibiting "aggressive" panhandling including "obviously threatening behavior" and prohibiting the use of traffic islands and roadways for purposes other than crossing roads, entering or exiting vehicles, or "other lawful purposes" were content-neutral and targeting behavior and circumstances that the city may be concerned about even if the behavior was largely associated with certain sorts of messages. *Thayer v. City of Worcester*, --- F.3d ----, 2014 WL 2782178 (C.A.1 Mass. 2014).

And, in *Green v. City of Raleigh*, 523 F.3d 293 (4th Cir. 2008), the Fourth Circuit Court of Appeals upheld a city ordinance that required picketers to notify the city beforehand of their intent to picket.

While implying that local governments can place more extensive regulation on commercial communication than on communication that is made for political or religious purposes, the Court fell far short of endorsing this concept. In fact, other cases have struck down similar ordinances on First Amendment grounds.

In *Planet Aid v. City of St. Johns, MI*, 782 F.3d 318 (C.A.6 Mich.2015), the Sixth Circuit Court held that a city ordinance banning outdoor, unattended charitable donation bins was a content-based regulation of charitable speech, so that strict scrutiny applied to First Amendment challenge to ordinance. The ordinance did not ban or regulate all outdoor, unattended bins, but only those bins that were intended to accept donated goods which carried a message about charitable solicitation and giving. The ordinance did not stand up to strict scrutiny, and thus, violated the First Amendment right of free speech.

And, in *Watchtower Bible and Tract Society of New York, Inc. v. Municipality of San Juan*, 773 F.3d 1 (C.A.1 Puerto Rico 2014), the First Circuit Court upheld an injunction requiring some Puerto Rico municipalities to give Jehovah's Witnesses access to gated communities along public streets. The court held that Puerto Rico's Controlled Access Law (CAL), which allowed municipalities to authorize neighborhood associations to erect gates enclosing public streets, violated First Amendment rights of religious tract distributors who sought access to those streets for

protected speech activities. The district court's remedial scheme, requiring that unmanned gated communities allow distributors access to public streets through issuance of access codes or keys, upon distributors' disclosure of their purpose and identities, was narrowly tailored to strike a balance between the distributors' significant interest in accessing public streets to carry out their ministry and the government's significant interest in the security of residents. Such scheme allowed distributors access to gated communities, the sharing of keys was not especially onerous to distributors, and scheme did not impose undue administrative burdens upon municipalities.

How far municipalities can go in regulating any door-to-door solicitation is still unclear. At what point does door-to-door activity rise to the level that would allow the municipality to require a permit? The League will continue to follow this area of law and update you as additional litigation occurs.

Time, Place and Manner Restrictions

Under the First Amendment, reasonable time, place and manner restrictions will be upheld as long as the restriction is narrowly tailored to serve a significant government interest and provide alternative channels of communication to exist. *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983).

In order to be valid, a solicitation ordinance must limit itself to placing reasonable time, place and manner restrictions on solicitors. These restrictions must be:

1. content-neutral;
2. serve a legitimate governmental objective;
3. leave open ample alternative channels of communication; and
4. be narrowly tailored to serve the governmental objective.

See, City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1552 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987).

Restrictions on Time

Municipalities often want to restrict the hours when solicitors may be active. Courts, though, disagree on what time restrictions are valid under the First Amendment. This makes drafting a valid ordinance difficult. The federal circuits are divided on even what standard of review to apply to these regulations. On one hand, the Third Circuit held that a town ordinance barring door-to-door canvassing after daylight hours was a reasonable time, place and manner restriction of speech that furthered the town's governmental interests in preventing crime and protecting the privacy of its residents, based on an "ample alternative channels of communication" standard. *See, Pennsylvania Alliance for*

Jobs & Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984). In contrast, the Eighth Circuit has adopted a “less restrictive means” standard. *See, Association of Community Organization for Reform Now v. Frontenac*, 714 F.2d 813 (8th Cir. 1983). There is also the “least restrictive means” standard, which has been used by the Second Circuit. *See, New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232 (2d Cir. 1982).

In *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (1986), the Third Circuit held that the defendant town’s failure to show that ordinances barring door-to-door solicitation during evening hours were precisely tailored to serve the town’s governmental interests in preventing crime, which precluded a finding that the solicitation ordinances in question were reasonable time, place and manner restrictions.

In *Wisconsin Action Coalition v. Kenosha*, cited above, the Seventh Circuit invalidated a city ordinance prohibiting charitable, religious and political solicitation between 8 p.m. and 8 a.m. While the court acknowledged the conflict among the circuits and expressed some preference for the “less restrictive means” standard, it decided that the impugned ordinance failed all of the review standards mentioned and it was not necessary to choose among them.

In *Watseka v. Illinois Public Action Council*, cited above, the U.S. Supreme Court affirmed without opinion a Seventh Circuit ruling which held that a city ordinance limiting door-to-door soliciting to the hours between 9 a.m. and 5 p.m., Monday through Saturday, violated the First Amendment. The Seventh Circuit held that the ordinance was not narrowly tailored to achieve a legitimate municipal interest in preventing fraud and protecting the privacy of residents. The court held that the municipality could prevent fraud by licensing solicitors and protect privacy by having homeowners post signs outside their homes stating that they did not wish to be disturbed. Also, the court ruled that the ban on solicitation during the hours from 5 p.m. and 9 p.m., which was the time period requested by the solicitors, was not sufficiently connected to the city’s interest in preventing crime.

The court found that by being more restrictive than the legitimate privacy and quiet enjoyment concerns its citizens demanded, the municipality had suppressed the protected speech of the solicitors. Further, the court concluded that the city had subordinated the First Amendment rights of those residents who would be willing recipients of the solicitors’ message during evening hours to the nuisance concerns of residents who did not wish to be disturbed during the same hours. In voiding the ordinance, the court noted that “[e]ven Girl Scouts will have a difficult time selling their cookies by 5 p.m.” The court also reasoned that the city failed to offer evidence that its other legitimate objective, crime prevention

could not have been satisfactorily served by enforcing laws against trespass, fraud, burglary, etc., or by merely enforcing the registration requirements for solicitors that the city had already adopted.

But, one court held that a city’s ordinance prohibiting persons from remaining in a public square between the hours of 10:00 p.m. and 5:00 a.m. without a permit did not violate the First Amendment guarantee of free speech. The ordinance was content-neutral, since it applied to all persons regardless of their message or activities, advanced the significant government interests of protecting the safety of those wishing to use the square after hours and protecting the city’s investment in that property, it was narrowly tailored, since it allowed unfettered and unrestricted access when the curfew was not in effect; and it left open alternative avenues of communication because it excluded adjacent streets, sidewalks, and bus shelters. *Cleveland v. McCordle*, --- N.E.3d ---, 2014 WL 2210652 (Ohio 2014).

Ordinances restricting the time solicitors can be active must be supported by compelling evidence that the time restrictions are needed to prevent criminal activity by persons claiming to be solicitors. Officials must be careful to make sure that the time restrictions they place on solicitors are valid under the circumstances. Courts have held that ordinances that fail to permit some evening activity by solicitors are not sufficiently tailored to serve the municipal interests. *Association of Community Organizations for Reform Now v. Frontenac*, *supra*.

Restrictions on Place

In addition to time restrictions, cities may also use their police power to decide where solicitors and peddlers may carry out their activities. Such regulations receive a higher degree of judicial scrutiny if they seek to restrict solicitation or peddling in a public forum than if they attempt to do so in a private forum. For example, a post office sidewalk, although set back from the street and parallel to a municipal sidewalk, is not a traditional public forum. Therefore, a United States Postal Service regulation prohibiting all solicitation on postal premises did not violate the First Amendment when used to bar non-disruptive political solicitation on a post office sidewalk. *United States v. Kokinda*, 497 U.S. 720 (1990).

Thus, a question arises as to which areas are generally considered public forums and which are not. Some courts that have ruled in cases involving canvassers and solicitors have found non-public forums to include:

- the doorways to private homes, *Pennsylvania Alliance for Jobs & Energy v. Council of Munhall*, 743 F.2d 182 (3d Cir.1984),
- residential areas of university campuses, *Chapman v.*

Thomas, 743 F.2d 1056 (4th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985), and

- even state-owned sports complexes, *International Soc. For Krishna Consciousness, Inc v. New Jersey Sports & Exposition Authority*, 691 F.2d 155 (3d Cir. 1982).

Public forums, on the other hand, have been found in such places as:

- airports, *Fernandes v. Limmer*, 663 F.2d. 619 (5th Cir. 1981), *rehearing denied*, 669 F.2d. 729 (5th Cir. 1982), and *cert. denied*, 458 U.S. 1124 (1982), and
- the sidewalks or parking lots of hospitals, *Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital Dist.*, 670 F. 2d 629 (5th Cir. 1982), *rehearing denied*, 680 F.2d 1391 (5th Cir. 1982). and *cert. denied*, 459 U.S. 1052 (1982).

Ordinances that regulate solicitation on streets, public thoroughfares and certain areas of town will be upheld if they are reasonable. *See e.g., Good Humor Corp. v. Mundelein*, 211 N.E.2d 269 (Ill. 1965). Government at various levels can also regulate solicitation on sidewalks, in front of businesses, in railroad stations, in airports and in other public places so long as such regulations do not unreasonably infringe on First Amendment rights. *See, Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *International Society for Krishna Consciousness v. Griffin*, 437 F.Supp. 666 (W.D. Pa. 1977); *Slater v. El Paso*, 244 S.W.2d 927 (Tex. Civ. App. 1951); *Wade v. San Francisco*, 186 P.2d 181 (Cal. App. 1947). A municipal ordinance banning the sidewalk sale of all merchandise is a valid time, place and manner restriction that is not invalid under the First Amendment. *One World One Family Now v. Honolulu*, 76 F.3d 1009 (9th Cir. 1996). The Eleventh Circuit Court of Appeals has upheld a municipal ban against tables placed on sidewalks. *International Caucus of Labor Committees v. Montgomery, Ala.*, 87 F.3d 1275 (11th Cir. 1996).

In *Heffron v. International Society for Krishna Consciousness*, the Supreme Court held that a State Fair rule restricting distribution and sale of written materials and solicitation of funds to booths rented on a nondiscriminatory first-come, first-served, basis constituted a permissible time, place and manner restriction on a religious group's First Amendment right to perform ritual distribution of literature and solicitation of contributions.

Solicitation may be restricted on the premises of schools and colleges, because there is no absolute right to use all parts of the school building or its immediate environs for an unlimited expressive purpose. *Grayned v. Rockford*, 408 U.S. 104 (1972); *Healy v. James*, 408 U.S. 169 (1972). Also, in a case upholding a ban imposed by a state

university on commercial solicitation in dormitory rooms, the Supreme Court found that governmental restrictions upon commercial speech need not be the absolute least restrictive means available to achieve the desired end. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). Rather, the restrictions require only a reasonable "fit" between the government's ends and the means chosen to accomplish those ends.

And, in *ISKCON Miami, Inc. v. Metropolitan Dade County*, 147 F.3d 1282 (11th Cir. 1998), the Eleventh Circuit Court of Appeals held that Miami regulations banning the sale of literature and solicitation of money inside and outside of its terminal facilities did not violate the First Amendment. The Eleventh Circuit Court of Appeals has also upheld a municipal ordinance banning tables from public sidewalks as a narrowly-tailored, content neutral regulation. *International Caucus of Labor Committees v. Montgomery, Ala.*, 111 F.3d 1548 (11th Cir. 1997).

Restrictions on the Manner of Soliciting and Licensing

Municipalities may also place some restrictions on the manner in which soliciting activities are conducted. This is frequently done through licensing requirements. A city's authority to require persons to register with the local police and obtain a permit or license before engaging in business activities within local jurisdiction can be applied to solicitors and peddlers. However, as with other licensing regulations, any ordinance adopted pursuant to that authority must be reasonable. *Collingswood v. Ringgold*, 331 A.2d 262 (N.J. 1975), *cert. denied*, 426 U.S. 901 (1976). Additionally, in the *Watchtower Bible* case noted above, the U.S. Supreme Court indicated that in some instances, these type restrictions may impermissibly infringe on protected First Amendment activities, especially where noncommercial solicitation is involved.

A solicitation ordinance that has been drafted so as to allow a city to use its licensing power to prohibit certain solicitors based upon the content of their message would violate the First Amendment. *Carey v. Brown*, 447 U.S. 455 (1980). However, a city may require persons representing organizations seeking charitable contributions to register with the city and provide certain membership and financial information if the city issues the licenses in a nondiscretionary fashion, and if the regulation is sufficiently narrowly drawn to further legitimate government interests. *International Society for Krishna Consciousness of Houston, Inc. v. Houston*, 689 F.2d 541 (5th Cir. 1982).

Ordinances cannot vest overly broad discretion in licensing officials to issue or deny a solicitation permit. *Schneider v. State*, 308 U.S. 147 (1939). An administrative official may not be empowered with unbridled discretion to determine, for example, the validity of a solicitor's message

and use that determination as a basis for exercising prior restraint on the solicitation by arbitrarily denying a permit. *See generally, Largent v. Texas*, 318 U.S. 418; *Cantwell v. Connecticut*, 310 U.S. 296 (1940). But, an ordinance requiring the filing of a registration statement containing objective information that identifies groups or individuals and makes the issuance of a permit mandatory where the information is furnished is not facially invalid as a restraint on First Amendment freedoms. *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984).

The issue of unguided direction is not the only relevant consideration for the drafter in putting together the licensing provisions of a solicitation ordinance. Other significant items to consider are:

1. **License Fees** - Local governments have been given broad discretion in imposing license fees on solicitors and peddlers. These fees, however, cannot be excessive. Fees charged cannot be prohibitive or confiscatory. Also, the fees cannot place an undue burden on interstate commerce. *See, Moyant v. Borough of Paramus*, 154 A.2d 9 (N.J. 1959); *Shapiro v. Newark*, 130 A.2d 907 (N.J. Super. 1957). A New York court has ruled that a municipal tax on transient retailers who operate at temporary business sites in the municipality improperly discriminates against interstate business in favor of local businesses. *Homier Distributing Co. v. Albany, NY*, 681 N.E.2d 390 (N.Y. 1997).
2. **Use of Funds** - Courts generally disfavor ordinances that specify the uses of solicited funds as a condition for granting a permit. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Supreme Court struck down an ordinance requiring that at least 75 percent of the receipts from charitable solicitations be used only for charitable purposes. The Court held that less restrictive alternatives could be used to achieve the government's legitimate interest in preventing fraud and other deceptive practices.
3. **Bond requirements** - Some cities require commercial solicitors and peddlers to provide a bond to the city. Like any other provision in a solicitation ordinance, bonding requirements must be reasonable and comply with state law. *See, Citizens For a Better Environment v. City Chicago Heights*, 480 F.Supp. 188 (N.D. Ill. 1979); *Holy Spirit Assn. For the Unification of World Christianity v. Hodge*, 582 F. Supp. 592 (N.D. Tex. 1984). In a New Jersey case, for example, an ordinance requiring a surety bond in the amount of \$1,000 was found to bear no reasonable relation to the amount of business done. *Moyant v. Borough of Paramus*. The court decided that the requirement was unduly

oppressive and held that it was an unreasonable exercise of police power.

4. **Exemptions** - Finally, many ordinances contain provisions exempting certain types of solicitors from licensing requirements altogether. In some earlier rulings these exemptions survived constitutional scrutiny. For instance, in *Cancilla v. Gehlhar*, 27 P.2d 179 (Ore. 1933), the Oregon Supreme Court upheld an exemption that applied to farmers who sold products from their own farms. However, in later decisions various sorts of exemption clauses were found unconstitutional. The Washington Supreme Court, in *Larson v. Shelton*, 224 P.2d 1067 (Wash. 1950), struck down a licensing exemption for honorably discharged war veterans as a violation of the Equal Protection Clause of the Fourteenth Amendment. That court also viewed the exemption as a grant of special privileges and immunities. Every drafter of a solicitation ordinance should consider the possibility that selecting a particular type of solicitor for exemption, while perhaps allowable in an extremely limited number of instances, may subject the municipality to Equal Protection, First Amendment and other types of constitutional challenges. Uninvited door-to-door solicitation by one person invades the privacy and repose of the home just as much as by another. However, the *Watchtower Bible* case does seem to permit more restriction on commercial speech, at least if the entity can demonstrate how the restrictions further a legitimate governmental interest.

Regulating Commercial Solicitation

Although the Supreme Court now acknowledges that commercial speech enjoys First Amendment protection, it is protected to a lesser extent than noncommercial speech. This means that commercial speech is subject to greater regulation than is permissible in the noncommercial realm. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 448 (1978).

In *Central Hudson Gas & Electric Corp v. Public Service Comm.*, 447 U.S. 557 (1980), the Supreme Court set out a four-part test for sustaining a government restriction on commercial speech. Under the *Central Hudson* analysis, commercial speech is entitled to First Amendment protection only if it concerns lawful activity and is not misleading. Under this standard, a restriction will be upheld if it meets the following requirements: the governmental interest cited as the basis for the restriction is substantial; the regulation directly advances the governmental interest asserted; and the regulation is not more extensive than is necessary to serve that interest.

Making door-to-door sales through in-person solicitation, assuming the absence of unlawful activity

or misleading information, has been found to include a sufficient element of commercial speech to qualify for First Amendment protection under the first part of the *Central Hudson* standard. See, *Project 80's Inc. v. City of Pocatello*, 876 F.2d 711 (9th Cir. 1988). Also, where local governments have asserted an interest in protecting the privacy of citizens, or crime prevention, as the reasons for enacting restrictions, the federal courts have had little difficulty in accepting these as substantial state interests, at least where evidence of a problem exists. See, *Frisby v. Schultz*, 487 U.S. 474 (1988); *Carey v. Brown*, 447 U.S. 455 (1980); *Watchtower Bible*. As a result, most municipal ordinances that regulate commercial solicitors could satisfy this second part, regardless of the specific wording of the ordinance.

The difficulties that commercial solicitation ordinances have encountered, particularly when they are too broadly worded, have occurred when the courts have applied the third part of the *Central Hudson* test. Ordinances that attempt to ban all uninvited peddling or solicitation in the name of privacy protection and crime prevention become particularly vulnerable when the courts begin to assess the extent to which these permissible governmental interests are directly advanced by such restrictions. A good example is the *Project 80's* case, where the Ninth Circuit noted that “privacy is an inherently individual matter” and it is therefore difficult to violate a person’s privacy unless the person wishes to be left alone. The court went on to criticize the ordinances of Pocatello and Idaho Falls, Idaho, for seeking to make the choice for the resident regarding whether to receive uninvited solicitors by imposing a complete ban on uninvited peddling. The court ruled the ordinances did not protect privacy when applied to residences whose occupants welcome uninvited commercial solicitors. The court did, however, acknowledge at least a marginal relationship between the cities’ interest in reducing crime and the act of prohibiting strangers from summoning residents to their doors.

Some solicitation ordinances that cleared this third hurdle by convincing the court that privacy and crime prevention were directly served by the ordinance’s restrictions, were nonetheless declared invalid because the restrictions went further than necessary to accomplish those ends. The so-called “least restrictive alternative” requirement, the last part of the *Central Hudson* test, has also been used to strike down ordinances that prohibit all uninvited solicitation. In *Project 80's*, the court noted that residents who want privacy can post a notice to that effect and that crime can be prevented by requiring solicitors to register with the city. The court concluded that less restrictive means were clearly available to the cities and that both cities’ ordinances had swept too broadly in attempting to protect privacy for either one to satisfy the

fourth requirement under *Central Hudson*.

The U.S. Supreme Court made a similar point in *Watchtower Bible*, noting the governmental interest in privacy could just as easily have been served by less restrictive means such as requiring citizens not wishing to be disturbed to post “no soliciting” signs on their front doors.

In *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290 (C.A.11 (Fla.), 2017) the court held that cosmetics retailers demonstrated likelihood of success on merits of First Amendment challenge to city’s anti-solicitation ordinance regulating commercial speech, as required for preliminary injunction against enforcement of ordinance against retailers’ use of greeters to solicit in front of stores in city’s pedestrians-only historic district because the ordinance was likely not narrowly tailored to address city’s substantial interest in preventing annoyance and aesthetic harm in historic district, as evidence showed city had numerous and obvious less-burdensome alternatives, such as restrictions it used for charitable solicitations and artists’ solicitations, which city did not even consider.

Further, the cosmetics retailers established a likelihood of success on merits of their First Amendment facial overbreadth challenge to city’s ordinance prohibiting commercial handbills in public right-of-ways in pedestrian-only historic district where retailers’ stores were located, as required for preliminary injunction against enforcement of ordinance because the ordinance prohibited “commercial handbills” in quintessential public forum and employed very broad definition of such handbills, prohibiting any expression by handbills which conveyed “any information about any good or service provided by a business,” so that it extended to noncommercial speech. *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290 (C.A.11 (Fla.), 2017)

Green River Ordinances

This analysis brings us back to the Green River ordinances. Green River ordinances typically declare uninvited door-to-door canvassing to be a nuisance punishable by fine or imprisonment. The Supreme Court upheld this type of ordinance in *Beard v. Alexandria*, 341 U.S. 622 (1951), finding that a municipality’s police power permits reasonable regulation of door-to-door solicitation for purposes of public safety.

Despite the *Beard* ruling, some state courts have invalidated Green River ordinances on state constitutional grounds. For instance, in *Hillsboro v. Purcell*, 761 P.2d 510 (1988), the Oregon Supreme Court struck down on state constitutional grounds an ordinance banning uninvited residential door-to-door solicitation by merchandise peddlers. Also, the Ninth Circuit struck down the two

Idaho ordinances mentioned above which banned uninvited solicitation at residences by merchandise peddlers, on the grounds that the ordinances were neither the least restrictive alternative available to further governmental interests in protecting residential privacy and preventing crime nor were they valid time, place and manner restrictions. It is worth noting, however, that this judgment was vacated and remanded without opinion by the Supreme Court. *Idaho Falls v. Project 80's Inc.*, 493 U.S. 1013 (1990). Additionally, some courts have held that the least restrictive alternative standard applies only where there is a content based attempt to regulate solicitation. *Pennsylvania Alliance for Jobs & Energy v. Council of Munhall*, *supra*. The *Munhall* case required that there be ample means of communication available to solicitors.

Green River ordinances have come under increasing attack. Therefore, a solicitation ordinance drafter should exercise a degree of caution when including a Green River provision in a solicitation ordinance. It is important to remember that commercial door-to-door solicitation or peddling is a lawful business rather than an inherent nuisance. Like any other business that is not considered a nuisance under state law, solicitation does not become a public nuisance merely because the municipality declares it to be so and acts to restrict it accordingly. *McQuillian Mun. Corp.*, Section 24.378 (3rd Ed. Revised 1997).

Roadway Solicitation

Solicitation along a roadway or highway is prohibited by state law unless the municipality or county with jurisdiction over the roadway or highway grants a permit allowing the solicitation in question. AGO 1995-308. Section 32-5A-216(b), Code of Alabama 1975, as amended, states that no person shall stand on a highway to solicit employment, business or contributions from the occupant of any vehicle, nor for the purpose of distributing any article, unless otherwise authorized by official permit of the governing body of the city or county having jurisdiction over the highway.

The Attorney General advised Hon. Al Shumaker on July 6, 1983, that this statute does not give a municipal governing body the authority to allow charitable solicitation on state highways. Many municipalities have adopted ordinances prohibiting charitable solicitation on all streets and roads within the municipality. Obstructions of public highways in order to solicit donations from motorists are prohibited by Section 32-5A-216 of the Code, unless a permit for such solicitation is granted by the local governing body. AGO 1981-216 (to Mayor Jerry C. Pow, February 3, 1981).

At least one court, the Ninth Circuit in *ACORN v. Pheonix*, 798 F.2d 1260 (9th Cir. 1986), has upheld a

municipal ordinance prohibiting persons from standing on the street to solicit contributions from occupants of motor vehicles. The Ninth Circuit has also held that an ordinance banning day laborers from soliciting employment from passing motorists does not violate the First Amendment's Free Speech Clause. *Comite de Jornaleros de Redondo Beach v. City Of Redondo Beach*, --- F.3d ----, 2010 WL 2293200 (9th Cir.2010).

49. Abatement of Nuisances

Section 11-47-117, Code of Alabama 1975, authorizes municipalities to abate all nuisances and to assess the costs against the person who created or maintained the nuisance. Section 11-47-118 of the Code gives municipalities the power to maintain a civil action to abate nuisances.

The statutory definition of “nuisance” is found in Section 6-5-120, Code of Alabama 1975, and reads as follows:

“A ‘nuisance’ is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man.”

The Alabama Supreme Court in *Milton v. Maples*, 235 Ala. 446, 179 So. 519 (1938), announced that the above definition is “but declaratory of the common law ...”

The term “nuisance” involves the idea of continuity or recurrence of the acts causing the injury. *McCalla v. Louisville and Nashville Railroad Co.*, 50 So. 971 (Ala. 1909).

Tuscaloosa v. Standard Oil Co., 221 Ala. 670, 130 So. 186 (Ala. 1930), held that the “bare possibility of injury will not warrant interference against an alleged threatened nuisance.” Even though the operation may be distasteful to the adjoining residents, the mere fact that there may be depreciation or diminution of value to their property is normally unavailing as a ground for equitable relief. *Milton*, 179 So. at 519.

Public and Private Nuisances

The Alabama Code also defines public and private nuisances in Section 6-5-121:

“Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual but must be abated by a process instituted in the name of the state. A private nuisance gives a cause of action to the person injured.”

The court has held that the Attorney General is the proper state official to bring action to abate public nuisances.

The following language is found in *Dozier v. Troy Drive-In Theaters, Inc.*, 265 Ala. 93, 89 So.2d 537, 548 (Ala. 1956):

“If this bill of complaint describes a nuisance, it is public in nature and a court of equity at the suit of the state by the Attorney General may enjoin it, although it is the injunction of criminal conduct which is ordinarily not subject to injunctive relief. This may also be done by cities under certain circumstances... But a private individual cannot have injunctive relief against a public nuisance unless he shows irreparable injury and damage peculiar to him, and such damage must relate to the use and occupancy of property as distinguished from damage to market value of property not used or occupied.”

Abatement by Municipalities

Municipalities are granted authority to abate and enjoin public nuisances under Section 6-5-122, Code of Alabama 1975, which states:

“All municipalities in the state of Alabama may commence an action in the name of the city to abate or enjoin any public nuisance injurious to the health, morals, comfort or welfare of the community or any portion thereof.”

Procedures

It is abundantly clear that municipalities may bring an action to abate a nuisance. Many cities and towns have ordinances proscribing nuisances but the absence of such an ordinance does not affect the right to file a lawsuit.

When allegations of a nuisance are brought before the council, the governing body should conduct a thorough investigation into the complaint. If circumstances warrant, the governing body should then adopt a resolution setting out the facts that justify the declaration of a public nuisance and authorizing the city attorney to file suit in circuit court.

In *Duncan v. Tuscaloosa*, 257 Ala. 574, 60 So.2d 438 (Ala. 1952), the city sought to abate an alleged nuisance created by the raising of chickens in a residential neighborhood. The complaint was tested by demurrer.

The complaint alleged that the brooders gave off foul and offensive odors that materially interfered with the health and comfort of the residents in the adjacent area. The respondent had obtained a permit from the city for the operation, but, at the time of issuance, he was warned that conduct of the business was to be at his own risk and that

if a nuisance developed, the city would take legal action to abate.

The court held, “the city is authorized to maintain an equitable action for the abatement of a nuisance notwithstanding there is not statutory authority therefore... and the statutory definition of a nuisance to which we shall refer is but declaratory of the common law and does not supersede the common law as to the other conditions and circumstances constituting a nuisance under the common law.”

The respondent argued that the ordinance was adopted after his permit was issued. The court noted that “... the respondent can have no vested and inalienable right of property in that which is a nuisance and an owner with knowledge or notice in the premises cannot complain if loss ensues when the law deals with the property in any way reasonably necessary for the suppression of the evil in connection with which it is used.”

Although municipalities are authorized to abate nuisances, governing bodies cannot declare a legal trade to be a nuisance and abate it when the business is not a nuisance and is not operated in a manner that is likely to become a nuisance. *Russellville v. Vulcan Materials Co.*, 382 So.2d 525, 527 (Ala. 1980).

Time Factors

Often it is more expedient to execute a warrant of arrest and process the case in municipal court than it is to seek equitable relief. Municipal court cases can be speedily disposed of whereas the procedures in equity are much more time consuming. A municipal judge may order the abatement of a nuisance as a condition of probation for the violation of a municipal nuisance ordinance. AGO 2006-103.

Under equity, the governing body, after a thorough investigation, must draft and adopt a resolution declaring a public nuisance. The city attorney must then evaluate the case, draft the complaint, file it and obtain service on the respondent. The respondent has 30 days to file a reply and then the court must set a date for a hearing. If pleading questions are raised, actual trial may be delayed by several months. During this period, citizens may become impatient and keep up a steady barrage of protest at city hall. The expense of civil actions is also a consideration since the city attorney and often other municipal employees, will be involved in the investigation to secure evidence for the case.

Relief Afforded

Courts are reluctant to enjoin the use of property unless other property owners, in the enjoyment of their property, are seriously affected. For this reason, any relief granted will be tailored, if possible, to permit a continuation of the

use if it can be done in any manner not offensive to the complaining parties. *See, Reaves v. Tusculumbia*, 483 So.2d 396, 397 (Ala. 1986).

In *McClung v. Louisville & Nashville Railroad Co.*, 255 Ala. 302, 51 So.2d 371 (Ala. 1951), a complaint was filed against several respondents charging them with a nuisance in causing the emission of large quantities of coal dust into the air, the creation of noise in unloading steel cars, and the creation of fumes and odors due to the heating and distribution of the contents of tank cars. The court found that the noise made by beating and pounding on the cars was obnoxious and that the odors and fumes were offensive. An injunction was issued against the respondents. The complaints offered evidence, which tended to show that a change in the manner of operations would materially reduce the noise level and the emission of fumes. The court also enjoined the coal haulers from loading in a manner, which raised dust and pointed out that evidence showed that sprinkling coal with water would reduce the dust. It should be noted that the injunction could probably have been avoided if the remedial steps had been taken in advance

Other Court Decisions

Numerous types of property uses have been the subject of complaints charging the establishment of a nuisance. Cases which have held that the actions complained of might, in the proper circumstances, constitute a nuisance include:

- Dust, noise and odors – *McClung v. Louisville & Nashville Railroad Co.*, 51 So.2d 371 (Ala. 1951); *Acker v. Protective Life Insurance Co.*, 353 So.2d 1150 (Ala. 1977).
- The “flow of pure air” – *Romano v. Birmingham Railway Co.*, 182 Ala. 335, 62 So. 677 (Ala. 1913).
- Discharge of sewage into a stream by the city of Clanton – *Clanton v. Johnson*, 245 Ala. 470, 17 So.2d 669 (Ala. 1944).
- “Honky-tonks” – *Howard v. State*, 238 Ala. 185, 190 So. 278 (Ala. 1939).
- “Bawdy houses” – *Barnett v. Tedescki*, 154 Ala. 474, 45 So. 904 (Ala. 1908).
- Blasting operations – *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65 (Ala. App. 1912).
- Storage of dynamite in a thickly-populated neighborhood – *Sloss-Sheffield Steel & Iron Co. v. Prosch*, 190 Ala. 290, 67 So. 516 (Ala. 1914).
- A dump, maintained by the city of Selma – *Selma v. Jones*, 202 Ala. 82, 79 So. 476 (Ala. 1918).
- Upholding a conviction for failure to remove junk

vehicles – *Nesby v. Montgomery*, 652 So.2d 784 (Ala. Crim. App. 1994).

- Heavy truck traffic that a proposed quarry would generate constituted an anticipatory public nuisance, as the traffic would render the roads adjacent to the quarry defective and dangerous. *Hall v. North Montgomery Materials, LLC*, 39 So.3d 159 (Ala.Civ.App.2008)
- A city ordinance’s definitions of “junk” and “nuisance” cannot be arbitrary, unreasonable, and overbroad, since cities may not, under the guise of police power, impose restrictions that are unnecessary and unreasonable upon the use of private property. A resolution authorizing a nuisance abatement submitted by the housing code department, accompanied by a list of the properties containing alleged nuisances and a short description of the alleged nuisances by housing code department employees, was itself sufficient evidence and that no additional evidence was required to shift the burden of proof to the property owners. *K & D Automotive, Inc. v. City of Montgomery*, 150 So.3d 752, 2014 (Ala.2014).
- City provided adequate notice to homeowner prior to demolishing his home, as required by procedural due process principles, where notice was mailed to forwarding address homeowner provided, so that it was reasonably calculated to apprise homeowner of pending action and to afford him opportunity to present his objections. *Kraft v. City of Mobile*, 588 Fed.Appx. 867 (C.A.11 (Ala.),2014)
- City’s public-nuisance ordinance, which defendant was convicted of violating based on complaints about multiple dogs barking at her home, set forth sufficient standards to place person of ordinary intelligence on notice of what conduct ordinance prohibited, and thus ordinance was not unconstitutionally vague, since ordinance incorporated objective standard by prohibiting only “disturbing noises” that were “habitually” made by animal and that caused “unreasonable annoyance or discomfort” to those in “close proximity[.]” ordinance clearly defined “disturbing noises” to include barking, and although “habitually” was not defined, reasonable person would have understood it to mean something more than incidental barking and that mere one-time disturbance was not enough to trigger ordinance. *Wallen v. City of Mobile*, 270 So.3d 1190 (Ala.Crim. App., 2018).
- Sheriff’s deputy who ordered the warrantless removal of inoperable motor vehicles from their owner’s driveway, which was a removal ordered by the deputy due to city’s nuisance ordinance, should have been aware that vehicles’ owner was entitled to some minimal process

before the vehicles could be removed, and thus deputy was not entitled to qualified immunity from owner’s § 1983 claim that the vehicles’ removal violated her Fourteenth Amendment right to procedural due process; because deputy was the official who made the decision to abate the nuisance, he was in the unique position to know that vehicles’ owner had not had an opportunity to be heard. *McDonald v. Keahey*, 2019 WL 3980631 (Ala.Civ.App., 2019).

- It should have been clear to sheriff’s deputy who requested the warrantless removal of inoperable motor vehicles from their owner’s driveway, which was a removal ordered by the deputy due to city’s nuisance ordinance, that he, absent some exigent circumstance, could not seize private property from the curtilage of a home without a warrant, and thus deputy was not entitled to qualified immunity from owner’s § 1983 claim that the vehicles’ removal violated her Fourth Amendment rights; law was clearly established that curtilage was part of the home itself for Fourth Amendment purposes, and there were no administrative procedures available for the purpose of abating the alleged nuisance. *McDonald v. Keahey*, 2019 WL 3980631 (Ala.Civ.App., 2019).
- Private company that towed, pursuant to a sheriff’s deputy’s request, inoperable vehicles from their owner’s driveway, which was a removal done due to city’s nuisance ordinance, was not entitled to quasi-judicial immunity from owner’s § 1983 action, which was based on claim that the vehicles’ removal violated her Fourth and Fourteenth Amendment rights; towing company and deputy were not enforcing a judicial order to remove the vehicles. *McDonald v. Keahey*, 2019 WL 3980631 (Ala.Civ.App., 2019).

Suggested Pleadings

Duncan v. Tuscaloosa, 60 So.2d 438 (Ala. 1952) provides an excellent example of how to file a nuisance complaint. This case sets out part of the allegations. It is also clear from this case that a good investigation was made prior to the initiation of the action.

Dilapidated Buildings

Many times, municipal officials face situations where a property owner will resist or ignore appeals to raze or rehabilitate an unoccupied dilapidated building. The officials may feel that such a building is a dangerous public menace as well as an eyesore. Destruction of the building could be handled as an abatement of a public nuisance.

Any incorporated municipality of the state may, after notice as provided in Section 11-40-31, move or demolish

buildings and structures, or parts of buildings and structures, party walls, and foundations when found by the governing body of the municipality to be unsafe to the extent of being a public nuisance from any cause. *See*, Sections 11-40-30 to 11-40-36, Code of Alabama 1975. Also, some building abatement legislation applies only to particular classes of municipalities. Class 4 municipalities have similar authority to that mentioned above in Sections 11-53A-20 to 11-53A-26. Class 5, Class 6, and Class 8 municipalities also have authority to abate unsafe buildings in Section 11-53A-1 and Section 11-53A-6.

Section 11-53B-1, *et seq.*, Code of Alabama 1975, was passed by the Legislature in 2002, and it provides a method for demolition or repair of unsafe structures for all municipalities. Once a municipality finds, after giving notice, that it is necessary to repair or demolish a building or structure or parts of buildings or structures, party walls and foundations which are found to be unsafe to the extent of being a nuisance, the municipality make take necessary action to demolish or repair the building or structure, and the cost shall be assessed against the property owner as provided in Section 11-53B-6. *See*, Section 11-52B-2, Code of Alabama 1975.

Language of a complaint regarding a dilapidated building, after alleging the jurisdictional facts, might take the following form, depending on the facts of the case and the statute followed:

“That located on the said described lot is a frame building and complaint alleges that said building is unoccupied and not tenantable; that said building is in a dilapidated condition, open to the public and to animals; that in its present condition and state of repair it constitutes a fire hazard and a menace to the City [Town] of _____ and is a nuisance under the laws of the State of Alabama, and that the existing conditions, herein described, constitute a flagrant and persistent continuing nuisance in the City [Town] of _____ which is dangerous, offensive, unwholesome and injurious to the health, safety and welfare of the City [Town] of _____.”

The City of Montgomery has adopted a policy of suing to abate nuisances allegedly created by dilapidated structures. The complaint alleges that all of the owners and their addresses cannot be ascertained after diligent search, although the known owners are listed in the complaint. The complaint also includes an allegation that no suit is pending to test the title to the land.

Included in the complaint is a request that the plaintiff (city) be ordered to abate the nuisance by removing the structure, but at the expense of the defendants, and that a

lien against the property be established equal to the sum expended by the city to remove the structure to abate the nuisance. The complaint also requests that the award include a reasonable attorney’s fee for the work of the city attorney.

Abandoned Motor Vehicles

Section 32-13-1, Code of Alabama 1975, defines an abandoned motor vehicle as a motor vehicle as defined in Section 32-8-2, that has been unclaimed as provided in Section 32-8-84 for not less than 30 calendar days from the date the notice was sent to the owner and lienholder of record, or if no owner or lienholder of record could be determined, has been unclaimed for not less than 30 calendar days. The term “abandoned motor vehicle” also includes any attached aftermarket equipment installed on the motor vehicle that replaced factory installed equipment.

Section 32-8-84, Code of Alabama 1975 defines an unclaimed motor vehicle as:

1. A motor vehicle left unattended on a public road or highway for more than 48 hours.
2. A motor vehicle, not left on private property for repairs, that has remained on private or other public property for a period of more than 48 hours without the consent of the owner or lessee of the property.
3. A motor vehicle, left on private property for repairs, that has not been reclaimed within 48 hours from the latter of either the date the repairs were completed or the agreed upon redemption date.

Reporting Unclaimed Motor Vehicles

A person or entity in possession of an unclaimed motor vehicle is required to report the motor vehicle as unclaimed to the Department of Revenue within five calendar days from the date the motor vehicle first was considered unclaimed. The report must be made in a manner as prescribed by the department. Section 32-8-84, Code of Alabama 1975.

A person or entity in possession of an unclaimed motor vehicle, upon reporting the motor vehicle as unclaimed to the department, must utilize the National Motor Vehicle Title Information System (NMVTIS) to determine the current title state of record or, if no current title exists for the motor vehicle, the most recent state of registration for the motor vehicle. Thereafter, the person or entity must submit a records request to the state of record within five calendar days from the date the motor vehicle was reported as unclaimed to the department. The records request must be sent to the current title state of record in order to obtain the name and address of the owner and lienholder, if any, of record, if any. If no current title exists, the records request must be sent to the most recent state of registration in order to obtain the name and address of the owner.

In the event that no NMVTIS record exists and there is evidence that could be reasonably ascertained by the person or entity indicating that the motor vehicle has been registered in another state, the person or entity, within five calendar days from the date the motor vehicle was reported as unclaimed to the department, must submit a records request to the state of registration in order to obtain the name and address of the owner. Section 32-8-84, Code of Alabama 1975.

Notice to Owner and Lienholder

After completing the records request, the person or entity must send notice by certified mail with either return receipt requested or electronic delivery confirmation, within five calendar days from receipt of the title record, to the owner and lienholder of record, if any, or registration record, to the owner of record, advising the owner and lienholder of record, if any, of the location of the motor vehicle, normal business hours of the facility holding the motor vehicle, any accrued charges or fees, the daily storage rate, and the mailing address and contact telephone number of the person or entity in possession of the motor vehicle. The notice must include the following language in no smaller than 10-point type:

“If this motor vehicle is not redeemed by the recorded owner or lienholder of record within 30 calendar days from the date of this notice, the motor vehicle shall be considered abandoned as defined in Section 32-13-1, Code of Alabama 1975. The motor vehicle may then be sold pursuant to the provisions of the Alabama Abandoned Motor Vehicle Act as provided for in Title 32, Chapter 13, Code of Alabama 1975.”

Failure to Provide Notice

A person who fails to report a motor vehicle as unclaimed or fails to notify the owner and lienholder of record, if any, in accordance with this subsection forfeits all claims and liens for the motor vehicle’s garaging, parking, and storage prior to the time the motor vehicle is reported as unclaimed; provided, however, failure to report shall not result in the forfeiture of claims and liens for the towing and repair of a motor vehicle. Section 32-8-84, Code of Alabama 1975.

Removal of Unclaimed Motor Vehicles

Section 32-13-2, Code of Alabama provides that a law enforcement officer may cause a motor vehicle to be removed to the nearest garage or other place of safety under any of the following circumstances:

1. The motor vehicle is left unattended on a public street,

road, or highway or other property for a period of at least 48 hours.

2. The motor vehicle is left unattended because the driver of the vehicle has been arrested or is impaired by an accident or for any other reason which causes the need for the vehicle to be immediately removed as determined necessary by the law enforcement officer.
3. The motor vehicle is subject to an impoundment order for outstanding traffic or parking violations.

In 2020 the Legislature passed Act 2020-130 authorizing parking enforcement officers or traffic enforcement officers who are not required to be certified by the Alabama Peace Officers’ Standards and Training Commission to remove abandoned vehicles in Class 1 municipalities. Section 32-13-2, Code of Alabama 1975

Lien Requirements

An owner or owner’s authorized agent, or a lessee of real property or the lessee’s authorized agent, upon which a motor vehicle has become unclaimed, as provided for in Section 32-8-84, may cause the motor vehicle to be removed to a secure place. Any person or entity removing the vehicle at the direction of the owner or lessee of real property or his or her agent pursuant to this section must have a lien on the motor vehicle for a reasonable fee for the removal and for storage of the motor vehicle.

A person removing a motor vehicle or other property at the direction of an owner or owner’s authorized agent, a lessee of real property or the lessee’s authorized agent, or a law enforcement officer must have a lien on the motor vehicle for a reasonable fee for the removal and for the storage of the motor vehicle. Section 32-13-2, Code of Alabama 1975.

Notice Requirements for Removal

A law enforcement officer who causes the removal of any motor vehicle to a garage or other place of safety pursuant to this section, within five (5) calendar days, must give written notice of the removal. The notice must include a complete description of the motor vehicle identification number and license number thereof, provided the information is available, to the Secretary of the Alabama State Law Enforcement Agency. Section 32-13-2, Code of Alabama 1975.

Liability for Removal

A law enforcement officer who, pursuant to this section, causes any motor vehicle to be removed to a garage or other place of safety shall be liable for gross negligence only. An owner or lessee or agent of the real property owner and the towing agent or wrecker service employed shall be liable to the owner or lienholder of record for action taken under

this section only for gross negligence. Section 32-13-2, Code of Alabama 1975.

Authority to Sell Abandoned Vehicles

Section 32-13-3, Code of Alabama 1975 authorizes a person, as defined in Section 40-12-240, in possession of a motor vehicle that is considered an abandoned motor vehicle to sell the motor vehicle at a public auction. Notice of the date, time, and place of the sale and a description of the motor vehicle to be sold, including the year, make, model, and vehicle identification number, must be given by publication once a week for two successive weeks in a newspaper of general circulation in the county in which the sale is to be held, provided the vehicle is currently registered in the county. In counties in which no newspaper is published, notice shall be given by posting such notice in a conspicuous place at the courthouse. The first publication or posting, as the case may be, shall be at least 30 days before the date of sale.

A person selling a motor vehicle at public auction must give notice of the public auction to the department at least 35 calendar days prior to the date of the public auction. The notice of public auction must be in a manner as prescribed by the department and shall include all of the following:

- a. The name and address of the current owner and lienholder of record, if any, as reflected on the current title or registration record of state.
- b. The contact information for the person or entity filing the notice.
- c. The motor vehicle's identification number, year, make, and model.
- d. The date, time, and location of the auction.
- e. If the motor vehicle is not being sold by a bonded agent pursuant to Section 32-8-34, Section 40-12-398, or Section 40-12-414, a statement that the purchaser is required to post a bond pursuant to Section 32-8-36 in order to obtain title to the vehicle.

The auction must occur where the vehicle is located. The department of Revenue, within five calendar days of receipt of the notice of public auction, shall send a motor vehicle interest termination notice to the current owner and lienholder of record, if any, as disclosed on the notice of public auction. The motor vehicle interest termination notice shall advise the owner and lienholder of record, if any, that their interest in the motor vehicle, upon its sale, will be terminated pursuant to this chapter, and personal property and items contained in the motor vehicle will be disposed of in a manner determined by the person or entity conducting the sale. The notice must include all the information provided in the notice of public auction as

well as the owner or other interested party's appeal rights, pursuant to Sections 32-13-4 and 40-2A-8, to contest the proposed sale of the motor vehicle. Section 32-13-3, Code of Alabama 1975.

If the purchaser of an abandoned motor vehicle fails to apply for a certificate of title within one calendar year from the date of the sale, the purchaser shall be subject to posting a bond under Section 32-8-36. Each person who sells a motor vehicle pursuant to this chapter, for three years from the date of the sale, shall maintain all of the following:

- a. Copies of the notices sent pursuant to subsection (d) of Section 32-8-84, to the previous motor vehicle owner and lienholder of record, along with evidence that the notices were sent by certified mail.
- b. Any associated National Motor Vehicle Title Information System (NMVTIS) records and owner and lienholder records received from any state pursuant to subsection (d) of Section 32-8-84.
- c. Any other records as required by the department.

If the person making the sale of the motor vehicle failed to provide proper notices as required in subsection (d) of Section 32-8-84, the sale of the abandoned vehicle shall be void and the current owners, registrants, secured parties, and lienholders of record, if any, for the motor vehicle shall retain their ownership, security interests, liens, and interests in the motor vehicle. Section 32-13-3, Code of Alabama 1975.

Rejection of Bids

The person making the sale has the right to reject any and all bids if the amount bid be unreasonably low and continue the sale from time to time if no bidders are present. Section 32-13-5, Code of Alabama 1975.

Deductions from Proceeds.

A person or entity making the sale of the motor vehicle must deduct from the proceeds of the sale the reasonable cost of repair, towing, storage, and all reasonable expenses incurred in connection with the sale. The person or entity must also pay the balance remaining to the license plate issuing official of the county in which the sale is made to be distributed to the general fund of the county, except any Class 2 municipality that owns and operates an impound facility and sells the motor vehicles at public auction, the proceeds from the sale shall be retained by the municipality and deposited into the general fund of the municipality; provided, that the costs shall in no event exceed the customary charges for like services in the community where the sale is made. Section 32-13-6, Code of Alabama 1975

False Statements Regarding Sale of Abandoned Motor Vehicle

Section 32-13-10, Code of Alabama 1975 prohibits a person from making a materially false statement regarding the sale of an abandoned motor vehicle. A person in violation of this section commits a Class C felony. A person, whether present or absent, who aids, abets, induces, procures, or causes the commission of an act in violation of this section commits a Class C felony.

Section 11-67A-4, et seq., Code of Alabama 1975, provides for the removal of abandoned vehicles in Class 1 municipalities.

Section 11-67B-4, et seq., Code of Alabama 1975, provides for the removal of inoperable vehicles in Class 5 cities with a mayor-commission form of government.

An ordinance declaring junked vehicles to be a public nuisance and prohibiting citizens from placing or keeping junked vehicles on their property did not violate freedom of expression as applied to wrecked automobiles that the owner of a novelty shop had had colorfully painted, planted with native cacti and placed on display outside of his store. Additionally the vehicles were not “works of visual art” protected under Visual Artists Right Act. Regulation of junked vehicles was within city’s traditional municipal police powers. The ordinance was not intended to regulate “speech” but was content-neutral health and safety ordinance, reasonably tailored to achieve city’s legitimate interests with only incidental restriction on protected expression. *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir.2010).

Bars and Nightclubs.

Nearly every municipal official has encountered the problem of bar and/or nightclub owners refusing to curb abuse in and around those business establishments. When such a business is operated so that it becomes a public nuisance, the district attorney or the city governing body can seek an injunction. A sample complaint, which can be adapted to local situations, is printed below.

“Plaintiff avers and shows unto this Honorable Court that the Defendant is engaging in the operation of a bar [or nightclub] upon the premises [description] and is so conducting said business in such a manner that it constitutes a flagrant and continuing nuisance in the City [Town] of _____, which is dangerous, offensive, unwholesome, and injurious to the health, morals, safety, comfort or welfare of the City [Town] of _____, and especially to that portion of the City [Town] of _____, in which said

premises are located; that the Defendant has allowed said premises to be a scene of drunkenness, fighting, and vile, vulgar or obscene conduct; that the Defendant has condoned, allowed or actively promoted the described acts or conduct on the premises; such acts or conduct have constituted and constitute a continuing nuisance in the City [Town] of _____, and are dangerous, offensive or unwholesome and Plaintiff avers that such acts or conduct are injurious to the health, morals, safety, comfort and welfare of the City [Town] of _____.”

The existence of a nightclub is not per se a nuisance. The club may, however, become a nuisance because of the manner in which it is operated. The municipality must conduct a thorough investigation to develop facts which demonstrate that the club is a nuisance.

The language above is suggested merely as a form. Each complaint in this type of case would normally be different from any other, depending on the facts of the situation.

Drug Nuisance Abatement Act

Although a detailed discussion of the subject is beyond the scope of this article, the Alabama Legislature has authorized municipalities to abate drug-related nuisances. The act has been codified at Sections 6-5-155, et seq., Code of Alabama 1975, and provides broad authority for a municipality, through its attorney, to maintain an action in circuit court to abate drug-related nuisances.

Abatement of Weeds

The control of weeds on public property and rights of way is not as vexing as it is expensive. Conversely, the job of ridding a municipality of weeds on private property is worrisome indeed. Civic leaders and garden club members often appeal to municipal officials to remove unsanitary and weedy eyesores which have accumulated on the property of a bellicose or absentee landowner.

All municipalities have the authority to abate weeds under Sections 11-67-60 through 11-67-67, Code of Alabama 1975. In addition, all municipalities have the authority to abate weeds under the general nuisance statutes, Sections 11-47-131 through 11-47-140, Code of Alabama 1975. Under both of the above provisions, the municipality may describe the conditions declared to be a public nuisance and punish the person or persons responsible for the maintenance of such conditions.

If the municipality follows Sections 11-67-60 through 11-67-67, the municipality should closely follow the notice requirements set out in the Code provisions. It should be noted that the term municipality in Section 11-67-60 does

not include the police jurisdiction; therefore, a municipality may not use Sections 11-67-60 through 11-67-67 to abate weeds in the police jurisdiction. Below is a list of steps that should be followed under Sections 11-67-60 through 11-67-67, Code of Alabama 1975:

1. Under Section 11-67-61, Code of Alabama 1975, the municipality must pass a resolution declaring the weeds to be a public nuisance and declaring its abatement. The resolution should include the street name under which it is commonly known or give a legal description of the property upon which or in front of which the nuisance exists. One resolution may include multiple properties.
2. Under Section 11-67-62, Code of Alabama 1975, after the resolution is passed, notice of a public hearing on the matter must be mailed by certified mail, return receipt requested, 21 days prior to the date of the hearing and shall inform the owner of the time, date and place of the hearing and the reason for the hearing. The notice must be mailed to the owner of the property as the information appears on record in the office of the tax assessor. All notices shall carry a list of names of persons or private contractors, or both, who perform the work and are registered with the municipal clerk. The names shall not constitute a recommendation and the failure to include a list shall in no way affect the operation of this article. Notice must be published in a newspaper of general circulation published in the municipality once a week for two consecutive weeks, or if no newspaper is published in the municipality, notice shall be posted in three public places located in the municipality for at least 21 days prior to the hearing.
3. In addition, under Section 11-67-62, Code of Alabama 1975, two signs shall be conspicuously posted on the property at least 7 days prior to the public hearing. The wording of the signs shall not be less than one inch in height and shall be in substantially the following form:

Notice is hereby given that on the ___ day of ___, 20__ at ___ A.M./P.M. in the council chamber, the council of the Municipality of ___ will consider a resolution regarding the weeds growing upon or in front of the property ___ Street, in the Municipality of ___, and more particularly described in the resolution, a copy of which is on file in the office of the municipal clerk; and at that time and place will determine whether the weeds constitute a public nuisance which shall be abated by removal of the noxious or dangerous weeds; and, if so, will order the abatement and removal of the nuisance. If abatement and removal are ordered, the cost of abatement and removal shall be assessed upon the

lots and lands from which or in front of which the weeds are removed, and the cost shall be added to the next regular bills for taxes levied against the respective lots and lands for municipal purposes. The costs shall be collected at the same time and in the same manner as ordinary municipal taxes are collected. The costs shall be subject to the same commissions and fees and the same procedure for foreclosure and sale in case of delinquency as provided for ordinary municipal taxes.

If no objections are filed with the municipal clerk at least five days before the meeting of the council and unless the person appears before the council in person or through his or her representative to show cause, if any, why his or her objection should be sustained, it shall be presumed that the person accepts the notice as fact and waives any rights he or she may have to contest the removal of the weeds and the action of the council shall be final unless good and sufficient cause can be otherwise shown.

Reference is hereby made to the resolution, on file in the office of the municipal clerk, for further particulars.

Dated this ___ day of ___, 20__.

Name of Municipality

City Clerk

4. Under Section 11-67-63, Code of Alabama 1975, if objections are filed at the time stated in the notice, the governing body of the municipality must conduct a hearing and hear and consider all evidence, objections and protests regarding the proposed removal of weeds. Upon the conclusion of the hearing, the governing body of the municipality, by resolution, must decide whether a public nuisance exists and, if so, must order it to be removed or abated with respect to any property or part thereof described.
5. Under Section 11-67-64, Code of Alabama 1975, after the governing body has passed a resolution finding the conditions to be a nuisance and orders its abatement, all employees and agents of the city may enter the property to abate the nuisance. If the governing body uses outside contractors, competitive bidding is not required, and the governing body must adopt a resolution stating the name of the contractors. After the resolution is adopted the contractors may enter the property to abate the nuisance.

A property owner may have the weeds removed at his or her own expense provided that the property owner's work commences before the municipal employee or contractor's work.

6. Under Section 11-67-65, Code of Alabama 1975, each municipality must keep a report of the costs of abating the nuisance and submit the report to the governing body. Before the report is submitted to the governing body, the report shall be posted outside the governing body's chamber door for at least five days prior to the report along with a notice that states when the report will be submitted to the governing body.
7. Under Section 11-67-66, Code of Alabama 1975, the governing body must hear the report, together with any objections that may be raised by any of the property owners liable to be assessed for the work of abating the nuisance. The governing body may make amendments to the report as deemed necessary, and a motion or resolution may be passed to accept the report in its final form. The amounts of the cost in the report should be referred to as "weed liens." The liens will constitute a weed lien on the property for the amount of the weed liens. After confirmation of the reports, a copy shall be given to the tax collector or revenue commissioner of the county who, under the "Optional Method of Taxation," is **charged** with the collection of the municipal taxes pursuant to Article 1, Division 2, Chapter 51, of Title 11. It **shall** be the duty of the county tax collector or revenue commissioner to add the costs of the respective weed liens to the next regular bills for taxes levied against the respective lots and parcels of land subject to a weed lien, and thereafter, the costs shall be collected at the same time and in the same manner as ordinary municipal ad valorem taxes are collected, and shall be subject to the same penalties and the same procedure under foreclosure and sale in case of delinquency; provided, however, that if the foreclosure and sale is the result of a delinquency caused by a weed lien, the municipality shall reimburse the county tax collector or revenue commissioner for all costs associated with the foreclosure and sale unless the costs are collected at the time of sale as part of the sale.
8. In Act 2014-303, the Alabama Legislature gave municipalities the authority to adopt its own alternate procedures to abate overgrown grass and weeds as a public nuisance once it follows the notice process in Sections 11-67-60 through 11-67-67 on the property the first time. As such, when property on which overgrown grass or weeds have been previously abated or abatement has been attempted through the process of posting notice on the property pursuant to Sections

11-67-60 through 11-67-67, a municipality may pass an ordinance adopting a different abatement procedure for subsequent abatements. Section 11-67-68, Code of Alabama 1975.

Additional Authority to Abate Weeds

Class 5, 6 or 8 municipalities have additional authority to abate weeds using Sections 11-67-20 through 11-67-28, Code of Alabama 1975. A municipality may use the provisions found in Section 11-67-20 et seq. and Section 11-67-60 et seq., Code of Alabama, 1975, to require abutting landowners of an unopened street in a subdivision to either cut or maintain weeds up to the centerline of the unopened street. This may be done at the owner's expense, or the city may assess the owner for the costs of the removal as provided in the statute. The city may also use the statutes to require abutting landowners of opened and paved streets in a subdivision to cut or maintain weeds in the street right-of-way between the lot line and the paved surface of the street or to pay an assessment for the costs of the city doing the work as prescribed in the statute. AGO 2003-093.

Class 2 municipalities have additional authority to abate weeds using Sections 11-67-1 through 11-67-9, Code of Alabama 1975.

Class 4 municipalities have additional authority to abate weeds using Sections 11-67-40 through 11-67-45, Code of Alabama 1975.

In Class 7 municipalities, after using the abatement procedures commencing at Section 11-67-60, the city council may adopt procedures different from the procedures provided in Article 4, Title 11 Chapter 67 to declare overgrown grass or weeds to be a public nuisance and abated pursuant to the procedures provided in the ordinance. After the abatement of any overgrown grass or weeds pursuant to the procedures provided in the ordinance, the costs of abatement must be assessed and collected as a weed lien in the same manner as provided in Section 11-67-66. The municipality may assess the costs authorized against any lot or lots or parcel or parcels of land purchased by the State of Alabama or any purchaser at any sale for the nonpayment of taxes and, where an assessment is made against a lot or lots or parcel or parcels of land, a subsequent redemption thereof by a person authorized to redeem or the sale thereof by the state shall not operate to discharge, or in any manner affect the lien of the municipality for the assessment.

The definition of the term "weed" in a municipal ordinance making it a public nuisance to have weeds over 12 inches in height on private property was not unconstitutionally vague nor did the ordinance violate due process. Further, the defendant's garden did not have sufficient communicative elements to bring it within the protections afforded by the First Amendment. Finally,

enforcement of the ordinance did not constitute an unlawful taking. *City of Montgomery v. Norman*, 816 So.2d 72 (Ala. Crim.App.1999).

Conclusion

Municipalities in Alabama have adequate legal remedies to abate and enjoin public nuisances. The manner of use, and sometimes the location of property, determines the existence of a public nuisance. Each case of alleged nuisance must be decided upon its own facts.

A wide spectrum of property use has been declared by the courts to constitute a public nuisance. The tools of abatement and injunction, although available, are costly and time consuming and should probably only be used in the absence of other remedies.

Relief afforded by the courts should not exceed the necessities of a particular case, but should be extensive enough to curb the existing nuisance and prescribe rules for future conduct and use of the property by the owner.

50. Regulation of Alcoholic Beverages

Regulation of alcoholic beverages is a task undertaken by the state, counties and municipalities. This article summarizes the regulatory powers of Alabama municipalities as to alcoholic beverages.

Municipal Option

Sections 28-2A-1 through 28-2A-4, Code of Alabama 1975, give municipalities of 1,000 or more in population the authority to hold a referendum on the question of legalizing sales of alcoholic beverages within the corporate limits of the municipality. The municipal governing body must call such an election when a petition, signed by 30 percent of the number of voters who voted in the last preceding general election of the municipality, is filed with the municipal clerk. A municipal option election can be held by municipalities located in dry as well as in wet counties. If a majority of those persons casting ballots in such an election vote “wet,” the sale of alcoholic beverages will be allowed in the municipal corporate limits. Each subsequent municipal option election must follow the petition process with a new petition.

A period of not less than 720 days must elapse between the dates of municipal option elections. A municipal council must give three weeks notice prior to the holding of a wet/dry referendum. AGO 1997-022.

The Attorney General has determined that if a city located in a wet county expands into a dry county, the newly annexed property within the dry county will remain dry. The primary rationale for this is that the city is only wet by virtue of the fact that it is located in a wet county, not because it has exercised its municipal option to elect to become wet. The sale and distribution of alcoholic beverages on the newly annexed land is governed by the county’s wet/dry election. AGO 2002-197. This opinion is inapplicable to Class 1, 2, and 3 municipalities, and any municipalities with a population of 18,500 or more, who follow the procedure outlined in Section 28-2A-20 of the Code of Alabama 1975. Section 28-2A-20 provides that the governing body of any Class 1, 2, or 3 municipality or any municipality having a population of 18,500 or more, which is legally wet and which has previously annexed or is annexing territory located in a dry county, shall pass an ordinance calling for a city-wide referendum to determine whether the annexed portions of the municipality shall be wet. If the referendum fails, the annexed portions located in the dry county shall remain dry but the failed referendum shall have no effect on the wet portions of the municipality.

A municipality does not have to prove its population by

decennial census to hold a wet/dry referendum. *Dennis v. Pendley*, 518 So.2d 688 (Ala. 1987). *See also, Bridgeport v. Citizens Action Committee*, 571 So.2d 1089 (Ala. Civ. App. 1990).

Dry Counties and Municipalities

In counties and in municipalities where the sale of alcoholic beverages has not been approved by voters in either a county-wide or municipal option election, alcoholic beverages may not be legally sold. However, possession of limited quantities of alcoholic beverages in dry counties is allowed.

Section 28-4-200, Code of Alabama 1975, allows any person 19 years of age or older to have in his or her possession, in his or her motor vehicle or a private residence or place of private residence or the curtilage thereof, in any dry county, for his or her own private use and not for resale, not more than three quarts of liquor and one case of malt or brewed beverages or three quarts of wine and one case of malt or brewed beverages, provided that no alcoholic beverages shall be kept, stored or possessed in the passenger area of any vehicle or in view of any passenger. All such containers must have affixed thereto a mark and tax stamp showing they were purchased from an ABC Board store or licensee and that the proper Alabama taxes have been paid.

Basis of State Regulation

Alabama is termed a “monopoly state” with respect to the control of alcoholic beverages. State statutes relating to the regulation of liquor, wine and beer are found in Title 28, Code of Alabama 1975, as amended. Section 28-3-2 of the Code sets out the general purposes of these statutes which regulate alcoholic beverages. It reads, in part, as follows:

“(b) Except as otherwise expressly provided in this chapter, the purpose of this chapter is to prohibit transactions in liquor and alcohol and malt or brewed beverages, which take place wholly within the state, except by and under the control of the board, as specifically provided in this chapter, and every section and provision of this chapter shall be construed accordingly. The provisions of this chapter, through the instrumentality of the board, and otherwise, provide the means by which such control shall be made effective ...”

Section 28-3-40, Code of Alabama 1975, provides that the board (which means the Alcoholic Beverage Control Board) shall consist of three persons appointed by the governor and provides that board members serve at the

pleasure of the governor. The statute also provides that the office of the board shall be in Montgomery.

The Alabama Supreme Court, in *State v. Murphy*, 237 Ala. 332, 186 So. 487 (1939), upheld the constitutionality of the Alabama Alcoholic Beverage Control Act (General Acts, Extra Session, 1936-37, p. 40). In *Tarrant v. Birmingham*, 39 Ala. App. 55, 93 So.2d 925 (Ala. App. 1957), the court stated “Traffic in intoxicating beverages is universally recognized as a proper subject of police regulation,” and noted that the act, in Section 28-3-2, Code of Alabama 1975, provides in part that “(a) This chapter shall be deemed an exercise of the police power of the State of Alabama for protection of the public welfare, health, peace and morals of the people of the state ...” In *Ex parte Alabama Alcoholic Beverage Control Board*, 683 So.2d 952 (1996), the Alabama Supreme Court upheld the right of the state to operate liquor stores.

State Licensing Code

Chapter 3A of Title 28, Code of Alabama 1975, gives the ABC Board the power to issue and renew licenses to reputable and responsible persons subject to the provisions of the licensing code and the regulations promulgated. The board is authorized to license retailers, wholesalers, importers, manufacturers and others. Any such licenses may not be issued in dry counties where traffic in alcoholic beverages is not authorized by law. The board is given broad discretionary powers in acting upon license applications. The application procedures are covered in Section 28-3A-4 while the procedures for issuance are covered in Section 28-3A-5, Code of Alabama 1975.

The ABC licensing code, codified at Chapter 3A of Title 28 of the Code of Alabama 1975, lists numerous licenses which may be issued by the state ABC Board to retailers, importers, wholesalers and manufacturers of alcoholic beverages. Of most interest to municipalities are the seven types of retail licenses available from the ABC Board.

A. Lounge Retail Liquor Licenses (Section 28-3A-11)

Two types of retail lounge liquor licenses are established by ABC Board regulation. A **Class I License** allows the licensee to sell alcoholic beverages for both on-premise and off-premise consumption. A **Class II License** allows the licensee to sell alcoholic beverages only for off-premise consumption. A Class II licensee may not sell for on-premise consumption. These are the so-called “package stores.” All sales for off-premise consumption are required to be in original unopened containers. If the licensee is to be located within the corporate limits or police jurisdiction of a municipality, the ABC Board can only grant the license upon approval of the governing body of the municipality.

Such licensees may permit dancing or provide other lawful entertainment on the licensed premises. No person under 21 years of age shall be admitted to such licensed premises as a patron or employee. In *Montgomery v. Glenn*, 749 So.2d 478 (1999), the Alabama Court of Civil Appeals held the city’s denial of an applicant’s first application for a Class 1 lounge liquor license did not have a res judicata effect on the second application. The court further held that the city carried the burden of proving that the denial of the application was supported by evidence.

B. Club Retail Liquor Licenses (Section 28-3A-12)

The holder of a club license under Section 28-3A-12 may sell alcoholic beverages for on-premise consumption seven days per week and for off-premise consumption on all days except Sunday. *Historic Warehouse, Inc. v. ABC Board*, 423 So.2d 211 (Ala. 1982). These licensees may sell liquor, wine and beer, including draft or keg beer in any county or municipality in which sale is permitted. Club licenses shall only be granted by the ABC Board upon approval of the governing body of the municipality in whose corporate limits or police jurisdiction the club is to be located.

C. Restaurant Retail Liquor Licenses (Section 28-3A-13)

This type of license may be issued to hotels, restaurants, civic center authorities or dinner theaters. It permits the sale of liquor, wine and beer, including draft or keg beer, in any county or municipality in which the sale thereof is permitted, in that part of the hotel, restaurant or dinner theater set out in the license. The license permits the sale of alcoholic beverages to patrons, guests or members for on-premise consumption in any part of the civic center or in that part of the hotel, restaurant, or dinner theater habitually used for serving meals to patrons, guests or members, or other public or private rooms of the building. If a restaurant located in a hotel, but not operated by the owner of the hotel, is licensed to sell alcoholic beverages in the restaurant, it may also sell alcoholic beverages to guests in private rooms in the hotel. These licenses may only be issued by the ABC Board upon approval by the municipal governing body.

D. Retail Table Wine License For On-Premises and Off-Premises Consumption (Section 28-3A-14)

This license permits the sale of table wine for on-premise and off-premise consumption. This license does not have to be approved by the municipal governing body, but it is subject to the municipality’s zoning

ordinances or any other ordinances passed through the valid exercise of the police powers of the city or town. The ABC Board may submit all applications for this license to the affected municipality for its comments.

E. Retail Table Wine License for Off Premise Consumption (Section 38-3A-15)

This license allows the holder to sell table wine in its original unopened container for off-premise consumption only. Municipal governing body approval is not required, but the board may submit the application to the city or town for comments. Municipal zoning and police power ordinances are applicable to such licenses.

F. Retail Beer License for On-Premise and Off-Premise Consumption (Section 28-3A-16)

This license permits the sale of beer, including draft beer in counties or municipalities where the sale thereof is permitted, for on-premise and off-premise consumption. This license does not have to be approved by the municipal governing body but is subject to valid zoning and police power ordinances of the municipality. The ABC Board may submit applications to the municipality affected for its comments.

G. Retail Beer Licenses for Off-Premises Consumption (Section 28-3A-17)

This license permits the sale of beer, including draft or keg beer in counties or municipalities where the sale thereof is permitted, in its original unopened container for off-premise consumption only. This license does not have to be approved by the municipal governing body, but is subject to valid zoning and police power ordinances of the municipality. The ABC Board may submit applications of this type of license to the municipality for its comments.

Any of the above provisions of the law notwithstanding, the ABC Board shall not have the authority to issue any form of license in a Class 1 or Class 2 municipality without first gaining the consent of the governing body of the municipality. Section 28-1-6, Code of Alabama 1975. Section 28-1-7 addresses when the ABC Board can issue a license in Class 4 municipalities organized pursuant to Section 11-44B-1, Code of Alabama 1975.

In addition to these retail licenses, the licensing code gives the board the authority to issue licenses to manufacturers, wholesalers and importers as well as special retail or special events licenses. Section 28-3A-21, Code of Alabama 1975, levies the fee that each licensee is required to pay the state. The section provides that in addition to the state license taxes, any

county or municipality in which the sale of alcoholic beverages is permitted shall be authorized to fix and levy privilege or license taxes on any of the foregoing licensees located or operating therein, conditioned on a permit being issued by the ABC Board. A city cannot levy any license or a tax of any nature on a state liquor store. However, in AGO 1989-260, the Attorney General ruled that a municipality may levy a license fee upon a state park lodge located within its jurisdiction.

H. Regulations Pertaining to Licensees

Section 28-3A-23, Code of Alabama 1975, sets out regulations pertaining to licensees. Every license shall be constantly and conspicuously displayed on the licensed premises. The municipal governing body must approve the license application if the retailer is located in the municipality. Even though one person owns several premises, a license must be acquired for each place of business. Also, a license must be issued for each type of operation conducted on the same premises. Alcoholic beverages can only be sold for consumption on the premises in rooms accessible to the general public. No licenses shall be issued by the board for the sale of liquor, beer or wine by rolling stores.

All beer, except draft or keg beer, sold by retailers must be sold or dispensed in bottles, cans or other containers not to exceed one pint, or 25.4 ounces. All wine sold for off-premise consumption must be sold or dispensed in bottles or other containers in accordance with standards of fill specified in the prevailing standards of fill for wine prescribed by the U.S. Treasury Department.

Importers can sell alcoholic beverages only to wholesale licensees, unless they are granted permission by the State of Alabama. Licenses may not be assigned, and transfers of licenses can only be approved by the ABC Board. Licenses are terminated if a licensee becomes insolvent, makes an assignment for the benefit of creditors, or is adjudicated bankrupt.

I. Entertainment Districts

Section 28-3A-17.1, Code of Alabama 1975 allows Class 1-5 and certain Class 8 municipalities to create and establish an entertainment district designation for retail alcoholic beverage licenses. In addition, the it also includes municipalities with an incorporated arts council, main street program, or downtown development entity. Section 28-3A-17.1(a), Code of Alabama 1975.

A Class 1, Class 2, Class 3, Class 4 municipality, or any municipality which is located 15 miles north of the Gulf of Mexico may establish up to five entertainment districts within its corporate limits, and

each district must have at least four licensees holding a manufacturer's license that conducts tastings or samplings on the licensed premises, a restaurant retail liquor license, an on-premises alcoholic beverage license, or other retail liquor licenses in the area. Each district cannot exceed one-half mile by one-half mile although it may be irregularly shaped. Section 28-3A-17.1(c), Code of Alabama 1975.

A Class 5 municipality, any other eligible municipality, or a municipality with an incorporated arts council, main street program, or downtown development entity can establish no more than two entertainment districts within its corporate limits. Each district must have at least four licensees holding a retail liquor license in that area. Each district may not exceed one-half mile by one-half mile in area, but may be irregularly shaped. Section 28-3A-17.1(b), Code of Alabama 1975.

The governing body of a Class 8 municipality located in a county with a Class 3 municipality may establish two entertainment districts within its corporate limits which may not have fewer than four licensees holding a retail liquor license in that area. Each district may not exceed one-half mile by one-half mile in area, but may be irregularly shaped. Section 28-3A-17.1(d), Code of Alabama 1975.

The governing body of a Class 8 municipality that is located in county with a Class 2 municipality and is primarily located on an island may establish three entertainment districts within its corporate limits. One district must have not fewer than two licensees holding a retail liquor license in a business or commercial area; one district may be established in a business or commercial area at times when special events are held as designated by the town council; and one district may be established on property owned by the Dauphin Island Property Owners Association and known as the Isle Dauphine Complex. Each district may not exceed one-half mile in area, but it may be irregularly shaped. Section 28-3A-17.1(g), Code of Alabama 1975.

While not required, the League encourages any municipality establishing an entertainment district as provided in Section 28-3A-17.1 of the Code to notify the ABC Board and provide the board with a copy of any ordinance passed establishing or relating to the district established. For enforcement purposes municipalities must work closely with the ABC Board and its enforcement personnel.

A licensee who receives an entertainment district designation for an on-premises retail license must comply with all laws, rules and regulations governing its license type except that patrons, guests, or members of the licensee may exit the licensed premises with

open containers of alcoholic beverages and consume alcohol anywhere within the confines of the established entertainment district. However, the patron, guest or member of the licensee may not enter another licensed premise with open or closed containers acquired elsewhere.

Other State Regulations

Other state regulations are found in Section 28-3A-25, Code of Alabama 1975. Included among the regulations are provisions which prohibit licensees from selling to minors; prohibit minors from purchasing alcoholic beverages; prohibit customers from consuming on state ABC Store premises; prohibit sales in dry counties; and prohibit sales by cafes, lunchrooms, restaurants, hotel dining rooms or other public places after 2:00 a.m. on Sundays, except where authorized by local law, ordinance in a wet municipality, or by municipal referendum election resulting in favor of Sunday sales in a wet municipality. A local act, which has been properly advertised, may authorize Sunday sales of alcohol within a single city as required by Section 28-3A-25(20), Code of Alabama 1975. The advertising requirement found in Section 106 of the Constitution of Alabama does not apply to laws passed for a class of municipalities because such laws are general laws and do not fall within the language of that section. AGO 2001-206. Act 2019-100 amended Section 28-3A-25, Code of Alabama 1975, and now authorizes the governing body of any wet municipality, by ordinance, to permit and regulate the sale of alcoholic beverages on Sunday after 2:00 a.m. for on-premises or off-premises consumption, or both. Act 2019-100 also gives the governing body of any wet municipality the option of holding a referendum election to determine whether Sunday sales of alcohol shall be permitted.

In addition to the above listed regulations on the possession of alcoholic beverages, the Motor Vehicles and Traffic portion of the Code prohibits the possession of an open container of alcoholic beverages in motor vehicles. Prior to 2000, there was not statewide open container law in Alabama. Section 32-5A-330, Code of Alabama 1975 provides that it is unlawful for a person to have in his or her possession alcoholic beverages in an open container in the passenger area of a motor vehicle of any kind on a public highway or right of way of a public highway of the state.

Municipal Regulation Through the Licensing Power

Section 11-51-90, Code of Alabama 1975, gives municipalities the authority to levy and collect license fees for the privilege of doing business within the corporate limits of a municipality. This section gives municipalities the authority to license retailers, importers, manufacturers and wholesalers of liquor, table wine and beer, although the

amount of the license fee may, in some cases, be regulated by state statute. For instance, Section 28-7-13 and Section 28-3-194, Code of Alabama 1975, limit municipal licenses on table wine and beer to one-half the state license levy. These licenses may be levied for the purpose of raising revenue and for purposes of regulation. Section 11-51-91, Code of Alabama 1975 limits licenses on businesses in the police jurisdiction of the municipality to not more than one-half the amount charged in the corporate limits. All money collected from police jurisdiction licensees must be expended to provide services in the police jurisdiction. Sections 28-7A-1 to 28-7A-6, Code of Alabama 1975, authorize municipalities to elect to have their licenses on beer and table wine collected by the state ABC Board.

Municipalities do not have unlimited discretion to deny approval of alcoholic beverage licenses even when local consent is required before the ABC Board will grant a liquor license. Certainly, the constitutional protections of the Commerce Clause, the Due Process Clause and the Equal Protection Clause are always applicable. To apply any ordinance dissimilarly to those similarly situated would be wrong.

A municipality may not deny its consent or approval simply because the governing body does not want a business of this type located in the municipality. While a municipality may prescribe certain conditions and regulations governing the issuance of liquor licenses, such regulations must bear a reasonable relationship to the municipality's interest in protecting the health, safety and public welfare of the community. A city or town may not, under the guise of its licensing power, prescribe such conditions or high fees as to constitute a prohibition on the sale of alcoholic beverages when the right has been granted by the state. *Inn of Oxford, Inc. v. Oxford*, 366 So.2d 690 (Ala. 1978); *Swann v. Graysville*, 367 So.2d 952 (Ala. 1979); *Davis v. Wilmer*, 376 So. 2d 698 (Ala. 1979); and *Harrelson v. Glisson*, 424 So. 2d 591 (Ala. 1982).

Valid reasons for denial of alcoholic beverage license applications or consent include:

- Traffic problems or congestion which would result if the license were granted;
- The proposed location is not zoned for such a business;
- The proposed location would violate distance requirements from churches or schools as established by city ordinances; and
- Any other reason which is grounded in the municipality's protection of the health, safety and public welfare of the community.

Is a substantial protest by property owners whose property surrounds the proposed location which is the

subject of a liquor license hearing, when the protest is based simply on the fact that the surrounding property owners do not want a liquor-selling establishment in their area, in and of itself a valid reason for a municipality to prevent an individual from selling liquor at that location? The courts are of mixed opinions on this question.

Unless a municipality has adopted a specific procedure to approve the issuance of alcoholic beverage licenses or consent, a majority vote of a quorum of the governing body is sufficient for approval. AGO 1981-436 (to Hon. Clarence Rhea, June 26, 1981).

License Suspension or Revocation

Section 28-3A-24, Code of Alabama 1975, provides that the state ABC Board shall have full and final authority to suspend or revoke any license issued under the ABC Licensing Code. While a municipality may revoke its privilege license for the sale of alcoholic beverages, the revocation would not prevent the continuation of business under a valid license since the ABC Board has exclusive authority to revoke licenses. *Ott v. Moody*, 283 Ala. 288, 216 So.2d 177 (Ala. 1968); AGO 1983-209 (to Hon. John H. Hood, March 2, 1983). All municipalities which have reasons for obtaining the revocation of an ABC license should contact the ABC Board on the matter.

Regulation Through Municipal Zoning Ordinances

A municipality, by properly drawn ordinance, may limit the locations from which alcoholic beverages may be sold. *Capps v. Bozeman*, 272 Ala. 249, 130 So.2d 376 (Ala. 1961); *Norwood v. Capps*, 278 Ala. 218, 177 So.2d 324 (Ala. 1965); *USA Oil Corp. v. Lipscomb*, 293 Ala. 103, 300 So.2d 362 (Ala. 1974). However, a municipality may not, through zoning ordinances, completely prohibit the sale of alcoholic beverages in the municipality. *Campbell v. Hueytown*, 289 Ala. 388, 268 So.2d 3 (Ala. 1972).

Some municipalities have adopted ordinances prohibiting alcoholic beverage establishments within a certain minimum distance from churches or schools (e.g., 500 feet). Ordinances of this type have been upheld by the courts provided no such establishments are located within the prescribed distances. *Davis v. Wilmer*, 376 So.2d 698 (Ala. 1979). Existing establishments within such distances cannot be grandfathered in. *Harrison v. Buckhalt*, 364 So.2d 283 (Ala. 1978).

Municipalities can prohibit certain types of conduct in drinking establishments. *Lanier v. Newton*, 518 So.2d 40 (Ala. 1987).

Municipalities have no authority to prohibit the sale of chilled wine and beer or the sale of single iced-down beer and wine. AGO 1991-220.

Other Municipal Regulatory Options

Section 28-3A-25, Code of Alabama 1975, provides for the hours of operation for establishments serving or selling alcoholic beverages. However, in *Gadsden Motel Co. v. Attalla*, 378 So.2d 705 (1979), the Alabama Supreme Court held that a municipality has authority, by ordinance, to regulate the hours of sale of alcoholic beverages as long as there is no conflict with state law and the hours set by the ordinance are reasonable. Jefferson County has authorized the sale of alcoholic beverages on Sunday in Act 90-177 and Mobile County has done the same in Act 91-604.

Some cities across the country have considered limiting the number of license applications that will be allowed within the city. Such restrictions could subject a city to a possible antitrust suit.

Any license increases should be reasonable and have a rational basis for the increase such as increased expenses for policing the area.

Selected Attorney General's Opinions and Court Decisions

NOTE: These summaries are not intended as a substitute for reading the opinion or decision itself.

- A municipal council must give three weeks notice prior to the holding of a wet/dry referendum. AGO 1997-022.
- In *Ex parte Alabama Alcoholic Beverage Control Board*, 683 So.2d 952 (1996), the Alabama Supreme Court upheld the right of the state to operate liquor stores.
- The Fourth Circuit Court of Appeals upheld an ordinance which bans all stationary outdoor advertising of alcoholic beverages in areas frequented by children. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996).
- In *The Ranch House, Inc. v. Anniston*, 678 So.2d 745 (1996), the Alabama Supreme Court upheld a municipal ordinance which prohibited nude or partially nude dancing in any establishment which sold or allowed the consumption of alcoholic beverages on the premises.
- In *Prattville v. Welch*, 681 So.2d 1050 (1995), the Alabama Supreme Court held that it was not an unreasonable violation of equal protection to tax private liquor stores while exempting state liquor stores from the tax.
- In *Mobile v. M.A.D., Inc.*, 684 So.2d 1283 (1996), the Alabama Supreme Court held that Alabama's tax on liquor is not a consumer tax and cannot be excluded when computing the license tax owed the City of Mobile. See also, *Montgomery v. Popular Package Stores, Inc.*, 684 So.2d 1288 (Ala. 1996).
- In *Opinion of the Justices*, 694 So.2d 1307 (1997), the Alabama Supreme Court held that because the purpose of a local act imposing a tax on beer was to raise revenue, rather than regulate liquor traffic, as is allowed by Section 104, Alabama Constitution, 1901, it is invalid because it conflicts with a general law on the same subject.
- A grandfather clause in an ordinance that allows the continued licensing of previously licensed premises, thus exempting those premises from the application of an ordinance that prohibits the sale of alcoholic beverages within a certain distance from a church or school, probably violates the equal protection guarantees of the Alabama Constitution. AGO 1997-279.
- In *Montgomery v. Glenn*, 749 So.2d 478 (1999), the Alabama Court of Civil Appeals held that the city's denial of an applicant's first application for a Class 1 liquor license did not have a res judicata effect on the second application. The court further held that the city carried the burden of proving the denial of the application was supported by evidence.
- The Alabama Court of Civil Appeals held that a municipality's denial of a liquor license on the grounds that the location was becoming "more residential" was arbitrary and capricious since no evidence indicated that the issuance of a liquor license would have a detrimental effect on adjacent residential neighborhoods, and the prior owner of the business had obtained a liquor license to operate in the same location. *Woods v. Trussville City Council*, 795 So.2d 721 (Ala. Civ. App. 2000).
- Persons who are 19 or 20 years of age may serve and dispense alcoholic beverages to patrons in a restaurant. AGO 2000-201.
- If a café owner in a dry county, having control over his premises, knowingly allows it to be used by those bringing alcoholic beverages, he may be accused of unlawful possession himself through constructive possession. He or she may also be guilty as an accessory who aids or abets the commission of the unlawful act under Section 13A-2-23, Code of Alabama 1975. If the restaurant is used frequently or customarily, and to the knowledge of the owner, as a place for private functions where alcohol is consumed, the owner may be subject to liability under the theory of liquor nuisance as found in Section 28-4-1, Code of Alabama 1975. AGO 2002-159.
- Local bill specifying circumstances under which a municipality fitting within the population limits prescribed in the bill can authorize the sale of alcoholic beverages serves the same purpose evidenced by

Section 28-2A-1 et seq. of the Code of Alabama 1975, and therefore, if enacted, would be an unconstitutional violation of Section 105 of the Constitution of Alabama of 1901 because it is subsumed by the general law. *Opinion of the Justices No. 376*, 825 So.2d 109 (Ala. 2002).

- Speculation that a liquor license applicant might operate their lounge in the same manner as the prior licensee was insufficient to establish circumstances “clearly detrimental” to the adjacent residential neighborhoods or show the creation of a nuisance so as to deny the approval of a liquor license and dance permit. *King v. Birmingham*, 885 So.2d 802 (Ala. Civ. App. 2004).
- Section 17-15-1 of the Code of Alabama 1975, which confers standing on qualified electors to challenge certain elections, does not confer standing on a qualified elector to challenge a local option election on the sale of alcoholic beverages. *Cedar Bluff v. Citizens Caring for Children*, 904 So.2d 1253 (Ala. 2004).
- To prove that a municipality’s decision to deny a liquor license was arbitrary and capricious, the burden is on the claimant to show that there was no reasonable justification supporting the municipality’s decision. *Phase II, LLC v. Huntsville*, 952 So.2d 1116 (Ala. 2006).
- The decision of a municipality in denying an application for a liquor license is subject to judicial review and is reversible only if it is shown that the municipality acted arbitrarily in denying the application for a liquor license. *Phillips v. Citronelle*, 961 So.2d 827 (Ala. Civ. App. 2007).
- A municipal governing body may not call for a special election and have that special election considered the election next succeeding the filing of the wet/dry petition. A municipal wet/dry referendum must be held at the same time as one of the elections enumerated in Section 28-2A-1 of the Code of Alabama. Section 28-2A-1(f) of the Code of Alabama does not authorize a municipal governing body to set a special election for a wet/dry referendum. It only allows the municipal governing body to determine which election date next succeeding the filing of the wet/dry petition will be used for holding the wet/dry referendum. AGO 2009-089.
- A municipal option election held pursuant to sections 28-2A-1 through 28-2A-3 of the Code of Alabama must be conducted by the municipality in the same manner that the municipality conducts other municipal elections regardless of the date of the election. AGO 2010-003.
- The process for the sale of draft beer in wet cities and

counties begins with a legislative act authorizing the same. Provided, however, that the Alcoholic Beverage Control Board may issue a special permit for the sale of draft beer without such an act, either if, in its judgment, the municipality is a rural community that currently has a predominantly foreign population and the consumption of draft beer is in accordance with their habits and customs, or if a civic center authority wishes to sell draft beer for consumption in the civic center. The wording of Section 28-3A-23(h) requires that, for either of these exceptions to apply, the circumstances that allow the exception must exist at the time the permit is granted. AGO 2011-029.

- A city’s decision to deny an application for a special retail liquor license for a bed-and-breakfast facility was not arbitrary or capricious. Although the applicants’ property was not in close proximity to a school or child care facility, it was directly across the street from a public park and next door to public basketball court, both places that children were likely to be found, and the city could have reasonably determined that granting of a liquor license to the applicants could create a nuisance or otherwise adversely affect public health, safety, and welfare of the adjacent residential neighborhoods. *Biggs v. City of Birmingham*, 91 So.3d 708 (Ala.Civ.App.2012).
- The decision of the municipality in denying an application for a liquor license is subject to judicial review and is reversible if it is shown that the municipality acted arbitrarily in denying the application for a liquor license. *Ensley Seafood Five Points, LLC v. City of Birmingham*, 98 So.3d 1149 (Ala.Civ. App.2012).
- Assuming all other aspects of section 28-3A-17.1 of the Code of Alabama are met, a city is authorized to establish an entertainment district because the city operates a recognized main street program as required for Class 7 municipalities pursuant to section 28-3A-17.1. AGO 2014-046.
- Substantial evidence supported the city council’s revocation of a nightclub’s business licenses and rescission of its liquor license and dance permit. *Atlantis Entertainment Group, LLC v. City of Birmingham*, 231 So.3d 332 (Ala.Civ.App. 2017).
- Gas station’s allegation that the town denied an application for a liquor license based on the owners’ race and national origins stated an equal protection claim. *Minesaha, Inc. v. Town of Webb*, 236 So.3d 890 (Ala.Civ.App. 2017).
- Circuit court lacks jurisdiction via certiorari over denial

of liquor license by a local government in a different county. *EMBU, Inc. v. Tallapoosa County Com'n*, 263 So. 3d 731 (Ala.Civ.App. 2018).

51. Municipal Animal Control

Animals are the source of many problems for municipal officials and there is no reason to expect the situation to change. Municipal officials should be aware of the latest laws relating to animal control. This article summarizes the laws relating to municipal animal control.

Municipal Control of Dogs

Ordinary dogs having no vicious or mischievous propensities are free commoners which the owner or keeper is under no duty to keep out of the public streets, in the absence of a statute or an ordinance so requiring. *Owen v. Hampson*, 62 So.2d 245 (Ala. 1952). By local option, the county governing body of any county may prohibit dogs from running at large except in cities and towns that require a license tag to be kept on dogs. Section 3-1-5, Code of Alabama 1975. Section 3-1-5 was held constitutional in *State v. Golden*, 531 So.2d 941 (Ala. Crim. App. 1988).

Section 11-45-1, Code of Alabama 1975, gives municipalities the authority to adopt ordinances to protect the public health, safety and welfare. Alabama's rabies protection statute, found at Sections 3-7A-1 through 3-7A-15 of the Code states: "Nothing in this chapter shall be held to limit in any manner the power of any municipality to prohibit dogs or cats from running at large, regardless of rabies immunization status as herein provided; nor shall anything in this chapter be construed, in any manner, to limit the power of any municipality to further control and regulate dogs or cats in such municipality." Section 3-7A-14, Code of Alabama 1975.

Express statutory authority is given to municipalities to regulate and prevent dogs from running at large on the streets and to pass all laws necessary for the impounding and sale of the animals. Municipalities may also regulate the destruction of dogs. Section 11-47-110, Code of Alabama 1975.

The Alabama Supreme Court in *Birmingham v. West*, 183 So. 421 (1938), upheld a Birmingham dog ordinance requiring all dogs kept in the city to be inoculated against rabies before a certain date each year; that the owner or keeper of a dog procure a dog license for the animal at a fee of \$1, even though the dog was not allowed to run at large; and that a redemption fee of \$3 plus board must be paid for dogs impounded for violation of the ordinance. The court pointed out that while the ordinance was more stringent than state law on the subject, it was not in conflict with state law and therefore did not violate Section 89, Alabama Constitution, 1901, which is not intended to limit the police power of a

municipality but to prohibit a municipality from making lawful that which state law renders unlawful.

The extent to which a municipality may regulate dogs is left largely to the legislative discretion of the municipal governing body. Such ordinances are adopted under the municipal police power and Alabama courts are reluctant to examine the wisdom or propriety of such laws unless they are palpably unreasonable. The authority of a municipal governing body to regulate dogs extends throughout the corporate limits and police jurisdiction and on any property or rights of way belonging to the city or town. Section 11-40-10, Code of Alabama 1975.

The Attorney General's office has held that a municipality may prohibit the keeping of vicious dogs in the municipality. It may also require that the dog be kept secure, and require removing vicious and dangerous dogs from the municipality. AGO 1999-078.

State Statutes on Animal Control

Title 3 of the Code of Alabama 1975 is titled "Animals" and includes general provisions, statutes on strays, branding and the fencing and control of livestock.

Sections 3-1-1 and 3-1-4 of the Code prohibit the keeping of any dog which has been known to kill or worry other stock, establish fines and a penalty of double the value of all stock killed and prescribe action for the killing of such dogs.

Section 3-1-2 imposes penalties for the keeping of rabid dogs which cause damage to people or stock. Section 3-1-3 subjects the owner of a vicious animal to civil damages for injuries caused by such animals.

Section 3-1-5 deals with dogs running at large but exempts dogs within the corporate limits of a municipality which requires a license tag to be kept on dogs.

Section 3-1-7 states that the proprietors and owners of places of public accommodation, amusement or recreation (such as hotels, restaurants, stores, theaters, etc.) must not refuse to permit a guide dog to accompany a visually impaired person entering such a place. The dog is required to wear a harness and the dog owner must present for inspection credentials issued by an accredited school for training guide dogs. Violation of this statute constitutes a misdemeanor and subjects the violator to a fine not to exceed \$50.

The wanton or malicious killing or injuring of animals is outlawed by Section 3-1-10, which authorizes fines up to \$1,000 and sentences of not more than six months. Section 3-1-13 permits employees of recognized humane societies to take up and care for animals cruelly treated or abused and imposes a lien on the owner for such service.

Cruelty to animals is covered by Section 13A-11-14 and

Sections 13A-11-240 through 247, Code of Alabama 1975.

Section 3-1-15 prohibits the sale of baby rabbits, baby chicks, baby ducks or fowl as pets or novelties and makes such transactions a misdemeanor.

The theft of animals or lost animals is covered by Sections 13A-8-3 through 13A-8-5 and Sections 13A-8-7 through 13A-8-9.

The Attorney General's office has held that a county commission has the authority to provide comprehensive animal control in unincorporated areas of the county. AGO 1997-262.

Owner's Liability for Dog Bites

The owner of a dog is liable for injuries caused if the dog bites or injures any person who is lawfully on the owner's property. Provocation of the injury may be offered as a defense, and lack of knowledge of the dog's propensity to commit such an act may be offered in mitigation of damages. *See*, Sections 3-6-1 through 3-6-4, Code of Alabama 1975; *see also*, *Kent v. Sims*, 460 So.2d 144 (Ala. 1984). This is known as the "Postman's Law."

Emily's Law – Dangerous Dogs

In 2018, "Emily's Law" was enacted and codified in Sections 3-6A-1 through 3-6A-8, Code of Alabama 1975. Emily's Law sets out a procedure for animal control officers or other law enforcement officers to conduct dangerous dog investigations. If the investigation causes the animal control officer or law enforcement officer to conclude that a dog is dangerous, the complainant is advised of the findings and the investigation results are submitted to the supervisor. *See*, Section 3-6A-4, Code of Alabama 1975.

The municipal attorney or municipal prosecutor may file a petition in municipal court or district court to declare the dog dangerous, and a hearing is held to determine whether the dog is dangerous. *See*, Section 3-6A-4, Code of Alabama 1975.

At the court hearing, the municipal attorney or municipal prosecutor shall present evidence that the dog is dangerous. If the court finds by a reasonable satisfaction that the dog bit, attacked, or caused physical injury, serious physical injury, or death to a person without justification, the court shall order the dog to be humanely euthanized by a licensed veterinarian or an authorized animal control official. *See*, Section 3-6A-4, Code of Alabama 1975.

If the court determines that the dog is dangerous, but it has not caused serious physical injury or death to a person, the court shall determine whether the dog has a propensity to cause future serious physical injury or death. If the court determines by reasonable satisfaction that the dog has such a propensity, the court may order the dog to be humanely euthanized by a licensed veterinarian or an authorized animal

control officer, or the court may order the dog be returned to its owner pursuant to all of the following conditions:

- The dangerous dog shall be microchipped.
- The owner of the dangerous dog shall provide a copy of the certificate of the current rabies vaccination of the dog.
- The dangerous dog shall be spayed or neutered.
- The owner of the dangerous dog shall be required to pay all expenses involved with the investigation, pickup, and impoundment, and any court costs or fees related to the hearing to determine whether the dog is dangerous.
- The owner of the dangerous dog shall be required to pay an annual dangerous dog registration fee of one hundred dollars (\$100) to the county or municipality for a dog deemed dangerous by a court or pay a penalty of one hundred dollars (\$100) to the county or municipality for non-registration within two weeks.
- The owner shall be required to obtain a surety bond of at least one hundred thousand dollars (\$100,000) and shall provide proof to the court or animal control office. *See*, Section 3-6A-4, Code of Alabama 1975.

Rabies Statute

The rabies control statute found in Sections 3-7A-1 through 3-7A-15 of the Code of Alabama 1975, imposes the duty upon the county board of health with the approval of the state health officer and the state veterinarian to appoint in January of each year a duly-licensed veterinarian who shall be known as the county rabies officer. The officer's term of office runs until December 31 of the year of appointment, and he or she is charged with the duty of enforcing the statute within the county. The county rabies officer has the authority to appoint deputies. The county sheriff and police officers of each municipality are declared to be aides for the enforcement of the law and are instructed to cooperate with the officer.

Animals required to be inoculated by the state rabies statute include all members of the canine family three months of age and all members of the feline family three months of age.

Every owner of an animal required to be inoculated for rabies shall have the animal inoculated by the rabies officer, his or her authorized representative, or any duly-licensed veterinarian when the animal reaches three months of age and annually thereafter. The owner receives a certificate of inoculation and a rabies tag. The tag must be attached to the animal's collar or harness and worn at all times. The vaccination of animals for rabies shall be good for one year. Provision is made for the replacement of lost tags. The fee for inoculation is established prior to the first day

of January of each year by a committee composed of the state health officer, the state veterinarian and the president of the Alabama Veterinary Medical Association.

Any animal not wearing a current tag and for which no certificate of inoculation can be produced that is apprehended by an officer charged with enforcing the rabies law, shall be subject to a penalty not to exceed an amount equal to twice the inoculation fee set by the state. The penalty is imposed by the rabies officer on the owner of the animal, in addition to the fee charged for inoculation.

The penalty shall accrue to the rabies officer or his agent except in cases of rabies officers who are employed full time on salary. In that case, the penalty accrues to the employing agency or agencies.

The law requires every county to provide a suitable county pound for the impoundment of all animals found running at large in violation of the rabies statutes. Every municipality over 5,000 in population, in which a county pound is not located, shall maintain a suitable pound or contribute their pro rata share to the staffing and upkeep of the county pound. A municipality with a population of less than 5,000 is not required to maintain an animal control service. A municipality may, by ordinance, establish regulations regarding animal control services and contract with an independent contractor to perform animal control services. AGO 2005-172.

The impounding officer is required to give not less than seven days notice of the impoundment, in some form or manner. If the owner of the animal is known, direct notice is required.

All animals which have been impounded for lack of rabies inoculation in accordance with the law and which are not redeemed by the owner within seven days may be humanely dispatched and disposed of, provided the owner was given the required notice. Owners may redeem impounded animals by paying for the inoculation of the animal (if a certificate of inoculation cannot be produced), paying the penalty prescribed and the board bill. The amount paid for the board of the animal shall accrue to the city or county, depending upon the pound in which the animal was confined. The impounding officer may sell any animals not redeemed within the seven-day period rather than dispatch them. The purchaser must pay the inoculation fee penalty and board bill. Section 3-7A-8, Code of Alabama 1975.

Whenever the rabies officer or county health officer receives information that a person has been bitten by an animal required to be inoculated against rabies, the county health officer is required to have the animal put in quarantine with a duly-licensed veterinarian for observation of rabies. It is illegal for any person having knowledge of such an animal bite to refuse to promptly notify the proper officials. It is also unlawful for the owner of the animal to refuse to

follow the instructions of the rabies officer or other health officials or to sell, give away, transport to another area or otherwise destroy the animal until it is released from quarantine.

Instructions for quarantine of the offending animal must be delivered in person or by telephone to the owner of the animal by the rabies officer or his authorized agent. If instructions cannot be delivered this way, they shall be mailed by regular mail, postage prepaid and addressed to the owner. Any expenses incurred in the quarantine are to be borne by the owner.

The veterinarian under whose care the offending animal has been committed for quarantine shall report the results of the observation to the attending physician of the person bitten.

Canine corps dogs and seeing eye dogs shall be exempt from the quarantine period where the bite occurred in the line of duty and evidence of proper vaccination against rabies is presented. However, a licensed veterinarian must examine the dog at the end of the 10 days.

Any person violating or aiding in or abetting the violation of the provisions of the rabies laws is subject to prosecution in any court of competent jurisdiction, including municipal courts.

Upon request of proper local officials, the state health officer may place certain areas of the state under a rabies quarantine to prevent the spread of the disease. In serious situations, an area may be placed under quarantine without waiting for a local request.

Municipal Control of Animals Other than Dogs

Section 11-47-110, Code of Alabama 1975, authorizes municipalities to regulate and prevent the running at large on the streets "all equine or equidae, cows, hogs, dogs or other animals" and provides for the impoundment and sale of such animals. This statute also authorizes destruction of dogs and the regulation of the movement of livestock in droves through a municipality.

Municipal police power which once extended to the regulation and prohibition of the keeping of livestock where the regulation or prohibition is reasonable and related to the public health, safety and welfare has been somewhat curtailed. Except as otherwise provided by state or federal law, the entire subject matter concerning the care and handling of livestock and animal husbandry practices involved in the production of agricultural and farm products on private property shall be reserved to the Department of Agriculture and Industries and the State Board of Agriculture and Industries and shall be subject to the sole jurisdiction of the department and board. Ordinances in effect before July 1, 2010 are not affected, repealed, superseded or overridden and will remain effective. A municipality is

not precluded or prohibited from hereinafter enacting an ordinance, concerning zoning, business licenses, or the enforcement of public nuisances. Section 2-15-5, Code of Alabama 1975. A farm or farm operation shall not be deemed to be or become a public or private nuisance for purposes of Section 6-5-127, Code of Alabama 1975, or any other law, or be deemed in violation of any municipal or county ordinance or resolution heretofore or hereafter adopted declaring any farm or farm operation a public or private nuisance other than a zoning ordinance. Section 2-6B-3, Code of Alabama 1975. Livestock markets in Alabama are regulated by the Commissioner of Agriculture and Industries under provisions of Title 2, Code of Alabama 1975. Municipalities, nevertheless, under zoning ordinances, can control the location of such markets. Normally, zoning laws only permit such operations in industrial areas.

Cruelty to Dogs and Cats

Section 13A-11-14, Code of Alabama 1975 establishes the crime of cruelty to animals. Sections 13A-11-240 through 13A-11-247, Code of Alabama 1975, more specifically establish the crimes of cruelty to a dog or cat and of intentional extreme cruelty to a domesticated dog or domesticated cat. The law also provides for penalties in the first and second degree. A person commits the crime of cruelty to a dog or cat in the first degree if he or she tortures any dog or cat with the intent to inflict intense pain, serious physical injury or death upon the dog or cat or skins a domestic dog or cat or attempts to sell their fur or hide. Cruelty in the first degree is a Class C felony. A person commits the crime of cruelty to a dog or cat in the second degree if they behave in a cruel manner or deprive the necessary sustenance or shelter, unnecessarily or cruelly beat any dog or cat. Cruelty in the second degree is a Class A misdemeanor.

Any municipality may appoint one or more trained agents to inspect alleged violations of this law. Any appointment made pursuant to this section shall be made at a meeting of the local governing body duly called with notice. In the event a law enforcement officer or agent has reasonable belief or evidence of or having found a dog or cat to be neglected or cruelly treated may either remove the animal from its present location or order the owner to provide certain care to the animal at the owner's expense. Within 20 days of seizure of the animal, a hearing shall be set. This law also provides individuals immunity under certain situations.

Selected Case law and Attorney General's Opinions

- Municipalities may, by ordinance, provide for the destruction of dogs running at large if
- destruction is necessary to protect the health and safety of its citizens. AGO 1991-204.

- In order to control or eliminate stray dogs, a municipality should provide, by ordinance,
- for the impounding and/or destruction of such dogs. AGO 1991-318. Counties are responsible for the expense of maintaining a county pound. However, a municipality with over 5,000 in population must contribute a pro rata share for maintaining the pound or maintain its own pound. The county is responsible for the costs of maintaining an animal that was not redeemed by its owner or sold. AGO 1990-308.
- Animal control officers that are not commissioned by the governing body to be law
- enforcement officers do not have arrest powers other than those of a private citizen pursuant to Section 15-10-7 of the Code of Alabama. AGO 2007-054.
- A statute criminalizing the commercial creation, sale, or possession of depictions of
- animal cruelty regulated expression based on content, and thus, the statute was presumptively invalid under the First Amendment, and the Government had the burden of rebutting that presumption. *U.S. v. Stevens*, 130 S.Ct. 1577 (U.S.2010).
- A person employed by the county commission as an animal control officer is under the
- supervision of the county commission regardless of whether that person is commissioned as a deputy sheriff under Section 3-1-16 of the Code of Alabama. AGO 2009-066.

52. Control of Junkyard and Salvage Operations

Frequently the League receives questions about the regulation and control of salvage operations. Activities of this type include junk dealers, junkyards, junk collectors, second-hand dealers, junk brokers and automobile salvage yards and dealers. This article summarizes the laws pertaining to the control of salvage operations. Also included are ordinance provisions which have been adopted by several Alabama cities and towns.

Police Power

The authority of a municipality to control salvage operations must be derived either from an express grant of power from the legislature or it must come from the general grant of police power to adopt ordinances and regulations for the health, safety, morals, welfare and convenience of its inhabitants.

The only statutory provisions governing junkyards are found at Sections 23-1-240 through 23-1-251, Code of Alabama 1975. These sections deal with the regulation of all junkyards within 1,000 feet of the right of way of any interstate or primary highway. Additionally, Section 11-80-10, Code of Alabama 1975, gives municipalities the power to license junkyards within its police jurisdiction to the same extent as if the junkyard was located within its corporate limits.

While these specific provisions are helpful, they fall far short of the control required to protect the public health, safety and welfare. It is generally recognized that municipalities may regulate second-hand dealers and shops, junk or salvage shops, dealers, stores and yards, including automotive wrecking, junking and dismantling places and may require that they be licensed. The general police and licensing power of a municipality is sufficient for this purpose. *McQuillin, Municipal Corporations*, 3rd Edition, Section 24.351. These establishments are subject to strict police control because of fire hazards created by the accumulation of inflammable materials, frequently in combustible buildings. Such businesses may pose a health hazard if clothing and materials are infected with disease. Furthermore, regulation is necessary to prevent them from becoming an outlet for stolen goods.

Power to Prohibit Limited

Municipal authorities having the power to abate nuisances cannot absolutely prohibit a lawful business which is not necessarily a nuisance. They may, however, abate it when the business is carried on in a manner so as to constitute a nuisance. Municipalities cannot, under the claim of exercise of police power, substantially prohibit a

lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. *Greensboro v. Ehrenreich*, 2 So. 725 (Ala. 1887). It is generally said that the operation of an automobile salvage yard is not a nuisance per se. *Crabtree v. City Auto Salvage Co.*, 340 S.W.2d 940 (Tenn. 1960). However, Section 23-1-250, Code of Alabama 1975, specifically provides that the operation of a junkyard required to be licensed under Alabama law is a public nuisance. See *Burnett Used Auto Parts v. Limestone County*, 687 So.2d 171 (Ala. Civ. App. 1997). Under Alabama zoning powers, cities and towns are authorized to restrict the establishment of junkyards to certain areas within the municipality and its zoning jurisdiction. However, where such yards and businesses were established prior to zoning they are allowed to continue as a nonconforming use until such use is discontinued.

The biggest problem is found in the allowance as a nonconforming use. Can a municipality prohibit salvage-type operations within certain areas of the municipality under the general police power? The answer is a qualified "yes." If the business would amount to a public nuisance in the area, then the municipal governing body could and should refuse to license such business operations. However, the prohibition must have a definite, obvious and real relationship to the public health, safety, morals, welfare and convenience. While some states have recognized aesthetic considerations in regulating and restricting automobile junk businesses, this is not the general rule. In the *Crabtree* case, the court pointed out that it found no decisions upholding an injunction to prevent the continuance of a business simply because of its unsightliness. The court pointed out that a difference exists between direct control by courts through injunction on the one hand and legislative control through the use of the police power on the other.

Consent of Neighbors

As a general rule, a municipality may not adopt an ordinance which makes the issuance of a license to conduct a salvage operation at a particular location dependent upon the consent of a specified percentage of neighboring land owners. Such requirements have been held oppressive and unreasonable and an unlawful delegation of the municipal legislative power. No cases in Alabama have directly dealt with this question, but it is safe to assume that the courts would not go along with such a requirement.

Special Zoning Provisions

In the case of *Allen v. Corpus Christi*, 247 S.W.2d 130 (Tex. Civ. App. 1952), the court held that a municipality

could not adopt a zoning ordinance provision requiring automobile salvage businesses located in areas restricted against them to move within three years to a proper zone or go out of business. In this case, the court pointed out that zoning ordinances work prospectively and should not be given retroactive effect.

Fencing Requirements

Numerous cases have considered ordinances requiring fencing around salvage and junkyards, including automobile wrecking yards. The decisions have not been uniform by any means. Generally, a municipality has the authority to require that salvage yards be fenced where it can be shown that the requirement is reasonably related to public health and safety. If the fencing requirement is obviously imposed to prohibit the operation, then the ordinance will be held invalid.

Conversely, if the requirement is not oppressive and obviously imposed but will prevent junk from scattering over adjoining areas or prevent children from being hurt by attractive nuisances located in such areas, it is generally upheld. If the ordinance specifies the type of fence in such detail that it is not necessarily connected with the reason for the fence, then the ordinance would be considered unreasonable and arbitrary. If the fencing requirement is based solely on aesthetic reasons, the courts have held such ordinances invalid.

NOTE: For junkyards requiring licenses by the state of Alabama, Section 23-1-245, Code of Alabama 1975, requires screening in order to qualify for a license. Screening includes natural objects, plantings, fences, or other appropriate means so as not to be visible from the main-traveled road or otherwise removed from sight.

Licensing Requirements

Before issuing a license to engage in business as a junk collector, junk dealer, second-hand dealer or automobile salvage dealer, a municipality may impose valid conditions. The applicant may be required to be of good character. Issuance of the license may be conditioned upon an investigation of the past conduct of the applicant which relates to the business involved. A prior conviction for receiving or purchasing junk from minors may disqualify an applicant, as may a conviction for receiving stolen property or a conviction for failure to keep proper records of purchases.

The ordinance may require that the applicant give permission to the police and fire departments to inspect and search the premises of the business at all times. The applicant may be required to specifically describe the area upon which the operation will be conducted and to submit a plat showing the area. As pointed out above, the ordinance

may require that the area be fenced for proper purposes and in a reasonable manner. In addition to these restrictions, the hours of business may be restricted and licensees may be required to maintain a rodent and vermin control program on the premises.

Selected Caselaw and Attorney General's Opinions

- In *Jaffe Corporation, Inc. v. Board of Adjustment of Sheffield*, 361 So.2d 556 (1977) the Alabama Court of Civil Appeals held that the city was correct when it ruled the corporation was operating a junkyard in an area not zoned for such business. The lower court decision was affirmed.
- The power to zone, qualify and define junk or salvage activities is a municipal function in light of the fact that the state has not taken action in the field. AGO to Hon. J.H. Summerlin, September 1, 1977.
- A county commission cannot require a junkyard to seek a county license if the junkyard is in the municipality's police jurisdiction, regardless of whether the city is enforcing its licensing requirements within its police jurisdiction. If a residence is being operated as a junkyard and is not within a municipality's police jurisdiction then the county is entitled to require the residence to be licensed as a junkyard. AGO 2002-177.
- A city ordinance's definitions of "junk" and "nuisance" cannot be arbitrary, unreasonable, and overbroad, since cities may not, under the guise of police power, impose restrictions that are unnecessary and unreasonable upon the use of private property. A resolution authorizing a nuisance abatement submitted by the housing code department, accompanied by a list of the properties containing alleged nuisances and a short description of the alleged nuisances by housing code department employees, was itself sufficient evidence and that no additional evidence was required to shift the burden of proof to the property owners. *K & D Automotive, Inc. v. City of Montgomery*, 150 So.3d 752, 2014 (Ala.2014).

53. Annexation and De-annexation of Municipal Property

Rapidly growing cities and towns frequently need to extend their municipal boundaries. The extension of municipal boundaries in Alabama and in other states is accomplished through a process known as “annexation.” The four methods of annexation available to Alabama municipalities are examined in this article. On certain rare occasions, a municipality may need to remove property from its corporate limits. This process, which is known as “de-annexation”, is also discussed in this article.

Annexation by Local Legislative Act

One of the most widely used methods of annexation in Alabama is the adoption of special acts by the Legislature. Annexation by local act is prohibited in all but a dozen or so states. The authority for annexation by local act in Alabama is found in Section 104(18) of the Alabama Constitution of 1901. Only the Legislature can annex property without the consent of the property owners or the municipal governing body. AGO 1989-315.

The Legislature of Alabama is not restricted to a positive annexation of territory to the municipalities in the adoption of a local act. Examples reveal legislation which states the annexation shall be complete only after a favorable referendum in the territory to be annexed, that agricultural property shall be exempt from ad valorem taxation by the municipality, that the annexation shall be effective only after a favorable referendum and the adoption of a resolution by the municipality, and that territory annexed shall be exempt from ad valorem taxation for a specified period of time. *See, Opinion of the Justices*, 249 Ala. 312, 31 So.2d 309 (Ala. 1947).

Generally, the Legislature’s power to annex by local act is not subject to attack on the grounds that property owners in the annexed territory are being deprived of their property without due process of law in violation of the 14th Amendment to the U. S. Constitution. *Cedar Rapids v. Cox*, 108 N.W.2d 253 (Iowa 1961); *Hunter v. Pittsburg*, 207 U.S. 161 (1907).

For the valid adoption of a local act to annex territory into a municipality, Section 106 of the Alabama Constitution of 1901, requires that notice of the intention to apply for the passage of such an act shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected is situated. The notice must state the substance of the proposed law and state that a map showing the territory proposed to be annexed is on file in the office of the probate judge. Section 11-42-6, Code of Alabama 1975.

The notice must be published at least once a week for four consecutive weeks in a newspaper published in such county or counties prior to the introduction of the bill. Proof by affidavit that such notice has been given must be exhibited to each house of the Legislature and spread upon the journal. It has been ruled that a local bill can be introduced immediately after it appears in a required publication for the fourth week. This means that a bill can be introduced 23 days after its first date of publication. Posting is allowed if no newspaper is published in the county affected.

In addition, Section 11-42-6, Code of Alabama 1975, requires all annexation bills to contain an accurate description of the territory proposed to be annexed and a map or plat showing the relationship of the territory to the existing municipal limits. The map is to be attached to the bill and must be filed in the office of the probate judge of the county or counties in which the territory is located. The Alabama Supreme Court has held that the Legislature may annex noncontiguous property to a municipality. *Birmingham v. Vestavia Hills*, 654 So.2d 532 (Ala. 1995).

The League recommends that a municipal governing body discuss the proposed annexation with its state legislators before taking any steps to procure the passage of a local act. Since the measure must be passed by both houses of the Legislature, the assistance and approval of the senator(s) representing the municipality, as well as the representative(s), are necessary. If both the senator(s) and representative(s) approve of the bill, it will most likely be passed under the local courtesy rule without opposition. It is recommended that once a municipality has discussed the proposed annexation with its legislative delegation that it seeks approval to work with Legislative Reference Service (LRS) to prepare the annexation bill. All bills introduced in the Alabama Legislature must be prepared through LRS. Having LRS prepare your local annexation bill for advertisement to begin with can help prevent duplicate advertising in the event LRS makes changes to any bill a municipality has already advertised prior to working with LRS. All bill drafting should begin with LRS.

Often, prior to introduction of a bill, representatives and senators will want a resolution passed by the municipality seeking annexation. The municipal governing body should adopt a resolution providing for the following:

- The public health and good require the annexation of the described territory,
- It is wise, expedient and economical for the annexation to be accomplished by the passage of a local law,

- The mayor is directed to cause notice of the application for passage of such local law to be published for four consecutive weeks in the newspaper published in the county after the bill is prepared by the Alabama Legislative Reference Service,
- The clerk should prepare necessary copies of the local bill for delivery to the local representative with a certificate from the publisher showing the dates of publication, and
- The costs of publishing the bill will be paid by the municipality.

If no newspaper is published within the county, the notice may be posted for two consecutive weeks at five different places in the county prior to introduction of the bill.

Municipal officials should anticipate legislative sessions and cause annexation bills to be prepared by LRS and advertised well in advance of the opening date of the session. Legislation becomes jammed toward the end of the session and if the bill is introduced late it might not receive the required attention. A minimum of five legislative days is required for a bill to pass through both houses, but a municipality should not count on such rapid passage.

As a final word of caution, care should be taken in the preparation of the bill and the published notice to ensure that the territory is properly described. While courts have recognized that slight changes may be made in local bills after their advertisement, it is difficult to predict what a court will consider a material or substantial change. *See, Mobile v. Aborady*, 600 So.2d 1009 (Ala. 1992) and *Tuscaloosa v. Kamp*, 670 So.2d 31 (Ala. 1995). In *Kamp*, the Alabama Supreme Court held that Section 106, Alabama Constitution, 1901, was not violated when the Legislature amended a local annexation bill, after notice was published, by reducing the amount of property being annexed.

Statutory Methods of Annexation

Alabama municipalities have three distinct statutory procedures for annexation. The first procedure is available to all municipalities regardless of size. Sections 11-42-1 through 11-42-6, Code of Alabama 1975. The second method, found at Sections 11-42-20 through 11-42-24, Code of Alabama 1975, was adopted by the state Legislature in 1971 and since 1982, has applied to all cities and towns. A third statutory method may be used by all cities of 25,000 or more in population and is found at Sections 11-42-40 through 11-42-88 of the Code.

1. The General Statute

The provisions set out in Sections 11-42-1 through 11-42-6, Code of Alabama 1975, state that any city or town, by adopting a resolution which is filed in the probate

court along with a detailed map, may initiate annexation procedures. Consent of persons owning at least 60 percent of the acreage of the platted or unplatted land must be obtained. At least two qualified electors residing on each quarter of each quarter section must also consent. The probate judge next orders an election and if a majority of the qualified electors residing in the territory proposed to be annexed vote in favor, the territory is annexed. The Alabama Supreme Court in *Givorns v. Valley*, 598 So.2d 1338 (1992), held that such an annexation election is legal even though individuals who owned property within the annexed area, but resided elsewhere, were not allowed to vote in the election.

The difficulty with the present provisions is obvious: “No platted or unplatted territory shall be included within such boundary unless there are at least two qualified electors residing on each quarter of each quarter section, according to government survey or part thereof, of such platted or unplatted land, who assent thereto in writing by signing said petition, together with the consent of persons, firms or corporations owning at least sixty percent (60%) of the acreage of such platted or unplatted land, such consent to be signified by their signing said petition.” There may be a quarter of a quarter section upon which no one resides and, therefore, the securing of two qualified electors is impossible. Further, a single landowner owning 60 percent of the acreage has a veto power.

In 1965, this law was amended by the Legislature at the request of the League to eliminate the necessity of the election if all of the persons affected by the annexation consent to it.

It is not necessary that the petitions allege that the signers have the required qualifications, but such facts must be proved to the probate court. *Oxford v. State*, 257 Ala. 349, 58 So.2d 604 (Ala. 1952). It is also not required that the consenting qualified electors be property owners. The Attorney General has ruled that “owners of 60 percent of the acreage” means a beneficial owner. AGO to Hon. J. C. Grady, June 17, 1958.

The territory to be annexed must be contiguous to the municipality and must not be in the corporate limits of an existing municipality. The Attorney General has ruled that parcels which touch corner to corner are not contiguous within the meaning required by statutes of this nature. AGO to Hon. Clyde Cargile, March 4, 1959 and AGO 1987-168. A substantial common boundary, however, between the annexing municipality and the annexed territory is not necessary. *Fultondale v. Birmingham*, 507 So.2d 489 (Ala. 1987). The resolution adopted by the municipality does not have to be published as an ordinance or resolution of general or permanent nature. *Talladega v. Jackson-Tinney Lumber Company*, 209 Ala. 106, 95 So. 455 (Ala. 1923).

Notwithstanding any other provision of law, any Class 6 municipality may annex land or territory pursuant to the provisions of Chapter 42, Title 11, Code of Alabama 1975, provided the land or territory is contiguous to land or territory owned by a public university when the land or territory owned by the university is contiguous to the municipality, notwithstanding that the land or territory to be annexed is not contiguous to the municipality. Nothing in this section shall affect the status of property owned by the university. Section 11-42-30, Code of Alabama 1975.

Annexation petitions filed pursuant to Section 11-42-2 of the Code are not required to be filed with the probate judge, although the probate judge may request proof of residency and qualification as an elector. AGO 1999-246.

2. Annexation by Unanimous Consent

Article 2 of Section 42 of Title 11 (Sections 11-42-20 through 11-42-24) of the Code of Alabama 1975, provide an additional method of annexation which can be used by all Alabama municipalities. It should be noted that hardbound volumes of the Code of Alabama 1975 still have this article titled as only applying to municipalities of 2000 or more population. This section of the Code was amended in 1982 to remove this population restriction but the Alabama Code Commissioners have not updated this change in the title of Article 2. This method of annexation is available to all municipalities regardless of population.

These sections require unanimous consent of all of the property owners in the area proposed to be annexed. It also requires that all such persons sign the petition. An owner of property in the area is “the person in whose name the property is assessed for ad valorem tax purposes in the absence of proof to the contrary.” This provision was included to prevent disputes and uncertainty of ownership.

A municipality should require proof of authority if a name appears on the petition and the records show that such person does not assess the property for which he or she signed. Both husband and wife should sign (much property is now held under survivorship deeds); property owned by corporations should be signed for by a qualified officer of the corporation and the signature attested; property owners who are not married should indicate their marital status. An expression to the effect that “John Doe who resides in the area does not object” is not a sufficient manifestation of his position to meet the legal requirements. The Attorney General has ruled that annexation petitions should be signed by both a life tenant and the holder of the remainder interest. AGO 1993-227.

The state of Alabama is an owner of property within the meaning of the annexation statutes and may consent to the annexation of property it owns, even though the state is exempt from property taxes. The petition for annexation

should be signed by the Governor. AGO 1998-009.

The owner of a mineral estate, whose property is assessed for ad valorem taxation, is an owner who must consent to an annexation under the unanimous consent method in Section 11-42-21, Code of Alabama 1975. AGO 1999-048.

The area to be considered for annexation must actually be contiguous to the corporate limits of the municipality. Parcels of property proposed to be annexed into a municipality by this method are not required to be contiguous to each other so long as each parcel is contiguous to the corporate limits and thus, holding a single election covering the various parcels proposed to be annexed is proper. AGO 2003-038.

The area may not be within the corporate limits or police jurisdiction of another municipality. The statute, however, provides that in the event the territory to be annexed by a city or town lies in the police jurisdiction of the annexing city as well as in the police jurisdiction of another city or town, the governing body of each municipality may exercise the annexation authority granted by this law in such overlapping portions of their police jurisdictions to a boundary which is equidistant from the respective corporate limits of each municipality with an overlapping police jurisdiction. A municipality may, by a series of ordinances, annex land to a boundary that is equidistant from its corporate limits and the corporate limits of another municipality. *Prichard v. Saraland*, 536 So.2d 1387 (Ala. 1988).

A municipality may not use long-lasso annexation to create contiguity with a parcel of property. A property owner must consent to the annexation of a corridor to reach the property. Where annexation of a public right of way is involved, more than just the roadway must be included in the corridor. AGO 1998-170. There is no requirement that a corridor annexation must include private, as opposed to public, property to avoid being categorized as a prohibited long-lasso annexation. A city’s corridor annexation, which involved property that was 19.3 miles long and 330 feet wide, did not consist solely of the public right-of-way and thus did not constitute a prohibited long-lasso annexation where less than 25% of the width of the annexed property was public right-of-way. *Fort Morgan Civic Ass’n, Inc. v. City of Gulf Shores*, 100 So.3d 1042 (Ala.2012). The petition, after it is fully signed by all persons owning property in the area, is presented to the city clerk. The petition must contain an accurate description of the property to be annexed. “Accurate description” as used in the act means a legal description – a description that would enable anyone to locate exactly the area encompassed. In addition to the description, the petitioners must attach a map “showing its relationship to the corporate limits of the

municipality ...” The Alabama Supreme Court has held that there is no requirement that cities and towns be regular in shape, but the law clearly necessitates that the area to be annexed must be contiguous and homogeneous. *Prattville v. Millbrook*, 621 So.2d 267 (Ala. 1993).

After the petition in proper form is presented to the city clerk, the governing body in a legal meeting may, in its discretion, adopt an ordinance assenting to the annexation. Upon adoption and publication of the ordinance, the area becomes a part of the corporate limits of the municipality on the date of publication of the ordinance. The governing body must file a description of the property annexed in the office of the probate judge of the county.

The expense of preparing the petition should normally be borne by the property owners. The city clerk should verify the facts and the governing body should find that the persons signing the petition constitute all the owners of the property and that it is contiguous to the corporate limits.

A municipality may annex contiguous territory even if the property is only accessible by a road that runs through another municipality. The police jurisdiction of one municipality may not extend into the corporate limits of another municipality. A United States highway is not an interstate as that term is used in Section 32-5A-171, Code of Alabama 1975. AGO 1999-148.

A property owner seeking to annex into a municipality under Sections 11-42-20 through 11-43-22, Code of Alabama 1975 (the unanimous consent method), may submit successive petitions to the council if the first petition was rejected. A council must follow its rules of procedure regarding reconsideration of the matter. AGO 1999-069.

3. The Special Statute

The fourth method of annexation is available to cities with populations of 25,000 or more. Under this procedure, found in Article 3 of Section 42 of Title 11 (Sections 11-42-40 through 11-42-88) of the Code of Alabama 1975, a municipality initiates the proceedings with a resolution. No petition containing written consent of a specified percentage of property owners, or number of electors, is required. The statute, however, has some serious drawbacks.

Electors residing in the territory must vote in favor of the election as under the general procedure. If the territory is voted into the municipality, it is exempt from city taxation for a minimum of 10 years. An exception to this stipulation is that after five years the annexed territory, if it has a population of 20 or more persons per contiguous 10 acres, becomes subject to city taxation. This exception does not apply to individual property which is exempt for a minimum of 10 years.

Persons residing in the annexed territory are not eligible to vote in municipal elections as long as the territory is

tax exempt. No person residing on tax-exempt territory is eligible for municipal office.

No person, firm or corporation in tax-exempt territory shall be liable for a privilege license to the municipality except as provided in the statute. This feature probably costs the municipality revenue because prior to annexation the municipality had the authority to license all businesses in its police jurisdiction in an amount not exceeding one-half of the amount charged similar businesses operating in the corporate limits.

In addition to these three statutory methods of annexation, there is authority for any Class 4 municipality organized in accordance with Section 11-44B-1, et seq., Code of Alabama 1975, (only applicable to the City of Tuscaloosa) to annex certain unincorporated territory which is enclosed within the corporate limits of the municipality. Such territory is commonly referred to as an “island.” The League for many years has attempted to have state-wide legislation passed which would allow all municipalities, regardless of Class size to take in property that is completely enclosed within the corporate limits of the municipality. A method for “Island Annexation” continues to be a legislative priority for the League.

De-annexation through Legislative Act

The corporate limits of a municipality may be reduced in one of two ways, (1) through a local legislative act of the state Legislature or (2) pursuant to the procedures set out in Article 7 of Section 42 of Title 11 (Sections 11-42-200 through 11-42-213) of the Code of Alabama 1975.

The procedures described above for annexation through local legislative act would also apply to de-annexation by local legislative act.

Statutory Procedures for De-annexation of Property

If a municipal council wishes to reduce the corporate limits of the municipality, the council must pass a resolution defining the proposed corporate limits. Section 11-42-200, Code of Alabama 1975. Once the resolution is adopted, the mayor or council president must file the following with the probate judge of the respective county: (1) a certified copy of the resolution that defines the proposed corporate limits; (2) a plat or map correctly defining the corporate limits proposed to be established; and (3) the names of all qualified electors residing in the territory proposed to be excluded from the area of such corporation. Section 11-42-201, Code of Alabama 1975.

After the above has been filed, the probate judge shall call a hearing at which those individuals residing in the area to be excluded may appear before the judge of probate and show cause as to why the proposed reduction of corporate limits should not take place. Section 11-42-202, Code of

Alabama 1975. All persons residing in the affected area should be notified by the probate judge. The date of the hearing must be no less than 10 days from the filing of the resolution and not more than 30 days from the filing. If no one appears at the hearing to object to the reduction, the judge of probate shall order the corporate limits reduced as outlined in the council resolution and map or plat. Section 11-42-203, Code of Alabama 1975. The order shall be recorded in the minutes and the map or plat shall be recorded in the probate office. Residents who appear at the hearing and protest the reduction must show reasonable cause as to why the reduction should not take place. Section 11-42-204, Code of Alabama 1975.

If the judge of probate determines that reasonable cause is shown, he or she shall order that an election be held by the qualified electors of the municipality. The election shall take place not less than 10 days and not more than 30 days from the order for election. The election will be directed by the probate judge.

The judge shall give notice of election as provided in Section 11-42-205, Code of Alabama 1975. Section 11-42-205 requires one publication of the notice for at least seven days in a newspaper published in the city or town. If there is no newspaper published in the city or town, the probate judge shall post a notice of election at three public places. The notice shall state the date of the election, describe the proposed limits as stated in the resolution and state that a map of territory to be de-annexed is provided for public inspection in the probate judge office of the respective county. The election shall be held at the regular voting places in the city or town and all qualified electors residing in the city or town shall have a right to vote on the reduction of corporate limits. Section 11-42-206, Code of Alabama 1975. The statute is ambiguous as to polling places, but the League's interpretation is that polling places shall be those designated for the municipal elections.

The probate judge shall conduct the election in accordance with the general election laws and any additional provisions found in Section 11-42-200, et. seq., Code of Alabama 1975. Section 11-42-207, Code of Alabama 1975. The probate judge is not required to provide an official ballot; however, the probate judge is responsible for the appointment of clerks, inspectors and a returning officer. Section 11-42-207, Code of Alabama 1975. Each voter may furnish his or her own ballot with one of the following phrases written or printed:

- "For adoption of the proposed corporate limits."
 - Or
 - "Against the adoption of proposed corporate limits."
- Section 11-42-208, Code of Alabama 1975.

Once the polls are closed, the election inspectors are responsible for determining the result of the election at their respective polling locations and deliver the results to the returning officer, who shall immediately return the results to the probate judge. The judge of probate is responsible for canvassing the results of the election. If a majority vote favors a reduction of the corporate limits, the judge must order on the record adjudging and decreeing that the corporate limits reflect the corporate limits as described in the council resolution. The probate judge shall also designate that the resolution and map or plat have been duly adopted and recorded of the records in the probate office. If a majority vote does not favor a reduction in the corporate limits, the probate judge shall enter an order dismissing the proposal. Section 11-42-208, Code of Alabama 1975.

The results of the election may be contested by any qualified elector who voted in the election in the manner provided for in Section 17-15-1, et. seq., Code of Alabama 1975. Section 11-42-209, Code of Alabama 1975. The party contesting the results of the election shall be responsible for the costs associated with the contest. Section 11-42-213, Code of Alabama 1975. The city or town shall be the contestee. Section 11-42-209, Code of Alabama 1975.

The city or town proposing the reduction in the corporate limits shall be responsible for the costs and expenses incident thereto. Section 11-42-210, Code of Alabama 1975.

The municipal governing body shall exercise the same jurisdiction over the new corporate limits as it exercised over the original corporate limits, including enforcement of laws and ordinances. Section 11-42-212, Code of Alabama 1975.

The municipality seeking to reduce its corporate limits is responsible for paying the probate judge \$10.00 for services surrounding the election. Section 11-42-213, Code of Alabama 1975. All other election officials are entitled to compensation as provided in the general election laws as found in Section 17-6-3, Code of Alabama 1975.

Notice of Annexations or De-annexations

Once an area becomes a part of the municipality through annexation or is taken out of a municipality through de-annexation, the municipality should notify the following federal and state agencies of their new boundaries:

- **Administrator, ABC Board:** 2715 Gunter Park Drive, West, Montgomery, Alabama 36109. A change in boundaries could increase revenue received from state ABC Board profits. Boundary change information will also aid the ABC Board in determining whether county or municipal approval is necessary in the granting of licenses. **Telephone:** (334) 271-3840; **Website:** www.abc.alabama.gov.
- **State Treasurer:** State Capitol, 600 Dexter Avenue,

Room S-106, Montgomery, Alabama 36104. A boundary change could affect the municipal share of the tag tax distributed by the state treasurer. **Telephone:** (334) 242-7500 or (334) 242-7501; **FAX:** (334) 242-7592; **Website:** www.treasury.state.al.us

- **State Comptroller:** RSA Union, 100 North Union, Suite 220, Montgomery, Alabama 36130. A boundary change could affect the proceeds from the State Oil and Gas Severance Tax distributed by the comptroller. **Telephone:** (334) 242-7063; **Website:** www.comptroller.alabama.gov • **State Revenue Department – Individual and Corporate Tax Division:** Gordon Persons Building, 50 North Ripley Street, Montgomery, Alabama 36130. A boundary change could affect the municipal share of the State Financial Institution Excise Tax. **Telephone:** (334) 242-1170; **Website:** www.revenue.alabama.gov
- **State Department of Revenue – Property Tax Division:** Gordon Persons Building, 50 North Ripley Street, Montgomery, Alabama 36132. A change in boundaries could affect utility ad valorem taxes which are assessed by this office. **Telephone:** (334) 242-1170; **Website:** www.revenue.alabama.gov
- **State Department of Revenue — Sales, Use and Business Tax Division:** Gordon Persons Building, 50 North Ripley Street, Montgomery, Alabama 36130. A change in municipal boundaries could affect the amount of sales and use tax revenue collected by the state revenue department for the municipality. **Telephone:** (334) 242-1525; **Website:** www.revenue.alabama.gov
- **Probate Judge:** A boundary change may affect the revenue distributed to the municipality by the probate judge based on the automobile tag tax.
- **County Tax Assessor and County Tax Collector:** Boundary changes will affect ad valorem tax revenues.
- **County Commission:** Boundary changes may affect proceeds from the TVA money received from the state to be shared with counties and municipalities.
- **County Board of Registrars:** Boundary changes will affect the municipal voting list prepared from county voting lists compiled by this office.
- **State Legislative Reapportionment Office:** Any municipality which annexes property into the municipality or de-annexes property from the municipality shall notify the Legislative Reapportionment Office of such action within seven days of the final action. The municipality shall provide all census blocks involved in the annexation or de-annexation so that the office may maintain accurate

information concerning the corporate limits of each municipality located within the state. A municipality's failure to notify the Legislative Reapportionment Office as provided by law shall not be grounds to challenge or invalidate the annexation or de-annexation. Section 11-42-7, Code of Alabama 1975.

Maintenance of Streets and Roads in Newly-Annexed Territory

Notwithstanding the adoption of a resolution as required in Section 11-49-80 and 11-49-81, Code of Alabama 1975, the annexation of unincorporated territory into a municipality, after July 7, 1995, shall result in the municipality assuming responsibility to control, manage, supervise, regulate, repair, maintain and improve all public streets or parts thereof lying within the territory annexed, provided such public streets or parts thereof were controlled, managed, supervised, regulated, repaired, maintained and improved by the county for a period of one year prior to the effective date of the annexation.

The municipality must also assume the responsibility to control, manage, supervise, regulate, repair, maintain and improve all public streets or parts thereof lying within the territory annexed, provided such public streets or parts thereof were dedicated to, accepted by, and were controlled, managed, supervised, regulated, repaired, maintained, and improved by the county for a period of less than one year prior to the effective date of the annexation when such public streets or parts thereof were also approved upon construction by the municipal planning commission of the annexing municipality.

Except as herein provided, this section does not require a municipality to assume responsibility to control, manage, supervise, regulate, repair, maintain or improve any street or part thereof located within the territory annexed which was not being controlled, managed, supervised, regulated, repaired, maintained and improved by the county prior to the effective date of the annexation, nor does this section require a county to assume responsibility to control, manage, supervise, regulate, repair, maintain or improve any street or part thereof located within the territory annexed which was not being controlled, managed, supervised, regulated, repaired, maintained and improved by the county prior to the effective date of the annexation.

After July 7, 1995, when the annexation of unincorporated territory by a municipality results in a public street or part thereof which was dedicated to, accepted by, and was controlled, managed, supervised, regulated, repaired, maintained and improved by the county for a period of one year prior to the effective date of the annexation, or for a period of less than one year prior to the effective date of the annexation when such public street

or part thereof was approved upon construction by the municipal planning commission, being located outside the corporate limits of the annexing municipality while at the same time bounded on both sides by the corporate limits of the annexing municipality, the county governing body shall consent to the annexation of such public street or part thereof by the municipality. Once consent is given by the owners of such public street or part thereof to annexation by the municipality, the municipality shall annex that portion of the public street or part thereof which is bounded on both sides by the municipal corporate limits. Once the annexation becomes effective, the municipality shall assume responsibility for the public street or part thereof as provided above.

Nothing contained in Section 11-49-80 and 11-49-81 shall prohibit a county and a municipality from entering into a mutual agreement providing for an alternative arrangement for the control, management, supervision, regulation, repair, maintenance or improvement of public streets or parts thereof lying within the corporate limits of an incorporated municipality.

A municipality may adopt a resolution pursuant to Section 11-49-80 and 11-49-81 of the Code of Alabama to accept responsibility for county roads within the corporate limits. If the municipality does not adopt this resolution, the county remains responsible for the road, unless it was annexed into the municipality after July 7, 1995, or unless other factors are present. AGO 2001-254, AGO 2002-277, and AGO 2003-034.

Extension of Police & Planning Jurisdiction

As a result of Act 2015-361, a municipality may only extend its police and planning jurisdictions as a result of an annexation once a year, on January 1, and only for those annexations finalized on or before October 1 of the previous year. It is important to note, however, that the limitation on the extension of the police and planning jurisdictions in no way limits the effective date of the underlying annexation. The annexation is effective as provided by law.

Court Cases and Attorney General's Opinions on Annexation

- There is no requirement that names on an annexation petition be dated. *Lett v. State*, 526 So.2d 6 (Ala. 1988).
- A municipality may annex property separated from it by a public waterway. *Johnson v. Rice*, 551 So.2d 940 (Ala. 1989). Provided, however, that in order to do so, there must be a public road by which the properties can be reached by automobile from the original municipal boundaries without traveling through another municipality to get to the proposed annexed territory.

See City of Irondale v. City of Leeds, 2013 WL 563410 (Ala. Feb. 15, 2013); *City of Spanish Fort v. City of Daphne*, 774 So.2d 567 (Ala. 2000); *City of Madison v. City of Huntsville*, 555 So.2d 755 (Ala. 1989).

- Long-lasso annexation – annexation of the public right of way along a road to bring in non-contiguous property – is invalid. *Fultondale v. Birmingham*, 507 So.2d 489 (Ala. 1987). Long-lasso annexations are retroactively repealed. *Birmingham v. Blount County*, 533 So.2d 534 (Ala. 1987). However, the legislature has the right to annex property through the long-lasso method. *Vance v. Tuscaloosa*, 661 So.2d 739 (Ala. 1995).
- A city may annex the waters of Mobile Bay either by local act or by approval of all property owners. AGO 1995-293.
- A municipality may not amend an ordinance of annexation which has been adopted and published pursuant to law to exclude property owners who no longer wish to belong to the municipal limits. This property should be de-annexed. AGO 1996-155.
- Voting by absentee ballots must be allowed in annexation elections. AGO 1999-027.
- The procedure for the annexation of fire districts is the same as the procedure for the annexation of unincorporated parcels of land. Like noncontiguous parcels of land, noncontiguous parcels of a fire district may only be annexed by local act. AGO 2001-277.
- If a city located in a wet county expands into a dry county, the newly annexed property within the dry county will remain dry. The sale and distribution of alcoholic beverages on that land is governed by the county's wet-dry election. AGO 2002-197. Section 28-2A-20, Code of Alabama 1975, provides a procedure which can be used by the governing body of any Class 1, 2, or 3 municipality or any municipality of 18,500 people or more which is wet and that has annexed territory located in a dry county to determine the wet-dry status of the annexed territory located in a dry county. [Note: If a municipality votes separately from the county to go wet in a municipal wet-dry election, rather than simply that the city is wet because it is located in a wet county, newly annexed territory beyond the county lines would be wet as well.]
- A city can require private and commercial entities to become a part of the municipality in order to continue to receive water and sewer services from the city. AGO 2005-038.
- Requiring annexation of property as a condition to providing water services is a reasonable condition

precedent to the obligation of a utility to serve an applicant. *Brown v. Huntsville*, 891 So.2d 295 (Ala. 2004).

- The territory in an industrial park established pursuant to section 11-23-1, et seq., of the Code of Alabama cannot be annexed. The property on the opposite side of the industrial park is not, and does not become, contiguous to the boundaries of the city unless it is actually touching at some point. AGO 2007-005.
- A city's annexation of property where a gas station was located was valid, where the map was located in a file on the chief probate clerk's desk and at least one person was furnished the map by the office staff after asking to see it. The annexation map was open to inspection during the public notice period of the annexation statute as was required for annexation. *Russell Petroleum, Inc. v. City of Wetumpka*, 976 So.2d 428 (Ala.2007)
- A town annexed public roads from the county. The public's use of a roadway for over 20 years provided the county with only a prescriptive easement in the roads, not ownership, and, thus, the county was not an owner with the ability to consent to town's annexation of portions of the roads. A neighboring town had standing to bring a counterclaim, even though it was not incorporated at time of the challenged annexation and the personal representative of the property owner's estate had the power to consent to neighboring town's annexation of the estate property. *Town of Elmore v. Town of Coosada*, 957 So.2d 1096 (Ala.2006)
- A willingness ordinance regarding annexation may be rescinded before the special election on the question of annexation to the extent that such rescission does not disturb any vested rights. *Bradley v. Town of Argo*, 2 So.3d 819 (Ala.2008).
- The town should assume responsibility for the public streets in the areas annexed during the 24 months following incorporation at the same time it begins to assume responsibility for the streets in the newly incorporated town. AGO 2019-049.

54. Zoning in Alabama

The 1923 Alabama Legislature passed Act 443 to give all municipalities in the state the authority to zone all territory located within their corporate limits. This Act is presently codified at Section 11-52-70, Code of Alabama 1975.

Although zoning laws deprive property owners of absolute control over property, these same laws provide protection to property owners from nuisances which might otherwise be located near a person's property and reduce the value of the property.

The purpose of a municipal zoning ordinance is to divide a municipality into districts or zones according to suitability for particular uses and to regulate the erection, construction, reconstruction, alteration, repair or use of buildings, structures and land according to such districts. The goal is to lessen congestion in the streets; to provide safety from fire; to provide adequate light and air; to prevent overcrowding of land; to facilitate adequate provisions for transportation, water, sewage, schools, parks and other public requirements; and to conserve the value of buildings.

Section 11-52-70, Code of Alabama 1975, authorizes municipalities to establish zoning districts and to provide for the "kind, character and use of structures and improvements that may be erected or made" in each of these districts. The Alabama Supreme Court held that: "The only limitation placed upon the power of municipalities to pass zoning ordinances is that such ordinances must be *comprehensive in scope and purpose* and not in conflict with the laws of the state or the state and federal constitutions." (Emphasis added) *Jefferson County v. Birmingham*, 55 So.2d 196 (Ala. 1951). The comprehensive nature of a zoning plan was discussed in *Johnson v. Huntsville*, 29 So.2d 342 (Ala. 1947). In this case, the Alabama Supreme Court held that zoning ordinances which create a zone for residential purposes only and fail to zone the rest of the municipality are invalid. The court said that a zoning ordinance should include the whole municipality in a 'comprehensive plan.' According to the court, spot zoning and zoning piecemeal are not authorized. *See also*, AGO to Hon. C. B. Johnson, June 8, 1977.

Section 11-52-85, Code of Alabama 1975, authorizes a municipality to "pre-zone" territory proposed for annexation into the corporate limits of the municipality by complying with the provisions of Article 4 of Chapter 52 of Title 11, Code of Alabama 1975. If all the requirements, including all notice and public hearing requirements, of this article are met, the zoning shall become effective upon the date the territory is annexed into the corporate limits, or upon the date the zoning process is completed, whichever is later.

A municipality is not required to provide a requested pre-zoning statement to a property owner who does not reside in the affected area in a dwelling or otherwise continuously or on a regular basis to demonstrate a minimal level of permanency of physical presence. AGO 2016-043.

Comprehensive Plan

A principal guideline defining the kind of public interest which a zoning action serves is the requirement that zoning must be in conformity with a "comprehensive plan." This requirement is specified in Section 11-52-72, Code of Alabama 1975. It is clear, then, that as required by Section 11-52-72 of the Code, zoning regulations must be consistent with a comprehensive plan in order to be valid. But what is a comprehensive plan?

The Alabama Supreme Court discussed this issue in *COME v. Chancy*, 269 So.2d 88 (1972). The court noted that:

"Cities should be encouraged to formulate long range plans encompassing all facets of municipal development ... [These] are of course only guidelines to be used in directing proper growth of a municipality, and zoning ordinances should be drafted to further the main objectives. Even though such master guidelines should be a helpful basis in all zoning legislation, the former does not occupy a position of legal superiority over the latter. The entire collection of zoning maps, zoning ordinances, and master plans or guidelines constitutes the basis for a comprehensive zoning plan of a municipality. It is, however, the ultimate zoning ordinance, the product of all of the above, that must govern." *Id.* at 95.

[T]he ultimate criterion in determining the validity of zoning ordinances is whether the ordinance creates zones in such manner that the classifications are consistent with the land use pattern of the area, and bear a substantial relationship to the public health, safety, morals and general welfare; the size and location of the property would necessarily enter into a determination of this question, which is primarily for the governing body of a political subdivision whose conclusions in the premises should not be judicially disturbed unless it be arbitrary and capricious, and therefore palpably wrong." *Id.* at 97.

Thus, the court concluded that the "requirement of [Section 11-52-72] of a comprehensive plan merely means

that zoning ordinances must be enacted with the general welfare of the entire community in mind.”

Each particular zoning restriction affecting each particular piece of property must be consistent in principle with the total concept of the best way to use land in the city to serve the best interests of all the people in the city rather than an individual landowner or any special interest group. The exercise of the power to zone territory should be zealously guarded to protect the whole municipality rather than certain property owners.

Ordinance Required

Alabama municipalities have the authority to zone all territory located within the corporate limits of the municipality. No general statutory authority allows municipalities to zone territory in the police jurisdiction. *See, Roberson v. Montgomery*, 233 So.2d 69 (1970) and AGO 2000-223.

If a municipality decides to establish zoning regulations, the governing body must adopt an ordinance of general and permanent nature to this effect. Section 11-52-77, Code of Alabama 1975. The municipal zoning ordinance should include a map establishing the various land use districts within the corporate limits. The regulations governing the use within the districts should specify restrictions as to the height of buildings, size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts and other open spaces; the location and use of buildings, structures and land for trade, industry, residence or other purposes. Section 11-52-73, Code of Alabama 1975.

Municipal Planning Commission

Three municipal agencies play an important role in the administration and adoption of zoning ordinances. Each of these agencies has distinct responsibilities which cannot be handled by the others. The first of these agencies is the municipal planning commission which is created by ordinance adopted by the municipal governing body pursuant to the enabling statutes located at Sections 11-52-1 through 11-52-54, Code of Alabama 1975. The League has prepared a publication entitled “Outline of Planning Board Procedure” which can be used as a guide for planning commission members to administer zoning ordinances or subdivision regulations. The publication also contains a sample ordinance which can be used to create a planning commission.

The planning commission, when performing its duties pertaining to zoning, shall keep its records and minutes in such a manner as to clearly indicate when it is acting in its official capacity.

Any proposal for a zoning ordinance or for an amendment to the existing zoning ordinance must begin with the planning commission. The planning commission must

draft a preliminary report of the recommended districts and regulations covering the entire municipality (in the case of an original zoning ordinance) or of the area involved (in the case of amendments to the zoning ordinance). After completing the preliminary report, the planning commission must hold a public hearing on the proposal, giving notice to the public of such hearing, its time, place and purpose. AGO 1997-282. The Code sections relating to the planning commission do not specify the type or the amount of notice required. However, the planning commission is subject to the Alabama Open Meetings Act (OMA) and all meetings and notices for such meetings must be in conformance with the OMA. A complete discussion of the OMA and its requirements can be found elsewhere in this publication. The League suggests that, at a minimum, notice be given by publication once in a newspaper of general circulation in the municipality or by posting in four conspicuous places in the municipality at least six days prior to the hearing. After holding the public hearing, the commission drafts its final report to the governing body. The report must contain the zoning ordinance and the map which the commission recommends for final adoption by the governing body.

It’s important to note that there are no specific provisions in the law regarding the presentation of a petition to the planning commission or the municipal governing body by citizens wishing to change the zoning measures. There is also no prohibition against the presentation of the same petition that was previously presented. However, if a petition is filed, public policy dictates that the signatures on it should be recent, valid and able to be verified. Moreover, the proper procedure as set out by law must be followed. Thus, the petition should be presented to the Zoning and Planning Commission for their report, public hearing and recommendation before the amendment to the city zoning ordinance is considered by the city council. AGO 91-00340.

The municipal governing body is not bound by the recommendations of the planning commission. *Calhoun v. Mayo*, 553 So.2d 51 (Ala. 1989). It is debatable whether or not it is even necessary for the planning commission to make any specific recommendations for or against adoption. The law requires consideration and a report by the planning commission on zoning measures before the municipal governing body has power to enact them. *See, Speakman v. Cullman*, 829 So.2d 176 (Ala. Civ. App. 2002); AGO to Hon. F. E. Draper, July 23, 1973 and AGO to Hon. Arnold Teks, March 24, 1972.

Final authority over subdivisions rests with the planning commission, not the city council. AGO 89-00050. In some smaller municipalities, a zoning commission as authorized by Section 11-52-79, Code of Alabama 1975, carries out the functions of the planning commission in the zoning process.

An alternate structure for planning commissions in Class

5 municipalities is provided by Sections 11-52-13 and 11-52-13.1, Code of Alabama 1975.

Municipal Governing Body

Once the governing body receives the planning commission report, the responsibility shifts to the governing body to follow the procedures set out in Section 11-52-77, Code of Alabama 1975. This section requires that the council give the public advance notice and hold a public hearing prior to adopting a zoning ordinance or an amendment to the zoning ordinance. A zoning ordinance may not be adopted by reference.

The council does not have to conduct a public hearing if the council has decided not to consider or will disapprove of the proposed zoning ordinance or amendment recommended by the planning commission, although a hearing may be held to receive public input. The council must hold a hearing if it will adopt the zoning ordinance or amendment. AGO 1999-236.

Section 11-52-77, Code of Alabama 1975, establishes two alternative procedures for giving the public notice of the proposed ordinance. The council may elect to follow either procedure.

Procedure 1 – If this procedure is selected, the municipal governing body must publish the proposed ordinance in full, for one insertion, in a newspaper of general circulation published within the municipality together with a notice stating the time and place that the ordinance is to be considered by the municipal governing body and stating further that at such time and place all persons who desire shall have an opportunity to be heard in opposition to or in favor of the ordinance. A newspaper is published where it is placed in the post office and first entered into circulation. AGO 1989-045.

Following this procedure, one week after the first insertion, the municipal governing body must publish a synopsis of the proposed ordinance. The synopsis must refer to the date and name of the newspaper in which the proposed ordinance was first published. Both insertions must be published at least 15 days in advance of the passage of the ordinance. If there is no newspaper, then the governing body must cause the ordinance and the notice to be posted in four conspicuous places within the municipality. Using this procedure, major changes in zoning ordinances must be published in their entirety. AGO to Hon. J. C. Davis, Jr., March 7, 1973.

Procedure 2 – If the second procedure is selected, the governing body shall publish the notice for three consecutive weeks in a newspaper in general circulation in the county. This provision requires publishing the notice at least once a week for three consecutive weeks. Section 11-52-77, Code

of Alabama 1975. The notice must include the following information:

- A provision that the council will consider a zoning ordinance or an amendment to its existing zoning ordinance and that a copy of the proposal is available for public inspection at the city or town hall;
- The location of the city or town hall;
- A map showing the location of the property proposed to be zoned or rezoned;
- A general description of the property proposed to be zoned or rezoned, including the common name by which the property is known; and
- The time and place where persons opposing or favoring the zoning or rezoning may present their views to the council.

The notice must be published in a standard format in the legal section of the newspaper. In addition, the same notice must be published one time in the regular section of the newspaper in the form of a one-quarter page advertisement.

Until one of these methods of notifying the public is followed, no adoption of a zoning ordinance or an amendment thereto will be valid. AGO to Hon. Terry G. Snow, May 19, 1976.

A municipality may provide more notice of a zoning change than is required by the Code. AGO 1988-207. In *Holland v. Alabaster*, 595 So.2d 483 (1991), the Alabama Court of Civil Appeals held that the fact that a particular newspaper published within the county was circulated in the city does not satisfy the publication requirements for zoning ordinances.

After a hearing, the governing body may adopt the ordinance as reported by the planning commission or in such amended form as it deems best. However, if the governing body makes substantial changes in the ordinance as first advertised, the governing body should hold another public hearing after giving notice as described above. For instance, in *Mobile v. Cardinal Woods Apartment, Ltd.*, 727 So.2d 48 (1999), the Alabama Supreme Court invalidated the zoning notice. In this case, the published notice for the consideration of a zoning ordinance amendment indicated that the property in question would be used only for “small specialty shops and professional offices.” What invalidated the notice was that at a council meeting the council made a change in the ordinance that allowed the property to be used for a restaurant. The court held that the notice must be sufficient to place the public on notice of the proposed use of the property and that this requirement was not satisfied in this instance. The published notice must apprise interested persons “how, and for what, to prepare.” *Buck v. C.H. Highland, LLC*, 2016 WL 3221095, at *5 (Ala. Civ. App.

June 10, 2016). The ordinance ultimately adopted be the same as the proposed ordinance that was published. *Ex parte Buck*, 256 So.3d 84, 97 (Ala., 2017). After the ordinance is adopted by the governing body, it must again be published as provided in Section 11-45-8, Code of Alabama 1975, relating generally to the publication of ordinances. Notice of final passage of a zoning ordinance can be published in synopsis form as provided in Section 11-45-8(b)(2). A zoning ordinance that is amended after a public hearing is invalid when a municipality fails to post or publish the final amended ordinance even when the proposed ordinance was published in full prior to the public hearing. *Stevenson v. Selby*, 839 So.2d 647 (Ala. Civ. App. 2001). **Note:** The League recommends reading this opinion in its entirety.

Amendments to a zoning ordinance must also be adopted by following the procedures outlined above.

Zoning Board of Adjustment

The third agency of municipal government which deals with the zoning process is the zoning board of adjustment. While the creation of such a board is not mandatory, no municipal officer or agency may perform the functions of the zoning board of adjustment where no such board has been established. AGO to Hon. G. C. Donaldson, October 4, 1974. Thus, a zoning board of adjustment is necessary to properly administer the zoning ordinance.

A zoning ordinance cannot cover all possible situations which might arise under it. Some method is necessary to ease strict application of the zoning ordinance and to still achieve the purpose of the land use plan on which the zoning ordinance should be established.

The function of the zoning board of adjustment is to hear and decide upon the interpretation and application of the provisions of the zoning ordinance in special cases. The zoning board of adjustment is not a legislative body with authority to substitute its opinion for that of the governing body nor is it charged with the routine administration of the zoning administrator. The zoning board of adjustment is an appeal board for variances, ordinance interpretations and special exceptions. The board does not have unlimited power. It must comply with the powers granted to it by state statute and local ordinance.

Section 11-52-80, Code of Alabama 1975, provides for the appointment of a zoning board of adjustment consisting of five members appointed for three-year staggered terms. In addition, the statute calls for the appointment of two supernumerary members for three-year terms to serve on the board at the call of the chairman in the absence of regular members. While serving, supernumerary members have and exercise the power and authority of regular members. In cities of not less than 175,000 and not more than 275,000 in population, board members must be bona fide residents and

qualified electors of the city. One member of the planning commission may sit as a member of the zoning board of adjustment except in cities of not less than 175,000 and not more than 275,000 inhabitants. Section 11-52-3, Code of Alabama 1975. The statute states that vacancies on the board shall be filled for the unexpired term of any member whose position becomes vacant. Appointed members may be removed for cause by the appointing authority upon written charges and after a public hearing.

Powers of the Zoning Board of Adjustment

Section 11-52-80, Code of Alabama 1975, gives the governing body the power to designate the powers and duties of the board as long as the powers granted do not conflict with state law. In cases where the governing body does not define the board's powers and duties, the board shall assume those powers and duties specified in the enabling law. Section 11-52-80, Code of Alabama 1975. *See, Nelson v. Donaldson*, 50 So.2d 244 (Ala. 1951).

State law has given the Zoning Board of Adjustment authority to decide issues in three distinct areas: (1) variance requests; (2) interpretation of existing zoning ordinances; and (3) requests for uses that may be permitted by the zoning ordinance upon appeal.

Variances. One of the specified duties of the board is to consider and grant or deny variance requests. A variance is a deviation from the design requirement of the zoning ordinance. Many times a variance is thought of as being granted when the meeting of design restrictions would place an unnecessary hardship on the use of the property. However, variances can also be granted in constructive situations which would enhance the design or utilization of the property.

The term "variance" is misunderstood due to the number of varying interpretations of the term "unnecessary hardship." An "unnecessary hardship" sufficient to support a variance from a zoning ordinance exists where the ordinance, when applied to the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property. The "unnecessary hardship" which will suffice for the granting of a zoning variance must relate to the land rather than to the land owner himself. A mere personal hardship does not constitute sufficient ground for the granting of a variance. A self-inflicted or self-created hardship may not be the basis for a zoning variance or for a claim thereof. *Ferraro v. Bd. of Zoning Adjustment of Birmingham*, 970 So.2d 299 (Ala. Civ. App. 2007).

A hardship exists when the conditions imposed by the zoning ordinance would deprive the property owner of certain development rights that are enjoyed by other property owners within the same zoning district. When

examining the hardship claimed, it should be determined that: (1) the property owner did not bring this hardship upon himself or herself; (2) the physical site conditions are such that a hardship does exist; or (3) the property owner would be deprived of rights which are normally afforded under the same regulations for the zone in which the property is located. A party seeking an area variance need not show that the property “cannot be put reasonably to a conforming use” or that it is “unfit for conforming use” in order obtain the variance. *Ferraro v. Bd. of Zoning Adjustment of City of Birmingham*, 970 So. 2d 299, 307 (Ala. Civ. App. 2007).

The term “hardship” should never be interpreted as meaning personal or economic hardship to the property owner. These conditions are not grounds for granting variances. *Gadsden Bd. of Adjustment v. VFW Post 8600*, 511 So.2d 216 (Ala. Civ. App. 1987) and *Bd. of Zoning Adjustment for Fultondale v. Summers*, 814 So.2d 851 (Ala. 2001). If a property owner creates a hardship that does not relate to the land, such as purchasing a mobile home because it is more cost effective to live in despite knowing that mobile homes were prohibited on the property owner’s land by zoning regulation, that property owner is not entitled to a variance from the zoning regulation precluding mobile homes. *Town of Orrville v. S & H Mobile Homes, Inc.*, 872 So.2d 856 (Ala. Civ. App. 2003).

However, see *Bd. of Zoning Adjustment of Huntsville v. Mill Bakery and Eatery, Inc.*, 587 So.2d 390 (1991), where the Alabama Court of Civil Appeals held that a variance should have been granted to a property owner who would suffer financial hardship not common to that of other property owners in the district if the variance was refused. In this case, the property owner had made improvements to his property based upon a previously-issued variance and the court held that the Board of Adjustment could not later refuse to issue them another variance.

No one factor is dispositive as to what constitutes undue hardship. *Mobile v. Sorrell*, 124 So.2d 463 (Ala. 1960). Instead, all relevant factors, when taken together, must indicate that the problems of the property are unique in that it cannot reasonably be used for a conforming use.

Other cases which discuss the question of undue hardship include:

- *Trussville v. Simmons*, 675 So.2d 474 (Ala. Civ. App. 1996) – city’s enforcement of its sign ordinance did not create a hardship for the property owner that would permit him to obtain a variance;
- *Asmus v. Ono Island Bd. of Adjustment*, 716 So.2d 1242 (Ala. Civ. App. 1998) – landowner did not suffer any unnecessary hardship that would entitled him or her to a variance to build a boat deck 250 feet from shore;
- *Behm v. Bd. of Zoning Adjustment of Mobile*, 571

So.2d 315 (Ala. Civ. App. 1990); *Brock v. Bd. of Zoning Adjustment of Huntsville*, 571 So.2d 1183 (Ala. Civ. App. 1990) and *Bd. of Adjustment of Mobile v. Murphy*, 591 So.2d 505 (Ala. Civ. App. 1991) – questions of undue hardship are factual issues to be submitted to the jury; and

- *Vernon’s Tri-State Pawn v. Bd. of Adjustment of Mobile*, 571 So.2d 309 (Ala. Civ. App. 1990) – jury instruction on self-inflicted hardships was correct and should have been given.

In *Ex parte Bd. of Zoning Adjustment*, 636 So.2d 415 (Ala. 1994) – loss of potential future economic gain was insufficient to establish unnecessary hardship to justify the grant of a use variance for a mobile home park. There are as many types of variances possible as there are design criteria incorporated into the zoning ordinance being considered. For example, variances are sought when any of the following criteria in a zoning ordinance create unnecessary hardship – set-back criteria; area criteria; height criteria; structure criteria; accessory structure criteria; fence, wall and screening criteria; and parking, storage and loading criteria.

A variance is granted to allow deviation from established design requirements. Appeal for a use variance occurs when an appeal is made to request allowance of a use within a zoning district which is prohibited by the ordinance in that district. According to courts in most jurisdictions, such an allowance negates the intent of the ordinance, constitutes rezoning and is not within the power and authority of zoning boards of adjustment. A change of use should be undertaken by the municipal governing body. **Note:** Although the above statement is the general weight of authority, the *Nelson* case cited above ruled to the contrary in Alabama. For a different opinion, see, *McKay v. Strawbridge*, 656 So.2d 845 (Ala. Civ. App. 1995). In this case, property owners purchased a parcel of land on which they planned to relocate their truck repair shop and to build a grocery store. At the time of the purchase, the property was zoned for residential use. They petitioned the Board of Adjustment for a variance in the zoning of the property from residential use (R-1) to general commercial use (B-2). After a hearing, the board granted the variance. The Alabama Court of Civil Appeals held that a board of adjustment had no authority to grant the requested variance because the request should have been done as a rezoning.

The Attorney General cannot decide whether a board of zoning adjustment should issue a variance. This is a factual issue the board must resolve. AGO 1996-222. The Attorney General’s office cannot decide factual issues, such as whether a variance should be granted by a zoning board of adjustment or whether a mobile home comes within the

definition of a mobile home as defined in a zoning ordinance. AGO 1996-314.

The Alabama Court of Civil Appeals held that a contractor did not have standing to apply for a variance because the contractor did not own the property, nor did he have any interest in the property. In this scenario, the owner had merely contracted for a contractor to perform improvements on the property. *Birmingham Zoning Bd. of Adjustment v. Jackson*, 768 So.2d 407 (Ala. Civ. App. 2000).

A landowner who knows of a zoning ordinance prohibiting mobile homes before he purchases a mobile home is not entitled to a variance to allow him to place a mobile home on his property, even if the landowner has previously secured a variance for another family member to place a mobile home on the property at an earlier date. A previously granted variance cannot be the basis on which to install a second mobile home. *Russellville v. Vernon*, 842 So.2d 627 (Ala. 2002).

When considering a request for a variance, each member of a zoning board of adjustment should decide whether the variance, if granted, would maintain adequate levels of health, safety and general public welfare for the community and the neighborhood involved.

Another aspect to be remembered is that the granting of the variance can be negotiated. Each side may have to give and take a little. For example, a variance might be granted with the stipulation that certain design features will be added.

Further, the board of adjustments can attach conditions to a variance. *Brown v. Jefferson*, 2014 WL 1328337, at *7 (Ala. Civ. App. Apr. 4, 2014). Unless prohibited by applicable law, attaching conditions is a well recognized inherent power of governmental bodies when granting variances from zoning requirements. 101A *C.J.S. Zoning and Land Planning* § 307 (2005) (“A zoning board may grant a variance or exception on stated conditions, provided the prerequisites for a variance have been satisfied.” (footnotes omitted)); C.R. McCorkle, Annotation, *Construction and Application of Provisions for Variations in Application of Zoning Regulations and Special Exceptions Thereto*, 168 A.L.R. 13, 60 (1947) (Originally published in 1947) (“It is generally held that a zoning board, in granting a variance or exception, may impose reasonable conditions.”); 83 *Am.Jur.2d Zoning and Planning* § 788 (2013) (“The power to impose conditions is one which is implicit in the power to grant a variance.” (footnote omitted)).

The Alabama Supreme Court has stated that “[a] variance could be granted by the Board of Zoning Adjustment, subject to such conditions as the Board required to preserve and protect the character of the area and otherwise promote the purpose of the zoning ordinance.” *Alabama Power Co. v. Brewton Bd. of Zoning Adjustment*, 339 So.2d 1025, 1026 (Ala.1976) (denial of variance affirmed on other grounds).

In addition, the Alabama Supreme Court and the Alabama Court of Civil Appeals have adjudicated cases involving variances with attached conditions, and neither court has denied the granting of a variance on the basis that a condition was attached. See, e.g., *Board of Zoning Adjustment for City of Fultondale v. Summers*, 814 So.2d 851, 854–55 (Ala. 2001); *Ex parte Board of Zoning Adjustment of City of Mobile*, 636 So.2d 415, 417 (Ala. 1994) (reversing this court’s judgment affirming the variance but noting this court’s reasoning “that the restrictions placed on the variance were ‘a reasonable and effective means of protecting the public interest.’ ”); *Moore v. Pettus*, 71 So.2d 814, 820 (1954) (conditional variance denied when condition was not met); *Board of Zoning Adjustment of the City of Mobile v. Dauphin Upham Joint Venture*, 688 So.2d 823 (Ala.Civ. App.1996) (noting that the trial court’s attempt to satisfy all competing interests by attaching conditions was admirable, but reversing the trial court’s judgment and remanding the cause because the unnecessary-hardship requirement had not been met); *City of Trussville v. Simmons*, 675 So.2d 474, 475 (Ala.Civ.App.1996) (board of adjustment attached condition to variance; variance denied on other grounds); *Bedgood v. United Methodist Children’s Home*, 598 So.2d 988 (Ala.Civ.App.1992) (board of adjustment imposed conditions; judgment reversed and cause remanded on grounds unrelated to the conditions); *Board of Zoning Adjustment for City of Dothan v. Britt*, 456 So.2d 1104 (Ala. Civ.App.1984) (affirming grant of variance with conditions attached by trial court).

Interpretation of Existing Zoning Ordinances.

The second of the three delegated functions of the zoning board of adjustment is the interpretation of existing zoning ordinances. This does not mean that the zoning board of adjustment can adopt new or amended provisions which revise the intent of the zoning ordinance.

The most common interpretations required are: (1) the intent of the zoning ordinance, and (2) the administrative procedures to be followed when they are not clearly spelled out. To maintain consistency in both cases, it is recommended that once an intent or administrative interpretation has been made it should be documented as a policy statement so that future cases will be handled in the same manner.

When interpreting the provisions of the zoning ordinance, the interpretation should be thought of not only as it relates to the specific case being considered, but as having general city-wide applicability. Interpretations should not be made on an individual basis.

Zoning interpretations must not be isolated decisions made only by the zoning board of adjustment. The equitable administration of any zoning ordinance relies on close coordination between the legislative body, the zoning

department and officials and the zoning board of adjustment. If for no other reason than to assure equitable treatment and avoid discriminatory lawsuits against the local government, this coordination must be achieved.

Special Exceptions.

The third delegated function of the zoning board of adjustment is the granting of special exceptions. A special exception, or a use allowed on appeal, is a use which is compatible with the primary district use, but because of its nature, should be reviewed and approved by the board before a building permit is issued. This power is a particularly critical area of zoning administration.

First, it requires the board to make a delicate interpretation as to whether they are granting a special exception or a rezoning. If it is, in fact, a special exception (uses specifically permitted by the ordinance on appeal to the board), the appeal is within the jurisdiction and authority of the zoning board of adjustment. If it is determined that the case would constitute a rezoning, this matter should be returned to the planning commission and governing body for appropriate legislative action. If the use is prohibited within the district, then the only recourse is for the property owner to appeal to the governing body to rezone the property or define the uses permitted. Such action is not within the authority of the zoning board of adjustment.

In ordinances which allow conditional uses on appeals to the zoning board of adjustment, the guidelines for what constitutes a special exception should be set forth as a part of the ordinance.

Some zoning ordinances do not specify which uses are conditional. Few, if any, ordinances list every conceivable use which may be considered by the board as a special exception and, therefore, some permissible uses may not be specifically listed. In these cases, the zoning board of adjustment must make the consideration by deliberate methods and decide if the specific use in question constitutes a conditional use. Similarity to listed uses and the intent of the ordinance are the guiding principles for special exceptions that are not listed.

Any newly-drafted zoning ordinance should list specifically those uses allowed on appeal. Older ordinances without these provisions should be amended, with professional technical assistance, to include specific uses allowed upon appeal to the zoning board of adjustment.

A board of adjustment does not have the authority to issue an order to abate the operation of a business in a residential zone. AGO 1999-230.

A zoning board of adjustment does not have the power to grant a special exception for a use not allowed in the zoning ordinance. Granting the special exception amounted to rezoning the property, a power the board of adjustments does not have. *Harris v. Jefferson County Bd. of Zoning*

Adjustment, 773 So.2d 496 (Ala. Civ. App. 2000).

The Alabama Court of Civil Appeals provides a good discussion of the difference between variances and special exceptions in *Lindquist v. Bd. of Adjustment of Jefferson County*, 490 So.2d 15 (1986).

Procedures of the Zoning Board of Adjustment

The Code of Alabama gives the board the authority to adopt rules in accordance with the ordinance under which the board was created. Section 11-52-80(b), Code of Alabama 1975. There are no specific Code sections dealing with the appointment of board officers. Generally, the chairman, vice chairman and other board officers and their terms and appointment procedures are specified in the rules of procedure.

Meetings of the board shall be held at the call of the chair and at such other times as the board may determine. In cities of not less than 175,000 and not more than 275,000 in population, the board must meet regularly once a month on a day determined by the board. The chair, or in his or her absence, the acting chair, may administer oaths and compel attendance of witnesses.

All board meetings are required by Section 11-52-80, Code of Alabama 1975, to be public meetings. As is the case for the planning commission and the municipal governing body, the Zoning Board of Adjustment must comply with the Open Meetings Act (OMA).

At any meeting where a hearing will be held by the board, public notice must be given. While the Alabama Code does not specify what constitutes public notice, it is suggested that the notice conform to the procedure required for giving notice of proposed amendments to the original zoning ordinance in Section 11-52-77(1), Code of Alabama 1975. Pursuant to this procedure, the zoning board of adjustment would publish notice of the time and place that the proposal is to be considered and state that at such time and place all persons desiring to speak in favor of or opposition to the proposal before the board shall have an opportunity to speak. The notice should be published once a week for two consecutive weeks in a newspaper of general circulation within the municipality, or if there is no newspaper, by posting such notice in four conspicuous places within the municipality. Both insertions, or posting, must take place for at least 15 days prior to the hearing. Although not required by law, many zoning ordinances require that adjoining property owners (as determined by the latest tax assessment roll) be notified of the hearing by mail at least five days prior to the hearing, and that notices of the hearing be posted on the property in question.

Section 11-52-80, Code of Alabama 1975, requires the zoning board of adjustment to keep minutes of its proceedings showing the vote of each member upon each

question, or, if absent or not voting, indicating this fact, and to keep records of its examinations and other official actions. All of these items are to be immediately filed in the office of the board and are public records.

The statute specifies a necessary vote of four members to take any action, but does not specify the number of members required to make a quorum. However, since a minimum of four members is required to take any action, a minimum of four should constitute a quorum for doing business.

Appeals to the Zoning Board of Adjustment

Any person aggrieved or any officer, department, board or bureau of the municipality affected by any decision of the zoning administrator may appeal to the zoning board of adjustment within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds for the appeal.

The board of adjustment may provide deadlines for appeal procedures. The intent is to allow the appellant ample time to prepare an adequate appeal to the board. However, the time allowed for appeal should be limited to the shortest practical period to avoid problems arising from unnecessary delays. In most cases, a period of three weeks is sufficient for both the appellant and the board.

The officer from whom the appeal was taken must transmit to the board all papers constituting the record upon which the appeal was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after receiving the notice of appeal, that by reason of the facts stated in the certificate, a stay would in his or her opinion cause imminent peril to life and property. After certification, the proceedings shall not be stayed other than by a restraining order granted by the board or by a court of record for due cause on application of notice to the officer from whom the appeal is taken.

The board shall fix a reasonable time for the hearing of the appeal, give notice to the public and to the parties in interest and decide the appeal within a reasonable time. Since two weeks notice is the suggested public notification period, the maximum time period for board hearings should be limited to 30 days. At the hearing, any party may appear in person or by agent or attorney.

In deciding appeals, the board, in conformity with the provisions of the state zoning laws, may reverse or affirm wholly or in part, or may modify the order, make such order, requirement, decision or determination as ought to be made and to that end, shall have all the powers of the officer from whom the appeal is taken.

Appeals from Decisions of the Zoning Board of Adjustment

Section 11-52-81, Code of Alabama 1975, provides that any party aggrieved by a final judgment or decision of the zoning board of adjustment may appeal the decision within 15 days to the circuit court, or court of like jurisdiction, by filing with the board a written notice of appeal specifying the judgment or decision from which the appeal is taken. Because the time provision of Section 11-52-81 is jurisdictional the court is not at liberty to alter or enlarge that period by resorting to the Alabama Rules of Civil Procedure. Thus the court cannot “relate back” to extend the time for filing an appeal of order denying a variance request. *City of Prattville v. S & M Concrete, LLC*, 151 So. 3d 295, 303 (Ala. Civ. App. 2013). A city has no authority to adopt an ordinance that alters the appeal process established in Section 11-52-81, Code of Alabama 1975, for appeals from a decision of the zoning board of adjustment. AGO 2002-028.

The zoning board of adjustment has a statutory duty to transmit a transcript of proceedings regarding a variance to the trial court upon neighboring landowner’s timely filing of a written notice of appeal with the board. *Carter v. Prattville Bd. Of Zoning Adjustment*, 976 So.2d 459 (Ala. Civ. App. 2007).

The case is tried by the circuit court *de novo*. Payment of a docket fee in circuit court is not a jurisdictional requirement for perfecting an appeal from a decision by the municipal zoning board of adjustment. To establish oneself as an aggrieved party, a person must present proof of the adverse affect the changed status of the rezoned property has or could have, on the use, enjoyment and value of his or her property. *Bastian v. Bd. of Zoning Adjustment of Daphne*, 708 So.2d 187 (Ala. Civ. App. 1997).

A property owner who sold his property before the formal meeting of a city’s planning commission at which his rezoning request was to be considered was not an “aggrieved party” with standing to bring an action challenging the alleged denial of the rezoning request. *Caton v. Thorsby*, 855 So.2d 1057 (Ala. 2003).

A municipality may be considered an aggrieved party and may appeal decisions of its board of zoning adjustment to the circuit court. *Ex parte Huntsville*, 684 So.2d 123 (Ala. 1996).

An adjoining neighbor whose legal interest in the use, enjoyment, and value of his property is directly and adversely affected by the board of zoning adjustment’s decision to grant a variance to a dance studio that resulted in traffic congestion is considered an aggrieved party. *Brown v. Jefferson*, 2014 WL 1328337, at *6 (Ala. Civ. App. Apr. 4, 2014).

Nonconforming Uses

Too often a municipality is seen as the villain in the zoning process. The governing body tries to limit the uses of property, angering that segment of the public which was generally quite happy to let the municipality develop in a haphazard manner. “It’s none of the city’s business what I want to do with my property” is a common complaint, especially in rural areas.

“The intention of zoning laws as regards a use of nonconforming property is to restrict rather than extend it. The objective is the gradual elimination of the nonconforming use by obsolescence or destruction by fire or the elements.” *Moore v. Pettus*, 71 So.2d 814 (Ala. 1954).

Naturally, one of the primary effects of zoning is to limit the uses of property. The intent is for all property in each district to eventually comply with the zoning classification it is given. Regulation of nonconforming uses is perhaps the most pervasive and complex problem facing municipalities contemplating zoning. The situation is particularly relevant today in light of the line of U.S. Supreme Court decisions that started with *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987). In this case, the Court ruled that a municipality may be held liable for even a temporary restriction on the use of property. Limiting a property owner’s use of his or her property may entitle the owner to damages in a case against the municipality. See also *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 US 302 (2002).¹

In addition to the constitutional limitations, immediate elimination of a particular use may result in a situation that is simply unfair. In *Quinnelly v. Prichard*, 291 So.2d 295 (1974), the Alabama Supreme Court stated, “It is only to avoid injustice that zoning ordinances generally (accept) existing nonconforming uses and that, therefore, the public effort is not to permit them to extend such nonconforming uses, but rather to permit them to exist as long as necessary and then to require conformity for the future.”

¹ A claim for regulatory takings as a result of a zoning regulation does not exist under Alabama law. The Alabama Constitutional provision for compensation upon a municipality’s taking of property does not allow for compensation to a property owner for an administrative or regulatory taking. Rather, Article 12, Section 235 of the Alabama Constitution of 1901, only provides for compensation for taking, injury, or destruction of property through physical invasion or disturbance of property, specifically by construction or enlargement of municipal corporation’s works, highways, or improvements. *Town of Gurley v. M&N Materials, Inc.*, 2012 WL 6634447 (Ala. 2012) (application for rehearing pending).

To avoid these difficulties, most zoning ordinances allow a use to continue if it was in effect at the time the ordinance was enacted. This is commonly known as “grandfathering in.” A pre-existing use that is “grandfathered” into a zoning district and does not comply with the classification is called a nonconforming use.

The nonconforming use must have existed prior to the effective date of the zoning ordinance in order to be grandfathered in. *Green v. Copeland*, 239 So.2d 770 (Ala. 1970). The burden is on the property owner to prove that the use existed on the date the ordinance went into effect. Yokely, *Zoning Law and Practice*, Section 22-5. The Alabama Court of Civil Appeals held that a mobile home which did not comply with municipal regulations at the time the zoning ordinance was amended to prohibit mobile homes in the district could not be permitted to remain as a nonconforming use. *Giles v. Hicks*, 564 So.2d 973 (Ala. Civ. App. 1990). A city is not estopped from enforcing its ordinance regarding placement of mobile homes where the clerk was misled. *Peterson v. Abbeville*, 1 So. 3d38 (Ala. 2008).

A contemplated use is not sufficient. Substantial construction or investment in a proposed use prior to the effective date of a regulation may cause the right to the nonconforming use to vest. Yokely, Section 22-4. However, a “rush” to begin construction in order to beat the effective date of a zoning ordinance might constitute bad faith and prevent the vesting of the nonconforming use. Each case must be determined on its own facts. For more discussion on vested rights, see the article titled *The Vested Rights Doctrine* in the publication *The Selected Readings for the Municipal Official* (2012 ed.) published by the Ala. League of Municipalities.

The Alabama Supreme Court has stated that a property owner generally has a right to continue a nonconforming use until the right is lost through abandonment, either before or after the adoption of the zoning ordinance. *Green* at 771. The use existing at the time of the adoption of the ordinance cannot be changed to some other nonconforming use. Yokely, Section 22-6. The Alabama Supreme Court held that a change in the use of property from a bakery to an automobile shop was a sufficient change in the nonconforming use to justify the city’s denial of a license. *State v. Mobile*, 503 So.2d 1224 (Ala. 1987). Thus, once the pre-existing use is abandoned, the property owner must comply with the zoning laws.

Most of the cases in Alabama involving nonconforming uses concern the definition of abandonment. In *Board of Zoning Adjustment v. Boykin*, 92 So.2d 906 (1957), the Alabama Supreme Court stated that there are two concurrent elements of abandonment. There must be an intent to abandon coupled with some overt act or failure to act which

implies abandonment. This is more, the court said, than a mere temporary cessation of the use.

In *Boykin*, the court ruled that because the zoning ordinance in question provided that no structure could be altered except in compliance with the regulations for its district, a property owner could not remodel his dwelling in order to prolong a nonconforming use. The policy of the law is to restrict the enlargement or extension beyond protecting the original property interest. For instance, in *Fulford v. Board of Adjustment*, 54 So.2d 580 (Ala. 1951), a restaurant owner applied for a license to sell beer. The restaurant, which was located in a residential district, was a nonconforming use. The court held that the sale of beer in the restaurant constituted an unauthorized extension of the nonconforming use.

In *Ex Parte Fairhope*, 739 So.2d 35 (1999), however, the Alabama Supreme Court held that the trial court had jurisdiction over a building permit issued by the city because under the rules of the Board of Adjustment in question, by not taking action the building permit was allowed to stand. The court also upheld the permit, which allowed the construction of a second story above a garage. Although the second story, like the original garage, did not conform to the setback requirements, it did not increase or extend the nonconforming use.

Further, it is important to note that the original property interest may or may not belong to the original property owner. The general rule is that once a nonconforming use is established, it runs with the land until abandoned and is not confined to any one person or corporation. Yokely, Section 22-3. A non-conforming use may be transferred to a new owner and the new owner may continue to operate as a nonconforming use. AGO 1989-022 and AGO 1989-027. In *Quinnelly v. Prichard*, 291 So.2d 295 (1974), the nonconforming use was the operation of a dirt pit in a residential area and involved two owners of the same piece of property. The first owner ceased selling dirt and later sold the property to a second owner who restarted the dirt pit operation. The court held that, under the circumstances, there was no real intent to abandon the use, and the operation must be permitted to continue. Thus, nonconforming uses of property can be transferred, as illustrated by the *Quinnelly* case.

The Alabama Supreme Court held that a change in the ownership, occupancy or name of an operating business facility does not eliminate its status as a legal-nonconforming use. A nonconforming use runs with the land and does not depend upon ownership of the property. Also, a sign that is nonconforming may be altered to reflect a name change without losing its nonconforming status. Consequently, a municipality may not divest a property owner of a vested right without compensation, and any attempt to do so

violates fundamental principals of due process. *Budget Inn of Daphne v. Daphne*, 789 So.2d 154 (Ala. 2000).

An interesting case which illustrates the need for an intention to abandon the use is *Green v. Copeland*, which is cited above. In this case, a district was rezoned to deny the sale of beer where it had been permitted before. At the time of the rezoning, the property owner's beer license had been indefinitely suspended by the ABC Board. The court held that since his discontinuance in selling beer was not voluntary, there was no abandonment of the use. The court pointed out that the nonconforming use must be an actual use, as distinguished from a contemplated one. The use must actually be in existence at the time the zoning restriction becomes operative. The court stated that an existing use "should mean the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose ... [T]he question of existing use is determined by ascertaining as near as possible the intention of the owner, in connection with the fact of a discontinuance or apparent abandonment of use." According to the court, a temporary cessation of the nonconforming use, even for a lengthy period of time, does not constitute an intention on the part of the owner to abandon the use, if the owner has no control over the discontinuance.

Similarly, in *Zoning Board of Adjustment of Birmingham v. Davis*, 699 So.2d 1264 (1997), the Alabama Court of Civil Appeals held that a nonconforming use was not lost when a restaurant was closed for renovations necessary to comply with safety codes. In this case, cessation of the use in order to bring the business up to code requirements was not an abandonment of a nonconforming use.

In a situation where a mobile home is allowed to be in an area not zoned for mobile homes because it was located in the area prior to the adoption of the zoning ordinance (i.e. a nonconforming use), it may not be replaced by another nonconforming home. AGO to Hon. Gary S. Roberts, January 7, 1976. In *Foley v. McLeod*, 709 So.2d 471 (1998), the Alabama Supreme Court held that a property owner's replacement of nonconforming mobile homes on his property violated the intent of the city's zoning ordinance that nonconforming uses should be abated. The court noted, however, that the city's previous acquiescence in allowing the replacement of nonconforming uses barred it from prohibiting the replacement in this case because there was no notice that the city planned to change its procedure. In the future, though, the city may enforce its ordinance and prohibit the replacement of nonconforming mobile homes because it has announced a departure from its previous acceptance of this use. The authority to regulate zoning is part of the municipal police power obligation to protect the public health, safety and welfare. In *State v. Baumhauer*, 234 Ala. 286, 174 So. 514 (Ala. 1937), the court quoted with

approval the U. S. Supreme Court case of *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), which stated that: “the law of nuisances ... may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power.” So, in a sense, a nonconforming use may be thought of as an accepted, or at least tolerated, nuisance.

Whether a nonconforming use loses that status under the specific circumstances of a given situation is a question of fact for a jury. *Tuscaloosa Bd. of Adjustment v. Booth*, 685 So.2d 752 (Ala. Civ. App. 1996). The total destruction of a nonconforming use by an act of God ends that use of the property. Yokely, Section 22-12. Perhaps an even more important question is “What if the property is merely damaged?” Almost uniformly, cases throughout the country have held that ordinances which provide a percentage of damage beyond which the building may not be rebuilt, or the use continued, have been upheld by the courts. A city building inspector’s determination that advertiser’s billboards were destroyed was reasonable, for purposes of city zoning ordinance providing that existing nonconforming billboards could remain unless removed, destroyed, or 50% or more structurally deteriorated, where each billboard had its face and horizontal supports, or “stringers,” ruined, particularly in light of the building inspector’s testimony that the those parts constituted 55% of the structure. *Studio 205, Inc. v. Brewton*, 967 So.2d 86 (Ala. 2007).

What about a situation where a nonconforming use constitutes a danger to the public? Does the municipality wait until the property owner abandons the use or can it be terminated immediately?

Here it is helpful to turn to the law of nuisances for guidance as the U. S. Supreme Court suggested in *Village of Euclid* cited above. Municipalities in Alabama have the authority to abate nuisances (Section 11-47-117, Code of Alabama 1975) or to institute an action in the name of the municipality to enjoin or abate the nuisance (Section 11-47-118 and Section 6-5-122, Code of Alabama 1975). Even with this authority from the Legislature, however, municipalities must be careful when seeking to abate nuisances. For instance, municipalities cannot declare a perfectly lawful business or trade to be a nuisance and abate when the business is actually not a nuisance and is not operated in a manner in which it is likely to become a nuisance. *Russellville v. Vulcan Materials Co.*, 382 So.2d 525 (Ala. 1980). For further information concerning nuisances and nuisance abatement, see the article titled *Abatement of Nuisances* in the publication *The Selected Readings for the Municipal Official* (2012 ed.) published by the Ala. League of Municipalities.

In addition to this authority, the vast majority of courts which have considered the question have upheld the right

of a municipality to abate a nonconforming use over a specific period of time, provided the length of time gives due notice to affected property owners and the restrictions are reasonable and fair in their application; however, there appear to be no Alabama cases on this issue. In addition, some courts have refused to uphold ordinances of this type on the ground that they constitute a taking of property without just compensation. In light of the *First English* decision, it is entirely possible that a court might rule that unless the nonconforming use constituted a nuisance, an attempt to amortize the use without compensating the property owner is unconstitutional. It is therefore important to proceed very carefully in this area.

Spot Zoning

Spot zoning refers to singling out a small parcel of land for use or uses classified differently from the surrounding area which is similar in character. Spot zoning primarily benefits the owner of the newly zoned property to the detriment of other owners in the area. “Spot zoning has been defined as a provision in a zoning plan or a modification in such plan that affects only the use of a particular piece of property or a small group of adjoining properties and is unrelated to the general plan for the community as a whole.” Yokley, *Zoning Law and Practice*, Section 13-2 (4th Edition).

It is generally agreed that spot zoning is illegal in Alabama. There is much confusion, however, as to what constitutes “spot zoning.” Generally, the smaller the area rezoned, the more questionable the rezoning becomes. Yet there is no conclusive relationship between the size of the rezoned area and the question of whether the rezoning constituted spot zoning.

Can a municipality zone only a portion of the municipality? In *Chapman v. Troy*, 4 So.2d 1 (Ala. 1941), the municipality adopted an ordinance creating a zone for residential purposes only, leaving the rest of the city unzoned. The court held that, “A single ordinance laying off a small portion of the city as a residence district, taking no account of other areas equally residential in character; and so far as appears without any comprehensive plan with a view to the general welfare of the inhabitants of the city as a whole is not permissible.”

In *COME v. Chancy*, 269 So.2d 88 (1972), the Alabama Supreme Court stated that: “Recent decisions have limited condemnation of ‘spot’ or ‘piecemeal’ zoning to the situation where there has been no comprehensive plan.” This view, the court recognizes, is the minority view nationwide. But, it is also clear that the court held a dim view of the entire concept of “spot zoning,” stating that, “the term ‘spot zoning’ is nothing more than a catchy phrase whose introduction into legal terminology has created only an illusory concept of no practical use.” The court’s minority view was upheld

in 1986, in the case of *Johnson v. Doss*, 500 So.2d 1129 (Ala. Civ. App. 1986). In this case, a five-acre parcel was rezoned from agricultural to commercial. Because the trial court held that the rezoning was taken pursuant to a comprehensive plan, it could not constitute spot zoning.

Thus, if a zoning amendment is in accordance with a comprehensive plan, it cannot be spot zoning. It is important to remember, though, that these cases are determined by the facts and circumstances of each situation and that zoning ordinances will be held invalid where they are unreasonable, arbitrary, capricious or discriminatory.

The essential idea is that the governing body, in the exercise of its zoning power, may not discriminate between different properties or property owners. From the standpoint of use and development, if there are no recognizable differences between a particular lot and other lots up and down the street from it or between a particular tract of land, no matter what size, and other property similarly situated, then any law which applies restrictions on the use and development of the one lot or tract which do not apply to the others is discriminatory except where the different treatment can be justified by considerations having to do with the comprehensive plan for land use and development by the entire municipality.

Again, the size of the property being considered for new classification, while important, is not the sole criterion. For instance, in *Sweeney v. Dover*, 234 A.2d 521 (1967), the New Hampshire Supreme Court pointed out that the mere fact that an area is small and is zoned at the request of a single owner and provides him with greater benefits than to others does not make out a case of spot zoning if there is a public need or compelling reason for it. The key, then, in these situations, is to examine the impact of zoning decisions on a larger scale than may be presented under the facts in the situation at hand. Zoning officials have to take into account all the facts of a given case and the effect these facts have on the community at large. They should be able to point to a significant benefit to the public from the zoning request.

Officials must also ask themselves whether rezoning a parcel of land will further a significant governmental purpose under the police power of the municipality and whether the reasons they use to justify their decision are fairly debatable to the average person. Where these objectives are served, granting a rezoning request even of a small parcel of land will not constitute spot zoning.

In a situation where a business was not lawfully operating at the time a zoning ordinance went into effect, the business could not be grandfathered in as a nonconforming use in a residential district. The Court of Civil Appeals also rejected a spot zoning claim because other businesses were allowed to operate within the zone, holding that the

Board of Adjustment's determination that the nature of these businesses were different was justified. *White's Excavation v. Bd. of Zoning Adjustment of Daphne*, 636 So.2d 422 (Ala. Civ. App. 1994).

Zoning for Aesthetics

To some extent, many zoning regulations are based on the public's need to regulate aesthetics. Of course, many of these ordinances also advance police power interests – that is, they benefit the public health, safety and welfare. When a municipality enacts a zoning ordinance regulating the size of signs over sidewalks, for instance, part of the purpose behind the ordinance is to preserve the public's use of the sidewalk – so that people don't have to walk in the street – and to protect the public from injury due to low-hanging protrusions. But another reason behind the regulation is the desire for an uncluttered look in the air above the sidewalk.

Because zoning ordinances are based on the exercise of municipal police power, courts tend to construe them liberally. *Roberson v. Montgomery*, 233 So.2d 69 (Ala. 1970). But does a zoning ordinance that is based solely on aesthetics protect the public health, safety or welfare? Stated another way, are aesthetics considerations alone a legitimate exercise of municipal police power?

Early court decisions did not recognize the right of municipalities to regulate land use for aesthetic purposes. In Alabama, in *Johnson v. Huntsville*, 29 So.2d 342 (1947), the Alabama Supreme Court held that zoning cannot “be left to the caprice, whim or aesthetic sense of a special group of individuals.” These early decisions forced local governments to combine aesthetic zoning ordinances with the advancement of a separate police power interest in order to legitimize the ordinance.

In 1954, the United States Supreme Court indicated, in dictum, that the idea of protecting the general welfare was broad enough to include the preservation of aesthetic values. *Berman v. Parker*, 348 U.S. 26, 33 (1954). Following this decision, several state courts upheld the authority of municipalities to zone for aesthetic reasons alone. Additionally, the United States Supreme Court, following its reasoning in *Berman*, acknowledged the need for aesthetic regulations in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The Court stated that, “the police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.”

Changing times, increasing population density and environmental concerns seem to have led many courts away from the belief that aesthetics are not a valid police power concern. The Fifth Circuit Court of Appeals has stated that: “[T]he value of scenic surroundings to tourists, prospective

residents and commercial development cannot be overstated. But in an age in which the preservation of the quality of our environment has become such a national goal, a concern for aesthetics seems even more urgent.” *Stone v. Maitland*, 446 F.2d 83 (5th Cir. 1971).

Ordinances based on police power are enacted to preserve and further the public peace, order, health, morality and welfare. *Homewood v. Wofford Oil Co.*, 169 So. 288 (Ala. 1936). This is a very broad power and the courts have recognized that it seems to allow municipalities to regulate on the basis of aesthetics. The Alabama Court of Criminal Appeals explicitly recognized the authority of municipalities in Alabama to use zoning power to regulate aesthetics. *Chorzempa v. Huntsville*, 643 So.2d 1021 (Ala. Crim. App. 1993). This decision appears to make it clear that municipalities in Alabama, under existing law, have the power to regulate for aesthetics purposes alone. Of course, the zoning ordinance must be valid in all other respects.

Although space limitations do not permit a full discussion of architectural review boards and historic preservation, any discussion of zoning for aesthetic purposes must address these aspects, at least briefly. The easy question concerns zoning to maintain the aesthetic nature of an historic district. This has been approved by the United States Supreme Court in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).

As for architectural review, that is, control over the design of buildings, Yokley considers this “the most sensitive use of the aesthetic concept.” Yokley, § 4-7. The purpose behind architectural review is to determine the aesthetic acceptability of structures before they are built. An architectural review board can refuse to permit the construction of a building that does not meet criteria established in an ordinance. Yokley cites numerous cases which have upheld the authority of municipalities to establish architectural review boards. Many of these cases, however, concern boards that existed in historic districts.

Section 11-68-13, Code of Alabama 1975, authorizes municipalities in Alabama to establish an architectural review board. Again, however, the principal function of the board is to review plans for proposed development, maintenance and construction of structures within historic districts. There appears to be no general legislative authority for Alabama municipalities to create architectural review boards for purposes other than the preservation of historic structures.

Of course, there are still jurisdictions which prohibit the use of a zoning ordinance to regulate for aesthetic purposes. The general trend, however, appears to approve of aesthetic regulation, provided the ordinance meets the accepted standards for upholding zoning ordinances.

Airport Zoning

Section 4-6-1, et seq., Code of Alabama 1975, allows municipalities to zone airport hazards, which are defined as, “Any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at any airport or is otherwise hazardous to such landing or taking-off of aircraft.” A county commission may adopt airport zoning regulations pursuant to Section 4-6-4, Code of Alabama 1975. AGO 2001-271.

In order to zone the hazard area, the municipality must either appoint an airport zoning commission consisting of five members, each to be appointed for a term of three years or designate any existing planning commission to recommend the boundaries of the various zones to be established and the regulations to be adopted therefor. This commission must make a preliminary report and hold at least one public hearing before submitting its final report. The municipal council may not hold its public hearings or take other action until it has received the final report of such commission.

No airport zoning regulations may be adopted unless and until the proposed ordinance has been published at least once a week for two consecutive weeks in advance of its passage in a newspaper of general circulation within the political subdivision, or, if there is no newspaper, then by posting the same in four conspicuous places within the political subdivision, together with a notice stating the time and place that the ordinance is to be considered by the legislative authorities, and stating further that at this time and place all persons who desire shall have an opportunity of being heard in opposition to or in favor of such regulations. No such regulations shall become effective until after a public hearing, at which parties in interest and citizens shall have an opportunity to be heard. Amendments and changes to these ordinances must be adopted by following the procedure set out above.

An ordinance adopted pursuant to these provisions must appoint an administrative agency to hear requests for variances and special exceptions. Standards applicable to these variances and special exceptions appear to be the same as are applicable under general zoning law. Although the Act doesn’t provide for it, it seems that these duties could be assigned to the zoning board of adjustment.

In any case where the municipality wants to remove, lower or otherwise terminate a nonconforming structure or use but can’t do so because of constitutional limitations, or if it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the municipality within which the property or nonconforming use is located or the municipality owning the airport or served by it may acquire, by purchase, grant or condemnation the air right, navigation easement or

other interest in the property or nonconforming structure or use to effectuate the purposes of this chapter.

If there is any conflict between a regulation adopted under this authority and any other regulation applicable to the same area, regardless of when the regulation was adopted or whether it was adopted by another political subdivision, the more stringent limitation or requirement shall govern and prevail.

A municipality may zone around its airport even into an adjoining county. *AGO to J. Aronstein, Jr.*, September 20, 1973. The zoning jurisdiction of any municipality, zoning under Section 4-6-4, Code of Alabama 1975 may include the corporate area of the municipality, the area within the police jurisdiction and the area lying within two miles of the boundary of any airport owned or operated by the municipality. However, where a local act limits the territorial jurisdiction of a city planning board to the corporate limits of a city, the zoning jurisdiction only includes the corporate limits. Section 4-6-4, Code of Alabama 1975

Religious Freedom

In 1998, Amendment 622 (Section 3.01), Alabama Constitution, 1901, was ratified by the state's voters. This amendment prohibits governments from taking any action that burdens religious freedom, unless the action:

1. furthers a compelling governmental interest, and
2. is the least restrictive means of furthering that compelling governmental interest.

Anyone whose religious freedom is burden by governmental action may assert this constitutional protection as a defense against the action or as a claim against the government for the action. This provision is liberally construed to effectuate its purposes.

Municipalities must be aware of this amendment when zoning churches and other property used for a religious purpose and exercise due care. It is possible that zoning constitutes a "compelling governmental interest." A municipality, though, should be prepared to justify its zoning decisions affecting any religious activity in light of this amendment.

Several court decisions have been rendered on the subject of religious freedom and zoning. Provisions of the 2000 Religious Land Use and Institutionalized Persons Act barring imposition of land use regulations that substantially burden religious exercise provided that such burden affects commerce or permits individualized assessments of proposed property uses unless the regulation is a least restrictive means of furthering a compelling governmental interest are a valid exercise of Congress's authority under the Commerce Clause and Section 5 of the Fourteenth Amendment to enforce the free exercise and the Free Speech Clauses of the

First Amendment. *Freedom Baptist Church v. Middletown Township*, 204 F.Supp.2d 857 (E.D. Pa. 2002).

If a zoning ordinance amounts to a regulatory taking of a landowner's property pursuant to the 5th Amendment to the United States Constitution, the landowner can recover damages from the municipality. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987). Jefferson County's refusal to rezone a parcel of property for a church may violate the free exercise of religion clause in the First Amendment. *Church of Jesus Christ of Latter Day Saints v. Jefferson County*, 721 F.Supp. 1212 (N.D. Ala. 1989). In *Prattville v. Hunting Ridge Church of God*, 608 So.2d 750 (1992), the Alabama Court of Civil Appeals held that the board of adjustment's denial of a variance to construct a church building was not justified by the evidence.

A Massachusetts law that prohibits municipal zoning authorities from excluding religious uses of property from any zoning district, does not violate the First Amendment's Establishment Clause. The court held that the statute has a legitimate secular purpose of barring religious discrimination, and its primary effect is "acceptable accommodation" of religion, not "impermissible favoritism." *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000).

Judicial Review of Zoning Ordinances

When a municipality adopts a zoning ordinance, it is presumed valid. Generally speaking, zoning ordinances, like all ordinances, are entitled to a presumption of correctness by the courts. *Marshall v. Mobile*, 35 So.2d 553 (Ala. 1948). As Alabama courts have pointed out in numerous cases, the wisdom of a municipal zoning ordinance rests, in large measure, in the wise discretion of the local governing body. *See e.g., Fleetwood Development Corp. v. Vestavia Hills*, 212 So.2d 693 (Ala. 1968). "It is well-settled that the courts must apply a highly deferential standard in reviewing zoning decisions. Courts generally will not substitute their judgment for that of the council" *See. American Petroleum Equipment and Constr., Inc. v. Fancher*, 708 So.2d 129 (Ala. 1997); *Ex parte Nathan Rodgers Const., Inc.*, 1 So.2d 46 (Ala. 2008). The Alabama Supreme Court has held that a trial court must not disturb the zoning decision of a duly constituted municipal body so long as that decision is based upon a 'fairly debatable' rationale. *Jefferson County v. O'Rorke*, 394 So.2d 937 (Ala. 1980), and *Cale v. Bessemer*, 393 So.2d 959 (Ala. 1980). Courts must recognize that zoning is a legislative function committed to the sound discretion of municipal legislative bodies, not to the courts. *Waters v. Birmingham*, 209 So.2d 388 (Ala. 1968); *Marshall v. Mobile*, 35 So.2d 553 (Ala. 1948). As a result, local governing authorities are presumed to have a superior opportunity to know and consider the

varied and conflicting interests involved, to balance the burdens and benefits and to consider the general welfare of the area involved. *Episcopal Found. of Jefferson County v. Williams*, 202 So.2d 726 (Ala. 1967); *Leary v. Adams*, 147 So. 391 (Ala. 1933). They, therefore, must of necessity be accorded considerable freedom to exercise discretion not diminished by judicial intrusion. *Walls v. Guntersville*, 45 So.2d 468 (Ala. 1950).

Nevertheless, this discretion is not unbounded and local authorities may not, under the guise of legislative power, impose restrictions that arbitrarily and capriciously inhibit the use of private property or the pursuit of lawful activities. Courts generally look to see if the municipality acted arbitrarily or capriciously. This issue has been held to be one of fact for a jury to resolve. *Bratton v. Florence*, 688 So.2d 233 (Ala. 1996). The only limitations on municipal zoning ordinances are that they must be comprehensive and not in conflict with the laws of the state or the state and federal constitutions. *Jefferson County v. Birmingham*, 55 So.2d 196 (Ala. 1951). Zoning ordinances are generally not overturned unless there is an abuse of discretion or the ordinance itself is arbitrary and capricious. *COME v. Chancy*, 269 So.2d 88 (Ala. 1972).

Of course, the enforcement of municipal ordinances cannot be left to the whim or discretion of officials. Therefore, it is important that the ordinance provide reasonable standards to govern the decisions of zoning officials, or create objective criteria that a property owner must meet in order to comply with the zoning ordinance. While defining objective standards is difficult, many courts have recognized that a municipality, within the limits of its discretionary power, can limit a landowner's use of his or her property. Because municipal zoning power in Alabama is derived from the Legislature's police power, *White v. Luquire Funeral Home*, 129 So. 84 (Ala. 1930), any regulations a municipality places in its ordinance must fit within the parameters of public protection. Ordinances based on police power are enacted to preserve and further the public peace, order, health, morality and welfare. *Homewood v. Wofford Oil Co.*, 169 So. 288 (Ala. 1936).

In *Ryan v. Bay Minette*, 667 So.2d 41 (1995), the Alabama Supreme Court held that summary judgment for the city was improper where the plaintiff raised a question of whether an administrative decision violated the city's own zoning ordinance. The "fairly debatable standard" for reviewing municipal zoning ordinances applies only to legislative decisions, not administrative decisions. *Ex parte Fairhope*, 739 So.2d 35 (Ala. 1999).

Municipalities must enforce their zoning ordinances even-handedly, or they may lose the right to enforce certain provisions at all. *Pearson v. Hoover*, 706 So.2d 1251 (Ala. Civ. App. 1997). In some cases, though, enforcement

may not be possible. The Court of Civil Appeals has held that because the construction of a county courthouse is a governmental operation of the county government, the construction is not subject to municipal zoning regulations. *Lane v. Zoning Bd. of Adjustment of Talladega*, 669 So.2d 958 (Ala. Civ. App. 1995). See also, AGO 1989-001 (UAH is not subject to municipal zoning control); AGO 1989-446 (Auburn University is not subject to municipal zoning control); *Alves v. Bd. of Educ. for Guntersville*, 922 So.2d 129 (Ala. Civ. App 2005)(school location); and *Selma v. Dallas County*, 964 So.2d 12 (Ala. 2007) (county communications tower).

It is also important to remember that in an appropriate case, a municipality may be subject to paying the plaintiff's attorneys fees as well as its own. The Alabama Supreme Court held that attorneys fees should be awarded in *Ex parte Horn*, 718 So.2d 694 (1998) because the court felt that the plaintiff's efforts resulted in a benefit to the general public.

Review of a zoning ordinance, or the denial of a zoning ordinance, involves two specific rules of law. *Dyas v. Fairhope*, 596 So.2d 930 (Ala. Civ. App. 1992). The court stated, "First, there must be a determination of whether the zoning ordinance, as applied to the appellants' property, has a "substantial relationship" to the objects of the police power of the city, i.e., the promotion of the health, safety, morals, and general welfare of the community. *BP Oil Co. v. Jefferson County*, 571 So.2d 1026 (Ala. 1990)." If this relationship exists, the court should then determine "whether the zoning classification application is fairly debatable, i.e., if the classification can be said to be reasonably subject to disagreement." If so, then the action by the zoning authority should not be disturbed. The law governing the second part of this requirement, that the regulation in question be fairly debatable, was explained in *Birmingham v. Morris*, 396 So.2d 53 (Ala. 1981).

Miscellaneous Court Decisions and Attorney General's Opinions on Zoning

The Attorney General and the courts have issued numerous opinions on zoning which should be mentioned:

- A municipality may zone newly-annexed territory even though such territory was subject to county zoning regulations prior to the annexation. AGO to Hon. Robert S. Vance, January 31, 1975.
- An ordinance prohibiting a person, whose application for rezoning certain premises has been denied, from reapplying for rezoning of the same premises until after the expiration of one year from the time of denial is valid. AGO to Hon. John V. Duck, February 20, 1974 and AGO to Hon. John V. Duck, March 12, 1974.
- In *Haley v. Daphne Planning Commission*, 740 So.2d

415 (1999), the Alabama Court of Civil Appeals held that the Daphne Planning Commission narrowly but consistently interpreted its zoning ordinance by allowing withdrawal of the rezoning application and filing of a subsequent application less than 12 months later, provided that the initial application was not considered by the planning commission. Therefore, consideration of the later rezoning application less than 12 months later is allowed.

- A city zoning regulation is unenforceable if it does not conform to restrictive covenants on the land. AGO to Mayor Hugh Herring, Jr., January 19, 1973.
- Restrictive covenants should be enforced by private landowners and not by the municipality unless the proposed use violates the municipality's zoning ordinance. AGO 1981-559 (to Hon. Charles W. Penhale, September 1, 1981) and AGO 1988-357.
- Amendments to a zoning ordinance apply prospectively only. AGO 1983-178 (to Hon. Patrick H. Boone, February 8, 1983).
- A good review of Alabama zoning laws is found in the Alabama Supreme Court case of *Byrd Companies, Inc. v. Jefferson County*, 445 So.2d 239 (1984).
- A zoning ordinance which permits group homes for the care of adults in certain districts only by special exemption violates Section 11-52-75.1, Code of Alabama 1975, which abolishes any zoning law or ordinance that prohibits group homes in areas zoned "multi-family." AGO 1987-309.
- Day care homes must comply with local zoning ordinances. A day care home located in an R-1 zone where no exception is provided in the local zoning ordinance, must obtain a special exception under any procedures provided for in the local zoning ordinance. AGO 2002-314.
- Group homes permitted under Section 11-52-75.1, Code of Alabama 1975, should attempt to comply with all zoning regulations. AGO 1988-128.
- In *Association for Retarded Citizens, Inc. of Jefferson County v. Fultondale*, 672 So.2d 785 (1995), the Alabama Supreme Court held that whether a municipal zoning ordinance discriminated against a group home in violation of the Fair Housing Amendment Act was a factual question that precluded summary judgment. In view of the fact that ordinance and provisions for permitted uses and special exceptions were aimed at controlling uses of premises within each zone, and not the types of people who might inhabit them, ordinance which required special exception for use of transitional

home for patients of hospital who were released on "trial basis," and under which special exception was granted by board of adjustment for "personal care home for adults" subject to conditions outlined by the board regarding screening residents and programming, was valid and the board was authorized to act as it did. *Indian Rivers Community Health Center v. Tuscaloosa*, 443 So.2d 894 (Ala. 1983).

- Planned Unit Developments (PUDs) must fit within a municipality's existing comprehensive plan and meet the requirements of the zoning ordinance. *Tuscaloosa v. Bryan*, 505 So.2d 330 (Ala. 1987).
- There is no conflict for councilmembers to vote to rezone an area where they own only a few of the more than 200 lots proposed to be rezoned. AGO 1990-286. **Note:** Councilmembers in this situation should also submit the question to the State Ethics Commission.
- Director of public works may serve on a zoning board of adjustment. AGO 1990-319.
- The Attorney General's office cannot determine the constitutionality of a zoning ordinance. AGO 1991-113.
- Zoning may not be made subject to a referendum. AGO 1991-262.
- Property owned by the State of Alabama Department of Conservation and Natural Resources is not subject to municipal zoning ordinances. AGO 1992-373.
- In *Orange Beach v. Perdido Pass Developers*, 631 So.2d 850 (1993), the Alabama Supreme Court held that where the city was extensively involved in the negotiations concerning the city's agreement with the developer to annex the island owned by the developer and zone it for development, the city did not abuse its legislative discretion in entering into an agreement, and the annexation-zoning agreement was valid.
- A city may, through a zoning ordinance, prohibit a disabled vehicle from remaining on property dedicated to residential purposes unless stored in an enclosed structure. AGO 1994-093.
- The Alabama Court of Civil Appeals held in *Beaird v. Hokes Bluff*, 595 So.2d 903 (1992), that a landowner whose request for rezoning is denied by the municipal legislative body, is not required to exhaust administrative remedies by requesting variance from a board of zoning adjustment pursuant to Section 11-52-80, Code of Alabama 1975, prior to seeking judicial relief.
- The Alabama Supreme Court held that use of the terms "structurally unsound" and "dilapidated" in a zoning ordinance were not impermissibly vague or

ambiguous when they refer to requiring the removal of nonconforming billboards that have become structurally unsound and dilapidated. The court will only review a zoning ordinance when it is arbitrary and capricious, because city ordinances are subject to the same rules of statutory construction as are acts of the Legislature. *Ex parte Orange Beach Bd. of Adjustment*, 833 So.2d 51 (Ala. 2001).

- In *Mobile v. Sullivan*, 667 So.2d 122 (1995), the Alabama Court of Civil Appeals held that the substantive immunity rule does not bar a suit against the city for negligent misrepresentations regarding the city's zoning laws.
- The Alabama Court of Civil Appeals has held that because the construction of a county courthouse is a governmental operation of the county government, the construction is not subject to municipal zoning regulations. *Lane v. Zoning Bd. of Adjustment of Talladega*, 669 So.2d 958 (Ala. Civ. App. 1995).
- In *Hale v. Osborn Coal Enterprises, Inc.*, 729 So.2d 853 (1997), the Alabama Court of Civil Appeals held that an agreement between a property owner and a municipality to annex territory and rezone it constituted contract zoning and was invalid.
- In *Cobb v. New Hope*, 682 So.2d 1375 (1996), the Alabama Court of Civil Appeals held that a municipality may enforce its zoning ordinance even though the municipality has issued a building permit for a purpose which would violate the ordinance.
- A planning commission has the duty to adopt a "master plan" to be used to advise the governing body in the determination of developmental decisions for a city and Section 11-52-10 of the Code of Alabama governs the procedure for adopting a master plan. AGO 2002-309.
- Developer's application for rezoning was improperly granted because the original request was defective, the city had no authority to grant a rezoning request without first receiving and considering any recommendation of the city planning commission, and the rezoning ordinance was not published in its final form, in violation of a zoning regulation requiring any proposed changes to a zoning ordinance be included in a second legal notice. *Speakman v. Cullman*, 829 So.2d 176 (Ala. Civ. App. 2002).
- A city's use of a building as a warehouse in a residentially zoned district was for a governmental function and, thus, the city was not subject to the zoning ordinance that prevented such use in a residential zone. *Cunningham v. Attalla*, 918 So.2d 119 (Ala. 2005).
- A city building inspector's determination that an advertiser's billboards were destroyed and no longer "grandfathered" was reasonable, for purposes of a city zoning ordinance providing that existing nonconforming billboards could remain unless removed, destroyed, or 50% or more structurally deteriorated, where each billboard had its face and horizontal supports, or "stringers," ruined. The building inspector's testimony was that those parts constituted 55% of the structure. *Studio 205, Inc. v. City of Brewton*, 967 So.2d 86 (Ala.2007)
- A county's communications tower to provide contact with emergency service providers was a governmental function, not a proprietary function. Thus, the city's zoning ordinances on historic properties and siting of wireless telecommunications facilities were unenforceable against the county. The tower provided interoperable emergency communications equipment contemplated by Congress and funded by grants made available through federal and state homeland security acts, the county's customers were emergency first responders, and the tower benefited county citizens and emergency personnel from other counties or states in any multi-jurisdictional response to crisis. *City of Selma v. Dallas County*, 964 So.2d 12 (Ala.2007)
- Town officers who enacted zoning ordinances were entitled to absolute legislative immunity for any damages in association with the passage of the ordinances, even if the officers had impure motives in enacting the ordinance. *Peebles v. Mooresville Town Council*, 985 So.2d 388 (Ala.2007)
- Subdivision regulations did not attempt to designate certain districts or areas or to restrict the kind, character or use of structures, and, thus, the regulations were not an improper attempt to apply zoning restrictions to a developer's proposed condominium complex on its property located outside of corporate limits. *Dyess v. Bay John Developers II, L.L.C.*, 13 So.3d 390 (Ala. Civ.App.2007)
- Private restrictions may be more but not less restrictive than valid zoning provisions. The appropriate remedy for violating restrictive covenants is to seek an injunction to remove the offending structure. *Dauphin Island Property Owners Ass'n, Inc. v. Pitts*, 993 So.2d 477 (Ala.Civ.App.2008).
- Municipalities have the authority to regulate the use of structures and improvements in certain zones or districts and can use their zoning power to regulate aesthetics in maintaining property values. So far as an ordinance restricts the absolute dominion of the owner

over its property, however, it should furnish a uniform rule of action, and its application cannot be left to the arbitrary will of the governing authorities. *Ex parte Duncan*, 1 So.3d 15 (Ala.2008)

- A city was not estopped from enforcing its ordinance regarding placement of mobile homes where the clerk was misled. Although the city clerk gave homeowners permission to complete the nonconforming installation of their mobile home, he did so in an effort to accommodate homeowners, who had been left homeless following a tornado, and only after the homeowners, whether intentionally or inadvertently, misled him as to the dimensions of their property and had installed a new septic tank, field lines, concrete pad, and half of the mobile home. *Peterson v. City of Abbeville*, 1 So.3d 38 (Ala.2008).
- Testimony from councilmen and planning commission members constituted an independent and adequate basis for concluding that a city's decision to deny a rezoning application was not based solely on speculation and thus was not arbitrary and capricious. The standard of review in a zoning case is highly deferential to the municipal governing body. *Ex parte Nathan Rodgers Const., Inc.*, 1 So.3d 46 (Ala.2008).
- Because the time provision of Section 11-52-81 is jurisdictional the court is not at liberty to alter or enlarge that period by resorting to the Alabama Rules of Civil Procedure. Thus the court cannot "relate back" to extend the time for filing an appeal of order denying a variance request. *City of Prattville v. S & M Concrete, LLC*, 151 So. 3d 295, 303 (Ala. Civ. App. 2013).
- An adjoining neighbor whose legal interest in the use, enjoyment, and value of his property is directly and adversely affected by the board of zoning adjustment's decision to grant a variance to a dance studio that resulted in traffic congestion is considered an aggrieved party. *Brown v. Jefferson*, 2014 WL 1328337, at *6 (Ala. Civ. App. Apr. 4, 2014).
- The Zoning Board of Adjustment has the authority to hear requests for variances to setbacks established by the city's zoning ordinance but not the setbacks established by restrictive covenants found in the recorded plat of a subdivision. AGO 2010-075.
- The planned expansion of a landfill by the City of Dothan is a governmental function and is therefore exempt from the jurisdiction of the Dothan Board of Zoning Adjustment. AGO 2013-034.
- Pursuant to section 11-52-85(b) of the Code of Alabama, a municipality is not required to provide a

requested pre-zoning statement to a property owner who does not reside in the affected area in a dwelling or otherwise continuously or on a regular basis so as to demonstrate a minimal level of permanency of physical presence. AGO 2016-043.

- The term "administrative officials of the municipality," as used in section 11-52-3(a) of the Code of Alabama, may include employees who oversee a key municipal function or area but who do not supervise other people. AGO 2016-034.
- Planning Commission members are not required to be residents of the city. AGO 2016-034.
- City council's adoption of conditions prior to approving an already published proposed zoning ordinance allowing the building of an apartment complex violated statute on notice requirements for proposed ordinances, even though the conditions added restrictions to the zoning district at issue; one condition changed the zoning district from one that would have allowed 37 possible uses of property to one that would have allowed only nine, but notice statute required that the ordinance ultimately adopted be the same as the proposed ordinance that was published, and such a change was never disclosed to the public before the council meeting or even to the council until the night before the meeting. *Ex parte Buck*, 256 So.3d 84 (Ala. 2017).
- The Athens City Council may utilize the notice procedure set forth in section 11-52-77(2) of the Code of Alabama to adopt a new zoning ordinance that completely amends and replaces the city's existing zoning ordinance. AGO 2017-011.
- The Board of School Commissioners of Mobile County is exempt from local zoning ordinances, local building codes, and local stormwater ordinances. AGO 2020-024.

55. Regulation of Subdivisions

Cities today are witness to substandard living conditions, congested traffic, inadequate and often dangerous surface drainage facilities, inadequate sewage disposal systems, lack of recreational open spaces, unmarked and improperly lighted streets, confusing block and house numbering systems, frequent excavations in streets to install larger utility lines, inadequate fire hydrants, narrow undersized lots and streets that don't match. These conditions speak forcefully for the public need for planned physical and economic growth in urban areas.

Costly Haphazard Growth

Alabama cities and towns have statutory authority to prevent costly, haphazard growth in the future. Every municipality in Alabama is authorized to establish a planning commission which has the power to develop a master plan for the future growth of the city or town, to regulate the subdivision of lands and to recommend zoning laws to the municipal governing body.

While subdivision regulations and zoning laws must be coordinated with the master plan, these three phases of urban growth control have separate and distinct features which may be regarded individually. To protect the municipal treasury, the power to establish and administer subdivision regulations is the most important planning tool available to cities and towns.

Creation of Planning Commission

The power to regulate subdivisions is granted to a municipal planning commission established by the municipal governing body. AGO 89-00050.

Sections 11-52-1, et seq., Code of Alabama 1975, provide statutory authority for all Alabama municipalities to create a planning commission. Section 11-52-3, Code of Alabama 1975, provides that the planning commission shall be composed of nine members. One member is the mayor or his or her designee, one member is an administrative officer of the municipality chosen by the mayor, one member is a member of the council chosen by the council, and the remaining six members are chosen by the mayor. All members of the commission serve without compensation. No appointed members of the planning commission can hold another municipal office, except that one of the appointed members may also serve on the zoning board of adjustment (except in cities of not less than 175,000 nor more than 275,000 in population, according to the most recent federal decennial census where no member may serve on the zoning board of adjustment). The term "administrative officials of the municipality," as used in section 11-52-3(a) of the

Code of Alabama, may include employees who oversee a key municipal function or area but who do not supervise other people. AGO 2016-034. A member of the city council may not, under Section 11-52-3(a), Code of Alabama 1975, serve as the administrative official on the planning and zoning commission. Further, the mayor may appoint a city employee to serve on the planning commission (in addition to the mayor, administrative official, and council member) as one of the 6 general appointments provided for in Section 11-52-3(a). AGO 2005-101.

In 2009, Section 11-52-3.1, Code of Alabama 1975 was added to provide that in a Class 2 municipality, two additional members of the municipal planning commission created under Section 11-52-3, shall be appointed by the mayor and shall reside outside the corporate limits of the municipality, but within the territorial jurisdiction of the planning commission at the time of the appointment.

In cities having populations of not less than 175,000 nor more than 275,000 all members of the commission must be bona fide residents and qualified electors of such cities. Section 11-52-3(b), Code of Alabama 1975. In cities with a population of less than 175,000, the city may appoint individuals residing outside the corporate limits and police jurisdiction as members of the Planning Commission. AGO 2016-034.

Both the mayor's designee and the administrative official selected by the mayor to sit on the planning commission are eligible to serve as chairman of the commission. AGO 1994-235.

The terms of the ex officio members – the mayor and the councilmember – shall correspond to their respective official tenures, except that the term of the administrative official selected by the mayor and the mayor's designee shall terminate with the term of the mayor selecting him or her. The term of each appointed member shall be six years or until the successor takes office. The members serve on a staggered-term basis.

A member of the planning commission may also serve as a member of a separately incorporated water, sewer and fire protection authority established pursuant to Section 11-88-1, et seq., of the Code of Alabama 1975. A planning commission member does not hold an office of profit or a public office and is therefore not an officer of the municipality. AGO 2003-163. A part-time park employee and the mayor's secretary are not municipal officers and therefore they are not prohibited from serving on the municipal planning commission. AGO 2003-127.

Members other than the member selected by the council may, after a public hearing, be removed by the mayor for

inefficiency, neglect of duty or malfeasance in office. The council may for like cause remove the member selected by it. The mayor or council, as the case may be, must file a written statement of reasons for such removal. In addition, the mayor may establish the term for his or her designee provided the term is not less than one year.

Vacancies occurring other than through the expiration of a term shall be filled for the unexpired term by the mayor, in the case of members selected or appointed by the mayor or by the council, in the case of members appointed by the municipal council.

Alternate structures and requirements for planning commissions have been established for Class 1 municipalities and for cities having populations of not less than 175,000 and not more than 275,000 according to the most recent federal decennial census. *See*, Section 11-52-3, Code of Alabama 1975. For Class 3 cities, *see*, Section 11-52-12, Code of Alabama 1975. For Class 5 cities, *see*, Sections 11-52-13 and 11-52-14, Code of Alabama 1975. For Class 6 cities with a council-manager form of government, *see*, Section 11-52-15.

A city planning commission must meet at least once each month. The planning commission is subject to the Alabama Open Meeting Act (OMA) and must provide notice and conduct their meetings according to the procedures set out in the OMA. For complete information on the OMA, refer to the article entitled "The Open Meeting Act" in this publication.

The quorum requirement for all municipal planning commissions, other than those in Class 3 municipalities, is a majority of the commission. Thus, at least five of the nine members must be present to conduct business. In addition, the approval of a subdivision plat requires a majority vote of the quorum present and voting. AGO 2000-171.

The law does not require that a council's appointed representative to the planning commission consult with the other members of the council before casting votes on the planning commission. Further, a city council may only remove a member it selected to serve on the commission upon a finding of inefficiency, neglect of duty, or malfeasance in office. If such a finding is made, the majority of the members of the council could vote to remove their appointee to the commission. AGO 2003-010.

A League publication titled "Outline of Planning Board Procedure" is available upon request. This publication contains an ordinance which can be used to establish a planning commission.

Definition of "Subdivision"

The term "subdivision" is defined in Section 11-52-1, Code of Alabama 1975, as the "division of a lot, tract or parcel of land into two or more lots, plats, sites or other

divisions of land for the purpose, whether immediate or future, of sale or of building development. Such term includes re-subdivision and, when appropriate to the context, relates to the process of subdividing or to the land or territory subdivided." In the book, *The Law of Subdivisions*, E.C. Yokley points out that this definition is almost universally used in enabling statutes relating to subdivision control and planning.

In order to determine whether there has been a subdivision of an owner's land, one must look to 1) the intent of the owner and 2) the purpose for which he transfers his land. AGO 83-00327. The Attorney General of Alabama ruled that a subdivision is created when a person divides a tract of land into two or more lots with the intent to convey, either presently or in the future, more than one of the lots. However, the opinion pointed out that a subdivision is not created by a person who sells or offers to sell only one lot which is part of a larger tract owned by him. If the owner intends to convey both lots, a subdivision would be created. This opinion makes the answer hinge on the intent of the owner as a question of fact to be decided in each case.

The sale or gift of one portion of a parcel of land does not constitute a subdivision. AGO to Hon. Russell B. Johnson, dated July 28, 1960 and AGO 1981-00128 (to Hon. A. J. Blake on December 9, 1980).

Conveyance of more than one portion of a parcel of land to heirs for homestead purposes does not constitute a subdivision as contemplated by Section 11-52-1 of the Code. AGO 1979-215 (to Hon. Robert M. Tyson, Jr., May 31, 1979).

The giving of a mortgage on only a portion of a person's overall parcel of property, coupled with the possibility that such mortgage could be foreclosed, does not constitute a subdivision under applicable law. AGO 2003-140.

Yokley points to cases which have held that a sale of lots which does not disturb existing lot lines on a map which has been filed does not constitute a subdivision, that a cemetery plat is not a subdivision and that a municipality is without authority to make its own definition of subdivision by adding exceptions.

The definition of subdivision dates from the original enabling statute adopted in 1935. While city planners have suggested that a more precise meaning could be adopted, the Legislature has not seen fit to amend the present definition.

Subdivision Regulation

Subdivision regulation consists of the power to govern the subdivision of land within a given territorial jurisdiction. In Alabama, this power is conferred upon the municipal planning commission which is given jurisdiction over the subdivision of all land in the municipality and all land lying within five miles of the corporate limits which is not located

in any other municipality, except that, in the case of non-municipal land lying within five miles of more than one municipality having a planning commission, the jurisdiction of each shall terminate at a boundary line equidistant from the respective corporate limits. Section 11-52-30(a), Code of Alabama 1975.

A municipal planning commission may limit its initial subdivision regulations to an area smaller than the 5-mile jurisdiction provided in the Code. AGO's to Hon. Charles J. Fleming, August 29, 1975 and to Hon. B. C. Hornady, December 20, 1977. The planning jurisdiction of a municipal planning commission may also be reduced by the municipal governing body from the five mile radius set by statute to a three-mile radius to coincide with the boundaries of the municipal police jurisdiction. AGO 2003-126.

A planning commission may designate areas within five miles of the municipal limits as the planning jurisdiction, so long as this discretion is not exercised arbitrarily or capriciously, but is based on legitimate criteria and objective factors which indicate the areas that are in need of regulation. AGO 1997-158.

In Limestone County, no planning or zoning regulation of a municipality located wholly or partially within Limestone County shall extend beyond the corporate limits of the municipality. Amendment 643 (Limestone 7), Alabama Constitution, 1901.

A city may not regulate subdivision development where plats were approved prior to the adoption of subdivision regulations. AGO 1979-237 (to Hon. B. C. Hornady, June 29, 1979). Subdivision regulations must apply prospectively and, therefore, do not apply to subdivisions in which the subdivision plats were approved and recorded prior to adoption of the regulations. AGO 95-00223.

In 1979, the state Legislature gave county governing bodies the authority to adopt subdivision regulations. *See*, Sections 11-24-1 through 11-24-7, Code of Alabama 1975. Section 11-24-5 provides that no county shall exercise jurisdiction over subdivisions within the jurisdiction of any municipal planning commission presently organized or functional or which shall become organized or functional within six months of the date the county assumes jurisdiction by publishing and adopting notice thereof. Section 11-24-6 of the Code gives the county governing body and the municipal governing body the authority to reach an agreement as to the exercise of this jurisdiction. *See*, AGO 1984-239 (to Hon. Neil Lauder, April 3, 1984); *Orange Beach v. Baldwin County*, 491 So.2d 945 (Ala. 1986). Municipal and county governing bodies may enter into agreements concerning the jurisdictional authority over planning pursuant to Section 11-24-6, Code of Alabama 1975, with or without the consent of the planning commission. AGO 1996-144. A county commission may exercise jurisdiction over subdivisions

within the five mile planning jurisdiction of a municipality only in areas in which the municipal governing body has agreed with the county to reduce the extraterritorial jurisdiction of the municipal planning commission and the agreement has been published as required by Section 11-24-6 of the Code of Alabama 1975. AGO 2005-111.

Section 11-24-6, Code of Alabama 1975, deals only with the division of planning jurisdiction between a county and a city outside the corporate limits. It does not affect the requirements of Section 11-52-30 (b) dealing with the required approval of the county engineer discussed later in this article. AGO 1993-150.

In describing the powers of subdivision regulation, Section 11-52-31, Code of Alabama 1975, states that the planning commission may provide for the proper management of streets in relation to other existing or planned streets and to the master plan, for adequate and convenient open spaces for traffic, utilities, access of firefighting apparatus, recreation, light and air and for the avoidance of congestion of population, including minimum width and area of lots, the extent to which streets and other ways shall be graded and improved and to which water and sewer and other utility mains, piping and other facilities shall be installed as a condition precedent to the approval of the plat. The commission is authorized to accept a bond with surety to secure to the municipality the actual construction and installation of required improvements or utilities at a time and pursuant to specifications fixed by or in accordance with the regulations of the commission. The municipality is given the authority to enforce the bond by all appropriate legal and equitable remedies. Section 11-52-31(a), Code of Alabama 1975.

The planning commission has complete authority to establish minimum standards for public facilities within the subdivision regulations. The regulations should include standards for drains, streets, curbs, gutters, electric lines, gas lines, telephone lines, water mains, street signs and so forth. If no minimum standards are developed for these public facilities, different sets of standards will develop for different subdivisions. This will cause future maintenance problems for the city when these areas become part of the city. Many municipalities have suffered from problems which could have been prevented by the proper requirements.

Prior to the adoption of subdivision regulations, the planning commission shall hold a public hearing thereon. The notice provisions of the OMA apply to this hearing. Although the statutes are silent as to the manner or length of notice of the public hearings, it has been suggested that the planning commission give at least six days notice of the hearing by publication once in a newspaper of general circulation published in the municipality or if no such newspaper exists, then by posting in four conspicuous

places in the municipality. The adoption of subdivision regulations shall be done by a resolution of the planning commission carried by the affirmative votes of not less than five members of the commission. While the statute does not specify the number of votes necessary to adopt subdivision regulations, it is the opinion of the League that a majority of the whole number of members on the commission should at least be required for adoption of subdivision regulations. The adopted regulations must be published in the same manner as are ordinances of the municipality. *See*, Section 11-52-31, Code of Alabama 1975. The secretary of the commission shall file a certified copy of the regulations with the probate judge of the county in which the municipality and territory are located. Once a planning commission has properly exercised its authority by adopting regulations that regulate subdivision development, it is bound by its regulations. AGO 2003-089. The planning commission may adopt new subdivision regulations by reference as provided in Section 11-45-8 (c), Code of Alabama 1975, provided there is compliance with the procedure set out in Sections 11-45-8(c) and Section 6-8-60, Code of Alabama 1975, and a copy of the regulations is certified to the probate judge as required by Section 11-52-31, Code of Alabama 1975.

Required Procedure

Subject to penalties which are noted later, any person desiring to subdivide land within the planning commission's jurisdiction must submit a plat of the proposed subdivision for the approval of the commission. Section 11-52-32(a), Code of Alabama 1975, requires a municipal planning commission to approve or disapprove a plat within 30 days after submission. The Alabama Supreme Court has held that the 30 days begins to run from the date of the public hearing. *Boulder Corp. v. Vann*, 345 So.2d 272 (Ala. 1977). If the plat is disapproved, the grounds for disapproval must be stated upon the records of the commission within 30 days. The minutes of the hearing of the applicant's application and the notation of the denial are sufficient to satisfy the requirements of Section 11-52-32(a). *Smith v. Eufaula Planning Commission*, 765 So.2d 670 (Ala. Civ. App. 2000). However, the subdivider may waive this and consent to an extension of time. If the commission refuses to act, the plat is deemed approved.

Properly adopted planning commission by-laws have the same force and effect as properly enacted statutes. *Lynnwood Property Owners Association v. Lands Described in Complaint*, 359 So.2d 357 (Ala. 1978). In *Smith v. Mobile*, 374 So.2d 305 (1979), the Alabama Supreme Court held that a city planning commission's disapproval of a proposed re-subdivision of a lot on grounds that it was "out of character with other lots in the area" was unrelated to the regulation of the commission and was improper. The court stated

that the planning commission, in exercising this function in approving or disapproving any particular subdivision plat, acts in an administrative capacity and is bound by any limitations on its authority contained in the state statutes authorizing it to act, as well as any limits contained in its own regulations. *See also, Sigler v. Mobile*, 387 So.2d 813 (Ala. 1980).

No plat can be acted upon by the commission without affording a hearing. Notice is sent by registered mail of the time and place of the hearing at least five days prior thereto. Notices must be given to the person set out in the petition for plat approval and to the owners of land immediately adjoining the platted land as their names appear upon the plats in the county tax assessor's office at their addresses as they appear on the tax records of the municipality or the county. Section 11-52-32(a), Code of Alabama 1975. Failure to provide notice to adjoining landowners as required by law invalidates the approval of a subdivision plat. The planning commission may set a new hearing to consider the subdivision plat and must provide proper notice to the adjoining landowners. AGO 2001-045.

In approving a plat, the commission may agree with special restrictions included by the subdivider upon the use, height, area or bulk requirements or restrictions governing buildings and premises within the subdivision, provided they do not conflict with the zoning laws of the municipality. Any special restrictions must be set out on the plat before it is approved and recorded. The restrictions have the force of law and are enforceable in the same manner and with the same sanctions and penalties and subject to the same power of amendment or repeal as though set out as a part of the zoning ordinance or map of the municipality. This feature of subdivision regulation is quite important, especially in areas beyond the municipality where the exercise of zoning regulations may not be authorized or is doubtful.

Where a property owner complies with all applicable ordinances and regulations, he or she may not be denied legal use of his or her land merely because adjoining landowners object to that use. *Ex parte Frazer*, 587 So.2d 330 (Ala. 1991).

Effect of Approval

The approval of a plat does not constitute or effect an acceptance by the municipality of any street or other open space shown on the plat. A town council may only accept streets after review by the municipal planning commission. Section 11-52-34, Code of Alabama 1975. The fact that a municipal engineer states that the improvements established in a subdivision meet the minimum standards required by the municipality for such improvements does not constitute an acceptance of these improvements by the municipality. This is expressly provided in Section 11-52-32, Code of

Alabama 1975, and the Supreme Court of Alabama upheld it in the case of *Oliver v. Water Works & Sanitary Sewer Board*, 261 Ala. 234, 73 So.2d 552 (1954). This case points out that an acceptance of dedication of streets is necessary for them to become public. Mere approval required by statute as a condition to recording of a plat is not an acceptance of dedication. A distinct act by the city through a formal resolution or by acts and conduct of the authorities recognizing it as a dedicated street is requisite to constitute acceptance. *See also, CRW, Inc. v. Twin Lakes Property Owners Association*, 521 So.2d 939 (Ala. 1988) Where there has been no dedication and acceptance, a city has no authority or obligation to maintain private property. AGO 97-00249. *Oliver* goes further to point out that even though private owners build streets and lay sewer lines and storm systems, a municipality may, after accepting dedication of the streets to public use, collect service fees for controlling the streets and sewers and permitting connection of the sewer system with that of the city. This statutory protection allows a municipality to ensure against the costly job of having to take over inadequate public improvements for upkeep and maintenance.

Enforcement Method

Any owner or agent of the owner of any land located in a subdivision who transfers or sells or agrees to sell land by reference to or exhibition of or by use of a plat of a subdivision before it has been approved by the planning commission and recorded in the office of the probate judge of the appropriate county shall forfeit a penalty of \$100 for each plat or parcel so transferred, sold or agreed to be sold. A municipality may enjoin such transfers in a court of competent jurisdiction. Section 11-52-33, Code of Alabama 1975. Neither a municipality nor its planning and zoning commission has the authority to impose a fine in excess of the \$100 penalty authorized by Section 11-52-33, Code of Alabama 1975, for selling lots in subdivision prior to receiving municipal approval. AGO 2000-054. It shall be the duty of every probate judge in this state to decline to receive for record in his office any map or plat upon which any lands lying within the corporate limits or police jurisdiction of any city of this state having a population of more than 10,000 inhabitants are platted or mapped as streets, alleys or other public ways, unless such map or plat shall have noted thereon the approval of the governing body or city engineer of such city. Section 35-2-52, Code of Alabama 1975. Section 11-52-30(c)(1), Code of Alabama 1975 provides that a county commission and the municipal planning commission may enter into a written agreement providing that the municipal planning commission shall be responsible for the regulation and enforcement of the development of subdivisions within the territorial jurisdiction

of the municipal planning commission under the terms and conditions of the agreement. In order to be effective, the agreement shall be approved by a resolution adopted by the county commission, the municipal governing body, and the municipal planning commission of the municipality, respectively.

If the county commission and the municipal planning commission are unsuccessful in reaching an agreement, Section 11-52-30(c)(2), Code of Alabama 1975 enables for the municipal planning commission to exercise its jurisdiction, the municipal governing body and the municipal planning commission may override the county's enforcement by fully complying with all of the following requirements:

1. The municipal governing body and the municipal planning commission shall each adopt separate resolutions expressing intent to exercise jurisdiction over the construction of subdivisions initiated after the effective date of the resolutions, despite the county commission's objections to the exercise of that authority,
2. The municipal planning commission shall at all times thereafter employ or contract with a licensed professional engineer who shall notify the county commission of the initiation of subdivisions; conduct inspections of the construction of the subdivision; and shall certify, in writing, the compliance with the subdivision regulations governing the development of the subdivision,
3. The county commission shall retain the authority to require a performance and maintenance bond from the developer, consistent with the requirements for the bonds in the county subdivision regulations, which shall be payable to the county,
4. The county commission shall retain the authority to execute on the bond to make necessary improvements to the public roads and drainage structures of the subdivision while it remains in the unincorporated area of the county,
5. The municipal governing body and the municipal planning commission exercising the authority granted in this subsection may thereafter withdraw their exercise of jurisdiction over future subdivisions located outside the corporate limits of the municipality after not less than six months' notice to the county commission. After withdrawal, the municipal planning commission of the municipality may not reinstate the authority granted in this subsection for 24 months after the effective date of its withdrawal.

Where any subdivision lies within the extraterritorial

planning jurisdiction of any municipality having exercised said extraterritorial jurisdiction, the requirement for approval of improvements in said subdivision by the county engineer shall in no way diminish, waive or otherwise lessen the requirements of such municipality. The more strict requirements, whether of the municipality or of the county, must be complied with by the developer. Approval by the county engineer shall in no way constitute approval in lieu of or on behalf of any municipality with respect to subdivisions lying within its extraterritorial planning jurisdiction. All such maps or plats must be first submitted to and approved by the municipal planning commission or other appropriate municipal agency exercising jurisdiction over any subdivision lying within the extraterritorial planning jurisdiction and, following such approval by such municipal planning commission, must then be certified by the county engineer or his or her designee within 30 days of being submitted to the county engineer. Section 11-52-30, Code of Alabama 1975. The county commission nor the county engineer have authority to regulate subdivision development or approve maps or plats for any developments within the corporate limits of a municipality. Section 11-52-30(j), Code of Alabama 1975.

Subdivisions are not subject to regulations adopted after plats are recorded, but new construction may be regulated through the zoning ordinance and use of municipal police powers. AGO 1992-056. A prior injunction barring the sale of improperly subdivided land by a husband binds the wife as well. *Shelby County Commission v. Seals*, 564 So.2d 900 (Ala. 1990).

Source of Authority

The power to regulate subdivisions has been delegated to cities and towns by the state and is a part of the police power of the state. It arises from the public's right to have reasonable regulations for the common good and welfare and is commensurate with the public need. That these needs coincide with the orderly development of urban areas has been recognized at all levels of government.

When a planning commission exercises control over subdivision lands within a municipality it acts in an administrative capacity. Furthermore, a planning commission's decision should not be invalidated unless it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. *Mobile City Planning Commission v. Stanley*, 775 So.2d 226 (Ala. Civ. App. 2000).

For the most part, the powers expressly granted to planning commissions for the regulation of subdivisions have been upheld by the courts as reasonable exercises of the police power. The approval or disapproval of subdivision plats exercised in a standardized and clearly-defined manner

based upon reasonable conditions is within the police power. It is generally recognized that the health and welfare of the subdivision dweller depends upon adequate streets and safe water, sewer and drainage systems and that those profiting from the subdivision development should, in a substantial way, assist in making initial improvements.

Specifically, the following regulations have been upheld: Grading and paving of streets, minimum width of streets and of improved surfaces, limitation of access to highways, curbs and gutters, provisions for parks, sanitary sewers, surface water sewers, profile maps, water mains, bonds for completion of required improvements and reasonable fees for examination and approval of plats.

Limitation of Powers

Since the power to regulate subdivisions has been delegated to municipalities, it follows that cities and towns, through planning commissions, may not enlarge or materially modify express statutory provisions. Subdivision powers are not unbridled. The planning commission must act within the terms of the statutory grant. *See, Smith v. Mobile*, 374 So.2d 305 (Ala. 1979). Procedures prescribed by statute are mandatory. *See, Noojin v. Mobile City Planning Commission*, 480 So.2d 587 (Ala. Civ. App. 1985). The planning commission must adopt adequate standards for its guidance and the guidance of subdividers in the approval of plats. It has often been held that subdividers may not be required to pay fees which in effect amount to taxes, regardless of the purpose for the fee. *See, Montgomery v. Crosslands Land Co.*, 355 So.2d 363 (Ala. 1978).

In the approval or disapproval of a plat, the planning commission acts in an administrative or ministerial capacity and the subdivider may bring an action to mandamus the commission to approve the plat where it refuses to act. *See, Noojin, supra*. As noted, the planning commission must act within 30 days after the submission of the plat in Alabama.

Once approved, neither the municipality nor the planning commission may impose further burdens on the subdivider.

While courts strictly construe subdivision regulations by rules applicable to the exercise of the police power, they presume such regulations to be valid and place the burden on any person assailing them to show unreasonableness. Furthermore, persons assailing subdivision regulations must have a real interest in the question submitted and must have exhausted their administrative remedies before seeking relief in court.

Performance Bond

As stated above, a planning commission may require a bond with sureties to secure the installation of required improvements prior to approval of the plat. Section 11-52-31(a), Code of Alabama 1975. Bonds are made payable

to the municipality which has the burden of maintaining the improvements after they are established. Any action for recovery under these bonds must be brought by the municipality. It has been held that these bonds are not for the benefit of third parties under which subdivision lot owners might recover.

Word of Caution

The development of subdivisions brings with it an increased flow of surface water from streets, sidewalks and buildings. Particular care should be exercised to ensure that drainage is adequate not only within the subdivision platted but also for subservient lands below the subdivision. Georgia courts have held that a subdivider could be held jointly liable with the municipality for negligence in channeling drainage water in such a way as to damage property of subservient owners beyond the limits of the subdivision. *See, Bass Canning Co. v. MacDougald Construction Co.*, 174 Ga. 222, 162 S.E. 687 (Ga. 1932). Another court held that a city, in accepting a subdivision drainage system as part of its public works, would be held liable for collecting water and throwing it off in such a manner as to erode a subservient landowner's property. *See, Myotte v. Village of Mayfield*, 54 Ohio App.2d 97, 375 N.E.2d 816 (Ohio Ct. App. 1977).

Court Decisions and Opinions of the Attorney General

Several court decisions and opinions of the Attorney General regarding subdivision controls are noted as follows:

- In *Ex parte Pine Brook Lakes, Inc.*, 617 So.2d 1014 (1992), the Alabama Supreme Court held that approval of subdivision plans may be secured through a writ of mandamus where the reason offered for disapproval fails to comply with applicable statutes.
- If work being done at a mobile home park falls within the definition of what constitutes a subdivision under Section 11-52-1 (6), Code of Alabama 1975, the city may regulate the mobile home park under its power to regulate subdivisions. AGO 1995-028.
- In *Mobile v. Southern Region Developers*, 628 So.2d 739 (1993), the Alabama Court of Civil Appeals held that the circuit court's findings that the city planning commission had denied the developer's application for subdivision without timely stating the valid reason for denial and without specifying any nonconformity with subdivision regulations, was not clearly erroneous.
- Unimproved lots in a subdivision are subject to subsequent zoning ordinances. AGO 1995-223.
- Subdivision regulations apply to privately owned land that is subdivided for sale, but in which roadways will remain private. AGO 1997-077.
- In *Haley v. Daphne Planning Comm'n*, 740 So.2d 415 (1999), the Alabama Court of Civil Appeals held that the Daphne Planning Commission narrowly but consistently interpreted its zoning ordinance by allowing withdrawal of the rezoning application and filing of a subsequent application less than 12 months later, provided that the initial application was not considered by the planning commission. Therefore, consideration of the later rezoning application less than 12 months later is allowed.
- Subdivision regulation permitting the totally discretionary determination of the buffer zone needed in a particular location, unguided by any objective, clearly stated criteria, failed to set forth sufficient standards to give applicants notice of what was required of them and thus, planning commission's imposition of an additional 10 feet of buffer space to a proposed 10 foot buffer in a commercial subdivision plan was arbitrary and capricious and exceeded the commission's power. *Providence Park v. Mobile City Planning Comm'n*, 824 So.2d 769 (Ala. Civ. App. 2001).
- While a city council may delegate to the planning commission the responsibility to review site development plans and make recommendations, the council may not delegate the function of making a final determination of whether a plan meets all state and local laws. AGO 2004-103.
- Condos and apartments are subdivisions. *See, Dyess v. Bay John Developers*, 13 So.3d 390 (Ala. Civ. App. 2007).
- A municipality is required to organize neither a zoning commission nor a municipal planning commission before enacting a comprehensive zoning ordinance; both such commissions are optional and, even if created, are strictly advisory. *Peebles v. Mooresville Town Council*, 985 So.2d 388 (Ala. 2007)
- Statutory provisions requiring subdivision plat approval prior to negotiation or contract for the sale of a subdivision lot was not limited to lot purchases made by individuals, and could also apply to purchasers that were developers. The purchase contract was illegal in that it was executed prior to plat approval. A contract obtained in violation of the subdivision control statutes is void. *Kilgore Development, Inc. v. Woodland Place, LLC*, 47 So.3d 267 (Ala.Civ.App.2009).
- Industrial parks are subject to the subdivision regulations of the county commission. AGO. 2012-047.

- A Town may not accept a gift of undeveloped lots from a limited liability company in exchange for an agreement from the Town to complete and repair roads within a subdivision developed by the limited liability company where the Town intends to sell the undeveloped lots to offset the cost to complete and repair the roads. AGO 2015-056.
- A subdivision in the corporate limits of the Town recorded without the approval of the county engineer, may be regulated by the town and is subject to subdivision regulations adopted by the town after the subdivision plat was recorded. AGO 2014-024.
- A town and its planning commission may not institute a moratorium, lawful or otherwise, solely to disregard their statutory duty to evaluate a particular plat application that has no apparent flaws without a reasonable “public welfare” explanation. *Lee v. Houser*, 148 So. 3d 406, 416 (Ala. 2013) (citing *Mobile City Planning Comm’n v. Stanley*, 775 So.2d 226 (Ala. Civ.App.2000) (holding that a municipal planning commission’s decision should not be invalidated unless it is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, morals, or general welfare of the community))).
- Even if a municipal planning commission has the authority to institute a moratorium on subdivision-plat applications, it may not use that authority, pursuant to § 11-52-32, without regard for the public welfare, to prevent the development of the private property of one individual. *Lee v. Houser*, 148 So. 3d 406, 415 (Ala. 2013).
- Because the proposed recreational vehicle park involves building development, it is a subdivision under section 11-52-1(6) of the Code of Alabama and the Town of Magnolia Springs Subdivision Regulations that is subject to regulation by the Magnolia Springs Planning Commission. AGO 2018-027.

56. The Vested Rights Doctrine

One of the main goals of zoning laws is to eliminate impermissible uses from specific areas of the municipality. However, impermissible uses existing at the time a zoning ordinance or amendment becomes effective are generally “grandfathered” into the zone. That is, they are permitted to continue to exist until the use is abandoned. These nonconforming uses create one of the most difficult problems for the creation and enforcement of a zoning ordinance. The Alabama Supreme Court has stated that a property owner generally has a right to continue a nonconforming use until the right is lost through abandonment. *Green v. Copeland*, 239 So.2d 770 (Ala. 1970).

Generally speaking, though, the nonconforming use must have existed prior to the effective date of the zoning ordinance in order to be grandfathered in. It is not unusual, though, to have an ordinance adopted to prevent the introduction of a previously allowed use, either due to public complaints or because the use, while permitted, no longer fits within the character of the zone and the ordinance has not yet been amended to reflect the changing nature of the zone. Sometimes, the attempted amendment takes effect after construction of the use has begun. Can the municipality force the property owner to cease construction, possibly losing a sizable investment, on the argument that the use has not started?

In some cases, the answer is no. A doctrine of law called the “vested rights doctrine” has arisen in many states to solve the problems created by this situation. Although our research has shown that Alabama courts have not yet adopted the vested rights doctrine, they have resolved cases using a similar analysis. This article examines the vested rights doctrine and discusses these Alabama cases.

What is the Vested Rights Doctrine?

In *Omnivest v. Stewartstown Borough*, 641 A.2d 648 (Pa. Commw. Ct. 1994), the court stated that:

“Vested rights ‘is a judicial construct designed to provide individual relief in zoning cases involving egregious statutory or bureaucratic inequities. In part it involves the equitable concept of detrimental reliance.’”

The court noted that the vested rights doctrine is applicable in a number of land use situations, such as “variance by estoppel” cases, where a property owner claims reliance on a municipality’s long-standing acquiescence in a nonconforming use; to determine if a landowner can continue development of property; or to permit reliance on

an improperly issued building permit.

Although different jurisdictions use different criteria to determine if a property owner has acquired a vested right, the Commonwealth Court of Pennsylvania has one of the best summations of many of these elements. In *Ferguson Township v. Zoning Board of Ferguson Township*, 475 A.2d 910 (Pa. Commw. Ct. 1984), the Commonwealth Court enunciated a clear, five-part test. The factors of this test are:

1. good faith;
2. due diligence in attempting to comply with the law;
3. the expenditure of substantial, unrecoverable funds;
4. the expiration without appeal of the period during which an appeal could have been taken from the issuance of a permit; and
5. insufficiency of evidence to prove that individual property rights or the public health, safety or welfare have been adversely affected by the use of a permit.

Note, though; not all states require that a permit has to have been issued. Additionally, not all states examine all these factors to determine if a vest right exists.

In *Hawkinson v. Itasca*, 231 N.W.2d 279 (1975), the Supreme Court of Minnesota noted that, “Under what circumstances a property owner may complete a project which is in progress at the time his use of the property becomes nonconforming is a difficult question. Its resolution is ordinarily governed by the degree of hardship which would be imposed if the construction or expansion were halted before completion.”

The vested rights doctrine is, then, a way for courts to permit municipal regulation through zoning while recognizing that a property owner may acquire a constitutional or equitable right to complete a nonconforming project. At what point does this right arise? Let’s look at some of the elements mentioned above for an answer.

The Elements: Substantial Investment and Prejudice to the Property Owner

In the *Hawkinson* case, the plaintiff owned some 32 acres on the shore of a lake that he had purchased by 1966. He operated a recreational business, which included rental property. In 1969, the municipality zoned the property as residential. At the time the ordinance was adopted, the plaintiff had started work on a utility building, a hotel and an expansion of the plaintiff’s home to include rental property. The trial court found that the character of the property had become almost entirely residential, and that the uses of surrounding property were consistent with this use. The

court upheld the ordinance, refusing to allow the plaintiff to expand what was now a nonconforming use.

The Supreme Court of Minnesota stated that in order to become a nonconforming use, there generally must be some actions taken to use the property for that purpose. In other words, the intent of the property owner alone is not enough. There must be some overt action taken toward using the property. Thus, “substantial expenditures, work or change of position relative to the erection of a building or establishment of a business, in addition to the purchase of land, may entitle one to protection. . . .”

The court found that the plaintiff’s expenditures were insufficient to overturn the ordinance. The plaintiff testified that he had spent over \$108,000 in developing the area and that he planned to spend up to \$275,000. The court, though, noted this amount included expenditures he had made in establishing his business to the level it was operating at prior to the ordinance and he could continue to operate his business at that level. The court noted that for the plaintiff to prevail, he had to show that he was substantially prejudiced by the ordinance. Many of the preparations he had performed were consistent with use of the property for residential purposes as well as for his business. The mere fact that his intent to further develop his property commercially was frustrated by the ordinance did not justify allowing him to continue.

This case demonstrates two universal elements in establishing a vested right. They are 1) the existence of substantial preparations to use the property for the intended purpose, and 2) the extent of the prejudice to the property owner.

The Elements: Good Faith

The requirement of good faith means that the property owner cannot act for the sole purpose of acquiring a nonconforming use before a contemplated zoning change becomes effective. In *Donadio v. Cunningham*, 277 A.2d 375 (N.J. 1971), the court held that a property owner did not act in good faith where after a court invalidated a zoning ordinance, the owner started construction before the appeals period could run. The court stated that a municipality should be afforded time to take an appeal or amend its zoning ordinance and that the property owner should have anticipated that the municipality would do one or the other. A property owner should not be able to thwart public interest in proper zoning by winning what the court called an “unseemly race.”

And, in *Stowe v. Burke*, 122 S.E.2d 374 (NC 1961), the court held that a property owner lacked good faith when he began construction of an apartment building even though he knew of community opposition to the project and that the municipality was proposing to change its zoning ordinance. The court held that in spite of this knowledge, the property

owner began construction at an extraordinary pace simply to establish a right to continue if the rezoning took place. This fact revealed that the owner did not act in good faith.

The good faith of the municipality is also relevant. In *Leda Lanes Realty v. Nashua*, 112 N.H. 244, 293 A.2d 320 (N.H. 1972), the court noted that a municipality cannot use an unduly prolonged procedure in considering a zoning ordinance to impose a selective or general moratorium on local land development.

The Elements: Permit or Governmental Action

Many jurisdictions require that a landowner act pursuant to a permit or in reliance on some governmental action in order to claim the protection of the vested rights doctrine. See, *Whaler’s Village Club v. California Coastal Comm.*, 173 Cal. App.3d 240, 220 Cal. Rptr. 2 (Cal. App.2 Dist. 1985). Even where a permit has been issued, however, the owner must still begin developing the project in reliance on the permit in order to be protected. *Reno v. Nevada First Thrift*, 100 Nev. 483, 686 P.2d 231 (Nev. 1984).

Some courts have found that the issuance of a permit is absolute. In the *Ferguson* case cited above, a Pennsylvania property owner sold livestock related to his poultry business to rent the buildings for commercial use. He was informed by a municipal representative that the use in question complied with his zoning classification and was told that he did not need to obtain any permits. Relying on this, the property owner began making improvements to the buildings and sold off the remaining property from his poultry operation. He began preparing to open a furniture store. His property was then rezoned to a residential use and the township issued a stop-work order prohibiting him from opening on the grounds that a permit had not been acquired. The issue was whether the misinformation the property owner had received eliminated his need to obtain a permit and gave him a vested right to continue.

The court refused to deviate from its conclusion that a permit is necessary before rights vest, noting that a person who relies on assurances by employees of the municipality does so at his or her own risk. The court said that while the owner might be able to use these misrepresentations to mitigate penalties enforced against him, they could not be used to prevent the municipality from enforcing its ordinance. The court held that the law requires a permit for rights to vest and since no permit had been issued, the owner could not rely on the doctrine to allow him to open the furniture store.

The Alabama Court of Civil Appeals issued a similar ruling in *Cobb v. New Hope*, 682 So.2d 1375 (1996). In *Cobb*, New Hope filed a complaint alleging that the property owner was in violation of the zoning ordinance because he had three families living together in two structures (a

garage and a single-story house with a built-in apartment) that were zoned for single-family residential use. One of the property owner's arguments was that the city should be estopped from enforcing its zoning ordinance because he had been issued building permits to construct the buildings.

The court was not persuaded, stating that while a building permit allows a property owner to build, the use of the structures is governed by the zoning ordinance. The court stated that "a city cannot be estopped from denying an illegally issued building permit – that is, one in violation of local statutes." Although it is unclear whether the Alabama Supreme Court feels that a valid building permit is necessary for an action to become arbitrary and capricious (which, it seems, is the Alabama standard for the existence of a "vested right"), this case makes it clear that a property owner cannot rely on an invalid permit to establish this fact.

The governmental act the property owner relies on does not have to be the issuance of a permit, though. In *Rocky Mount v. Southside Investors, Inc.*, 254 Va. 130, 487 S.E.2d 855 (1997), Virginia Supreme Court, the court pointed out that, "A landowner who asserts a vested property right to a particular zoning classification must identify a significant governmental act permitting the landowner the particular use of its property that otherwise would not be allowed ... The requirement of a significant governmental act creates a bright line test that enables the landowner to determine the point at which it has acquired the vested right."

In *Rocky Mount*, the significant government act the owners relied on was the approval of a previous development plan. At the time of the original development, the city had rezoned the property to allow the owners to construct townhouses on the property. A subsequent amendment eliminated this use from the zone. The property owners argued that the rezoning of their property amounted to approval and, because they had built their sewer lines and street extensions to support more townhouses, their rights to continue construction had vested.

The Virginia Supreme Court disagreed, stating that the rezoning could not be construed as permission to continue development to the extent sought by the property owners. The fact that they had built street extensions and sewer lines to support further development was irrelevant to the court because they had been approved to service the existing townhouses, regardless of potential development in the future.

Can a municipality refuse to issue a permit for a use that is allowed under an existing ordinance simply because it is considering changing the ordinance to prohibit that use? There is authority to support this view.

In *Navin v. Exeter*, 339 A.2d 12 (N.H. 1975), the owner received a variance to construct 10 apartment buildings. The variance stipulated that any future construction would

require further variances. A proposed zoning change a few years later would have required more land area per dwelling unit. At the time the proposal was made, the owner applied for a variance under the existing ordinance, which the board of adjustment granted only after the ordinance became effective. The board argued that because the request was made before the ordinance went into effect, it had the right to issue the variance under the old ordinance. The court disagreed, stating that:

"It would be 'utterly illogical to hold that . . . any person could by merely filing an application compel the municipality to issue a permit which would allow him to establish a use which he either knew or should have known would be forbidden by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purposes for which the zoning law was enacted.'"

In fact, New Hampshire state law prohibited building officials from issuing permits while a proposed ordinance on the use in question was being considered. The court found no difference between the issuance of a permit and the variance in this case and held that it should not have been issued.

At least one other case, though, has stated that the date of filing an application determines which laws should be used to consider whether a permit should be issued. In *Noble Manor v. Pierce County*, 943 P.2d 1378 (Wash. 1997), a Washington housing developer submitted a subdivision application to develop three multi-family residential units. Before this was approved, the county passed an interim ordinance that increased the minimum lot size for these units. Two of his proposed units did not satisfy the requirements of the interim ordinance. The Washington Supreme Court held that the vested rights doctrine entitled the developer to have his proposal considered under the law as it existed on the date of the application, regardless of subsequent changes in the law. The court said that the purpose of this rule is to allow developers to determine the law applicable to their proposed development to promote certainty and to keep them from wasting money due to a newly enacted law. Note, though, that this case construed a state law, RCW 58.17.033. A different result might have occurred if there had not been a statute on the subject.

Alabama, it seems, would follow the rule that a municipality may change its ordinance even after a property owner has taken steps in reliance on a present zoning classification. For instance, in *Ex parte Jacksonville*, 693 So.2d 465 (Ala. 1996), the city adopted an ordinance rezoning some 200 acres from R-2, which permitted multi-family uses, to R-1, which restricted use to single-family

residences. The area rezoned included a 6.2-acre tract intended for use as two separate apartment complexes. The property owner contended that the decision to rezone was arbitrary and capricious and that the city should be estopped from rezoning because he was told at the time he purchased the property that apartment complexes were a permitted use.

The Supreme Court disagreed with these arguments. First, the court stated that the decision to rezone was not arbitrary and capricious, as demonstrated by the fact that the area in question was a developing area of single-family residences. In fact, no property in the area in question was presently being used for an R-2 purpose. The property owner's expert admitted this during cross-examination.

Second, the court held that the property owner could not rely on assurances by municipal employees that the property was properly zoned for the use he had in mind. Equitable estoppel did not prevent the municipality from rezoning the property even after these assurances were made.

Essentially, the owner was arguing that the property was zoned for the use he intended at the time of purchase and "citizens should be able to rely on current zoning laws." He stated that his argument was supported by the fact that the City had performed no studies justifying the change. The court said that nothing requires a council to conduct studies or give its reasons before undertaking a rezoning. Therefore, the rezoning was proper.

A similar action, though, was held arbitrary and capricious in *Martin v. O'Rear*, 423 So.2d 829 (Ala. 1982). In *Martin*, the property owner bought land in an R-4 district for the purpose of constructing a seven unit condominium. A citizens group then petitioned to have approximately 24 blocks, including this property, rezoned to allow only single-family residences, prohibiting this type structure.

Evidence revealed that there were a number of other structures in the area rezoned that were being used as apartments and condominiums. These buildings became nonconforming uses in the new zoning classification. This indicated that the new zoning classification was inconsistent with the land use pattern of the area. The court also noted that an attempt to show that the proposed unit would create a traffic or parking problem was not based on any studies or expert testimony. In fact, the chairman of the planning commission testified that in his opinion the condominium would have no affect on the public health, safety or welfare. Thus, the court found this rezoning improper.

Regardless of whether a property owner can rely on assurances from city officials to continue building if that advice proves incorrect, however, damages may result from giving such advice. In *Mobile v. Sullivan*, 667 So.2d 122 (Ala. Civ. App. 1995), the property owners bought their land to operate a used car lot based on assurances by municipal employees that the property was zoned for this use. The

Alabama Court of Civil Appeals refused to protect the municipality and its employees from liability. It is important to note, though, that *Sullivan* involved a misinterpretation of an existing zoning ordinance, not a rezoning.

Even where courts have allowed a property owner to build based on a valid permit being issued under a subsequently changed zoning ordinance, the vested right to construct a nonconforming use is controlled by the permit. For instance, in *Todem Homes, Inc. v. Board of Zoning Appeals*, 74 A.D.2d 908, 425 N.Y.S.2d 852 (N.Y.A.D. 1980), the court held that even though the property owner had a vested right to complete a hotel pursuant to a valid permit, he could not expand the development or build different structures.

Protection of the Public

Where an ordinance change is made to protect the public, a property owner may not acquire vested rights. In at least one case, a property owner was not allowed to rely on a building permit issued pursuant to a prior ordinance – even where he had done site preparation work – because the new ordinance was enacted to address safety and construction concerns. *Smith v. Arkadelphia*, 336 Ark. 42, 984 S.W.2d 392 (Ark. 1999).

Change in Enforcement

A similar issue that should be examined here is whether a municipality may change its enforcement or interpretation of its ordinances. In *Foley v. McLeod*, 709 So.2d 471 (Ala. 1998), the property owner operated a mobile home park in an area that was subsequently zoned for single-family usage. The city allowed the park to continue operating as a nonconforming use. The property owner sought to replace six mobile homes in the park with new units. The city argued that this would merely extend the life of the nonconforming use and should not be allowed. The court agreed, stating that the zoning ordinance clearly disfavored extending the life of nonconforming uses. The replacement of units contravened that policy. Thus, the city was permitted to prohibit the replacement of the mobile homes.

That did not end the inquiry, though, because the city had allowed other units to be replaced. The property owner argued that the municipality was estopped from enforcement of this change in policy against his park. On this point, the court agreed, stating because numerous units had been replaced over the years without objection, "it would be unjust and unfair at this point to allow the city to force the (owners) to remove the six mobile homes."

The court refused to permanently bar the city from enforcing its ordinance, though. The court said that although the action in this case marked a departure from a previous action, in the future the property owner was on notice that

replacement units would not be allowed. This case seems to indicate that where a municipality intends to change its procedure or interpretation, notice to those affected by this change is necessary before acting. Once notice is given, though, the ordinance or new interpretation may be enforced.

Conclusion

General public policy favors the elimination of nonconforming uses. However, constitutional and equitable rights do not permit a municipality to order the immediate cessation of nonconforming uses. This is true, sometimes, even where the use isn't in existence on the date the zoning ordinance goes into effect. The vested rights doctrine is one method the courts have created to determine when a property owner must be allowed to continue to operate, even when his or her actions are prohibited by subsequent municipal regulation.

Although Alabama courts do not recognize the vested rights doctrine, it seems that our courts come to similar conclusions, generally through the use of equitable estoppel. For this reason, it helps to see how courts in other jurisdictions have used this theory to determine when a nonconforming right vests.

57. The Power to Condemn

Eminent domain, by definition, is the power of the state to take private property for public use. In Alabama this practice and procedure is known as the right of condemnation. This power is founded on common necessity of taking an individual's property for the benefit of the whole community. The consent of the individual is not necessary since the state has a superior right to appropriate for public use private lands within its borders subject, of course, to payment for the land.

The exercise of this power of the sovereign, an ancient right, became increasingly important as the nation developed its factories, utilities, highways and railroads. The vast expansion of the armed forces and federal installations was possible because of the existence of the right to condemn. It is a necessary and useful tool of government.

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

Municipalities in Alabama have been specifically authorized by the Legislature to condemn private property for public or municipal uses. This article examines this legislation, its scope and effect, and its constitutional limitations. Practical pointers and procedures are discussed so municipal officials may be better informed about the methods of employing this right.

The Authority to Condemn

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

Limitations on the power to condemn are found in the Fifth and Fourteenth Amendments to the Constitution of the United States. These amendments state that no person shall be deprived of life, liberty or property without due process of law. The Fifth Amendment provides further that no private property shall be taken for public use without just compensation. The latter limitation is a prohibition

on the federal government, but the Supreme Court has, in recent years, under authority of the Fourteenth Amendment, applied many principles of the Bill of Rights (first ten Amendments) to state procedures.

Section 23 of the Alabama Constitution of 1901 deals with the right of eminent domain and provides that just compensation must first be made before the taking of private property. Section 235 of the Alabama Constitution provides specifically that municipal corporations shall make just compensation for private property taken, injured or destroyed, and further, that such compensation must be paid before the taking, injury or destruction. Section 235 further provides that entry may be obtained, notwithstanding an appeal from the probate court, after the judgment of condemnation, provided the damages assessed are paid into court and a bond in double the amount of damages is filed to secure payment of the amount of damages determined upon appeal. It also provides that on appeal either party may demand the right of trial by jury.

Additional Authority

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

Authorized Uses

The Code of Alabama authorizes municipalities to acquire property by condemnation generally for any city or town purpose. Section 11-47-171, Code of Alabama 1975. Municipalities commonly acquire property for street and sidewalk improvements, water supplies and sources, drainage and sewage projects. Cities and towns may acquire sites for public museums and public art galleries. Section 11-47-16, Code of Alabama 1975. City boards of education may acquire lands for school purposes under Section 16-11-13 of the Code. Lands for development of municipal airports may be acquired under the provisions of Section 4-4-5, Code of Alabama 1975. Section 4-4-10, Code of Alabama 1975, authorizes the abatement of obstructions within one-quarter mile of municipal airports. Public corporations organized under the provisions of Sections 11-59-1, et seq., Code of Alabama 1975, may acquire sites for athletic fields and facilities. Gas districts

organized under Sections 11-50-391, et seq., Code of Alabama 1975, are granted the power of eminent domain, subject to the same limitations as in the case of municipal corporations. The Alabama Supreme Court held that use of property for off-street public parking in urban areas is a “public use” for which property may be condemned. *Florence v. Williams*, 439 So. 2d 83 (Ala. 1983).

These citations are sufficient to point out the many and varied purposes for which lands, easements and privileges and property may be acquired by cities and towns. The city attorney, in drafting the petition or bill of complaint seeking the right to condemn, should be encouraged to specifically name the statutory authority under which the petition is brought. Likewise, if doubts or questions arise concerning the right of a municipality to acquire property for specific reasons, a conference with your city attorney and the legal department is recommended.

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

Why Condemn?

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

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

Another common reason for condemnation arises because of title defects which can take many forms

– uncertainty as to the actual owner; the owner is of unsound mind or is an infant; or in cases where the property has been held in one family for a number of years, the record title holder is deceased and no administration has been had on the estate.

Problems often arise because of absentee ownership which makes negotiations difficult and uncertain. Normally, time is of the essence since a city is usually anxious to proceed with a proposed project. Often it is quicker to condemn than to take a chance on a breakdown of negotiations with an absentee owner. If negotiations are begun and then break down, the time devoted to negotiations has been lost and the project is further delayed. Absentee ownership normally means the owner is not conversant with the affairs of the city, has little or no interest therein and may be suspicious of any offer made by the city. Usually such an owner has no concept of the market value of the property, especially if the owner has been away from the city for a number of years. All of these factors make bargaining more difficult.

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

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

Procedures

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

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

If the property owners agree with the appraisal price,

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

If the property owners do not agree with the appraisal price, Section 18-1A-32, Code of Alabama 1975, requires the municipality to commence a condemnation action to acquire the property. However, Section 18-1A-4 of the Code permits a municipality to reach a settlement with the property owners either before or during the condemnation proceedings. No condemnation action can be maintained unless the municipality has offered to acquire the property on the basis of its approved offer by purchase before commencing the action.

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

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

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

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

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

circumstances, including an award of defendant's litigation expenses.

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

Consistent with prior Alabama law, Section 18-1A-270, Code of Alabama 1975, provides that the state of Alabama or any county or municipality or any person or association proposing to acquire land or an interest in land, may apply to the probate court for an order of condemnation. Within 30 days after the filing of the complaint, the probate judge must conduct a hearing on the condemnation request among all interested parties. Within 10 days after the hearing, the probate judge must issue an order granting or refusing the complaint.

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

Duties of Officials

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

furnish the attorney with certified copies of this resolution for attachment to the petition.

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

The Role of the City Attorney

The city attorney must steer the entire proceeding through the courts. The attorney should, as a first step, draft the resolution for adoption by the governing body. This resolution is the authority to proceed in court on behalf of the municipality. The title should be examined to ascertain the names of all persons interested in the property and the names of all defendants in the case. The defendants include the record owners and all persons having a lien on the property in question, such as mortgages, judgment holders and the county tax collector. Any omission in naming the proper defendants is at the peril of the condemnor. The attorney will probably decide to file a lis pendens at the same time the petition is filed, although this step is not mandatory.

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

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

The attorney usually prepares and assists in the preparation of all orders, reports, notices and so forth, needed during the entire course of the proceeding. Upon

report of the commissioners, the attorney assists the judge in preparing the judgment of condemnation, the order which formally gives the city the green light to take the property.

Appeals

The governing body and the attorney should discuss the desirability of an appeal on the part of the city. Appeals are filed based on the results obtained in the probate court proceedings. If the award is considerably out of line with the evidence gathered by the city, normally an appeal is justified. The statutes authorize an appeal by either of the parties, so the attorney must be prepared to represent the city in circuit court, either in prosecution of the city's appeal or in defense of the landowner's appeal.

Time Elements

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

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

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

Condemnation Expenses

It is virtually impossible to predict the exact expenses of any lawsuit. An estimate of costs, however, should be helpful to city officials faced with the decision of whether or not to condemn, especially if there is not a wide

difference of opinion as to the estimate of value between the city and the owner.

The first factor to consider is the value of expediting the initiation of the proposed project. Often a delay in the beginning of a project, caused by the time taken to condemn, will result in additional construction costs. Second, the value of the time of the clerk, engineer and attorney must be considered. This evaluation and analysis must take into consideration other work these persons may put aside in order to handle the case.

The actual costs of court are fairly standard from county to county, except for the allowance of commissioners' fees. Section 18-1A-293, Code of Alabama 1975, authorizes the probate judge to set the compensation of the commissioners for their services. The commissioners selected by the court are usually persons trained in property evaluation and are entitled to a good rate of pay for their time and service. If notices are required to be published, the printing charges are an additional cost which is determined by multiplying the publication rate times the number of words. The probate court charges fees for filings, reproducing copies and other court costs. The sheriff is entitled to regular service fees plus the expense of mileage. The probate judge makes an additional charge for services by registered or certified mail.

There can also be expenses involved in a dismissed condemnation action. Section 18-1A-232, Code of Alabama 1975, governing the award of litigation expenses for a dismissed eminent domain action makes payment of the landowner's litigation expenses mandatory following dismissal by the circuit court. *Russell v. State*, 51 So.3d 1026 (Ala. 2010).

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

Random Practical Tips

As pointed out above, sometimes it is cheaper to settle than to condemn. In addition, a settlement often saves time. Generally, constituents (voters) are usually better satisfied if no suit is brought. The city attorney should be encouraged to combine as many tracts or parcels as possible into one complaint to reduce court costs.

City officials should realize that land appraisers are using their judgment and experience and that their estimates are mere opinions. In other words, the appraiser may actually be too low and a little give and take in bargaining with the landowner may avoid a lawsuit and may save the city money in the long run. The old adage that land values go up when a condemnation suit is filed

generally holds true. Further, people have a tendency to revolt against the power to condemn, a feeling sometimes reflected in a verdict.

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

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

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

The city attorney's job is finished when the case is closed and the money is paid into court. Often the attorney can gain good will for the city by assisting the owners in securing their money from the court. Section 18-1A-291, Code of Alabama 1975, requires that the owners file a petition in court to collect their share of the award of damages and, if an owner is not represented by counsel, this requirement poses a problem.

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

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

Finally, the authority to condemn is a power of the sovereign. Condemnation should be used when necessary and no apologies are in order for any criticism because of its use.

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

- The Alabama Supreme Court held that the method for valuing property in a partial taking case is the fair market value of the property before the taking and the fair market value of the remainder of the property after the taking. *Cullman v. Moyer*, 594 So.2d 70 (Ala. 1992).
- The Court of Civil Appeals held that a city did not have authority to condemn land for a roadway outside its

corporate limits. *Huntsville v. Brown*, 611 So.2d 372 (Ala. Civ. App. 1992).

- In *Doughty v. Birmingham Airport Authority*, 675 So.2d 431 (Ala. Civ. App. 1995), the Alabama Court of Civil Appeals held that the condemning authority was responsible for the costs of a lienholder's claim for distribution of the condemnation award.
- In *Jefferson County v. Flanagan*, 722 So.2d 763 (Ala. Civ. App. 1998), the Alabama Court of Civil Appeals held that a probate court's condemnation award did not preclude filing of claims for trespass, conversion, negligence, private nuisance and Section 1983 violations.
- A municipality may condemn the property of a municipal officer or employee provided that the officer or employee refrains from the decision-making process regarding the condemnation. AGO 1996-231.
- The condemnation notice published initially pursuant to Section 18-1A-74, Code of Alabama 1975, may also include the preliminary notice of a possible commissioner's meeting. AGO 1997-120.
- Economic Development can constitute a "public use" within the meaning of the Fifth Amendment's takings clause so as to justify a local government's use of eminent domain to take private property, in exchange for just compensation, as part of a comprehensive plan intended to provide a distressed community with such benefits as increased tax revenue and new jobs, even if the proposed economic rejuvenation will benefit private parties. *Kelo v. New London, Conn.*, 125 S.Ct. 2655 (2005).
- The Alabama statute regarding interest on compensation in eminent domain actions, rather than the statute regarding interest on money judgments, controls the rate of post-judgment interest in eminent domain cases. *Alabama Department of Transportation v. Williams*, 984 So.2d 1092 (Ala.2007).
- Constitutional provision for compensation upon a municipal corporation's taking of property did not allow for compensation for administrative or regulatory taking. The eminent domain provision of state constitution did not apply to preclude town from adopting regulations preventing intended use of private property as rock quarry. *Town of Gurley v. M & N Materials, Inc.* 143 So.3d 1 (Ala. 2012).
- The purchase of a temporary or permanent easement or right-of-way with public funds is subject to public disclosure under section 9-15-100 of the Code of Alabama. The purchase of same without public funds is

not subject to disclosure. The acquisition by purchase, but not by condemnation, in eminent domain, of land in fee simple or a temporary or permanent easement or right-of-way, is subject to public disclosure. Disclosure is not required if the decision to purchase was made at an open meeting of the purchasing entity for which notice was given under the Open Meetings Act and the minutes include the information required by section 9-15-100(b). AGO 2015-024.

58. Dedication of Lands

Dedication, in real property law, is an appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. A dedication may be **express**, as where the intention to dedicate is expressly manifested by a deed or declaration of the owner of his or her intention to donate the land to public use. Or, the dedication may be **implied**. An implied dedication may be shown by some act or course of conduct on the part of the owner from which an inference of the intent to dedicate may be drawn.

McQuillin defines “dedication” as “the owner’s offer, either express or implied, of appropriation of land or some interest or easement therein to the public use, and acceptance thereof, either express or implied (when acceptance is required).”

The Court, in *Manning v. House*, 211 Ala. 570, 100 So. 772 (1924), defined the term by stating, “A dedication is a donation or appropriation of property to public use by the owner, accepted by the public. It may be in writing or in parol; may be evidenced by words or acts; by one declaration or unequivocal act; or by a course of conduct evincing a clear purpose to dedicate.” In *Newsome v. Morris*, 539 So. 2d 200 (Ala. 1988), the court upheld the use of parole evidence to prove a dedication of property.

History

The principle of dedication was known to the common law. Dedications are classified as **common law** and **statutory**. The difference between the two consists in the mode of proof. Statutory dedications are necessarily express, while common law dedications may be express or implied.

Municipal corporations in Alabama have the authority to accept or reject grants or dedications of property. Section 35-2-51, Code of Alabama 1975, provides that the recording of plats or maps (recorded in probate court) shall be a conveyance of the areas marked or noted thereon as donated or granted to the public. The premises intended for street, alleyway, common or other public use, as shown, shall be held in trust for the uses and purposes intended. Section 35-2-52, Code of Alabama 1975, requires a probate judge to decline to receive for record any map or plat upon which any lands lying within the corporate limits or police jurisdiction of any city having a population of 10,000 or more inhabitants are platted or mapped as streets, alleys or public ways, unless such map or plat shall have noted thereon the approval of the governing body or city engineer. In *Tuxedo Homes, Inc. v. Green*, 63 So. 2d 812 (1953), the court held that the recording of the map or plat **does not add**

to its effect as an acceptance of the dedication. [Emphasis supplied.] See also *CRW, Inc. v. Twin Lakes Property Owners Association, Inc.*, 521 So. 2d 939 (Ala. 1988).

A good discussion of the law regarding dedication is found in the Alabama Supreme Court case of *Ritchey v. Dalgo*, 514 So. 2d. 808 (Ala. 1988).

Elements of Dedication

It is essential to a dedication that the land is owned by the person making the offer and it is necessary that the owner intends to dedicate the land or some interest therein. Equally vital is the act of acceptance for or on behalf of the public by proper authorities.

The offer or intention to dedicate does not have to be in writing. It may arise from an oral dedication or be manifested by acts that reveal the intent to dedicate the property. In *Town of Leeds v. Sharp*, 218 Ala. 403, 118 So. 572 (1928), the Court considered the validity of an alleged common-law dedication and stated that, “To establish such a dedication the ‘clearest intention’ on the part of the owner must be shown. . . .”

The Court elaborate on this in *Oliver v. Water Works & Sanitary Sewer Board*, 261 Ala. 234, 73 So.2d 552 (1954), noting that “It requires some distinct act by the city to constitute an acceptance, such as a formal resolution or by acts and conduct of the city authorities recognizing it as a dedicated street. After the city has accepted its dedication there are certain duties and responsibilities imposed by statute upon the city.”

Because of these responsibilities, and the potential liability exposure municipalities face if they fail to adequately meet those responsibilities, municipal officials should carefully weigh the risks before accepting the dedication of property or an easement.

No specific grantee needs to exist at the time dedication is made since the “public” is an ever-existing grantee capable of taking a dedication for public uses.

Purposes of Dedication

Courts recognize dedication of streets, highways, alleys, public squares, parks, cemeteries, public wharves and landings, schoolhouses and public buildings. Sewers, drainage ditches and wells may be subject to dedication.

The owner dedicating land to the public may impose reasonable conditions, restrictions and reservations on the dedication, provided those conditions are not inconsistent with the uses or purposes for which the land is dedicated. The recipient, by accepting the dedication, agrees to such conditions or restrictions.

Intentions and Acts of Dedication

The vital principle underlying a dedication is the **intention** to dedicate. Courts have ruled that the “clearest intention” to dedicate must exist. In *City of Birmingham v. Graham*, 202 Ala. 202, 79 So. 574 (1918), the court held that there should be an “unequivocal act of the owner of the fee manifesting the intention that it shall be accepted and used presently or in futuro.”

The existence of an intent to dedicate, or the lack of an intent to dedicate, must be resolved from the facts of a particular case. Such facts may be shown by either positive or circumstantial evidence. See *Manning v. House*, 100 So. 772 (Ala. 1924).

Intention is easily shown by proof of a written instrument--for example, a plat or map placed on record. In *Burton v. Johnson*, 222 Ala. 685, 134 So. 15 (1931), the court held that “the platting and sale of lots with reference to such map was per se a dedication of this parcel ...” Even though a map is insufficient to satisfy statutory requirements, if places on the map are shown as streets, alleys, parks, etc., it is said to be evidence of intention to dedicate after the map is recorded. The proprietor of the land, if lots are sold in conformity to the map, would be estopped to deny a dedication as against his purchasers. The municipality must still accept the dedication, however, before it becomes effective.

The intention to dedicate may also be shown by recitals in a deed in which the rights of the public are recognized. Additionally, in a few cases, the court has found that uninterrupted use by the general public of a roadway--when there is no evidence to contradict the presumption of dedication--shows an intention to dedicate. See *Newell v. Dempsey*, 219 Ala. 513, 122 So. 881 (1929). In these circumstances, however, the use must be shown to have been with the knowledge and consent of the owner. This type of case is important in the law relating to prescriptive rights.

Evidence showing lack of intention on the part of the owner to dedicate is admissible. *Thomas v. Vanderslicc*, 201 Ala. 73, 77 So. 367 (1929). The burden of proof to establish a dedication is on the party asserting it and it is never presumed in the absence of evidence of an unequivocal intention on the part of the owner.

However, once a dedication is made, it generally cannot be withdrawn unless statutory procedures are followed. In *Pritchett v. Mobile County*, 958 So.2d 349 (Ala. Civ. App. 2006), the Court of Civil Appeals held that a county’s alleged failure to use a right-of-way, which was dedicated for public use as a roadway, did not cause the right-of-way to be vacated. After there has been a proper dedication to the public, that dedication is irrevocable, and it cannot

be altered or withdrawn except by statutory vacation proceedings.

Acts of Acceptance

As stated above, there must be something on the part of the public entity showing an intent to accept the dedication in question. In *Ivey v. City of Birmingham*, 190 Ala. 196, 67 So. 506 (1914), the court declared that “The owner of the property through which this street was originally laid off could not impose his dedication of the street upon the public by platting the territory and disposing of lots according to the plat. He thereby made it a way, irrevocable as to purchasers; but to devolve upon the public the duty of maintaining the way as a public road or street it was necessary that there should be an acceptance by the public of the dedication.” Acceptance requires some distinct act by the city or conduct of the city authorities recognizing the declaration. *Oliver v. Water Works and Sanitary Sewer Board*, 261 Ala. 234, 73 So. 2d 552 (1954).

Mere acceptance of a plat for recording is not in itself sufficient to complete the dedication. *Tuxedo Homes v. Green*, 258 Ala. 494, 63 So. 2d 812 (1953).

Acceptance may arise by express act, by implication from acts of municipal officers and by implications from uses by the public for the purpose for which the property was dedicated. Without doubt, an ordinance or resolution of the governing body in accepting a dedication would be sufficient. But an ordinance or resolution is not necessary to show acceptance of the dedication.

In *City of Birmingham v. Graham*, 262 Ala. 202, 79 So. 574 (1918), the court enumerated methods of acceptance as follows: “... that it must be by competent authority; that it may be evidenced in several ways: (1) by deed or other records; (2) by acts that operate as an estoppel in pais; or (3) by long continued use on the part of the public in such wise that a dedication and acceptance is presumed.”

As early as 1881, the court, in *Steele v. Sullivan*, 70 Ala. 586 (1881), held:

“Such acceptance by a town or city may be manifested, among other methods, by long and uninterrupted use by the public without objection; by the expenditure of corporate money or labor in repairs, and by recognition of the street or alley in the official maps of the municipality, prepared under their authority or direction.”

In view of the decisions in several later cases, though, there may be doubt as to the accuracy of the last sentence, depending on how “official” the map is made by the municipality.

The length of time of use of streets and ways is usually not as important as the character of the use. In *Valenzuela v. Sellers*, 246 Ala. 329, 20 So. 2d 469 (1944), the court stated:

“True, it [the alleyway in dispute] might not have been

to any great extent used by the traveling public, but as was observed in *Still v. Lovelady*, it is the character rather than the quantum of use that controls.”

In new subdivisions, streets normally connect with existing public streets and become extensions of the streets. Since municipal authorities almost invariably approve and supervise the type of construction used in new streets, those streets are, in fact, accepted when joined to existing streets and opened to use by the public.

The general rule is that proof of acceptance by the public must be unequivocal, clear and satisfactory and consistent with any other consideration. See *Mobile v. Chapman*, 79 So. 566 (Ala. 1918).

Use of Dedicated Lands

In general, property dedicated to the public must not be used except for the purpose named. The court, in *City of Troy v. Watkins*, 78 So. 50 (1918), quotes with approval:

“A public highway cannot be used in a manner foreign to its dedication and any encroachment thereon or use thereof which is inconsistent with some purpose will constitute a nuisance which may be enjoined.”

It is permissible for the dedicator and dedicatee to change the purposes of the dedication. However, if the interests of a third person have intervened and would be damaged by the change, consent of the third party is also necessary.

A dedication of property to a municipality under Section 35-2-50 and Section 35-2-51, Code of Alabama 1975, cannot be revoked unless statutory vacation procedures are followed. *Montabano v. City of Mountain Brook*, 653 So. 2d 947 (Ala. 1995).

An abandonment is generally a question of fact, but abandonment of a part is not an abandonment of the whole. Non-use is usually not considered as abandonment.

Parks

Land may be dedicated and accepted for public use as a park. Often, a landowner may subject the grant to conditions and restrictions and the municipality may receive lands so conditioned. If the condition requires the use of the property as a public park subject to reverter, an abandonment of the park may work a reversion of the title.

The park lands may be utilized in any manner consistent with use as a park, such as construction of playgrounds for children, tennis courts, flower gardens or other recreational areas.

Municipalities may adopt reasonable rules and regulations for the use and protection of the parks. Such regulations may establish speed limits for driving in the park or may establish hours for opening and closing. See Section 11-47-22, Code of Alabama 1975.

Provisions Relating to Parks

In 1956, Section 94 of the Constitution was amended (Amendment 112) to provide that the Legislature might enact general, special or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration, public parks and playgrounds conditioned upon the approval of a majority of the duly-qualified electors voting at an election held for such purpose. In keeping with this authority, the Legislature enacted the law now found at Sections 35-4-410 through 35-4-412, Code of Alabama 1975. These statutes establish the procedures for publishing the terms of the proposed conveyance and the holding of a referendum election to determine the desire of the electorate.

Section 11-47-22 authorizes municipalities to exercise police jurisdiction over all lands purchased or acquired for parks.

Sections 11-47-20 and 11-47-21 authorize sales and leases of property “not needed or public or municipal purposes.” In *Moore v. City of Fairhope*, 277 Ala. 380, 171 So. 2d 86 (1965), the Alabama Supreme Court limited the usefulness of Section 11-47-20, Code of Alabama 1975, where a public entity is attempting to alienate dedicated park property. In that case, the city attempted to dispose of park lands upon which the court found there had been a common law dedication and longtime use by the public. The decision turned on the question:

“... does [this section] confer upon the city power and authority to convey to a private individual or corporation property within its corporate limits which has been subject to a common-law dedication for use by the public as a park? We think not ... Indeed, as we construe [this section] the legislature has not attempted to authorize the sale of property held by the city in trust such as that with which we are dealing.”

In *Mobile County v. Isham*, 695 So.2d 634 (Ala. Civ. App. 1996), the Court of Civil Appeals held that because the county failed to show that it had accepted property dedicated to it as a park before the property owner divided the property into lots and sold them, the dedication was revoked and the county cannot now claim ownership of the property.

Abandoned Streets and Unneeded Property

Generally, the owner of the abutting property of a street owns the fee to the middle (medium line) of the street but subject to the easement of the public. If the public way is abandoned, the abutting owner may normally reclaim the property since it has been freed of the easement. In view of this general rule, it is a mistake for a municipality to assert

ownership to the fee in such an abandoned street until the title is thoroughly searched. The rights of a municipality in a public way are generally limited to the surface and so much of the depth as is customarily used, as streets are used, for example, for sewers, drains, cables and so forth. See *Citronelle v. Gulf Oil Co.*, 270 Ala. 378, 119 So. 2d 180 (1960).

If a municipality has acquired its right of way by condemnation, it is possible that it will own the entire fee, depending on the eminent domain proceeding at time of the acquisition. Ordinarily, a municipality, by condemnation, merely acquires an easement for public street purposes.

Caution is the watchword before committing a municipality to any course of conduct regarding the disposal of unneeded property until the full facts are ascertained as to the extent of the city's title. Section 94 of the Constitution of Alabama of 1901 prohibits a municipality from giving away public property. Therefore, if the city does, in fact, have a right to dispose of property it must be for an adequate consideration.

Court Decisions and Opinions of the Attorney General

A city has the statutory authority to accept the dedication of streets, roads, and utilities of a privately owned condominium complex that is incorporated in a subdivision within the city that has mixed zoning. AGO 2008-131.

Acceptance by the county governing body was unnecessary for public dedication of roads in a subdivision outside the city limits or police jurisdiction. By completing and recording the plat in compliance with statutory requirements, the developer dedicated the roads to the public. A road can be made public in one of three ways: (1) a regular proceeding for that purpose, (2) a dedication of the road by the owner of the land it crosses, with acceptance by the proper authorities or (3) the way is generally used by the public for twenty years. *Harper v. Coats*, 988 So.2d 501 (Ala. 2008).

A city may enter into an agreement with the YMCA of a county for the YMCA to provide services to its citizens in exchange for the use of city property. Whether the property has been dedicated as a public park is a factual determination to be made by the city. AGO 2017-024.

59. Adoption of Municipal Standard Codes and Ordinances by Reference

The cities and towns of Alabama have witnessed unprecedented growth during the last two decades. According to the most recent census data, for the first time in history, more people live in cities and towns than live in unincorporated areas.

This rapid urbanization of the population has produced a pronounced need for municipal ordinances designed to provide minimum standards of health, sanitation and safety for residential, commercial and industrial building construction; minimum standards for gas, electrical and plumbing installations; minimum regulations for fire prevention; uniform traffic regulations and other technical rules necessary to ensure the public health and welfare. Such controls are essential if municipalities are to prevent the costly blight of slums in the future and to qualify for federal assistance to accomplish certain projects.

Ordinances of this type are necessarily long and technical. Fortunately, numerous standard codes are published and distributed in pamphlet form and are available to cities and towns. It is possible for a city or town to adopt the provisions of a standard code published in pamphlet form without the expense of publishing the full text of the code in the adopting ordinance. By following prescribed procedures, cities and towns save both time and money.

Statutory Provisions

Express authority is given to cities and towns in Alabama to adopt, by reference, certain ordinances published in pamphlet or code form without publishing the full content of such pamphlets or codes. *See* Section 11-45-8, Code of Alabama 1975.

Subsection (c) of Section 11-45-8 provides that municipalities may pass ordinances adopting rules and regulations which have been printed as a standard code in book or pamphlet form by reference without setting out those rules and regulations at length in the ordinance). Section 11-45-8 provides for the adoption of codes for any of the following:

- The construction, erection, alteration or improvement of buildings.
- Installation of plumbing or plumbing fixtures.
- Installation of electric wiring or lighting fixtures.
- Installation of gas or gas fixtures.
- Fire prevention.

- Health and sanitation.
- Milk and milk products.
- Parks.
- Airports.
- Waterworks and sewers.
- Traffic.
- Mechanical.
- Swimming pools.
- Housing.
- Standard code for elimination and repair of unsafe buildings.
- Other like codes.

Municipalities may adopt the Federal Motor Carrier Safety and Hazardous Material Regulations as a Code pursuant to Section 11-45-8, Code of Alabama 1975, except for provisions which exceed the authority of municipalities under Alabama law. AGO 1993-001.

Model ordinances which are not codes printed in book or pamphlet form may not be adopted using the procedure in Section 11-45-8(c). AGO 1994-141. In *Seewar v. Summerdale*, 601 So.2d 198 (Ala. Crim. App. 1992), the Court of Criminal Appeals held that a municipal ordinance adopting by reference all state misdemeanors must be adopted in accordance with Section 11-45-2, Code of Alabama 1975, and may not be adopted through the procedure for adopting codes in pamphlet form set out in Section 11-45-8 of the Code.

Additional Authority

State law requires the state building commission to adopt a building code for schools, hotels and movie theaters. A municipality and county may adopt the code and extend the application of the code to private buildings and structures. Section 41-9-166, Code of Alabama 1975, provides that municipalities may adopt any model building code published by the Southern Building Code Congress International and the National Electrical Code published by the National Fire Protection Association as a municipal ordinance, enlarging the applicability thereof to include private buildings and structures other than private schoolhouses, hotels, public and private hospitals and moving picture houses as it deems necessary and to prescribe penalties for violations thereof in the same manner in which other ordinances and related penalty provisions

are adopted and prescribed. Changes in the provisions of the building code affected by the building commission may be adopted similarly by counties and municipalities. No county or municipality shall apply the building code to state buildings and construction of public schoolhouses.

Model building codes adopted by a county or municipality pursuant to this section shall only apply to structures and facilities on the customer's side of the electric meter and shall not apply to any electric power generation, transmission or distribution facilities on the electric service provider's side of the electric meter.

Nothing contained in Section 41-9-166 shall be construed as requiring the advertising or posting of the code itself. The provisions of this section shall be satisfied by giving of notice that it is proposed to adopt a code.

Recommended Procedure

The League recommends using the following procedure to adopt standard codes by reference. First, the municipal governing body must determine if there is a need for one or more of the 16 technical regulatory codes listed above. If codes are needed, the governing body should assign each field of regulation to the study of a committee composed of members of the governing body and citizens active in the field proposed to be regulated. Committees should report their recommendations to the governing body. Members may recommend the adoption of a standard code, with or without amendments, or may submit a set of regulations of their own composition with the recommendation that they be prepared as a code and printed in pamphlet form for adoption by reference.

After deciding to adopt a set of rules and regulations which have been printed as a code in book or pamphlet form, the governing body must adopt a resolution proposing the adoption of the specified code. The resolution should set a day, time and place for a public hearing to determine whether the code will be adopted. The resolution also should invite all persons interested to appear and be heard on the question. It is recommended that the public hearing be set for a regular meeting date, time and place so the code may be adopted at that meeting without the possible later need for proving the proper call of a special meeting.

The resolution must state that three copies of the code shall be filed, in the office of the municipal clerk, not less than 15 days prior to the public hearing for use and examination by the public. This resolution must be published once a week for two successive weeks before the date of the hearing in a newspaper published in the municipality. In municipalities which had a population of less than 2,000 as shown by the 1950 federal census, the governing body has the option of publishing the resolution in a newspaper or by posting the resolution in three public

places in the municipality for the length of time required. One of the public places must be at the mayor's office in the city or town. *See*, Section 11-45-8, Code of Alabama 1975.

After the public hearing, a record of which should be made in the municipal journal, the governing body must determine if the code is to be adopted with or without amendments. After deciding to adopt the code, an ordinance specifying the adoption of the code by reference, pursuant to Section 11-45-8, must be passed by the governing body just as any other ordinance of general and permanent nature. Unanimous consent is required to consider passing the ordinance at the first meeting at which it is introduced. After adoption, the ordinance must be published as directed by Section 11-45-8, Code of Alabama 1975, for the publication of other municipal ordinances.

Upon publication of the ordinance, the municipal clerk must append his or her certification upon the record of the ordinance stating the time and manner of publication of the ordinance.

Code Enforcement

All municipalities have statutory authority to enforce standard codes. Section 11-43-59, Code of Alabama 1975, gives municipalities the authority to require all persons or firms doing construction work to obtain building, plumbing and other permits from the municipality and to charge a fee for the permits. Fees charged for the permits should be reasonable and should approximate the cost to the municipality of inspecting the work permitted. The Attorney General has ruled that upgraded fire and building codes may be enforced against existing buildings. AGO 1987-296.

Municipalities have the authority to impose an ordinance requiring the annual inspection of apartments and rental houses for the purpose of ensuring compliance with the local building code. A municipality has the right to charge a reasonable fine or revoke the certificate of occupancy for any apartment or rental house failing to comply with the local building code. A municipality may charge a reasonable fee to defray the expense of performing inspections of apartments and rental houses for the purpose of ensuring compliance with the local building code. AGO 2007-009.

Municipal ordinances relating to fire protection, such as building codes and burn permits, may be enforced within the police jurisdiction of the municipality. Only municipal police officers have the authority to issue citations for violations of these municipal ordinance violations. The chief of a municipal fire department or municipally sanctioned volunteer fire department, as an assistant to the State Fire Marshal, who has complied with APOSTC standards, may, if directed by the Fire Marshal, issue a citation for the violation of a state law related to the matters

set forth in Section 36-19-2 of the Code of Alabama 1975. However, state law allows any witness to the commission of a crime to go before a magistrate and swear out a warrant against the perpetrator of that crime. AGO 2009-075.

Section 40-9-13, Code of Alabama 1975, exempts volunteer fire departments from paying building inspection fees. AGO 2004-044. A Water, Sewer, and Fire Protection Authority established pursuant to section 11-88-1 of the Code of Alabama, is not exempt from paying for construction permits and review fees imposed by the municipality for projects that provide water and sewer services for the residents of the municipality. The Authority is obligated to acquire permits and adhere to the permitting process of the municipality, even if the projects meet State Building Codes and are engineered and inspected by a state licensed engineering firm. AGO 2010-035.

A county board of education must comply with the building code of the Alabama Building Commission but is not required to comply with county or city building codes. Board projects are not required to pay local building permits. AGO 2004-165. The following persons may enter into any school to inspect and enforce state fire prevention and protection laws: the State Fire Marshal; employees of the State Fire Marshal's office; the chiefs of police and fire departments; the mayor, if there is no fire department; the sheriff; and those persons acting under the authority of these officials as assistants to the fire marshal. AGO 2005-183.

Generally, mobile home parks should be considered general residential areas and be treated like any other residential premises. AGO 2010-092. The Alabama Manufactured Housing Commission has the statutory authority to regulate the construction, transportation, site location, and manufacturing standards of a manufactured building. Because a storm shelter is defined as a manufactured building, the Alabama Manufactured Housing Commission has the authority to regulate the sale and installation of storm shelters. AGO 2012-013. The Alabama Manufactured Housing Commission and the Alabama Licensing Board for General Contractors have concurrent jurisdiction to regulate the installation of nonresidential, prefabricated buildings and storm shelters that are permanently attached to real property where the cost of the undertaking is \$50,000 or more. AGO 2012-036.

While standard codes may be enforced in the police jurisdiction, legislation adopted in 2015 places additional notice requirements on municipalities prior to enforcement of ordinances in the police jurisdiction. Please refer to the article on the police jurisdiction for more information on this.

Sources of Standard Codes

Standard building, gas, plumbing, fire, housing,

swimming pool, electrical, energy, and mechanical codes are available from the International Code Council (formerly the Southern Building Code Congress International, Inc.), 900 Montclair Road, Birmingham, Alabama 35213-1206. Phone: 1-888-422-7233. **Web address:** www.iccsafe.org.

Caution Urged

Only the types of codes listed in Section 11-45-8, Code of Alabama 1975, may be adopted by reference. All zoning ordinances, and amendments thereto, must be published both prior to adoption and after adoption in accordance with Sections 11-52-77 et. seq. and 11-45-8 of the Code of Alabama. AGO 1981-224 (to Hon. O. Stanley Thornton, February 9, 1981). AGO 1991-404. Publication on a noncommercial web site of a local government's enactment of a model building code does not infringe on the code-writing organization's copyright in the code itself. *Veeck v. Southern Building Code Congress Int'l, Inc.*, 293 F.3d. 791 (5th Cir. 2002).

Prior to 1995, all zoning ordinances and amendments thereto could not be adopted by reference to avoid publication costs. Such ordinances had to be published at length until the state Legislature, in 1995, amended Section 11-52-77, Code of Alabama 1975, to create a procedure for publication of certain zoning ordinances by reference. When a zoning ordinance is published by reference, the publication should be made in accordance with the procedures set out in Section 11-52-77(2) and Section 11-45-8(b)(2) Code of Alabama 1975. However, the Attorney General has held that a planning commission may adopt subdivision regulations in pamphlet form as provided in Section 11-45-8(c), Code of Alabama 1975, as long as other legal requirements for adoption of subdivision regulations are followed.

It is important not to confuse this procedure with the process adopted in 2011, which allows municipalities to publish planning and zoning ordinances in synopsis form by following the procedures set out in Section 11-45-8(2), Code of Alabama 1975.

Although only county commissions and municipalities have the power to adopt general residential construction and building codes, the Alabama Supreme Court has held that the State Fire Marshal may adopt statewide residential construction and building codes relating to fire prevention and protection that supersede the municipal and county codes to the extent they are inconsistent with the code adopted by the State Fire Marshal. *Ridnour v. Brownlow Homebuilders, Inc.*, 100 So.3d 554 (Ala. Civ. App. 2012).

A municipality does not have the authority to adopt an ordinance that would prohibit the water and sewer board from providing water and/or sewer service to residential and commercial buildings that do not meet the minimum standards of the municipality's building codes. The

municipality does not have the authority to require the owner of a substandard property to bring the property up to minimum standards before water and/or sewer service can be restored. AGO 2013-039.

Assistance from the League

The League has sample ordinances and resolutions which can be used to adopt standard codes by reference.

60. Streets, Alleys and Sidewalks

A way over land set apart for travel by the public in a city, town or village is usually designated as a street. The term “street,” in a legal sense, usually includes all parts of the way – the roadway, the gutters and the sidewalks. Streets are public ways and for travel by the public.

Elements of Streets

Three elements constitute a street: (a) the surface, (b) as much beneath the surface as is necessary to provide a foundation for the surface and for water mains, gas lines, sewer lines and other needful utilities, and (c) enough above the surface to afford clearance for traffic. A bridge over a stream, ditch or channel is part of the street.

The term “highway” is a generic name for all kinds of ways and generally is broad enough, in statutory usage, to include streets, although statutes may be written to exclude city or town streets.

An “alley” is a passageway, usually somewhat narrow, between two parallel streets and usually at the rear of the properties facing the street. Alleys are primarily for the convenience of the abutting property owners, but the public is interested in them for access and utility installations. Alleys may be public or private, the same as streets but for the purposes of this article, only public alleys will be discussed. Normally, alleys are dedicated in plats and are under control of municipal authorities. The law prevailing as to streets is applicable to them.

A “sidewalk,” popularly speaking, is that part of the street, on the side thereof, intended for use by pedestrians. Alabama statutes authorize cities and towns to control use of sidewalks. *See*, Section 11-49-2 Code of Alabama 1975. “Street” was defined in *Cloverdale Homes v. Town of Cloverdale*, 62 So. 712 (Ala. 1913), as:

“The word ‘street’ means ‘the surface;’ it means the whole surface and so much of the depth as is or can be used not unfairly for the ordinary purpose of a street. It comprises a depth which enables the original authority to do that which is done in every street, namely, to raise the street and to lay down sewers, for at the present day there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. Street, therefore, in my opinion, includes the surface and so much of the depth as may not unfairly be used as streets are used.”

In *Williams v. Nearen*, 540 So.2d 1371 (Ala. 1989), the court held that in determining the width of a public road,

consideration should be given to the safety and convenience of the traveling public as well as the need for repairs and improvements.

Duty of Municipalities

This article discusses only streets that are properly dedicated public ways. See the article in this publication titled “Dedication of Lands” for more information. Section 11-47-190, Code of Alabama 1975, reads in pertinent part:

“No city or town shall be liable for damages for injury done to or wrong suffered ... unless the said injury or wrong was done or suffered through the neglect or carelessness or failure to remedy some defect in the streets, alleys, public ways or buildings after the same had been called to the attention of the council or other governing body or after the same had existed for such an unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council or other governing body ...”

Alabama courts have consistently construed this section as imposing an affirmative duty on a municipality to maintain streets in a reasonably safe condition. In *Florence v. Stack*, 155 So.2d 324 (Ala. 1963), Stack sued the city of Florence for personal injuries allegedly received when a two-wheeled motor scooter he was riding ran into a “defect, hole, cut, ditch or excavation” in the paved surface of a public street. The basic question presented on appeal was whether a city’s duty to maintain its streets is different with respect to a two-wheeled motor scooter than it is in respect to a four-wheeled motor vehicle. The decision in this case contains a good summary of the law:

“A municipality’s duty with respect to maintenance of its streets for travel is well-established in this State. In general terms, the liability of a municipality in a suit of this kind is governed by the duty and obligation to exercise ordinary and reasonable care to keep its streets and sidewalks in a reasonably safe condition for travel. This imposition does not make the municipality a guarantor of the safe and unharmed travel to the public. The duty is based on the responsibility and accountability of the city to remedy such defects upon receiving actual notice, or after the same has remained for such length of time and under such conditions and circumstances that the law will infer that the defect ought to have been discovered and remedied. The general rule is that public ways for their entire length and width should be reasonably safe for uses consistent with the reason for their establishment and existence. But this general rule

is subject to the necessary qualification that the municipal authorities may, in the exercise of a sound and reasonable judgment, fairly and with due regard to the public needs and welfare apportion the surface of public streets to the use of vehicles, to the use of pedestrians, and to ornamentation and beneficial uses resulting from parkways. It is the duty of a municipality to keep its public streets in a reasonably safe condition for travel by night as well as by day, and this duty extends to the entire width of the street. The duty of a city to use due care to keep its streets reasonably safe for ordinary travel is not controlled by the manner in which the defect arose, or by whom it was created. It is well settled that persons using a public street have a right to presume, and to act on the presumption, that the way is reasonably safe for ordinary travel, whether by day or night.”

The responsibility to control, manage, supervise, regulate, repair, maintain, and improve public streets in newly-annexed areas is governed by Section 11-49-80, Code of Alabama 1975, as amended.

Bicycles

In *Hill v. Reaves*, 139 So. 263 (Ala. 1932), the city of Mobile was sued for injuries a bike rider sustained from a plant which overhung the sidewalk. The court denied recovery, stating that there was no duty owed to the plaintiff in this case. The court found that the proper place for operation of all vehicles designed for speed or draft is in “the speedway of the street, and not upon the sidewalk which is set apart for the use of pedestrians, vehicles for cripples, invalids and baby buggies, propelled by a pedestrian; that a bicycle is a ‘vehicle’ designed for speed, and its proper place is upon the highway or street proper.”

In *City of Florence, supra*, the court quoted with approval from 13 R.C.L. p. 377, Section 308:

“A municipality is required to maintain only the respective portions of the street, divided into sidewalks and roadway, in a reasonably safe condition for the purpose of which they are respectively devoted, that is, the sidewalks for pedestrians and the roadways for vehicles and horses. It is not bound to keep its sidewalk and footways fit for the use of vehicles, and drivers of vehicles who intentionally and unnecessarily use them for passage of their wagons, do so at their peril, and cannot hold the municipality liable for injuries sustained because of their unfitness for such use, at least where such use is a contributing cause of the injury. 13 R.C.L. p. 377, Section 308.”

Use of Streets

The right of the public to use the streets in a proper manner is absolute and paramount. Streets are held in trust for the public for the ordinary purposes of travel and other customary uses. It follows that these public ways must be kept free from obstructions, nuisances, or unreasonable encroachments which destroy, in whole or in part, or materially impair, their use as public thoroughfares. A municipality may not in any way surrender or impair its control over streets.

In *State v. Louisville and Nashville R. Co.*, 48 So. 391 (Ala. 1908), the court held that when lands are dedicated as streets, a municipality has no power unless specifically authorized by the Legislature to divert them in any manner from the uses to which they were originally designated. Sections 11-49-100 through 11-49-106, Code of Alabama 1975.

Any encroachment on a street or any use of a street which is inconsistent with its use will constitute a nuisance which may be enjoined. *McKenzie v. Commalander*, 549 So.2d 476 (Ala. 1989). This is true whether the encroachment was caused by an individual or by the municipality. *Troy v. Watkins*, 78 So. 50 (Ala. 1918). An obstruction or encroachment may consist of anything which renders travel on the roadway more difficult. In *McIntosh v. Moody*, 153 So. 183, (Ala. 1934), a building was constructed by an individual in a public street in the city of Russellville, and the court declared it to be a nuisance. The court also found that the complainant, who suffered a special damage different from the general public, had the right to maintain the action and that the city of Russellville likewise had a cause of action to abate the nuisance.

For a discussion of the issues relating to the encumbrance of municipal streets for fairs or carnivals, see *McQuillin, Municipal Corporations*, Section 30.99, Third Edition.

It is settled that no one may use the streets of a municipality unless authorized by the governing body. Section 220 of the Constitution reads:

“No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village.”

In *Lybrand v. Pell City*, 71 So.2d 797 (Ala. 1954), the town sought to construct a swimming pool within the right of way of a street which had never been opened, although it was platted and dedicated. The Alabama Supreme Court reversed the trial court, which had denied a temporary injunction sought by the complaining property owner and

held that the town's actions were unauthorized and void. The street had to be maintained as a street until vacated. For a complete discussion on vacating public streets, see the article in this publication titled "Vacation of Streets".

Many cities and towns have adopted ordinances making it illegal to block or obstruct streets, sidewalks and alleys. This is a recommended procedure since municipal officials then have available simple and easily understood language to point out to the offender. Such an ordinance may read: "It shall be unlawful for any person to encumber a street or sidewalk with ..." or "It shall be unlawful for any person to erect, extend or enlarge a fence so as to encroach upon the streets and sidewalks."

Abandonment of Streets

Often streets become abandoned through non-use. The Alabama Supreme Court in *Floyd v. Industrial Development Board of Dothan*, 442 So.2d 927 (1983), held that a public road may be abandoned by non-use for a period of 20 years or by a formal statutory action pursuant to Sections 23-4-1 through 23-4-6 of the Code. Additionally, the Alabama Court of Civil Appeals, in *Darnall v. Hughes*, 17 So.2d 1201 (2008), recognized that if one road replaces another, there can be an abandonment of a public road by nonuse for a period short of the time of prescription.

What right does a municipality have to the lands of such streets? In every instance, an investigation must be made as to the title and the manner in which the municipal interest was acquired. If the city or town merely holds an easement, it has no fee in the property which can be sold. In *Citronelle v. Gulf Oil Corp.*, 119 So.2d 180 (Ala. 1960), the facts of the case showed that the town was grantee in a deed executed subsequent to the platting of the streets. The court held that the fee to the land across which a street is situated is not subject to alienation apart from the abutting lots after the dedication becomes complete. The court refused to permit the town to lease the mineral rights beneath the streets.

If the entire fee is owned by the city or town, it may sell or lease the lands under provisions of Sections 11-47-20 and 11-47-21, Code of Alabama 1975. These sections require an affirmative declaration that the property is "not needed for public or municipal purposes." The utility of these sections is somewhat limited by the holding of *Moore v. Fairhope*, 171 So.2d 86 (Ala. 1965), if the property in question was dedicated to the municipality for use as a park.

A city or town should, because of the provisions of Section 94 of the Alabama Constitution, always receive adequate consideration for any lands sold or leased. This section prohibits the lending of the city's credit or granting public property to individuals, associations or corporations.

Sidewalks

Questions often arise concerning municipal authority over sidewalks. Of particular interest in this connection is Section 11-49-2, Code of Alabama 1975, which states:

"Cities and towns may prohibit openings being made on the sidewalks for cellar entrances and may close the same, and may prescribe plans and specifications to be followed for such openings, if allowed. They may prohibit stationary or movable stands from being placed on the sidewalks and do any and all things necessary to secure free and ample passageway thereon, including the removal of stairways. They may prohibit the erection of awnings and verandas and signs hanging over the streets and sidewalks, and may prescribe plans and specifications therefor, if allowed. They shall require the sidewalks to be kept in repair, and, if not repaired by the owners of property abutting thereon, upon reasonable notice, to be determined by the council in the manner to be provided by ordinance, they may be repaired by the municipality at the owner's expense, and the amount expended therefor shall be a lien upon the property, which, with interest, may be collected as taxes or assessments are collected."

It is a good practice, in instances where a sidewalk opening is solely for the benefit of the property owner, to require indemnification by insurance or bond. A person injured because of an opening will almost invariably sue the city or town, along with the property owner, in any lawsuit that may be filed.

Section 11-48-10, Code of Alabama 1975, dealing with public improvements, permits a municipal council to establish the grade of sidewalks along with the grade of streets and alleys. Section 11-48-65 Code of Alabama 1975, specifically states that nothing in the article on public improvements shall be construed to affect the power and authority of a municipality to require property owners to repair sidewalks in front of their property. Moreover, since sidewalks wear out, a property owner should be encouraged, if the building is remodeled, to install new walks under supervision of city personnel.

In *Birmingham v. Holt*, 194 So. 538 (Ala. 1940), the city sought a mandatory injunction to require the removal of advertising signs placed on posts located on the sidewalks, taking the view that the signs obstructed and interfered with the use of the streets and hence constituted a nuisance. The court granted relief to the city holding that the city had no power to authorize the use of its streets for a private purpose. The court, in effect, held that the rules of law applicable to streets were also the rules of law applicable to sidewalks.

Summary

Unless otherwise qualified, a street is a public way or road, usually urban, and it embraces the surface from side to side and end to end. In common parlance, a sidewalk is the part of the street assigned to the use of pedestrians. *See, Smith v. Birmingham*, 168 So.2d 35 (Ala. App. 1964). The public also has an interest beneath and above the surface.

Generally, the same rules of law apply to public alleys as to streets. Municipalities have an affirmative obligation to maintain streets in a reasonably safe condition for use by the public. Anything or any use which interferes with public travel is apt to be illegal. Streets should be kept clear of obstructions and encroachments. Municipalities should exercise caution when alienating lands used for public streets.

Selected Attorney General's Opinions and Court Opinions

- Municipal and county street signs must conform to the Alabama Manual on Uniform Traffic Control Devices. AGO 1992-380.
- A municipality may not lease mineral rights under its streets. AGO to Hon. Richard H. Prescott, Jr., February 21, 1975.
- A municipality may close a road located in the city cemetery and allow the road to be used only for funerals and visiting the cemetery. AGO 1991-203.
- The Attorney General has also held that there are a number of methods by which a municipality may convey a right to construct a privately-owned passageway over a public roadway. AGO 1992-144.
- If a municipality has accepted a street for public use, the municipality assumes a duty to maintain the street in a reasonably safe condition for public travel. AGO 1995-265.
- Property may become dedicated to the municipality by purchase, express or implied dedication, condemnation, or adverse possession. This is a factual question. AGO 1995-275.
- If a county was in control of and maintained county roads and rights of way in the corporate limits of a municipality on July 7, 1995, it is to continue the maintenance and upkeep of these roads unless the procedures of Section 11-49-80(a) and 11-49-81 have been followed. In the absence of an agreement, a county cannot insist that a municipality's share of the gasoline tax proceeds be used for the upkeep of county roads in a municipality. AGO 2000-007. For more information on this see the article in this publication titled "Municipal Annexation of Property."
- The county remains responsible for streets and roads which are incorporated into a new municipality unless the municipality assumes responsibility pursuant to Sections 11-49-80 and 81, Code of Alabama 1975. The municipality, and not the county, sets speed limits on streets within the corporate limits, even if the county is responsible for maintaining the road. AGO 1997-002.
- A city may not make improvements on streets that are within its police jurisdiction, but which are outside its city limits. AGO 2000-023.
- The City Council of Abbeville has the authority under its police power to enact an ordinance to close, during school hours, a portion of a public street located adjacent to property owned by the Henry County Board of Education. AGO 2000-030.
- A city may pave a roadway adjacent to a public street if the city acquires the adjacent roadway for a public purpose, for example, by dedication, transfer of deed, or acquisition by prescription. AGO 2004-143.
- A public road is established in one of the following three ways: (1) by a regular proceeding for that purpose, (2) by a dedication of the road by the owner of the land it crosses and a subsequent acceptance by the proper authorities, or (3) by the road's being used generally by the public for a period of 20 years. A public road may be abandoned in several ways including but not limited to the following: (1) the commencement of a formal, statutory action, (2) nonuse for a period of 20 years, or (3) if one road replaces another, there can be an abandonment of a public road by nonuse for a period short of the time of prescription. *Darnall v. Hughes*, 17 So.3d 1201 (Ala.Civ.App.2008).
- The City of Northport may legally close a public street at its city limits without actually vacating its public rights in a portion of the street. The City should give reasonable notice under the circumstances to afford proper notice to all interested persons prior to closing a street. AGO 2008-105.
- The municipality is an indispensable party to an action between private litigants seeking to determine whether a road is public or private. The fact that a municipal employee is called to testify as a witness at trial does not negate the requirement that the municipality be joined as a party to an action seeking to determine whether a road is public or private. *Allbritton v. Dawkins*, 19 So.3d 241 (Ala.Civ.App.2009).
- Based on the facts presented, the City of Sheffield is not authorized to expend public funds for the maintenance and upkeep of an 1840's bridge, connecting Colbert

and Lauderdale Counties, which is located outside of its corporate limits. AGO 2010-017.

- A county is not an indispensable party to an easement action involving a private roadway over private land. *Steele v. O’Neal*, 87 So.3d 559 (Ala.Civ.App.2011).
- There is no authority for a municipality to independently place a toll booth on public streets. AGO 2013-030.
- Owner of property 400 feet away from vacated portion of county road lacked standing to appeal vacation of road, since owner failed to show that she had suffered a special injury as a result of the vacation; although owner alleged that she had used the vacated portion of the road to access a creek and that the vacated portion of the road was now blocked with a chain and padlocks, owner did not show that there was no other convenient way to access the creek. *Crossfield v. Limestone County Comm’n.*, 164 So.3d 547 (Ala.2014).
- State law authorizes municipalities to set speed limits and post speed limits on state and county roads within their incorporated limits. AGO 2012-050.
- Because the county commission never accepted the streets located in the subdivision that is within the corporate limits of the town, the county is not obligated to maintain those streets. AGO 2014-042.
- The town should assume responsibility for the public streets in the areas annexed during the 24 months following incorporation at the same time it begins to assume responsibility for the streets in the newly incorporated town. AGO 2019-049.

61. Vacation of Streets

The legislative authority to vacate streets has been delegated to municipalities subject to the constitutional prohibition against taking or damaging private property without just compensation. This delegation of authority is full and complete. The proper municipal authorities are the sole judges of the use of this power but must be guided by statutory provisions, limitations and restrictions. Vacation statutes are in derogation of the common law prohibition against vacating public ways and are strictly construed. *Bownes v. Winston County*, 481 So.2d 362 (Ala. 1985). This article summarizes the various methods available to municipalities for vacating public ways.

Vacation of Streets for the Erection of Public Buildings

The authority to vacate streets for the erection of public buildings is found in Sections 11-49-100 through 11-49-106, Code of Alabama 1975. This type of vacation is initiated by the governing body by adoption of an ordinance which should be preceded by a finding that “it is in the interest of the public convenience” that a portion of a street be vacated and discontinued as a highway.

The vacated portion of the street should be used, in whole or in part, for the erection and maintenance of “any state, county or municipal public building, or railroad station or depot, or street railroad station or depot.” Section 11-49-104, Code of Alabama 1975, requires that a “sufficiently ample portion of the thoroughfare” remain open for travel and traffic and it limits the vacation to “not more than one-half of the width of such highway or thoroughfare.”

The ordinance shall be adopted only by a two-thirds vote of the council. *See*, Section 11-49-103, Code of Alabama 1975. The ordinance contemplated under these sections may not be adopted until 30 days have expired since it was first introduced and after publication in a newspaper for two successive weeks. The publication shall state the time when the governing body will consider the ordinance and when an opportunity shall be given to object to its passage. This statute also authorizes postponement of action until the next regular meeting or to subsequent regular meetings of the governing body. The cost of publication shall be borne by the proposed user of the site. *See*, Sections 11-49-101 and 11-49-102, Code of Alabama 1975.

Section 11-49-106, Code of Alabama 1975, states that the “party for whom the street may be vacated under this article shall be liable to the owners of property adjacent thereto in any action for special damages suffered by them.”

This appears to be an infrequently used procedure.

Additional Statutory Authority

Sections 23-4-1 through 23-4-6, Code of Alabama 1975, provide an additional statutory method of closing and vacating streets. Sections 23-4-2 and 23-4-5 were amended in 2004 and Sections 23-4-4 and 23-4-5 were repealed. *See*, Act 2004-3231, 2004 regular session. Prior to 2004, these provisions required a hearing and approval in probate court in order to vacate streets and provided for the compensation of objecting landowners. As such, this method of vacating streets was rarely utilized by municipalities. As amended, the governing body of a municipality holds the hearing and makes the determination as to the vacation of streets without the involvement of the probate court except for the ultimate filing of the vacation. Further, there is no longer a provision for the compensation of objecting landowners.

Section 23-4-2, Code of Alabama 1975, provides that whenever the governing body of a municipality proposes to vacate a public street, alley, highway or portion thereof, the governing body shall schedule a public hearing prior to taking final action and shall publish notice of the proposed hearing on the vacation in a newspaper of general circulation in the portion of the county where the street, alley or highway lies once a week for four consecutive weeks prior to deciding the issue at a regularly scheduled meeting of the governing body. In addition, a copy of the notice shall be posted on a bulletin board at the county courthouse and shall also be served by U.S. mail at least 30 days prior to the scheduled meeting on any abutting owner and on any entity known to have facilities or equipment such as utility lines, both aerial or buried, within the public right of way of the street, alley or highway to be vacated. The notice shall describe the street, alley, highway or portion thereof proposed to be vacated and also give the date, time and location of the meeting of the governing body at which the proposed vacation is scheduled to be addressed. Any citizen alleging to be affected by the proposed vacation may submit a written objection to the governing body or may request an opportunity to be heard at the public hearing. Section 23-4-2, Code of Alabama 1975.

If the governing body elects to vacate, it must adopt a resolution describing with accuracy the street, alley, highway or portion thereof, to be vacated and give the names of the owner or owners of the abutting lots or parcels of land and also the owner or owners of such other lots or parcels of land, if any, which will be cut off from access thereby over some other reasonable and convenient way. The resolution must further set forth that it is in the interest of the public that such street, alley, highway or portion thereof, be vacated and must be filed in the probate court

of the county where the public way is located. The vacation does not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to and from their property and if that right is not afforded by the remaining streets and alleys, another street or alley affording that right must be dedicated. The resolution consenting to the vacation must be clear and unequivocal or the vacation is invalid. *Fordham v. Cleburne County Commission*, 580 So.2d 567 (Ala. 1991).

The filing of the resolution operates as a declaration of the governing body's vacation and divests all public rights and liabilities, including any rights which may have been acquired by prescription, in that part of the public street, alley or highway vacated. Generally, title and all public rights, including the right to close the street, alley or highway vacated, vests in the abutting landowners. However, the Alabama Court of Civil Appeals has held that Section 23-4-2(b) of the Code of Alabama, indicating that, upon vacation of a public right-of-way, title and all public rights "shall vest in the abutting landowners," does not alter the common law so as to require that every abutting landowner is entitled to a share of a vacated right-of-way. The common law would apply to permit the landowner abutting the vacated right-of-way, whose predecessor in interest contributed all the property for the right-of-way, to retake full ownership of the vacated right of way in fee simple. *Keeton v. Kelly Co., LLC*, 47 So.3d 1262 (Ala.Civ. App.2010). Further, entities with utility lines, equipment or facilities in place at the time of vacation, have the right to continue to maintain, extend and enlarge their lines, equipment, and facilities to the same extent as if the vacation had not occurred. Notice of the governing body's action shall be published once in a newspaper in the county no later than 14 days after its adoption.

Section 23-4-5, Code of Alabama 1975, provides that any party affected by the vacation of a street, alley or highway pursuant to Section 23-4-2 may appeal within 30 days of the decision of the governing body vacating the street to the circuit court of the county in which the lands are situated and upon such appeal, the proceeding shall be tried de novo, either party having the right to demand trial by jury when and as demand is authorized in civil actions. The appeal does not suspend the effect of the decision of the governing body unless the appealing party gives bond, with sureties, in an amount to be determined by the circuit judge. From the judgment of the circuit court, an appeal may be taken within 42 days by either party to the Court of Civil Appeals or the Supreme Court in accordance with the Alabama Rules of Appellate Procedure."

As stated earlier, prior to 2004, these statutes were not utilized often by municipalities in Alabama, perhaps because of the probability of the assessment of damages

and the cumbersome process of going through the probate court. These statutes are cited in *Talley v. Wallace*, 39 So.2d 672 (Ala. 1949); *Purvis v. Busby*, 71 So.2d 18 (Ala. 1954); and *Lybrand v. Pell City*, 71 So.2d 797 (Ala. 1954).

Vacation of Streets by Circuit Courts

Sections 35-2-58 through 35-2-62, Code of Alabama 1975, authorize the circuit courts to vacate and annul maps, plats, streets, alleys, avenues and roads pursuant to a civil action filed by any person owning land abutting the street, road or alley sought to be vacated or annulled. Unless all abutting owners join as plaintiffs, the owners not consenting shall be joined as party defendants along with the municipality.

The proceedings shall be conducted as equity suits and the court may grant the relief sought in whole or in part or it may deny relief in whole or in part. Appeals may be perfected to the Alabama Supreme Court which may affirm, reverse or render such judgment, decree or order as the trial court should have rendered. Section 35-2-59, Code of Alabama 1975. If the final judgment or order of the court states that any street, road or alley shall be vacated or annulled, the petition and final order shall be recorded at the expense of the person filing the proceedings. Section 35-2-60 and 35-2-61, Code of Alabama 1975.

This is the statute which the Supreme Court said was misconstrued in *Talley*, supra. It should be noted that there is no provision for compensating an objecting landowner under these sections. See, *Thetford v. Cloverdale*, 115 So. 165 (Ala. 1927). Courts have held that a circuit court cannot vacate property under these sections unless the consent of all abutting property is first obtained. *Turner v. Hoehn*, 494 So.2d 28 (Ala. 1986), *Hammond v. Phillips*, 516 So.2d 707 (Ala. Civ. App. 1987), and *Hoover v. Kanellis*, 574 So.2d 850 (Ala. Civ. App. 1990).

Vacation by Abutting Landowners

The most common procedure for vacating streets and alleys is found in Section 23-4-20, Code of Alabama 1975, which was amended in 2014 by Act 2014-333. This section provides that any street or alley may be vacated, in whole or in part, by the owner or owners of the land abutting the street or alley or abutting that portion of the street or alley desired to be vacated. The owner or owners of the land abutting the street or alley to be vacated must join in a written petition requesting that the street or alley be vacated and must file the petition with the governing body with jurisdiction over the street or alley or portion thereof, requesting the governing body's approval of the vacation. The governing body must set the request for vacation for public hearing within 100 days from the date the petition is received and notice of the hearing shall be provided as

set out in Section 36-25A-3 for notice of meetings of the governing body and shall describe the street or alley, or portion thereof, requested to be vacated. A copy of the notice shall also be served by U.S. mail at least 30 days prior to the scheduled meeting on any abutting owner and on any entity known to have facilities or equipment such as utility lines, both above ground or buried, within the public right-of-way of the street or alley, or portion thereof, to be vacated. If the municipal governing body elects to act on the petition, the governing body shall follow the procedures in Section 23-4-2(b) for taking the action. Any appeal of the decision of the governing body to vacate the street or alley, or portion thereof shall be as provided in Section 23-4-5. If the governing body approves the vacation, it has the same effect, including that the vacation must not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to and from their property and if that right is not afforded by the remaining streets and alleys, another street or alley affording that right must be dedicated.

Section 35-2-54, Code of Alabama 1975, is similar in procedure in that it allows abutting property owners to vacate property by joining in a written instrument declaring the vacation of a street or alley. It is essential that the written instrument be executed, acknowledged and recorded as are conveyances of land. When the declaration has been recorded, it shall operate to destroy the force and effect of the dedication of the street or alley vacated and the public rights in the street or alley will be divested. Like Section 23-4-20, when a street or alley sought to be vacated lies within the limits of a municipality, the governing body of the municipality must assent to the vacation. Assent is evidenced by a resolution adopted by the governing body, certified by the clerk and filed and recorded with the written declaration of vacation. The county governing body must assent if the street or alley is not within the limits of any municipality. Act 2014-333 also added provisions relating to vacation of streets and alleys by the county commission when family members petition to vacate a street or alley within the county. These provisions do not apply to municipalities. Section 23-4-20, Code of Alabama 1975.

The court, in *Stack v. Tennessee Land Co.*, 96 So. 355 (Ala. 1923), held that what is now Section 35-2-54, Code of Alabama 1975, was applicable only to streets which had been the subject of statutory dedication. *Chichester v. Kroman*, 128 So. 166 (Ala. 1930), held that the Legislature may vacate a street and may delegate this power to municipal authorities. This case also stated that “It is not every lot owner on said street whose rights are thus protected. But only those whose lots abut the portion of the street vacated, not including one whose lot only corners it, unless his property has by said vacation been cut

off without some convenient and reasonable way of travel from the outside.”

“A conveyance of lots embodied in such a plan [legal dedication] passes to the grantee the fee to medium line of the street encumbered by the easement in favor of the public ... Said fee is not subject to vacation by legislative action without just compensation being made or provided.” [court’s emphasis.] *Lybrand v. Pell City*, 71 So.2d 797, 801 (Ala. 1954). This rule was repeated in the *Bragg Apartments Inv. v. Montgomery*, 201 So.2d 510 (Ala. 1967). *Bragg* also held that the owner was entitled to compensation under the authority of Section 235 of the Constitution on the facts of the case. *Id.* at 513.

The Alabama Supreme Court, in *Gwin v. Bristol Steel and Iron Works, Inc.*, 366 So.2d 692 (1978), held that statutes in derogation of the common-law prohibition against the vacation of public ways will be interpreted to protect the property interests of non-consenting property owners affected by the proposed closing, subject only to the rule of remoteness. The court held that not only is this a rule of reason, but it is mandated by the most basic application of constitutional due process. *See also, Booth v. Montrose Cemetery Ass’n.*, 387 So.2d 774 (Ala. 1980); *Jackson v. Moody*, 431 So.2d 509 (Ala. 1983).

Suggestion

A request for a street vacation by abutting owners is usually proposed because of the resulting benefit to the petitioners. Often the petitioners do not consult counsel before making the proposal and therefore are usually not informed of the legal requirements necessary to affect the vacation.

The city of Montgomery has prepared a guide for petitioners/owners. This guide sheet is given to persons applying for a vacation of property. The guide cites the statutes, outlines legal requirements and states that the governing body may or may not assent to the proposal. In practice, all proposals are checked by the city attorney and the city engineer before action is taken by the governing body. All public utility easements should be protected before final approval is given at the expense, if any, of the petitioners. Easements, if required in the vacated street, should be granted simultaneously with the giving of assent and should be recorded along with the other documents.

Suggested Form A

STATE OF ALABAMA

_____ COUNTY

DECLARATION OF VACATION OF _____
STREET

WHEREAS, we, the undersigned _____, an un-
married man; _____, a widow; and _____ and
_____ husband and wife; separately and severally,
are the owners of all property abutting _____ Street
as same appears on the Plat of _____, which plat
is recorded in Plat Book _____, at page _____, in
the probate court of _____ County, Alabama, and,
also, as same appears on the _____ Plat, as recorded
in Plat Book _____ at page _____, in the Probate
Court of _____ County, Alabama; a map of which
street is attached hereto and made a part hereof, and

WHEREAS, we the said _____, an unmarried
man; and _____, a widow; and _____ and
_____, husband and wife, are desirous of vacating
said _____ Street, as same appears on each of said
plats;

NOW, THEREFORE, we the undersigned
_____, an unmarried man; _____, a widow;
and _____ and _____, husband and wife,
owners of each of said plats embraced within the boundar-
ies of said _____ Street, as same appears of record
on each of said plats to be vacated, and same is hereby
requested to be vacated.

We, the said _____, an unmarried man;
_____, a widow; and _____ and _____,
husband and wife, do hereby, pursuant to and in accord-
dance with the provisions of Section 23-4-20 of the Ala-
bama Code of 1975, join in the execution of this written
request for vacation of said street and same being within
the limits of the city of _____, a municipality, do
hereby pray and request the assent of the municipal coun-
cil of the city of _____, Alabama, to said vacation
of said street and its approval of same.

Such vacation will not deprive other property owners of a
convenient and reasonable means of ingress and egress to
their property.

IN WITNESS WHEREOF, we the said _____,
an unmarried man; _____, a widow; and _____
and _____, husband and wife, have hereunto set our
hands and seals on this the ____ day of _____, 20__.

(L.S.)

(L.S.)

(L.S.)

(L.S.)

STATE OF ALABAMA

_____, COUNTY

I, _____, a notary public in and for said county
in said state, hereby certify that _____, _____,
_____ and _____, whose names are signed to
the foregoing instrument, and who are known to me, ac-
knowledge before me on this day that being informed
of the contents of said instrument they executed the same
voluntarily on the day the same bears date.

Given under my hand and seal this the ____ day of
_____, 20__.

(SEAL)

My Commission Expires:

Notary Public

_____ County, Ala.

Suggested Form B

STATE OF ALABAMA

_____ COUNTY

WHEREAS, a petition signed by the owners of all

of the lands abutting the following described street, situated in the city of _____, county of _____, state of Alabama, requesting the vacation of said street, has been duly presented to the _____ of the city of _____, Alabama, for the assent and approval of said governing body, said petition with map attached being hereto affixed, marked Exhibit A and made a part hereof, and

WHEREAS, pursuant to Section 23-4-2 of the Code of Alabama 1975 notice of said request for vacation was published and a hearing was held on the ____ day of _____, 20____, and

WHEREAS, the street above referred to is more particularly described as follows:

[Legal description of street to be vacated and to coincide with the description used in the declaration] and

WHEREAS, it appears to the _____ of the city of _____, Alabama, that the vacation of said street is in order and that convenient and reasonable means of ingress and egress is afforded to all other property owners owning properties in the tract of land embraced in said Plat of _____ and in the said _____ Plat:

NOW, THEREFORE, BE IT RESOLVED, by the _____ of the city of _____, Alabama, that the vacation of the hereinabove described street is assented to and approved and same is hereby vacated pursuant to the provisions of Section 23-4-20 of the Alabama Code of 1975.

STATE OF ALABAMA

_____ COUNTY

I, _____, city clerk of the city of _____, Alabama, do hereby certify that the above is a true, correct and exact copy of a resolution duly and legally adopted by the _____ of the city of _____, Alabama, at a meeting thereof on the ____ day of _____, 20____, as taken from the minutes of said meeting.

Witness my hand and official seal on this the ____ day of _____, 20____.

City Clerk of the City of _____, Alabama

(OFFICIAL SEAL)

Note that the above form is in writing, purports to be signed by all abutting owners of the street, is properly executed and acknowledged and asserts that the vacation will not deprive other property owners of rights of ingress and egress to their property. The resolution states that all abutting owners have signed the declaration, gives a legal description of the street, finds that the vacation does not affect rights of ingress and egress of other property owners and manifests the assent of the city to the proposal. The clerk's certificate is essential.

Those instruments should be recorded in the appropriate probate court at the expense of the landowners.

Note: These forms should be considered only as samples and guides since nearly every proposal will require slight changes. Care should be exercised in all vacations as title to real estate is affected by the recording of the instruments in the probate court.

Fee Can Be Required of Abutting Landowners

Prior to a municipality exercising its power to vacate a public right of way for a road, street, alley or other dedicated public way, open or unopen, as a condition of the exercise of such power to vacate, the governing body may require abutting landowners who will directly benefit from such vacation to pay to the municipality a vacation right of way fee equal to the fair market value of the land which will be added to the holdings of such abutting landowners. Procedures for determining the amount of the fee are set out in Section 11-49-6, Code of Alabama 1975, as amended.

Railroad Crossings

The Alabama Department of Transportation has authority to abandon or discontinue a grade crossing of a railroad on any portion of a state highway or a street on a state highway route. This law was amended in 1994 to give the Alabama Department of Transportation the authority to abandon, close, or discontinue a grade crossing of a railroad on a private, municipal, or county highway, street, or right of way. The procedures are set out at Section 37-2-84, Code of Alabama 1975.

Attorney General's Opinions and Court Opinions

- A town may not vacate a dedicated street if such vacation will result in denial of both public and private access to a public body of water by the currently-used route. AGO 1983-334 (to Hon. Thomas B. Norton, May 30, 1983).

- The vacation of a street or alley abutting a public body of water requires the consent of the public entity owning the land under that public body of water. AGO 1983-445 (to Hon. Thomas B. Norton, August 24, 1983).
- A city may not vacate a street without the consent of all abutting property owners, although there are other statutory methods available which do not require the consent of abutting landowners. AGO 1992-253.
- A city may, at the request of a property owner, in its discretion vacate a street, avenue and alley surrounded by a property owner's property provided the requirements of Section 35-2-54, Code of Alabama 1975, are satisfied. AGO 1994-092.
- There is no authority for a public agency to rescind the vacation of a public road. The road must be re-dedicated and accepted. AGO 1994-195.
- Where a street is vacated by abutting property owners pursuant to Section 23-4-20, Code of Alabama 1975, the procedures spelled out in Section 23-4-2 must be followed. AGO 1997-048.
- In *Elmore County Commission and Elmore County v. Smith et al.*, 786 So.2d 449 (2000), the Alabama Supreme Court held that the procedures for vacating a public roadway in Section 23-4-2, Alabama Code 1975, *do not* apply to vacation under Section 23-4-20. **Note:** With the amendment of Section 23-4-20, Code of Alabama 1975, this case is no longer good law. Section 23-4-20 requires that the procedures in Section 23-4-2 be followed.

62. Municipal Fire Protection

Fire protection is one of the oldest functions performed by municipal corporations. The need for fire protection in closely developed communities has often stimulated inhabitants to incorporate a town or city. While tremendous strides have been made in firefighting through the improvement of equipment, scientific training and constant research, the fact remains that hostile fires continue to be a fearsome and dreaded threat to homes and businesses. It would seem that problems connected with the municipal fire protection function would have been solved during the long history of the service. However, as old problems are solved, new problems appear.

Fire departments may be either paid or volunteer. They may be established either as a municipal department or a totally separate organization. The relationship between the municipality and the fire department differs based on how the department was established and whether it is considered a municipal department.

Municipal volunteer fire departments should not be confused with fire districts or community fire departments. Fire districts are authorized by state statute and are manned by either paid or volunteer firefighters. Community fire departments operate as private organizations and are supported by donations or by contracts with property owners. A municipal volunteer fire department, on the other hand, is a branch of the municipal government. Operating funds are appropriated by the governing body, and firefighters are volunteers who receive little or no reimbursement above actual expenses for their services.

The League has prepared a special report entitled *The Municipal Volunteer Fire Department* which answers basic organizational questions regarding volunteer fire departments. Copies may be obtained by writing to League headquarters.

Basic Authority

The creation of a fire department is at the discretion of the municipality. The basic authority for municipalities to provide fire protection services within the corporate limits is found in Section 11-43-140, Code of Alabama 1975. This statute is permissive rather than mandatory.

Section 11-43-5, Code of Alabama 1975, authorizes the municipal governing body to provide for the appointment of a chief of the fire department and to prescribe the duties of the chief. The courts have ruled that this section also authorizes the governing body to fix the salary of the fire chief. *See, Beasley v. McCorkle*, 184 So. 904 (Ala. 1938). The mayor may appoint the fire chief where the ordinance is silent as to appointing powers. See Section 11-43-81,

Code of Alabama 1975. Section 11-43-160 of the Code of Alabama 1975, gives the city council the authority to remove any officer in the several departments, including the fire chief, but not city employees. The term “officer” includes all those positions specifically set forth in the Code of Alabama as “officers,” as well as any position created by the city council pursuant to ordinance. AGO 2012-039.

The council may delegate to commissioners by ordinance the power to control and manage such fire department under such rules and regulations as the commissioners or the council may prescribe. Section 11-43-140, Code of Alabama.

The chief of the fire department, the chief of police or marshal of every incorporated city or town in which a fire department is established, the mayor of each incorporated town in which no fire department exists and the sheriffs of the several counties of the state shall be, by virtue of such offices so held by them, assistants to the Fire Marshal, shall be subject to the duties and obligations imposed by this article and subject to the direction of the Fire Marshal in the execution of the provisions of this article. Section 36-19-3, Code of Alabama 1975. The chief of a municipal fire department or a municipally sanctioned volunteer fire department, who has complied with APOST standards may, if directed by the State Fire Marshall, issue a citation for the violation of a state law related to the matters set forth in Section 36-19-2 of the Code of Alabama 1975, relating to fire protection. AGO 2005-198. A person under the age of 18 is prohibited from serving as a firefighter in a volunteer fire department. Section 25-8-43, Code of Alabama 1975.

Firefighters in a Fire Protection District may not perform routine traffic control in non-emergency circumstances. AGO 2011-061. Volunteer firemen at the scene of a vehicle accident do not have arrest powers other than those of a private citizen. The chief of a municipally sanctioned volunteer fire department may, under certain limited circumstances as set forth in AGO 2005-198, issue citations. A volunteer firefighter’s privately-owned vehicle is not an authorized emergency vehicle unless designated as such by the chief of police of an incorporated city or the Director of Public Safety. Only authorized emergency vehicles may use red lights visible from the front of such vehicle. No vehicle other than an authorized emergency vehicle may have flashing white lights other than signal lights and emergency flashers authorized by section 32-5-241(d)(3) of the Code of Alabama. AGO 2009-063.

A municipality cannot be held liable for the intentional torts of its employees, pursuant to §11-47-190, Code of Alabama 1975. In the case of *State v. Baumbauer*, 12 So. 2d

326 at 330 (1942), the Supreme Court of Alabama observed that the law does not impose a duty upon a municipality to establish and maintain a fire department. Once a city or town organizes and provides for a professional fire department, however, a duty is owed to the citizens of the city or town and the municipality may be liable for negligent acts committed in the performance of that duty. *See, Williams v. Tuscumbia*, 426 So.2d 824 (Ala. 1983) and *Zeigler v. Millbrook*, 514 So.2d 1275 (Ala. 1987). However, if a city creates a volunteer fire department, the municipality does not have a legally enforceable duty to provide skillful fire protection for the purposes of imposing municipal liability. *Hollis v. Brighton*, 885 So. 2d 135, 140 (Ala. 2004) (emphasis added). Municipalities should carefully consider their ability to provide adequate fire protection prior to organizing a department or agreeing to provide protection outside the municipal limits.

Since the decision of the Alabama Supreme Court in the case of *Jackson v. Florence*, 320 So.2d 68 (1975), which abolished governmental immunity for municipalities, cities and towns have been liable for negligent actions of their employees, including firefighters, which happen in the exercise of governmental functions such as firefighting. However, in 2009 the Alabama Supreme Court held that a “governmental entity” as defined in the Volunteer Service Act, is immune from civil liability if the damages or injury were not caused by the volunteer’s willful or wanton misconduct and that a governmental entity could not be held vicariously liable for acts of a volunteer who was immune from liability under the Volunteer Service Act. *Wheeler v. George*, 39 So.3d 1061 (Ala. 2009). Municipalities are not required to pay medical expenses incurred by firefighters in the exercise of their duties. However, all municipalities over 2,000 in population must provide workers compensation coverage for their employees. Municipalities of less than 2,000 in population may provide workers compensation coverage. Section 25-5-13, Code of Alabama 1975.

No direct authority exists for a municipality to provide fire protection within the police jurisdiction. This authority is implied by, and is necessarily incident to, the power of a municipality to provide for the health, welfare and sanitation in the police jurisdiction. Section 11-40-10, Code of Alabama 1975. In addition, the power to levy license taxes in the police jurisdiction under the police power implies the authority of the municipality to provide protection services. Section 11-51-91, Code of Alabama 1975. And, the Attorney General has ruled that a municipality may expend public funds to equip and maintain a fire station in its police jurisdiction. AGO 1997-234.

While the power exists, it is not imposed as a mandatory duty upon a municipality. For instance, in AGO 1999-019, the Attorney General held that unless there is a contract, if a municipality does not receive any tax revenue from the police jurisdiction, the municipal fire department has no obligation to provide fire protection in the police jurisdiction. However, where a town is providing police and fire services within its police jurisdiction, albeit by contract and subsidies, businesses within the police jurisdiction of the town are subject to reasonable privilege and license taxes. AGO 2014-008. Municipalities have adopted a variety of policies for fire protection services in the police jurisdiction. If a city levies and collects taxes to provide fire protection services, the city council is not allowed to establish an additional fee system that would charge individuals for fire protection services to the extent of their insurance coverage. AGO 2007-116. In addition, the city may not seek to collect insurance proceeds from applicable policies held by individuals who reside in the corporate limits pursuant to the costs of EMS, hazardous material, and rescue services rendered by the department. If the city does not levy and collect license fees in its police jurisdiction, it may seek to collect insurance proceeds from applicable policies held by individuals who reside there pursuant to the costs of fire, EMS, hazardous material, and rescue services rendered by the fire department. AGO 2019-012.

A municipality’s authority over fire protection and rescue services in the police jurisdiction is not exclusive. If, however, a municipality undertakes to provide fire protection in its police jurisdiction, the services provided in the police jurisdiction should be provided equally throughout the police jurisdiction. E-911 boards, municipalities, and volunteer fire departments should work together to ensure the most efficient service to persons in their districts. A municipality may contract with an E-911 board and the municipality may contract with a volunteer fire department to provide service in a portion of the police jurisdiction, provided that the protection is equal to that provided elsewhere in the jurisdiction. AGO 2010-103.

Firefighter Training

In 1975 the state Legislature created the Firefighters’ Personnel Standards and Education Commission to govern the paid employees of each municipal firefighting agency. The law, codified at Sections 36-32-1 through 36-32-12, Code of Alabama 1975, as amended, requires all appointees as firefighters to meet certain minimum standards for firefighters as prescribed by the commission. Volunteer firefighters may be certified by the Commission, although certification is not mandatory. Candidates for volunteer firefighter certification must complete 160 hours of training within a 24-month period at a training center approved by

the Commission. This training does not have to be taken during continuous sessions. The cost of such training is paid by the municipality. Section 36-32-7, Code of Alabama 1975; Ala. Fire College & Personnel Stnds Comm'n Rule 360-X-2-.01.

Any entity that hires a firefighter, within two years of the completion of the required training, shall reimburse the amount expended on the training to the governmental entity that paid for the training. Section 36-21-7, Code of Alabama 1975.

Firefighter Organizations

Section 11-43-143, Code of Alabama 1975, forbids strikes by firefighters. However, firefighters are given the authority to present proposals on working conditions to their employers by any representative of their own choosing.

Mandatory Disability and Cancer Benefits

In 2019, the Alabama Legislature passed Act 2019-361 codified in Section 36-30-50, Code of Alabama 1975 which requires municipalities with paid fire departments to provide and maintain sufficient insurance coverage on each career firefighter to pay claims for cancer diagnosed after the career firefighter has served 12 consecutive months. The law also requires that these benefits be made available to Volunteer firefighters on an optional basis.

The Code defines a paid fire department as any department or division of the state, a county or municipal government, an airport authority, or a fire district with paid employees assigned firefighting duties. Section 36-30-50 (b)(5), Code of Alabama 1975. Career firefighters are defined as “any person employed with the state, a county or municipal government, an airport authority, or a fire district who has obtained certification as a firefighter through and as defined by the Alabama Firefighters’ Personnel Standards and Education Commission, or a firefighter employed by the Alabama Forestry Commission who has been certified by the State Forester as having met the wild land firefighter training standard of the National Wildfire Coordinating Group, and is offered typical employment health insurance coverage. Section 36-30-50 (b)(2), Code of Alabama 1975.

Typical employment benefits include health insurance coverage, but health insurance coverage is not the only type of typical employment benefits that may be offered to employees. Thus, if a paid fire department provides typical employment benefits to its employees, the department must provide this cancer coverage to a firefighter who has obtained certification as a firefighter through the Commission. AGO 2020-031.

In the event a career firefighter is employed by multiple fire departments at the same time, the primary employer is responsible for the cancer coverage. Section 36-30-50(d)

(1), Code of Alabama 1975. The primary employer is the employer who provides primary health insurance benefits to the career firefighters. AGO 2020-031.

Beyond the Police Jurisdiction

At the discretion of the governing body, a municipality may contract with other municipalities, counties, industries and residential and business areas to provide fire protection. Except as otherwise provided or prohibited by law, any county or incorporated municipality of the State of Alabama may enter into a written contract with any one or more counties or incorporated municipalities for the joint exercise of any power or service that state or local law authorizes each of the contracting entities to exercise individually. Section 11-102-1 *et. seq.*, Code of Alabama 1975. In 1955, the Legislature adopted a law authorizing municipalities to send firefighting equipment to areas beyond the boundaries of the police jurisdiction. This law is found in Sections 11-43-141 and 11-43-142, Code of Alabama 1975. Section 11-43-141 states in part: “Whenever the necessity arises during any emergency resulting from fire or other public disaster, the firemen of any city or town, may, together with all necessary equipment, lawfully go or be sent beyond the corporate limits and police jurisdiction of such city or town to any point within the State of Alabama, to assist in meeting such emergency.”

Citing this section, the Attorney General has ruled that a municipality may assist in fighting fires which occur beyond its corporate limits and police jurisdiction without reference to a definition of the word “emergency.” AGO to Hon. Frank Amberson, September 4, 1963. In another opinion, the Attorney General ruled this section authorizes a municipality to send its firefighters and equipment beyond the corporate limits and police jurisdiction without compensation to the municipality. AGO to Mayor V. H. Albright, March 8, 1963.

However, a municipality may charge a fee for providing fire protection “outside the corporate limits.” AGO 1995-160. Section 11-43-142, Code of Alabama 1975, states “the governing body of any city or town may, in its discretion, authorize or require the fire department thereof to render aid in cases of fire occurring beyond their corporate limits and police jurisdiction, and may prescribe the conditions on which such aid may be rendered and may enter into a contract or contracts with other cities and towns, with counties or county boards, manufacturing or industrial concerns, or residential and business areas for rendering fire protection in such places on such terms as may be agreed upon...” While these are useful statutes which expressly authorize mutual aid agreements between municipalities, a municipal governing body should be extremely cautious about entering agreements to protect areas beyond the

police jurisdiction. Before entering such an agreement, the governing body should consult ISO Commercial Risk of Atlanta, to determine possible effects on the insurance rating of the municipality. Furthermore, the contract or agreement should be worded so that the municipality cannot be held liable for breach of contract.

Rural Protection

Fire protection to unincorporated areas is provided by fire districts organized by state statute and by private volunteer fire departments. Local emergency management units also provide some services in this area. Fire protection authorities formed pursuant to Section 11-88-1, et seq., of the Code of Alabama are not required to provide services to their entire defined service territory. Residents within the territory who receive such services by virtue of a municipal fire department or a volunteer fire department should not be charged by the authority. Section 11-88-7(a) (24) allows fire protection authorities to charge reasonable rates, fees, and other charges for fire protection services. The determination of whether a particular rate or fee is reasonable must be made by the authority. AGO 2008-008. A Water, Sewer, and Fire Protection Authority, formed pursuant to sections 11-88-1, et seq., is authorized to revise its rates and assess consumers in a manner that the Authority deems to be reasonable given the particular circumstances. AGO 2010-004.

Because fire districts may be created as firefighting districts or firefighting and medical services districts, the types of calls to which the Volunteer Fire Department must respond depends on the type of district created in its bylaws. Such a Volunteer Fire Department is responsible for responding to all fire calls within its district. AGO 2010-027. Fire protection authorities formed pursuant to section 11-88-1, et seq., of the Code of Alabama are not required to provide services to their entire defined service territory. Residents within the territory who receive such services by virtue of a municipal fire department or a volunteer fire department should not be charged by the authority. Section 11-88-7(a)(24) allows fire protection authorities to charge and revise from time to time reasonable rates, fees, and other charges for fire protection services. The determination of whether a particular rate or fee is reasonable must be made by the authority. AGO 2008-008.

Establishing and Funding Volunteer Departments

A municipality may establish a municipal volunteer fire department by adopting an ordinance of general and permanent operation. Final control of a municipal volunteer fire department should be left in the hands of the municipal governing body.

To be certified as a volunteer fire department by the Alabama Forestry Commission, an entity must meet the requirements that are set forth in Section 9-3-17, Code of Alabama. Specifically, fire departments seeking volunteer certification must be an incorporated nonprofit organization or as an authority of a municipality, fire district, or other legal subdivision to be eligible for assistance from the Forestry Commission. Further, to be classified as a volunteer fire department under Section 9-3-17, there must be no less than 80 percent unsalaried membership in the department. AGO 2011-064. Municipal volunteer fire departments can be funded by municipal appropriations, grants and/or donations. All expenditures for fire department purposes should be made through appropriation by the governing body. Municipal funds cannot be used to purchase equipment or supplies for a volunteer fire department without the knowledge and consent of the municipal governing body, or council. AGO to Hon. Christine Clifton, September 20, 1955. A volunteer fire department is subject to the Competitive Bid and Public Works Laws. AGO 2012-016.

A city may donate training funds under Section 9-3-18, Code of Alabama 1975, to a volunteer fire department that is not part of the municipal government without regard to the residence of its volunteers; however, it is highly suggested that the city enter into a contract with the volunteer fire department for the services in return for money donated, if such an agreement is intended. AGO 1982-036 (to Hon. Jack A. Higgins, October 27, 1981).

If a volunteer fire department is recognized or sanctioned by a city, funds collected by that agency become city funds and should be included in the written financial mayor's report to the council and should be audited with other city funds. The city council has final authority on the expenditure of these funds. If the funds are solicited by a group of volunteers not directly tied to the city, then these funds belong to that organization. *See*, AGO 1985-129 (to Ms. C. Eleanor Byrd, December 18, 1984), and AGO 1994-063. If a volunteer fire department is sanctioned by a municipality, funds received by the department must be audited along with all other municipal funds. AGO 1995-050 and AGO 1994-083.

Except where otherwise provided by law, the mayor is generally the appointing authority for firefighters in a municipal volunteer fire department, *See* Section 11-43-81, Code of Alabama 1975. The mayor of a city or town does not have oversight over who may be accepted as a local volunteer firefighter if the volunteer fire department is organized as a nonprofit corporation separate from the municipality. A volunteer fire department organized as a nonprofit organization with a board of directors as its governing body is separate and apart from the governance

of the municipality in which the volunteer fire department is located. AGO 2009-098

Volunteer fire departments are not exempt from paying their prorated share of the cost of programs for the equalization of ad valorem taxes. AGO 1995-287. A volunteer fire department is exempt from solid waste disposal fees under section 40-9-13 of the Code of Alabama. AGO 2011-054.

Compensation for Volunteer Firefighters

If a person is compensated for volunteer work, that person could be considered an employee for purposes of the Fair Labor Standards Act (FLSA). The FLSA recognizes the generosity and public benefits of volunteering and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. In this spirit, in enacting the 1985 FLSA Amendments, Congress sought to ensure that true volunteer activities are neither impeded nor discouraged. Congress, however, also wanted to minimize the potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements in "volunteer" situations.

Section 3(e)(4)(A) of the FLSA and 29 C.F.R. §§ 553.101 and 553.103 indicate that an individual is a volunteer, not an employee of a public agency, when the individual meets the following criteria:

- Performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered. Although a volunteer can receive no compensation, a volunteer can be paid expenses, reasonable benefits or a nominal fee to perform such services;

- Offers services freely and without pressure or coercion, direct or implied, from an employer; and

- Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

Section 3(e)(4)(A) of the FLSA, 29 U.S.C. § 203(e)(4)(A), also permits public agency employees to volunteer their services to their employing public agency, as long as there is no coercion or undue pressure on the employee, and they do not provide the same type of services for which they are employed. The phrase "same type of services" means "similar or identical services." 29 C.F.R. § 553.103(a). *See*, Wage and Hour Opinion Letter FLSA2009-35.

Neither the FLSA nor the 1985 FLSA Amendments define the term "nominal fee." However, the Department of Labor has issued regulations providing guidance in this area. The regulations focus on preventing payment for performance, which is inconsistent with the spirit of volunteerism contemplated by the FLSA. Thus, a fee would not be considered nominal if it is, in fact, a substitute

for compensation or tied to productivity. *See* 29 C.F.R. § 553.106(e); *see also* Wage and Hour Opinion Letter FLSA2005-51. Generally, a key factor in determining if a payment is a "substitute for compensation" or "tied to productivity" is "whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities." Wage and Hour Opinion Letter FLSA2005-51. If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal. *See id.*; *see also* 29 C.F.R. § 553.106(e). Whether the nature and structure of payments made to individuals would result in their losing volunteer status is determined by examining the total amount of payments made (expenses, benefits, and fees) in the context of each particular situation. *See*, Wage and Hour Opinion Letter FLSA2008-16.

Further, when a public agency employee volunteers, the Department of Labor will presume the fee paid is nominal as long as the fee does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time employee for the same services. This 20 percent rule is derived from the FLSA and implementing regulations. *See*, Wage and Hour Opinion Letter FLSA 2005-51. A willingness to volunteer for 20 percent of the prevailing wage for the job is also a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. *See*, Wage and Hour Opinion Letter FLSA 2006-28.

Section 11-43-12 of the Code does not prohibit a mayor or members of the city council from serving as volunteer firemen or volunteer fire chief, voting on matters related to the volunteer fire department, including budgets, spending, and fire-call compensation, so long as they do not receive compensation for their services from the fire department. Opinion to Honorable Joe C. Brantley, Mayor, Town of Flomaton, dated AGO 1997-248; AGO 1997-12 (opining an uncompensated volunteer fire chief does not hold an office of profit and could serve as a city council member.)

All municipal officers may be provided reimbursement for their expenses incurred in the performance of municipal duties. AGO to Hon. Paul Shipes, February 8, 1974. Municipalities are not required to secure medical insurance for their employees. Cities and towns can provide such coverage for their employees including volunteer firefighters. AGO 1983-337 (to Hon. Robert S. Milner, May 30, 1983). A city or town may not purchase disability insurance for members of the volunteer fire department unless a contractual relationship exists between the two entities. If a councilperson serves as a volunteer, he may receive such coverage provided he did not vote on it. AGO 1979-282 (to Hon. J. Frank Lanier, September 10, 1979).

Municipalities may provide workers compensation coverage for volunteer firefighters. Each municipality

should contact its insurance carrier about this coverage. Beneficiaries of volunteer firefighters are entitled to the death benefit provided by the state if the firefighter died while engaged in the performance of duties as a volunteer firefighter. AGO to Hon. William H. McDermott, February 26, 1975. In addition, the State of Alabama provides benefits to volunteer firefighters who are killed or disabled in the line of duty. *See*, Section 11-43-144, Code of Alabama 1975. The city may elect to provide for a pension system or an allowance for service-connected disabilities under the provisions of Section 11-43-144, Code of Alabama 1975. However, in the absence of a monetary allowance or pension system established for firemen injured in the line of duty by the city, the city does not have any liability imposed by law in favor of a disabled fireman qualified pursuant to Section 11-43-144, Code of Alabama 1975. AGO 1993-254.

Fire Insurance Rating

The fire insurance rating of a municipality is the grade assigned to it by fire insurance underwriters. The rating is based on the fire defenses of a city and on the physical conditions which pertain to fire insurance. Depending on the insurance company, the rate assigned to a municipality may directly affect the fire insurance premiums paid for coverage of properties situated within the corporate limits of the municipality. Rating engineers from ISO Commercial Risk periodically visit each municipality in the state to inspect the fire defense system. From such visits, a municipality may receive a better rating, retain its current rating, or receive a lower rating. Municipalities should consult with rating engineers to determine what is needed to improve ratings. In some instances, minor changes can result in a better rating to save property owners large sums in fire insurance premiums.

Under the fire insurance rating system, the highest classification designates the least fire protection and, therefore, results in higher insurance premiums. A lower classification brings with it a reduction in premiums.

The rating is determined by scores on items in fire protection defenses – water supply, fire department, fire alarm system, police department, fire prevention activities, building department and structural conditions.

Generally, the fire insurance rating of a municipality is applied to all properties located within the corporate limits of the municipality for fire insurance premiums. Different types of property within the municipality take different individual rates under the overall rate assigned to the city or town. It is possible, however, for a municipality to have a split rate.

Some years ago, the City of Huntsville annexed approximately 10 square miles of territory. Rather than rate the whole city down because of the dissipation of

city fire defenses to cover the new territory, the rating engineers allowed the area within the old city limits to retain its existing classification while the newly-annexed area was given the highest classification in the protection grading system. In so doing, the city established a plan to upgrade the classification in the annexed area on a year-to-year basis until it was as good as the rating within the old corporate limits.

Effect of Outside Service

The problem of confining the firefighting service to the corporate limits of a municipality involves moral, economic, political and organizational considerations. Municipal officials are often reluctant to establish a firm policy on the question of whether to send firefighters and equipment beyond the corporate limits.

The debate usually begins with the question “Is it wrong to allow property to burn without sending assistance when equipment and firefighters are available?” Then it is pointed out that citizens of the municipality incorporated the area for protection and the citizens pay the costs of maintaining the services. Similarly, the question is raised about dissipating the available forces for protection inside the corporate limits. Then the argument is advanced that businesses in the police jurisdiction pay license taxes to the city based on the police power which includes protection services rendered in the area by the municipality. All the while there lingers the question of if the municipality extends services freely in the police jurisdiction and the areas beyond, what are the advantages of incorporation and what reason would the inhabitants of the fringe areas have for annexing to the municipality? Last, and probably most controlling, is the question of economic costs and the effect which the extraterritorial fire service policy has on the insurance rating of the city or town.

Unlimited free service to all residences and businesses in the police jurisdiction and areas beyond would probably result in a higher, less desirable, fire insurance rating for a municipality. Conversely, if a municipality has sufficient equipment and firefighters to fight limited fires in areas beyond while still maintaining forces to fight fires within the corporate limits, the rating might not be affected. This is a matter which varies between municipalities. Care should be taken by the municipal governing body to consult with ISO officials before going too far in establishing an extraterritorial service policy.

Alternative Policies

Numerous policies could be adopted by municipalities to answer the question of extending fire services beyond the corporate limits. A municipality may flatly refuse to send any firefighters and equipment outside the corporate

limits. Or, services may be extended to all businesses and residences in recognition of the taxes paid by such businesses. Or, services may be extended beyond the corporate limits on the basis of a contract or agreement with extraterritorial property owners who reimburse the municipality for services rendered. Another factor which might enter into the determination of the fire service policy is the willingness of extraterritorial residents to pay for a rider on fire insurance policies which carry an agreement on the part of the insurer to pay the city for calls actually answered to the property and not exceeding a stipulated amount.

If a municipality adopts a policy to provide protection to extraterritorial areas within three miles of its firefighting units and the municipal forces meet certain minimums in equipment and personnel and alarm facilities, the extraterritorial property so protected enjoys what is known as a protected suburban rate, which lowers the cost of insurance premiums. This is a factor which the municipal governing body should take into consideration when deciding whether to extend free firefighting services to nontaxable properties beyond the corporate limits.

Another policy option should be mentioned. Should a municipality enter into mutual aid agreements with neighboring municipalities? ISO smiles upon such agreements in most cases, provided the firefighting forces do not leave the municipality unprotected when aid is sent to a city or town covered by the agreement. Such agreements are recommended for, and suited to, municipalities located in close proximity to each other. Again, the municipal governing body should seek the advice of the rating engineer before making a firm commitment with another municipality.

The Effect of Annexation

When property is annexed to a municipality it usually enjoys the insurance rating given to the municipality. A municipality is generally committed to protect all property within the corporate limits; therefore, an annexation automatically dissipates the strength of the firefighting forces of the municipality. For this reason, ISO maintains a close watch for annexations and, if a very large area is annexed to a municipality, engineers are sent in immediately to re-evaluate the fire defenses available to the whole area of the city or town.

The rating bureau has been most cooperative with municipalities in this respect. A municipality is rarely graded down because of an annexation, especially when the municipal governing body agrees to increase its fire defenses in a planned manner over future years and then follows the plan. As noted above, the old corporate limits of Huntsville maintained its rating when the city annexed

10 square miles while the newly-annexed area was given a different rating. The annexation did bring a better rate to the annexed area than it enjoyed prior to the annexation. Therefore, annexation does not automatically mean a change for the worse in the municipal insurance rate. Property annexed will generally enjoy a better rate, but care should be exercised when the annexation of a very large area is contemplated.

Accepting Subdivisions

New subdivisions can strain existing fire defenses. Most municipalities now have subdivision regulations which state that plats will not receive final approval until a minimum of public utilities and public improvements have been installed and approved by proper municipal officials or until the subdivider provides a bond payable to the municipality to ensure proper installation of such facilities.

Most subdividers are primarily interested in economic return for their efforts and investment. Therefore, it is vitally important for a municipality to ensure that permanent installations which affect the fire insurance rating of the municipality meet the standards required by ISO. For instance, minimum-sized water mains and adequately-spaced regulation fire hydrants should be installed. A municipality should ensure that such installations will be made within rating requirements at least as restrictive as those needed to meet the existing rate enjoyed by the municipality.

Opinions of the Attorney General and Court Cases

- Fire Records of fire districts are public records. AGO 92-00351.
- District records maintained as a computer data base are public records. AGO 92-00274.
- An uncompensated volunteer fire chief does not hold an office of profit and could serve as a city council member. AGO 1993-012.
- The city may elect to provide for a pension system or an allowance for service-connected disabilities under the provisions of Section 11-43-144, Code of Alabama 1975. However, in the absence of a monetary allowance or pension system established for firemen injured in the line of duty by the city, the city does not have any liability imposed by law in favor of a disabled fireman qualified pursuant to Section 11-43-144, Code of Alabama 1975. AGO 1993-254.
- Departments may provide standby fire protection for brush fires and controlled agricultural burns, but equipment cannot be used to fill swimming pools and ponds for residences. AGO 1995-085.

- Sections 36-19-1 through -3, Code of Alabama 1975, do not authorize deputies and assistant fire marshals to issue citations for municipal ordinance violations. Citations may only be issued by municipal police officers. AGO 1997-221.
- Section 11-43-12 of the Code does not prohibit a mayor or members of the city council, all serving as volunteer firemen, from voting on matters related to the volunteer fire department, including budgets, spending, and fire-call compensation, so long as they do not receive compensation for their services from the fire department. AGO 1997-248.
- The proceeds of a local tax which provides that the funds shall be used “for fire protection and rescue services” may be used to establish an ambulance service within a municipal fire department. AGO 1998-222.
- In *Rainsville v. State Farm Insurance Co.*, 716 So.2d 710 (Ala. Civ. App. 1998), the Alabama Court of Civil Appeals held that the city insurance policy did not cover the city or the firefighter who had an accident while driving his own car to the fire station.
- Volunteer, nonprofit fire departments that act gratuitously and in good faith are entitled to immunity provided by Section 6-5-335 of the Code. Whether the immunity applies in other situations can only be determined by a court of competent jurisdiction. AGO 1999-045.
- A councilmember may serve as a volunteer firefighter and be reimbursed for expenses or receive an expense allowance. The councilmember may drive a fire department vehicle home if the officials in charge of the department authorize it. The ethics commission should also address this question. AGO 1999-165.
- Funds of volunteer fire departments sanctioned by a municipality are under the control of the municipal governing body. AGO 2001-059.
- Pursuant to their authority to protect the health, safety and welfare of the public, volunteer fire departments may enter private property to extinguish a fire. Volunteer, nonprofit fire departments acting gratuitously and in good faith are entitled to immunity provided in Section 6-5-335 of the Code of Alabama. However, the liability of firefighters, fire departments and municipalities, in general, can only be determined by a court of competent jurisdiction. AGO 2001-151.
- The requirements of membership and payment of dues are valid requirements for eligibility to vote on matters before a volunteer fire department if the bylaws require membership and payment of dues in order to vote. AGO 2001-138.
- Pursuant to section 11-43-142 of the Code of Alabama, a City is authorized to contract and provide fire service to residents outside its corporate limits and police jurisdiction. AGO 2003-125.
- A volunteer fire department is exempt from building inspection fees levied by the county. AGO 2004-044.
- The following persons may enter into any school to inspect and enforce state fire prevention and protection laws: the State Fire Marshal; employees of the State Fire Marshal’s office; the chiefs of police and fire departments; the mayor, if there is no fire department; the sheriff; and those persons acting under the authority of these officials as assistants to the fire marshal. AGO 2005-183.
- A volunteer fire department certified by the Alabama Forestry Commission is subject to the Open Meetings Law. AGO 2006-108.
- National Fire Incident Reporting System forms are public records except when specific records or portions thereof can be demonstrated by a municipal fire department to fall within a recognized exception. AGO 2006-134.
- A Water, Sewer and Fire Protection District must follow the procedures of the Local Government Records Commission established pursuant to section 41-13-23 of the Code of Alabama, regarding the destruction of any of its records, including the length of time that the records must be kept. 2007-016.
- A volunteer search and rescue squad that is not associated with the state or a political subdivision is not a public safety agency for purposes of an emergency communications district. The commissioners of the Emergency Communications District have the authority to determine if volunteer fire departments and rescue squads are to be dispatched as primary responders to a request for emergency services. AGO 2007-021
- Current law does not specifically prohibit persons 16 years of age and older from riding in fire trucks to the scene of a fire. If the Alabama Department of Labor determines that such activities are a danger to life and limb, they may promulgate rules and regulations that regulate or restrict the ability of persons who are under 18 years of age. AGO 2007-104.
- A town council may require its municipally sanctioned volunteer fire department to provide the town with unredacted copies of fire and emergency medical services reports to keep on file for use in determining the reimbursement of expenses of department personnel making fire and medical calls. AGO 2007-111.

- A Water, Sewer, and Fire Protection Authority is authorized to revise its rates and assess consumers in a manner that the Authority deems to be reasonable given the particular circumstances. AGO 2010-004.
- An E-911 Board may provide for an emergency communication system and may provide radios, which will be used to receive dispatch calls, to a volunteer rescue squad. AGO 2010-019.
- An action to enforce a lien for unpaid fire dues by a Fire District is subject to a twenty-year statute of limitations. AGO 2010-056.
- The Alabama Firefighters' Personnel Standards and Education Commission/Alabama State Fire College may employ off-duty municipal firefighters and paramedics during their "off time" as educational adjunct fire instructors for the Commission's "open enrollment" training classes to teach educational training classes to other firefighters and paramedics, including his or her own coworkers who may also be enrolled in such classes. This employment does not violate section 11-43-12 of the Code of Alabama. AGO 2011-019.
- A volunteer fire department is subject to the Competitive Bid and Public Works Laws. AGO 2012-016.
- The County E-911 Board should honor a request made by resolution from the municipality to dispatch, within the corporate limits, the ambulance service provider that the municipality requests to be dispatched. Any private ambulance service provider that is selected by the municipality as the exclusive provider within the municipality, must be selected in compliance with the Competitive Bid Law. AGO 2012-077.
- A Fire District may contract with a Water Authority for the use, installation, and maintenance of fire hydrants. The Authority and District should cooperate to enable the District to provide the most effective fire protection for a reasonable cost for its residents. AGO 2012-092.
- Because a Town has the authority to make expenditures to provide a fire department, the Town may expend municipal funds to raise money for its Volunteer Fire Department if the town council determines the expenditure serves a public purpose. AGO 2015-058.
- In the aldermanic form of government, as a general rule, the mayor is the appointing authority for all employees and officers whose appointment is not otherwise provided by law, and the city council is the appointing authority for certain municipal officers. AGO 2014-007.
- Section 11-43-160 of the Code of Alabama gives the city council the authority to remove any officer in the several departments, but not employees. The term "officer" includes all those positions specifically set forth in the Code of Alabama as "officers," as well as any position created by the city council pursuant to ordinance. An officer is limited to a person that exercises some level of authority, presumably over employees, and performs some discretionary, policy-making functions. AGO 2012-039.
- The fire chief of the City is authorized to inspect and test fire hydrants to ensure proper serviceability and operation, provided that he or she does so subject to the direction of the State Fire Marshal. AGO 2015-034.
- City sued for negligent and/or wanton hiring, training, or supervision of individual firefighters who allegedly failed to recover all of decedent's remains from fire scene. The Alabama Supreme Court held that volunteer fire department did not become professional fire department not entitled to immunity by fact that city donated money to it; city could not be vicariously liable for firefighters' alleged negligence; and city could not be liable for wanton or intentional conduct. *Ex Parte Labbe*, 156 So. 3d 368 (Ala. 2014).
- Where a town is providing police and fire services within its police jurisdiction, albeit by contract and subsidies, businesses within the police jurisdiction of the town are subject to reasonable privilege and license taxes. AGO 2014-008.
- The North Chilton Volunteer Fire Department may respond to calls in a county adjacent to Chilton County if authorized by its bylaws and no funds received from the tax levied for fire, medical, and emergency services in Chilton County are used on such calls for equipment, materials, personnel compensation, or otherwise. AGO 2012-034
- If the City of Springville does not levy and collect license fees in its police jurisdiction, it may seek to collect insurance proceeds from applicable policies held by individuals who reside in the police jurisdiction pursuant to the costs of fire, emergency management services ("EMS"), hazardous material, and rescue services rendered by the city's fire department. Because the city levies and collects taxes to fund the services of its fire department, the city may not seek to collect insurance proceeds from applicable policies held by individuals who reside in the corporate limits pursuant to the costs of EMS, hazardous material, and rescue services rendered by the fire department. AGO 2019-012
- Section 40-9-13 of the Code of Alabama exempts a volunteer fire department from the payment of the

fee required by Section 32-8-6(a)(1) of the Code of Alabama for the application of a certificate of title.
AGO 2020-016.

63. The Municipal Police Force

The Code of Alabama gives the municipal council the authority to organize and establish a police force under the general supervision of the chief of police. Section 11-43-55, Code of Alabama 1975. Many municipalities have their own police department and many rely on the Sheriff's Department for law enforcement. A county is not responsible for police protection within municipalities, located within the county, that have established their own police force. Further, the sheriff does not have a duty to enforce municipal ordinances. AGO 1998-188.

Alabama law gives sheriffs and their deputy's law enforcement authority over the entirety of their respective counties. This authority is not limited or restricted inside the city limits of a municipality that is located within the sheriff's respective county. A county sheriff is not required to obtain permission or prior approval of a municipal government or police department before it may perform law enforcement operations within the limits of a municipality. However, the sheriff may not provide law enforcement services in an adjacent county unless an agreement to provide reciprocal services has been entered into by both counties and is executed as provided for in Sections 11-102-2 and 11-102-3, Code of Alabama 1975. The sheriffs and county commissions of both counties must consent and be parties to the agreement. If a speed limit is set by state statute or by the Alabama Department of Transportation, a citation could be prosecuted as either a municipal offense (where state offenses are adopted by reference) or a state offense. But if the posted speed limit was set or altered by municipal ordinance, the case would have to be initially prosecuted as a municipal offense. AGO 2008-063.

Section 11-43-16, Code of Alabama 1975, authorizes municipalities to hire deputy sheriffs as part-time police officers. Absent a county personnel rule prohibiting such service, a deputy sheriff may serve as a part-time police chief while he is off duty from the county. AGO 1994-023. A deputy sheriff does not hold an office of profit because a deputy does not exercise some portion of the sovereign power of the state. A person may be employed as a deputy sheriff and serve as a mayor of a town. AGO 2009-048. There is also no prohibition against the County employing a full-time police officer of the City as a part-time deputy sheriff. AGO 2015-045. A municipality may not contract with a sheriff to provide police protection where the contract delegates to the sheriff the municipality's police power. AGO 1991-317. A municipality may not contract with a sheriff to provide police protection in a portion of the police jurisdiction, if the contract would, in essence, delegate the

municipal police power to the sheriff. AGO 2000-050.

A municipality may authorize its chief of police to enter into a contract with other municipalities for the creation of a unified investigative agency to investigate major felonies occurring within the municipalities which are parties to the contract. AGO 1988-334. Except as otherwise provided or prohibited by law, any county or incorporated municipality of the State of Alabama may enter into a written contract with any one or more counties or incorporated municipalities for the joint exercise of any power or service that state or local law authorizes each of the contracting entities to exercise individually. Section 11-102-1 et. seq., Code of Alabama 1975. The county sheriff and his or her deputies may enforce municipal ordinances provided the contract between the municipality and the sheriff provides for such enforcement. AGO 2016-005. Although municipalities may contract with each other for the performance of law enforcement duties, no such authority exists for a contract between a municipality and a private entity. AGO 2013-041.

Municipalities have no authority to impose a fee for providing police protection. AGO 1993-164. A city cannot appropriate funds to subsidize a contract between a detective agency and the City Merchants Association. But, the city may contract with the detective agency to provide police protection. AGO 1982-583 (to Hon. John H. Smith, September 30, 1982). A city may organize a reserve police force of private citizen volunteers who have no powers of arrest other than those of private citizens generally. However, the city may be liable for the torts of its reserve police officers under the doctrine of respondeat superior. AGO to Hon. Morgan Reynolds, November 3, 1976.

Pursuant to Section 15-10-7, Code of Alabama 1975, a private person may arrest another for any public offense and take him without unnecessary delay before a judge or magistrate, or deliver him to a state or local law enforcement officer, who must take the arrestee immediately before a judge or magistrate. Unless the person to be arrested is currently committing the offense, the arresting person must inform him or her of the cause of the arrest. However private citizens who make such arrests do not enjoy the immunity from tort liability that covers a law enforcement officer. See, Section 6-5-338, Code of Alabama 1975.

Basic Authority

The creation of a police department is at the discretion of the municipal governing body. The basic authority for municipalities to establish a police department is found in Section 11-43-55, Code of Alabama 1975, which states that

“...the council shall have power to establish a police force and to organize the same under the general supervision of the chief of police, and to provide one or more station houses and to require all things necessary for the maintenance of an efficient police department.”

“The mayor shall be the chief executive officer, and shall have general supervision and control over all other officers and affairs of the city or town, except as otherwise provided in this title...” Section 11-43-81, Code of Alabama 1975. The council may not assume direct control over the police department. AGO to Hon. A.J. Cooper, May 6, 1977. The city council may give city police officers the duty of serving as watchmen in the city jail. AGO 1979-220 (to Hon. William Anglin, June 11, 1979). A city may require all of its police officers to reside within the limits of the municipality. AGO 1982-018 (to Hon. Kelvin Cumbie, October 20, 1981). A city may purchase a mobile home in order to provide living quarters for the police/fire chief and his family so that the city may provide adequate police and fire protection to its citizens. The provision of living quarters will be deemed a portion of the compensation of the police/fire chief. AGO to James O. Powell, November 1, 1976. A city and a member of the City Police Department, may enter into a rental agreement allowing the officer to live rent-free in a mobile home owned by the city and located on city property in exchange for the officer providing security for the city property during the officer’s off-duty hours, when the arrangement is subject to a rental agreement made a part of the officer’s employment contract with the city, and clearly sets out the obligations of all parties concerned; and further, where a public interest is served. AO NO. 2007-06

Police Chief

Section 11-43-5, Code of Alabama 1975, authorizes the municipal governing body to provide for the appointment of a chief of police and to prescribe the duties of the chief. Ordinances and resolutions relating to the establishment and organization of a police force take precedence over the executive power of the mayor in policy matters. AGO 1984-153 (to Hon. Roger D. Burton, February 3, 1984). A mayor cannot prevent a police chief from performing his duties as a law enforcement officer by ordering him not to arrest a person or by ordering him to “drop charges” against certain persons. The mayor does have the legal authority to remit fines and costs, commute sentences, and grant pardons following conviction for violation of municipal ordinances. AGO to Hon. Hayden R. Battles, March 29, 1976.

The mayor may appoint the police chief where the ordinance is silent as to appointing powers. The council may appoint the police chief if power is retained. AGO to James E. Hart, March 29, 1973. If there is no civil service or merit system provision to the contrary, a municipality may

contract with a corporation for the services of an individual to perform the duties of police chief. AGO 2001-104. Where the council is the appointing authority, Section 11-43-160 of the Code of Alabama 1975 gives the council the authority to remove any officer in the several departments including the police chief. The term “officer” includes all those positions specifically set forth in the Code of Alabama as “officers,” as well as any position created by the city council pursuant to ordinance. AGO 2012-039.

The chief of police holds an office of profit. *See*, AGO to Hon. Larry Moody, November 18, 1975. A councilmember may not serve as a police officer for the municipality he or she serves, even if there is no compensation for acting as a police officer. AGO 1997-115. A person may not serve on the city council or as mayor pro tem for one municipality while also serving as police chief for another municipality. AGO 2002-109. The council may abolish the position of police chief and create the Department of Public Safety by ordinance, so long as the police chief is not an elected official. AGO to Hon. Ted Northington, December 13, 1973.

Certified Law Enforcement Officers

The Alabama Legislature has prescribed minimum standards for police officers and these are codified in Sections 36-21-40 through 36-21-51, Code of Alabama 1975. The Alabama Peace Officers Standards and Training Commission (APOSTC) supervise the certification of Alabama law enforcement officers. Nothing requires police officers to be sworn in before making arrests, provided they have undergone the proper training. AGO 1991-314. APOSTC requires law enforcement officers to be at least 19 years old. Section 36-21-46, Code of Alabama 1975. They must complete 480 hours of Minimum Standards training and a minimum of 12 hours of agency-approved continuing education annually. Municipal police chiefs must receive a minimum of 20 hours of APOSTC approved executive training annually. Section 36-21-51, Code of Alabama 1975; Alabama Peace Officers Rule 650-X-4-.01. Any chief of police or law enforcement officer who fails or refuses to comply with these requirements certification or authority as a law enforcement officer is subject to be revoked by the commission. Section 36-21-51, Code of Alabama 1975. The appointment of a police officer who serves over 9 months without completing the required training is null and void. *See*, AGO to Hon. Leon T. Waits, September 22, 1975 and AGO 1983-547 (to Hon. T. Walter Oliver, Jr., September 10, 1982) (NOTE: the law now provides that they have 6 months to complete the training). The certification or authority of any law enforcement officer certified by the Alabama Peace Officers Standards and Training Commission or otherwise exempt from the minimum standards pursuant to subsection (b) of Section 36-21-46 of the Code of Alabama 1975, shall

be revoked by the commission when a law enforcement officer is convicted of a felony. If the conviction is reversed or a new trial granted, the certification or authority of the law enforcement officer shall be restored. Section 36-21-52, Code of Alabama 1975; Rule 650-X-6-.02.

The training mandated by Sections 36-21-40 through 36-21-51, Code of Alabama 1975, is required to be reimbursed by a municipality who hires an officer within 24 months after another municipality has paid for that training. The costs of any extra training the municipality elects to provide are not required to be reimbursed by the hiring municipality. AGO 1991-195. The 24-month period for reimbursing police training costs in Section 36-21-7, Code of Alabama 1975, is computed from the time an individual completes the APOSTC training. AGO 1997-117. The Fair Labor Standards Act requires all covered employers to pay their employees at least the federal minimum hourly wage every workweek. A policy requiring city police officers to contract to repay training expenses if they voluntarily leave their employment before completing a minimum time of service does not limit the employee's right to receive minimum wage. The city may withhold wages as long as the employee receives at least minimum wage in his final paycheck. The city may then seek repayment of the training debt as an ordinary creditor. *Gordon v. City of Oakland*, 627 F.3d 1092 (9th Cir.2010).

Law enforcement officers are granted specific due process rights pursuant to Sections 11-43-230 through 232, Code of Alabama 1975. Section 11-43-231, Code of Alabama 1975, defines the term "law enforcement officer" as an official who is certified by the Alabama Peace Officers' Standards and Training Commission who has authority to make arrests and who is employed by any municipality in the state as a permanent and regular employee with law enforcement duties, including police chiefs and deputy police chiefs. The term does not include any person elected by popular vote, any person who is serving a probationary period of employment, or any person whose term of office has expired. If a city employee meets the definition of a law enforcement officer as set forth in this statute a city must afford that person certain due process rights and the city must establish written due process procedures applicable to any pre-disciplinary hearing. Every municipality must provide a pre-disciplinary hearing prior to the suspension or termination of its law enforcement officers, however nothing shall preclude a municipality from placing a law enforcement officer on leave with pay until the person or body holding the hearing has made a decision on the matter. Pursuant to Section 11-43-232, Code of Alabama 1975, these statutes do not apply to any municipality with an established due process procedure for law enforcement officers already in place on July 14, 2001, so long as the

municipality has maintained that due process procedure.

Additionally, each municipality with a population of 5,000 and above according to the most recent federal decennial census must establish a merit system for certified law enforcement officers pursuant to Sections 11-43-180 through 11-43-190 of the Code. The chief of police and the deputy chief may be exempted from this merit system. These provisions do not apply to municipalities that had established merit systems as of August 23, 1976.

Reserve Police Officers

Authority for establishing a reserve police force is granted by Section 11-43-210, Code of Alabama 1975. A city may organize a reserve police force of private citizen volunteers who have no powers of arrest other than those of private citizens generally. The city is liable for the torts of its reserve police officers under the doctrine of respondeat superior. AGO to Hon. Morgan Reynolds, November 3, 1976.

Reserve police officers generally serve without pay and perform some of the tasks ordinarily performed by trained police officers. However, reserve officers are not an alternative to a fully-trained force. State law limits the duties of reserve officers. But by allowing volunteers to perform the permitted functions, trained officers are free to concentrate more on the tasks they were trained to perform.

Obviously, each municipality will have to decide for themselves if reserve officers are a realistic option. Many factors will vary locally. Other considerations, though, must be examined by all municipalities with reserve police forces. This summary is intended as a guide through some of the benefits and potential pitfalls of creating a reserve police force. A suggested ordinance for the creation of a reserve police force is below:

AN ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF _____, ALABAMA AS FOLLOWS:

SECTION 1. ESTABLISHMENT. As provided by Section 11-43-210, Code of Alabama, 1975, a police reserve force, hereinafter called reserve, is hereby established within the Police Department of the city [town] of _____, Alabama.

SECTION 2. QUALIFICATIONS. The reserve shall consist of not more than _____ members. Any person desiring appointment to the reserve must submit a written application to the chief of police [or appointing authority] of the city [town] of _____, Alabama, certifying that he or she is a resident of the city [town] of _____,

Alabama, is at least 19 years of age, of good moral character and reputation and has never been convicted of a felony or of a misdemeanor involving force, violence or moral turpitude. Applicants must consent in writing to a fingerprint and background search. [Residency of reserve officers is an option of the municipality; the other qualifications are required by Section 11-43-210, Code of Alabama, 1975.]

SECTION 3. APPOINTMENT. Appointments to the reserve shall be made by the mayor [or other appointing authority] with the approval of the chief of police. Such appointments shall be for terms of ____ years. Members of the reserve serve at the pleasure of the chief of police [or appointing authority], and may be removed with or without cause and without hearing, by the chief of police with the approval of the mayor [or other appointing authority].

SECTION 4. SUPERVISION. The reserve shall function under the immediate direction of the chief of police, who shall provide for its organization and training. The chief of police is hereby authorized and directed to establish such rules and regulations as may be necessary for the efficient operation of the reserve.

SECTION 5. EQUIPMENT. Each member of the reserve shall be issued an identification card signed by the chief of police and the mayor. Members of the reserve shall carry this identification card with them at all times. Whenever a member of the reserve shall be called to active duty, he or she shall be issued a badge and a cap which shall be worn at all times while on active duty in the manner prescribed by the chief of police. Upon completion of each tour of active duty, members of the reserve shall turn in their badges and caps at police headquarters.

SECTION 6. DUTIES. The duties of reserve officers are confined to the following:

1. Patrol operation performed for the purpose of detection, prevention and suppression of crime or enforcement of the traffic or highway laws of the state, provided the reserve law enforcement officer acts at all times under the direct control and supervision of a certified law enforcement officer.
2. Traffic direction and control may be performed without direct supervision; provided, however, that supervisory control is exercised by a certified law enforcement officer whose total span of control would be considered within reasonable limits. [The municipality may wish to define in the ordinance the degree of control required.]
3. Reserve officers may render crowd control assistance

at public gatherings or municipal functions as directed by the municipality, provided supervisory control will be exercised by a certified law enforcement officer whose total span of control would be considered within reasonable limits. [The municipality may wish to define in the ordinance the degree of control required.]

For purposes of this section, the term “certified law enforcement officer” shall mean a municipal police officer who has completed the training requirements of the Alabama peace officers’ standards and training commission as set out in Article 3, Chapter 21, Title 36, Code of Alabama, 1975.

SECTION 7. ARREST POWERS. No member of the reserve shall have any authority to exercise any power of arrest unless he or she has completed the training requirements of the Alabama Peace Officers’ Standards and Training Commission as set out in Article 3, Chapter 21, Title 36, Code of Alabama, 1975.

SECTION 8. ACTIVE DUTY. Members of the reserve shall be called to active duty by the chief of police with the written consent of the mayor.

SECTION 9. WEAPONS. No member of the reserve shall carry a weapon while on active duty. [Municipalities may authorize reserve officers to carry weapons only if the member has obtained a properly issued permit for the firearm. For liability reasons, the League recommends that municipalities not permit untrained reserve officers to carry weapons. If reserve officers are authorized to carry weapons, the municipality should develop regulations governing the use of such weapons and provide training in the use of the weapons.]

SECTION 10. COMPENSATION. No member of the reserve shall receive compensation for time required by Reserve rules and regulations while not on active duty. Every member of the Reserve shall be paid at the rate of \$____ per hour for each hour in excess of ____ hours served on active duty in any one calendar month. Members of the reserve may be compensated for any reasonable expenses incurred in the performance of official duties while on active duty on approval of an expense voucher by the chief of police. Each member of the reserve may be compensated for official use of his privately-owned automobile at the rate of ____ cents per mile while on active duty. All vouchers for compensation for expenses shall be sworn to by the member of the reserve seeking reimbursement before it shall be considered for payment. [It is not necessary to compensate reserve officers for their time while on active duty. However, if the municipality elects to compensate reserve officers beyond

reimbursement of expenses, the Fair Labor Standards Act would require compensation at one and one-half (1-1/2) times the regular compensation for overtime worked. Additionally, compensation may remove the officers' tort liability protection as a volunteer under Section 6-5-336(d). An additional concern is that if payment brings the officer under the State Employees' Retirement System, payment may entitle the officer to hazardous duty pay under Section 36-27-59, Code of Alabama, 1975.]

SECTION 11. VIOLATIONS.

1. It shall be a misdemeanor for any person not a member of the reserve to wear, carry or display a reserve identification card, badge, or cap, or in any way represent himself or herself to be connected with the reserve.
2. It shall be a misdemeanor for any member of the reserve to loan, sell, lease, or otherwise permit any person not a member of the reserve to wear, carry or display a reserve identification card, badge or cap.
3. It shall be a misdemeanor for any member of the reserve to assist any person who is not a member of the reserve to represent himself or herself as being connected with the reserve.

SECTION 12. PENALTY. Any person found guilty of violating the provisions of Section 11 of this ordinance shall, upon conviction, be fined in an amount not exceeding five hundred dollars (\$500) or sentenced to imprisonment for not exceeding six (6) months; either or both, at the discretion of the court trying the cause.

Additionally, any member of the reserve charged with violating subsections (2) and (3) of Section 11 of this ordinance shall be suspended from the reserve pending a determination of guilt. Suspended reserve members must surrender their identification card, badge and cap to the chief of police. Reserve members who are convicted of violating subsections (2) and (3) of Section 11 of this ordinance shall immediately be removed from the reserve force. A person convicted of violating subsections (2) and (3) of Section 11 of this ordinance is not eligible for reappointment to the reserve.

SECTION 13. EFFECTIVE DATE. This ordinance shall become effective immediately upon its adoption and publication as required by law.

ADOPTED THIS THE ____ DAY OF _____, 20__.

Mayor

ATTEST: _____ City Clerk

Duties of Reserve Officers

Section 11-43-210, Code of Alabama 1975, is very specific as to the duties reserve officers may perform. Reserve officers may patrol to detect, prevent and suppress crime or to enforce traffic laws, provided they operate under the direct supervision of a trained law enforcement officer. They may also direct traffic and render crowd control assistance at public gatherings and municipal functions.

Municipalities have no authority to grant reserve officers any additional powers. Reserve officers may not "fill in" for regular officers during off-duty hours. Unless certified by APOSTC, reserve officers have no powers of arrest beyond those possessed by all citizens. Only persons who have the training mandated by Section 36-21-46(3), Code of Alabama 1975, have authority to arrest, under color of law, while acting as a law enforcement officer.

Prior to the adoption of Section 11-43-210, the Attorney General had ruled that reserve police officers may perform routine traffic and crowd control functions at public gatherings, may assist regular police officers in security jobs such as checking doors on businesses and public buildings, and may assist regular officers in the performance of routine patrol and enforcement activities. AGO 1988-356. Now, though, a reserve officer who is performing patrol duties must be physically accompanied by a certified law enforcement officer who maintains direct control and supervision over him or her at all times. Reserve officers whose only control and supervision by a certified law enforcement officer is by radio contact may not perform any patrol operations. AGO 1992-350.

Eligibility and Training of a Reserve Officer

Section 11-43-210(b), Code of Alabama 1975, establishes the minimum standards for reserve officers appointed after April 12, 1990. Applicants must submit a written application certifying that they are at least 19 years old, of good moral character and reputation, and that they have never been convicted of a felony or a misdemeanor involving force, violence or moral turpitude. Applicants must also agree in writing to undergo a fingerprint and background search.

In addition to training reserves as to how to use a weapon, reserves should be trained regarding their duties. Adequate training is the best way for a municipality to protect itself from liability resulting from the actions of

reserve officers. The better trained an officer is the less likely he or she is to negligently perform assigned duties.

APOSTC offers a training course for reserve officers. Municipalities have the option of whether or not to train their reserve officers. However, it should be noted that failure to train may be the basis for a cause of action against a municipality. In *Clanton v. Harris*, 489 U.S. 378 (1989), the United States Supreme Court held that inadequacy of police training may serve as the basis for municipal liability under Section 1983 if the failure amounts to deliberate indifference to the rights of persons with whom the police come into close contact. Training all officers, including reserves, will help prepare them for the varied situations they are likely to encounter while on active duty.

The fact that a reserve officer is a volunteer does not shield the municipality from liability. During the 1991 Regular Session, the Alabama Legislature passed Section 6-5-336(d), Code of Alabama 1975, which provides civil immunity to any public volunteer who serves without compensation. Under Section 6-5-336(d), supervisors and other volunteers are immune from civil liability for damage or injury caused when acting in good faith and within the scope of their official functions and duties and the damage or injury was not caused by their own willful or wanton misconduct. AGO 2020-019. While this section protects reserve officers who serve without pay, the municipality remains liable for the actions of its reserve officers. AGO 1993-085.

Municipal liability for reserves may be very broad. Probably the greatest potential for damages is caused by permitting a reserve officer to carry a weapon. According to Section 11-47-210(e), reserve officers may carry firearms if the required permits are obtained and the municipality consents. A reserve officer may use the weapon only to the extent allowed by municipal regulations. Municipal governing bodies should deliberate thoroughly before permitting reserve officers to carry weapons. Liability may ensue for any injury an officer causes to a third party, even if the injury is unintentional. Injuries resulting from the mishandling or accidental firing of a weapon are often severe. Damage awards are generally too hefty for this decision to be made lightly. Injuries cannot be foreseen and often result from unusual circumstances.

While space does not permit a full discussion of the potential liabilities of having reserve officers, there is no question that municipalities are liable for negligent actions committed by their reserve officers. This includes actions for state torts under Section 11-47-190, Code of Alabama 1975, and claims for civil rights violations brought pursuant to 42 U.S.C. Section 1983. For more information on the extent of municipal liability, please see the article

entitled “Municipal Liability” included elsewhere in this publication.

Workers Compensation and Reimbursement

Municipalities should also ensure that their workers compensation carrier covers reserve officers. Otherwise, the municipality may be directly liable to the officer for any injury he or she suffers while on duty. The League’s municipal workers compensation program covers reserve officers for an annual fee. However, some workers compensation companies do not cover reserves or volunteers.

Additionally, municipal officials should be aware that in some instances, reserve officers may be entitled to compensation from the state if they are killed in the line of duty. *See, e.g.*, Section 36-30-1, Code of Alabama 1975.

Selected Cases and Attorney General’s Opinions

- The Alabama Supreme Court held that a municipality could be held liable under state law for improperly training an officer that beat a prisoner incarcerated in the city jail. *Birmingham v. Thompson*, 404 So.2d 587 (Ala. 1981).
- A police officer may not act as prosecutor in municipal court. AGO 1983-336 (to Hon. H.A. Alexander, May 30, 1983).
- Pursuant to Rule 4.3, Alabama Rules of Criminal Procedure, a municipal police officer, after arresting a person without a warrant, has the authority to cite and release the person or release the person upon execution of a secured appearance bond in an amount set according to the established bail schedule. Security for the bond must be deposited with the court clerk. AGO 1992-152.
- A municipal council may authorize the police chief to escort local school organizations, even if this requires travel outside the police jurisdiction. AGO 1995-148.
- In municipalities with populations of 5,000 or more, the chief of police is responsible for complying with the provisions of the Community Sexual Offender Notification Act. The sheriff performs these functions in all other municipalities and in unincorporated areas. Under this Act, no criminal sex offender may reside with a child 18 years old or younger. There is no exception created for relatives or stepchildren. AGO 1996-285.
- Other than contempt violations, municipal law enforcement officers may arrest for violations of municipal ordinances where a warrant has been issued,

even if the warrant is not in the actual possession of the officer. AGO 1996-322.

- Unpaid reserve police officers are not required to take a leave of absence to run for office pursuant to Section 17-1-7, Code of Alabama 1975, unless the council adopts a procedure requiring them to take leave to run. AGO 1997-034.
- The United States Supreme Court has held that police officers who allow media members to accompany them into a residence while a warrant is executed violate the Fourth Amendment. *Wilson v. Layne*, 526 U.S. 603 (1999). See also, *Hanlon v. Berger*, 525 U.S. 981 (1998).
- A town is not required to pay a police officer, who voluntarily resigned, for appearing in court, when the officer was served a lawful subpoena to appear in court as a witness, after his resignation. AGO 2001-195.
- By rules adopted by the Alabama Supreme Court, the law enforcement duties of municipal law enforcement officers have been extended beyond the corporate or police jurisdiction limits for the purpose of executing search warrants addressed to them, and the statute, providing for arrest in the county within which the municipality is located, has been reaffirmed. AGO 2003-099.
- Where a private citizen is swearing out a complaint to a violation of Section 32-10-1 of the Code of Alabama 1975—which requires drivers of vehicles involved in accidents to remain at the scene—the driver must be charged on a Uniform Traffic Ticket and Complaint (“UTTC”) where no physical injury occurs because the violation is a misdemeanor traffic violation that does not require custodial arrest. Where a law enforcement officer did not observe the commission of the offense, the complainant must have witnessed the violation. AGO 2003-166.
- Uncompensated reserved police officers do not hold an “office of profit.” AGO 2004-174.
- Municipal law enforcement officers may cite drivers in a municipal police jurisdiction for violating Section 32-5A-170 of the Code of Alabama 1975 (“Reasonable and Prudent Speed”) but they must specify the hazardous conditions present in the “Facts Relating to the Offense” box on the Uniform Traffic Ticket and Complaint (UTTC) to distinguish the charge from the provisions specified in Section 32-5A-171 of the Code of Alabama 1975. AGO 2004-061. NOTE: Municipalities are specifically prohibited from enforcing Section 32-5A-171 within the police jurisdiction.
- A municipal police officer is not required to take a leave of absence to be a candidate for the office of sheriff. AGO 2006-067.
- A police chief may not prohibit a constable from performing a statutorily proscribed duty within the police jurisdiction where the jurisdiction of the police and the jurisdiction of the constable overlap. A constable may perform those duties granted him or her by statute within the county. AGO 2007-018.
- A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. *Scott v. Harris*, 127 S.Ct. 1769 (U.S. 2007).
- Any witness to a traffic offense may swear out a complaint using a uniform traffic ticket and complaint pursuant to Section 12-12-53 of the Code of Alabama. The law enforcement officer or the magistrate may furnish witness, with a uniform traffic citation with a note as to the duty of the witness to appear before the magistrate. This opinion gives a good discussion of the procedure that should be followed in serving a citation on a person witnessed by a bus driver violating Section 32-5A-154(a) of the Code. AGO 2008-002.
- A provision of the 2002 Sarbanes-Oxley Act that criminalizes knowingly making false entries in records with the intent to impede or obstruct a federal investigation can apply to lies entered in a police use-of-force report. *U.S. v. Hunt*, 526 F.3d 739 (11th Cir. 2008).
- A municipality may limit its police department to providing only emergency services within its police jurisdiction if the revenue collected in the police jurisdiction “reflects reasonable compensation” to the town for the cost of the emergency services provided. The monies collected must do no more than recoup the costs of providing the emergency response services. AGO 2008-007.
- Any minor found in possession of tobacco or tobacco products may be prosecuted under Section 28-11-14 of the Code of Alabama. Disposition of any violation of this statute shall be within the jurisdiction of the district or municipal court and not the juvenile court. Violation of this statute shall not be considered a criminal offense but shall be administratively adjudicated. AGO 2008-047.
- As a municipal police officer with responsibility for the city jail, a law-enforcement duty within the meaning of immunity statute, a police department major was

within the umbrella of protection provided to peace officers by the immunity statute when she conducted a body search of a city correctional officer to determine if she had stolen an inmate's money, and, thus, the major was immune from tort liability in correctional officer's action against her. If a municipal peace officer is immune pursuant to immunity statute, then the city by which he is employed is also immune. *Ex parte Dixon*, 55 So.3d 1171 (Ala. 2010)

- The town council may, by ordinance, permit or require the police department to escort funerals pursuant to the council's "power to establish, organize and set the policy for the municipal police department as authorized by Section 11-43-55, Code of Alabama 1975. AGO 2015-061.
- The sheriff may not provide law enforcement services in an adjacent county unless an agreement to provide reciprocal services has been entered into by both counties and is executed as provided for in Sections 11-102-2 and 11-102-3, Code of Alabama 1975. The sheriffs and county commissions of both counties must consent and be parties to the agreement. AGO 2012-034.
- Although municipalities may contract with each other for the performance of law enforcement duties, no such authority exists for a contract between a municipality and a private entity. AGO 2013-041.
- The City of East Brewton may contract with the City of Brewton for the performance of policing duties within its jurisdiction. The contract must comply with the specifications set forth in Section 11-102-2 of the Code of Alabama 1975. Both municipalities must adopt an ordinance approving of the contract, and each municipality should adopt all ordinances, resolutions, and policies necessary to authorize law enforcement officers of the City of Brewton to carry out policing duties within the jurisdiction of the City of East Brewton. AGO 2013-041.
- The city clerk-treasurer, police chief, and fire chief are "employees" of the City of Alabaster for which there is a term of office pursuant to Section 11-43-3 of the Code of Alabama 1975. The term of office for the city clerk-treasurer is four years. The council may establish the term of office for the fire chief and police chief. No term of office for any municipal officer may exceed the term of the mayor, which is four years. AGO 2013-020.
- There is no statutory authority for the sheriff to transport prisoners charged with crimes in other states to and from those states. AGO 2012-026.
- The Town of Butler ("Town") may not contract with a private entity to provide extra police protection to property owned by the private entity. AGO 2014-077,
- The County can employ a full-time police officer of the City as a part-time deputy sheriff. AGO 2015-045.
- State law does not prohibit the spouse of a police captain from serving as a court clerk and magistrate for the municipal court. If appointed, the magistrate should recuse himself or herself in matters where the police-officer spouse is involved in the matter being presented to the magistrate. AGO 2015-005.
- The Sheriff of Shelby County and his or her deputies may enforce municipal ordinances of the Town of Wilsonville ("Town") provided the contract between the Town and Sheriff provides for such enforcement. AGO 2016-005.
- Section 11-43-160 of the Code of Alabama gives the city council the authority to remove any officer in the several departments, but not employees. The term "officer" includes all those positions specifically set forth in the Code of Alabama as "officers," as well as any position created by the city council pursuant to ordinance. An officer is limited to a person that exercises some level of authority, presumably over employees, and performs some discretionary, policy-making functions. AGO 2012-039.

64. Ethics and Liability of Off-Duty Police Officers

For many years, municipal officials have struggled with the issues surrounding the off-duty employment of police officers. Pursuant to the generally accepted wisdom, police officers are considered to be on the job 24 hours a day. In many cases, however, police officers must supplement their incomes by seeking secondary employment. Because of this, Alabama law implicitly recognizes the need for officers to accept off-duty employment. *See*, Sections 6-5-338 and 36-25-5(c), Code of Alabama 1975.

In addition to the financial benefits the officer receives from accepting off-duty employment, the benefits that a private employer receives by having a uniformed officer visible in his or her business are obvious. A less often understood aspect of off-duty employment, however, is that municipalities themselves also have an interest in allowing officers to accept off-duty work in some circumstances. The public can benefit greatly by having trained police officers available and visible.

For instance, having a uniformed officer seen working security by potential violators at school functions or in high-traffic areas like malls may prevent crimes from occurring. Even if the crime is not prevented, apprehending violators may be easier since the officer will be close at hand.

Despite the public benefits, however, off-duty employment of police officers raises many issues – such as liability concerns – that must be resolved. This is especially true where the officer will use the uniform, car, weapon or other public equipment during off-duty employment. Again, the public has an interest in allowing the officer to use this equipment while off-duty. Also, because officers are expected to be on-duty 24 hours a day, they may be called upon to act in their official capacity at any time, making it important for them to have ready access to official equipment.

When an off-duty officer is called upon to act in an official capacity, he or she becomes a municipal representative, and – generally speaking – the municipality becomes liable for any negligent action the officer takes. The liability issues of off-duty employment have plagued Alabama municipalities for years, largely as the result of a \$1.6 million dollar judgment against an Alabama city for actions taken by an off-duty officer. *See*, *Birmingham v. Benson*, 631 So.2d 902 (Ala. 1993).

In addition to the liability concerns, in recent years, ethical problems have arisen from the employment of off-duty officers. For instance, in one case before the Ethic

Commission, a police chief and several of his officers were required to repay money they had received from off-duty employment because of alleged ethical violations.

This article is devoted to an examination of the concerns inherent in allowing off-duty employment of police officers, with particular emphasis on the ethical aspects. The liability concerns are largely the same as those discussed in the liability article found elsewhere in this publication, and will not be repeated here. There is, however, one aspect of the liability of off-duty police officers that is not discussed in detail in the liability article. That is the issue of when does the officer cease to be performing off-duty work and instead begin performing an action for which the municipality may be liable?

Tort Liability

The general rule is that once an officer begins performing a public duty or function, as opposed to the duties of their private employment, the officer is acting as a public employee. The issue is, frequently, one of control.

In *Birmingham v. Benson*, 631 So.2d 902 (Ala. 1993), the city of Birmingham was sued because of the actions of an officer who was working as an off-duty security guard at a bar. The officer was wearing full police uniform, with radio, gun, nightstick, flashlight, handcuffs and mace. In accordance with the rules and regulations of the Birmingham Police Department, the officer had notified his supervisor that he was working as a security guard at the bar. On the night of December 14, the officer was aware of growing tension in the bar between Blair and Billy Weidler.

The evidence indicated that Blair was threatened by Weidler and that afterwards Blair asked the officer to escort him and three minors who were with Blair to their car. The officer repeatedly told them that they could not fight inside the bar. He escorted the four, including Blair, outside. A large crowd followed them out the door. As Blair and his three friends crossed 22nd Street, the officer stood on the sidewalk; Weidler asked him what he was going to do. He replied: “I don’t care what you do, I am going back inside.”

At that time, a group of people (at least 15), including Weidler and Sean Brooks, chased the four and pulled Blair, who was halfway in the car, out of the car and beat him for 5 to 10 minutes. Blair was knocked down, kicked, and run over by the car in which his friends were trying to leave. Blair died; the cause of his death was “asphyxiation, shock, and cardiac arrest as complications of severe multiple

blunt force trauma.” Weidler and Brooks were convicted of manslaughter as a result of Blair’s death.

The city investigated and concluded that the officer had violated rules and regulations of the department, that he had neglected his duties, that he had failed to take appropriate action, that he could have intervened, that had he done so “things might have turned out differently.” The city’s investigator also said that a reasonable police officer should have tried to stop the hostilities leading to Blair’s death. As a result of this case, the officer was fired and a jury awarded the plaintiff a verdict of \$1.6 million.

One of the key issues in the case was the extent of the city’s control over the off-duty employment of the officer. The court ruled that there was a sufficient amount of control by the city to find that the officer was acting in the line and scope of his duties. The court pointed to a document entitled “Conduct and Responsibility of Police Officers Working Police Related Off -Duty Jobs,” and stated:

“Pursuant to these rules and regulations, any police officer who wanted to work police-related off-duty jobs was required to submit a request for extra work to the officer’s commanding officer for approval, specifying the location of the extra job, the hours, the employer, the duties involved, whether the job was a one-time event or would be continuous, and whether the job was to be worked in uniform. The rules and regulations specifically stated that ‘any outside police activity will be considered to be regular police work insofar as conduct, performance of duty and compliance with the Rules and Regulations are concerned’ and ‘will be under the direction of the superior officer on duty in the district where the police work is being performed.’ Furthermore, the rules and regulations state that at least once during the shift of the precinct supervisor, the supervisor shall inspect the police officer working extra duty jobs in uniform to ensure compliance with the rules and regulations.”

This, the court held, amounted to a great extent of control over the officer’s off-duty work, and justified holding the municipality liable when the officer was confronted with a duty to act as a certified officer.

The court also refused to extend the protection in this case even though the actions of police officers are generally cloaked by substantive immunity, stating that:

“There is no way, under the facts in this case, that the imposition of liability can be reasonably calculated to materially thwart the city’s legitimate efforts to provide public services. Policy considerations supporting immunity do not come into play when a policeman is, in fact, on the scene and in a position to control an aggressor. The question then becomes one of whether the officer acted reasonably or acted negligently.”

Fortunately, in a later appeal the court ultimately held that the \$100,000 cap on the tort liability of municipalities also applies in actions that seek to have municipalities indemnify their negligent employees. *Benson v. Birmingham*, 659 So.2d 82 (Ala. 1995).

In 1994, the legislature attempted to address some of the concerns of police officer liability by enacting Section 6-5-338, Code of Alabama 1975, which extends tort immunity protection to police officers. Specifically, Section 6-5-338 extends state agent immunity to on-duty police officers. *Blackwood v. City of Hanceville*, 936 So.2d 495 (2006). Section 6-5-338, Code of Alabama 1975, also requires private employers of off-duty police officers to obtain \$100,000 of liability insurance coverage to indemnify the officer against claims. Despite these protections, it is clear that municipalities remain liable for the actions of their off-duty officers, if the nature of the duty they are performing is related more to their responsibilities as police officers rather than as private employees. This includes areas where any police officer may become subject to liability. A few of these areas include those listed below.

Liability for Omissions

The general rule is that a municipality is not liable for the nonfeasance of police officers in the performance of governmental duties in the absence of other evidence to indicate negligence. *McQuillin, Municipal Corporations*, Section 53.80.20. For instance, a municipality is generally not liable for the failure of an officer to search someone for dangerous weapons after arresting him or for failing to investigate a reported crime. However, where sufficient evidence exists to show that a duty was performed negligently, a municipality may be held liable. Thus, where the police received notice of a dangerous situation and failed to respond, causing a death, liability was attached to the municipality. *McQuillin, Municipal Corporations*, Section 53.80.20

In *Luker v. Brantley*, 520 So.2d 517 (Ala. 1987), for instance, the Alabama Supreme Court held the City of Brantley liable when its police officers turned a vehicle over to a person they should have realized was intoxicated and the driver struck and killed someone. But, in *Tyler v. Enterprise*, 577 So.2d 876 (Ala. 1991), the Alabama Supreme Court affirmed a summary judgment in favor of Enterprise in a case where it was alleged that a police officer allowed an intoxicated driver to drive home and the driver subsequently died in an accident. The court held that the plaintiff’s contributory negligence barred the suit. And, in *Wright v. Bailey*, 611 So.2d 300 (Ala. 1992), the Alabama Supreme Court held that even assuming police officers were negligent in permitting a drunk driver to leave a tavern, mere negligence was not enough to implicate the

due process concerns of Section 1983. Further, in *Flint v. Ozark*, 652 So.2d 245 (Ala. 1994), the Alabama Supreme Court held that it was not negligence for police officers to fail to arrest underage persons at a party where alcohol was available, even though one of the underage persons was later determined to be driving under the influence when he left the party and struck and killed another individual.

Also, in *Stokes v. Bullins*, 844 F.2d 269 (5th Cir. 1988), the Fifth Circuit found that the failure of municipal officials to fully investigate the background of an applicant for a job as a police officer did not justify holding the municipality liable under Section 1983 for injuries resulting from the officer's shooting of a citizen. Note, however, that this case was decided before the U.S. Supreme Court decided *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), where the Court held that the inadequacy of police training may serve as the basis for municipal liability under Section 1983 if the failure to train amounts to deliberate indifference to right of persons with whom the police come into contact and the deficiency identified in the training program is closely related to the ultimate injury incurred.

Failure to Provide Adequate Police Protection

Courts are very reluctant to impose liability upon a municipality for the failure to provide adequate police protection. Comments, *Municipal Liability: The Failure to Provide Adequate Police Protection – The Special Duty Doctrine Should be Discarded*, 1984 WIS. L. REV. 499 (1984). This area is usually protected by the substantive immunity rule, discussed in the article on tort liability. Note, though, that the court in the *Benson* case held that substantive immunity does not apply where the officer is on the scene, available to help.

Assault and Battery

Ordinarily, a municipality is not responsible for an assault and battery committed by one of its police officers. *McQuillin, Municipal Corporations*, Section 53.80.40. However, when the assault and battery occurs in the course of the officer's duties, the municipality may be held liable. See, *Lexington v. Yank*, 431 S.W.2d 892 (Ky. 1968). Remember, too, that a municipality may be held liable for off-duty actions, if they are performed in furtherance of the municipality's interest.

In Alabama, Section 11-47-190, Code of Alabama 1975, states that a municipality can only be held liable for the actions of its agents or employees which occur due to negligence, carelessness or unskillfulness. A municipality cannot ordinarily be held liable for the intentional torts of its employees, pursuant to Section 11-47-190. *Wheeler v. George*, 39 So.3d 1061 (Ala. 2009). However, in *Birmingham v. Thompson*, 404 So.2d 589 (Ala. 1981), the

Alabama Supreme Court held that in some instances, even intentional torts may be committed due to a lack of skill. If so, then the municipality may be held liable. Municipalities in Alabama, therefore, may be sued for assault and battery.

In a suit filed in federal court pursuant to Section 1983, a municipality can be found liable if a plaintiff can establish, first, that the assault and battery deprived him of his federal constitutional or statutory rights, and second, that it occurred pursuant to a municipal policy or custom. In an unjustified assault case, there is no question concerning the deprivation of rights. The key question in these cases is whether the police officer acted pursuant to a municipal policy.

Generally, of course, there will not be an articulated policy favoring or promoting assaults. Therefore, a plaintiff must establish either that the city policymakers intervened to cause the abuse or that there is such a pervasive pattern and practice of abuse as to indicate a municipal policy favoring such behavior. Seng, *Municipal Liability for Police Misconduct*, 51 Miss. L. J. 1 (1980). Municipal inaction, such as failure to train or supervise, might demonstrate a tacit approval. Similarly, failure to discipline others guilty of similar conduct may establish a pattern. Finally, the municipality may be shown to have ratified the officer's action by consistently condoning such behavior or ignoring citizen complaints.

Use of Excessive Force

A police officer may use reasonable force in order to effectuate an arrest, even to the point of taking a life. In Alabama, Section 13A-3-27, Code of Alabama 1975, sets out the degrees of force an officer may use in various situations. Section 13A-3-27(a) states that an officer may use non-deadly force in order to make a lawful arrest for a misdemeanor, violation or violation of an ordinance, or to protect himself or a third person he reasonably believes to be in danger from the imminent use of force during an arrest.

Subsection (b) provides that an officer may use deadly force in order to effectuate an arrest for a felony or to defend himself or a third person from what he reasonably believes to be the imminent use of deadly force. Deadly force is defined in Section 13A-3-20(2) as any force which is readily capable of causing death or serious bodily injury under the circumstances in which it is used. Even recklessly driving an automobile to effectuate an arrest may be classified as deadly force in the proper circumstances. See, commentary to Section 13A-3-27.

Section 13A-3-27 was held unconstitutional to the extent that it authorizes the use of deadly force in circumstances where such force is not necessary to prevent death or bodily harm in *Ayler v. Hopper*, 532 F.Supp. 198 (M.D. Ala. 1981). In *Tennessee v. Garner*, 471 U.S. 1 (1985) the U.S. Supreme Court held, "Although the armed

burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous, so as to justify the use of deadly force in effectuating his apprehension.” Similarly, in *Pruitt v. Montgomery*, 771 F.2d 1475 (11th Cir.1985), the court held, where a police officer had no probable cause to believe that an unarmed burglary suspect posed a physical threat to the officer or others, the City of Montgomery was held liable for his use of deadly force.

In *Morton v. Kirkwood*, 707 F.3d 1276 (11th Cir.2013) the court held that using deadly force without warning on an unarmed, non-resisting suspect who poses no danger is excessive. E.g., *Morton v. Kirkwood*, 707 F.3d 1276 (11th Cir.2013); *Mercado v. City of Orlando*, 407 F.3d 1160 (11th Cir. 2005) (noting that it is a “clearly established principle that deadly force cannot be used in non-deadly situations”). In *Salvato v. Miley*, 790 F.3d 1286 (11th Cir. 2015), the court held that Eleventh Circuit Court precedents and those of the Supreme Court made clear that “[u]sing deadly force, without warning, on an unarmed, retreating suspect is excessive.” *Salvato*, 790 F.3d at 1286 (citing *Garner*, 471 U.S. 1). Thus, the officer in *Salvato* had “fair warning” that she acted unconstitutionally in July 2012 when she used deadly force against a suspect who, although he had previously resisted arrest and struck the officers multiple times, was apparently unarmed and outside of striking distance, and the officer failed to warn the suspect before shooting him. *Id.* at 1293–94.

A municipality will only be held liable for injuries caused by the excessive force used by an officer. If circumstances justify the officer’s use of some force but he goes beyond what is justified, the municipality will be liable only for injuries caused by the excessive force. In *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir.2002) the court held that the use of deadly force against a suspect who, though initially dangerous, has been disarmed or otherwise become non-dangerous, is conduct that lies “so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [is] readily apparent.” *Lee v. Ferraro*, 284 F.3d 1188, 1199 (quoting *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)); see also *Salvato*, 790 F.3d at 1294. It is up to a jury to decide at what point the force used became excessive, just as it must determine what injuries the excessive force caused.

In addition, Sections 13A-3-27(e) and (f) place a duty upon a private citizen to aid an officer. If this private individual were to use excessive force while acting pursuant to the officer’s directions, the municipality may be held liable for the individual’s actions as well.

In federal court, the ordinary Section 1983 principles govern. In *Montoute v. Carr*, 114 F.3d 181 (11th Cir. 1997),

for example, the court held that in a Section 1983 action against a police officer for excessive force, an arrestee has the burden of proving that no reasonable officer could have believed that the arrestee either had committed a crime involving serious physical harm or that the arrestee posed a risk of serious physical injury to the officer or others. And, in *Jones v. Dothan*, 121 F.3d 1456 (11th Cir.1997), the court held that the actions of a police officer, while rude, would not inevitably lead a reasonable officer to conclude that the amount of force used under the circumstances was excessive. In this case, the plaintiff filed an excessive force claim after the officer yelled at her, twice told her to shut-up, ignored her questions about her husband, and stuck his finger in her face, making contact with her skin.

Search and Seizure

Normally, questions of improper search and seizure arise only where a defendant in a criminal case seeks to prevent his conviction by alleging that a piece of evidence was improperly obtained. However, an officer may become liable if, subsequent to seizing evidence, he misuses it. *Yeager v. Hurt*, 433 So.2d 1176 (Ala.1983). If the property is lost, damaged or destroyed, the officer will be liable if the loss is the proximate result of his failure to exercise due care to preserve it.

While *Yeager* dealt solely with the officer’s individual liability, a municipality might be found liable if it can be determined that the officer acted negligently or carelessly in the course of his duties. In addition, if he acted pursuant to a policy or custom, the municipality might be liable under Section 1983. For instance, the Alabama Court of Civil Appeals held in *Campbell v. Sims*, 686 So.2d 1227 (Ala.Civ. App.1996), that a motorist’s claim that she was stopped and searched without probable cause stated a sufficient claim against the police officer and the city. And, in *Lightfoot v. Floyd*, 667 So.2d 56 (Ala.1995), the Alabama Supreme Court held that a police officer was not entitled to qualified immunity after improperly seizing and retaining cash and a vehicle for several months.

Other Causes of Action

While this article has covered only some of the major areas of liability for municipalities which provide police protection, there are many others such as malicious prosecution, improper arrest, mistreatment of prisoners and negligent driving. Any aspect of police protection can result in municipal liability in the proper circumstances. In any of these areas, the tort principles discussed above and in the article on tort liability elsewhere in this publication will apply in determining whether the municipality is liable for the officer’s actions in either state court or federal court.

Avoiding Liability

The first step toward avoiding liability for the actions of police officers is training. The better trained an officer is, the less likely he is to perform negligently. An officer should know how to respond in specific situations to avoid charges against him or the municipality.

In Alabama, all officers are required to complete at least 480 hours of training in a recognized police training school in order to comply with the Peace Officers' Standards and Training Act. In addition to this training, the municipality should promulgate a proper written policy which deals with the numerous situations facing a police officer daily and which explains to the officer how he should be required to be familiar with this policy.

Much research and study is necessary to formulate this type of policy. It will be necessary to examine each potential area of liability exposure and develop ways in which to handle the problems. Every aspect of police operations should be investigated, from personnel rules to the operation of vehicles. It may be necessary to appoint a committee to ensure that all police department operations are covered. The municipality must be honest about problems it has and thorough in its resolutions.

In *Coverage*, a monthly publication of the Texas Municipal League, one city's solution to the liability crisis was described. After researching the complaints and lawsuits filed against its police department, the City of Hazelwood, Missouri, decided to implement preventative measures. The city discovered that the majority of the complaints resulted from a one-on-one confrontation between the officer and the complainant at the time of booking.

The city decided that the best way to deal with the situation was to maintain a record of the interaction between the officer and arrested individuals. The city purchased miniature tape recorders for each officer to attach to his belt or place in his pocket. In addition, they purchased enough video and audio equipment to provide 24-hour television surveillance and recording of the police parking lot, prisoner booking area and all department passageways. The total cost of the system was around \$20,000.

In the first six months of use, complaints against the police department dropped by over 75 percent. Of the complaints that were filed, the majority were determined to be unfounded based upon the recorded evidence that existed. While such a system might seem costly to justify for most municipalities in Alabama, it is an example of the type of innovative thinking that will help a municipality avoid complaints against their police departments.

The Ethics Law

The rest of this article is devoted to an examination of the ethical issues that surround a police officer's acceptance of off-duty employment and the use of public equipment

in the course of that employment, specifically pursuant to Section 36-25-5(c), Code of Alabama 1975. The hope is that other officers may avoid ethical problems in the future.

Generally speaking, the Alabama Ethics Law prohibits public officials and employees from using their official position or any public equipment to benefit themselves financially. However, Section 36-25-5(c), Code of Alabama 1975, provides:

"(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy. Provided, however, nothing in this subsection shall be deemed to limit or otherwise prohibit communication between public officials or public employees and eleemosynary or membership organizations or such organizations communicating with public officials or public employees."

Thus, Section 36-25-5(c) prohibits the use of public equipment or facilities unless another law provides otherwise, or unless an employment agreement or policy permits the use of the equipment. This means that the first step in allowing the off-duty use of public equipment by police officers is the enactment by the municipal governing body of a policy permitting that use. Without a specific policy in place, Section 36-25-5(c) seems to be an absolute prohibition against the use of public equipment during off-duty employment.

Although this section does not prohibit an officer from taking off-duty employment, officials should be aware that the municipality may have a policy in place that prohibits officers from taking off-duty jobs. This would be perfectly valid. This is a policy issue that the municipality must weigh before deciding to allow off-duty employment.

Even where the municipality decides that the positive effects of having officers work off-duty jobs outweigh the potential liability, the municipality must then decide whether to allow the use of public equipment and, if so, should retain some control over what municipal equipment may be used during the off-duty employment.

Although the municipality will want to address the issue of off-duty employment in more detail than can be done in this article, to allow officers to work off-duty jobs the policy should at a minimum state something similar to the following:

"Police officers of the City/Town of _____ may accept off-duty employment subject to the restrictions

and guidelines set out herein. Any officer seeking to accept outside employment must file with the chief of police a request for approval of outside employment. This request shall include the location and nature of the outside employment; the date and hours to be worked; the name of the outside employer; the duties of the outside employment; whether the job is a one-time event or is continuous; whether the job is to be worked in uniform; a list of any public equipment that may be used during the job; and any other information required by the chief of police. The chief of police shall approve or disapprove of any outside employment in writing. The chief of police may place conditions not inconsistent with this policy upon the acceptance of any outside employment. Public equipment may be used only as approved by the chief of police.”

This policy should be adapted to meet local needs and requirements. To avoid ethical problems under Section 36-25-5(c), the policy must include a statement permitting the use of public equipment during the off-duty employment. The municipality may want to specifically list the types of equipment that an off-duty officer may use. The municipality should retain a written copy of the approval or disapproval of outside employment, which should include a list of equipment that the officer has been authorized to use on the off-duty job.

Additional issues to consider included in the policy are a definition of off-duty employment; requiring the private employer to sign a hold-harmless agreement; whether all officers will be allowed to work off-duty jobs (for instance, the municipality may want to restrict some supervisors from accepting off-duty jobs due to the hours they will be expected to be on-duty); the type employment that will be allowed; the number of off-duty hours an officer may work; whether the officer should file a statement following the employment as to the duties he or she performed; and how far outside the municipality the officer may work, among other issues.

Compensatory Time

One aspect of off-duty employment that seems blatantly obvious but has created problems in the past is that outside employment **must take place when the officer is not on duty**. An officer may not draw pay from both a private employer and the municipality at the same time.

Closely related to this issue is the use of compensatory time. Comp time is time off from work that is granted either by federal or local law or ordinance in return for extra on-duty hours worked. Although the municipality may in its policies grant comp time for regular hours worked, generally comp time is given only for hours above the normal hours a person is required to work. This operates in a manner similar to overtime pay. As an example, under

the Fair Labor Standards Act (FLSA), police officers may be required to work up to 43 hours in a 7 day work period (or 171 hours in a 28 day pay period). Once an officer works more than 43 hours (or other hours, based on the pay period), the municipal employer must either give the officer comp time or overtime pay. Under the FLSA, payment for overtime pay or comp time is at time-and-a-half.

Hours that are used to compute both the number of regular hours worked and comp time used are time spent on-duty. That is, a municipality can only compensate an employee for time worked for the municipality. Outside employment time does not enter into the computation.

Continuing to follow the above example, if a police officer works 45 hours in a week (assuming a pay period of one week), the officer would be entitled to three hours of comp time – that is, one-and-one-half-hours for every hour of overtime worked – or overtime pay at time-and-a-half. Depending on the municipal policy in place, comp time can be used similar to leave time. The officer is not on the clock when he or she uses comp time. Because of this, if the municipal policy allows outside employment, the officer may use comp time to work outside employment.

Bear in mind that the above rule applies only to officers who are subject to the FLSA. If a municipality employs fewer than five law enforcement personnel, the municipality is excused from the overtime and comp time provisions of the FLSA as to those employees. Additionally, certain employees are exempt from these provisions of the FLSA because of the jobs they hold. This may include supervisory police officers. The FLSA includes tests to determine if an individual is an exempt employee and, if so, that employee is not entitled to any overtime pay or comp time.

Despite this, the municipality may decide that it wants to grant comp time to these employees. This action must be taken by the municipal governing body through the adoption of a policy allowing the use of overtime pay. This step is extremely important. While an employee who is exempt from the FLSA may be entitled to leave time, and may – if allowed by municipal policies – use this off-duty time to work a second job, these employees are not entitled to comp time unless the municipality adopts a policy providing for it. From the point of view of the Ethics Commission, a municipal policy establishing a written comp time program for employees who are not covered by the FLSA is mandatory before they can have time off from work (other than pursuant to regular leave time) to work an off-duty job.

Other Requirements

No municipal employees may use on-duty time for purposes related to off-duty employment. This rule extends, not only to the officer but also to employees who

are not being hired by the outside employer. For instance, a secretary may not use time at work to schedule off-duty work for police officers. Of course, the secretary may use work time for purposes related to on-duty work. For instance, it will probably be necessary to maintain a record of officers working off-duty jobs, where they are working and the hours they are at the off-duty location.

Additionally, supervisors should not receive pay or any other benefit for assigning or approving off-duty work for officers.

Conclusion

The municipal governing body has the power to decide whether municipal police officers may work off-duty jobs. If the council elects to allow this type work, it must establish a written policy to this effect. The League encourages municipalities to work closely with the municipal attorney, police chief and liability insurance carrier in the drafting and implementation of a policy on off-duty employment. If public equipment will be used on the off-duty job, this must be spelled out in the policy pursuant to Section 36-25-5(c).

In addition to a policy allowing off-duty employment, the council must pass a policy granting comp time to officers who are exempt from the FLSA, if these officers will be allowed to use comp time to work off-duty. All off-duty work must be performed on the officer's own time. Finally, bear in mind that on-duty municipal employees may not use their time to help in any way with the off-duty employment, and supervisors should not accept payment for assigning officers.

Note: The portions of this article related to the Ethics Law have been reviewed and approved by attorneys for the Ethics Commission.

Ethics Rulings

The Ethics Commission will address any questions regarding officers working off-duty jobs. The commission can be reached at (334) 242-2997. The commission has released the following opinions related to off-duty employment of police officers:

- A law enforcement officer may work for another law enforcement agency on his or her day off. AO NO. 1995-105.
- A law enforcement officer may not provide information obtained in the course of his public employment to a family member employed by a bail bonding company, if that information would be used in a manner that would benefit the officer, the family member, or the business with which the family member is associated. AO NO. 1996-03.
- A deputy sheriff may purchase and operate a wrecker

service provided that all work done for the service is done on his or her own time, whether annual leave or after hours; that no public equipment, facilities, time, materials, labor or other public property will be used to assist him with the wrecker services; that he doesn't use his or her public position to benefit him or her in his or her private business; and that no confidential information gained while on his or her public job is used in the operation of the wrecker service AO NO. 1998-06.

- A deputy may not serve civil papers for attorneys during off-duty hours because this is one of the deputy's functions as an employee of the sheriff's department. AO NO. 1998-25.
- A municipal police detective may work part-time for an attorney investigating civil matters or matters outside the county in which his jurisdiction lies, provided that he does not involve himself in any matters concerning the county while performing this part-time work. The detective may serve civil papers, provided service of the papers is not the normal function of the police department for which he works. Outside employment must comply with any municipal policies or regulations. AO NO. 1998-28.
- A police chief may not practice law in his or her off-duty hours because the police chief is on duty twenty-four hours a day. AO NO. 1998-31
- A municipal chief of police may not practice law during his off-duty hours because the chief is on duty 24 hours a day. AO NO. 1998-32.
- A probation officer may practice law or serve as a municipal prosecutor in his free time, provided all provisions of the Ethics Law are complied with. His or her law practice must not involve individuals he or she supervises and he or she may not practice criminal law in the area in which he or she has jurisdiction as a probation officer. AO NO. 1998-36.
- A police officer may perform security consulting work during his or her off-duty hours, provided that he or she doesn't use his public position to assist him or her in the private work, he or she does not use any public equipment, and that he or she performs the work on his or her own time. The work must comply with municipal guidelines and regulations. AO NO. 1998-37.
- A municipal police dispatcher may not accept employment with a local bonding company because the opportunity arose because of his or her position as police dispatcher and because it would be difficult to

separate his or her duties as a dispatcher from those as an agent for the bonding company. AO NO. 1998-39.

- An off-duty state trooper may be paid to serve as an instructor at a police academy, provided that the provisions of the Ethics Law are complied with. AO NO. 1999-01.
- A police officer may not also serve as coroner in the county in which he resides and is employed because it would be difficult to separate the duties of both positions and it would be difficult not to use the public equipment in one position in the performance of another. AO NO. 1999-04.
- A police officer with the City of Huntsville may perform accident reconstruction services for law firms and insurance companies; provided, he does not use any of the City's equipment, facilities, time, materials, human labor or other property under his discretion or control to assist him in performing or obtaining these services. In the alternative, he shall not perform accident reconstruction services with nor within the City of Huntsville or its police jurisdiction. AO NO. 2000-02.
- The chief of police for a city police department may not accept outside employment with a wrecker service that is under contract with the city. AO NO. 2000-31.
- A member of the Jackson Police Department may set up a part-time business filling and inspecting portable fire extinguishers; however, all work conducted in conjunction with his or her off-duty employment must be done on time, whether it is after-hours, on weekends, etc; that there is no use of any public equipment, facilities, time, materials, human labor or other public property under his or her discretion or control to assist him or her in conducting his outside employment or in obtaining opportunities; and further, that the member of the Jackson Police Department not do business with the city with which he is employed or with the various departments or agencies of the city. AO NO. 2000-36.
- A sheriff may receive compensation for teaching law enforcement related subjects provided that teaching these subjects is not part of the normal duties of the office, the teaching is performed when off-duty and no county materials or labor are used to assist the teaching. AO NO. 2004-03.
- A city police officer may run for the position of county constable; provided that, if elected, all activities relating to his position as constable are conducted on his own time, whether after hours, weekends, or annual leave. Further, he may not use any public equipment, facilities, time, materials, labor, or other public property under his discretion and control to assist him in performing the duties of constable or in running for such office. AO NO. 2003-52.
- A municipal police officer may perform accident reconstruction services for law firms and insurance companies; provided, however, that the officer does not use any municipal equipment, facilities, time, materials, human labor, or other municipal property in performing those services. Provided further, that the officer does not perform accident reconstruction services within the municipal corporate limits or police jurisdiction or on any matters involving the municipality. AO NO. 2004-27.
- A city and a member of the city police department, may enter into a rental agreement allowing the officer to live rent-free in a mobile home owned by the city and located on city property in exchange for the officer providing security for the city property during the officer's off-duty hours, when the arrangement is subject to a rental agreement made a part of the officer's employment contract with the city, and clearly sets out the obligations of all parties concerned; and further, where a public interest is served. AO NO. 2007-06.
- A copy of a contract to provide services entered into by a public official, public employee, member of the household of the public official/public employee or a business with that person is associated, which is to be paid in whole or in part out of state, county or municipal funds must be filed with the Ethics Commission within ten (10) days after the contract has been entered into, regardless of the amount of that contract, or whether or not the contract was obtained through competitive bid. AO NO. 2009-10.
- A police officer may work an off-duty job as security for a private business so long as they did not use their position as leverage to obtain the opportunity or to create the opportunity and they are performing the work on their own time and not on public time. If the use of equipment is pursuant to a lawful employment agreement regulated by agency policy, an off-duty officer may use equipment, facilities, time, materials, human labor, or other public property under their discretion or control in an off-duty job with a private business. Absent that agreement, it would be a violation of Ala. Code §36-25- 5(c) for an off-duty officer to use any equipment available to him as a public employee while working for a private business. AO NO. 2018-08.

Attorney General's Opinions

- City council may allow off-duty police officers access to city police equipment where officers are performing services which could be provided by officers on duty. AGO 1982-477 (to Hon. Earl F. Hilliard, July 27, 1982).
- In the absence of an ordinance prohibiting it, a police officer can be authorized to use city uniforms and equipment while working off-duty as a security guard in certain limited cases. The police officer has full arrest powers while on or off-duty. The question of workmen's compensation liability depends upon who the officer was employed by when the injury occurred. If an off-duty officer using city equipment and acting within the line and scope of his or her duties causes injury to another, the city may be held liable for damages. AGO 1984-318 (to Hon. Steve Means, June 14, 1984).
- Section 11-43-16, Code of Alabama 1975, authorizes municipalities to hire deputy sheriffs as part-time police officers. Absent a county personnel rule prohibiting such service, a deputy sheriff may serve as a part-time police chief while he or she is off duty from the county. AGO 1994-023.
- A deputy sheriff may not obtain outside employment to investigate criminal matters during his or her off-duty hours. AGO 1994-159.
- Off-duty police officers employed by a community college have immunity pursuant to Act No. 94-640 when performing duties as set out in that act. AGO 1995-059.
- In instances where other exemptions are not applicable, off-duty sworn peace officers are required to obtain a state license and/or certification from the Alabama Security Regulatory Board (Board). The Alabama Security Regulatory Act is codified at Section 34-27C-1, et seq., of the Code of Alabama. This Board was created to regulate security guards, armed security guards, and the companies that employ such persons. Pursuant to section 34-27C-18(b) of the Code of Alabama, a City may not continue to regulate security officers who work for companies that are exempt from state regulation. AGO 2010-028.
- The town council may, by ordinance, permit or require the police department to escort funerals. Police vehicles may use flashing blue or red lights during the escort. AGO 2015-061.

All cities and towns of this state shall have the power to establish, erect, maintain, and regulate jails, station houses and prisons according to Section 11-47-7, Code of Alabama 1975. Section 11-47-8 of the Code states:

“If the jail of any municipality is destroyed or becomes overcrowded, insufficient or unsafe or any epidemic dangerous to life is prevalent in the vicinity, or there be danger of rescue or lawless violence to any prisoner, any circuit judge of the county, on application of the mayor or governing body of such municipality and proof of the fact, may direct the removal of any prisoner or prisoners, either before or after conviction, to the nearest sufficient jail in any other municipality or county; and it is the duty of such judge in such case to make an endorsement on the order or process of commitment stating the reason why such removal is ordered, and to date and sign such endorsement. The maintenance and costs of removal of said prisoners shall be borne by the municipality requesting said removal.”

The statutes quoted above are self-explanatory and give legal sanction to the establishment and operation of jails and the expenditure of public funds for jails. A place to incarcerate a convicted offender is essential to good order and discipline and, therefore, a necessity for every municipality.

Tort Liability

Prior to July 10, 1975, municipalities were immune from suits arising out of the exercise of governmental functions. On July 10, 1975, the Alabama Supreme Court issued an opinion in the case of *Jackson v. Florence*, 320 So.2d 68 (Ala. 1975), in which governmental immunity for municipalities was abolished. The court had previously ruled that the operation of a jail by a municipality constituted a governmental function. *Hillman v. Anniston*, 108 So. 539 (Ala. 1926). As a result of the decision in the *Jackson* case, municipalities were held to be liable for injuries which result from the municipal operation of jails. However, the Alabama Supreme Court has since issued opinions that hold that immunity applies to employees of municipalities in the same manner that immunity applies to employees of the State. See, *Ex parte Birmingham*, 624 So.2d 1018 (Ala. 1993) and *Birmingham v. Brown*, 969 So.2d 910 (Ala. 2007).

As a municipal police officer with responsibility for the city jail, a law-enforcement duty within the meaning of immunity statute, a police department major was within the umbrella of protection provided to peace officers by the immunity statute when she conducted a body search of a

city correctional officer to determine if she had stolen an inmate's money, and, thus, the major was immune from tort liability in correctional officer's action against her. If a municipal peace officer is immune pursuant to immunity statute, then the city by which he is employed is also immune. *Ex parte Dixon*, 55 So.3d 1171 (Ala.2010).

Exemption from Attachment and Execution

McQuillin states that jails owned by municipalities and the lots upon which they stand, are exempt from attachment and execution, and this is true independent of express statutory provisions. *McQuillin, Municipal Corporations*, Section 28.57 (3d Ed. 1990). See, *New Orleans v. Louisiana Construction Company, Ltd.*, 140 U.S. 654 (1889), for the proposition that property held by municipal corporations, in trust for the benefit of their inhabitants and used for public purposes, is exempt from attachment and execution.

Under Alabama statutes, municipal property is exempt from attachment. Section 6-10-10, Code of Alabama 1975, states: “All property, real or personal, belonging to the several counties or municipal corporations in this state and used for county or municipal purposes shall be exempt from levy and sale under any process or judgment whatsoever. In *Ellis v. Pratt City*, 20 So. 649 (Ala. 1896), the plaintiff sought to garnish insurance proceeds payable to the city from fire loss of the public hall and market house and the defendant city claimed its exemptions. The decision is quoted in part: ‘Under the evidence in the case, and the legal principles applicable thereto, said fund was not liable to, but was exempt from plaintiff's garnishment.’” Further, a lien on property owned by a municipality and used for municipal purposes cannot be enforced. AGO 2000-178.

Contractual Authority

“Municipalities and counties may contract with each other for the ownership or use and occupation of parts of city halls, city jails, county courthouses and county jails or other public buildings held and owned by such municipalities or counties located within such municipalities, and any such contract shall be binding upon both the municipality and county until revoked by the joint agreement and action of both parties to such contract.” Section 11-80-3, Code of Alabama 1975. This is the authority by which municipalities may arrange through contractual agreements to use a county jail. Additionally, state law provides that except as otherwise prohibited by law, any county or incorporated municipality of the State of Alabama may enter into a written contract with any one or more counties or incorporated municipalities for the joint exercise of any

power or service that state or local law authorizes each of the contracting entities to exercise individually. Section 11-102-1 *et. seq.*, Code of Alabama 1975.

Abolition of a municipal jail does not relieve the municipality of the responsibility to house municipal prisoners, nor is the county required to accept municipal prisoners without a valid contract. AGO 1993-079. *See also*, AGO's 1999-160; 1999-210; and 2000-013. If the prisoner is charged with violation of a state offense, the county becomes responsible. If a municipality has failed to pay the costs of housing municipal prisoners, and where there is no written agreement or statutory requirement, the sheriff may refuse to accept prisoners from the municipality. The sheriff should give adequate notice to the municipality that he will no longer accept their prisoners. AGO 1999-210.

The Attorney General has advised that once a contract between a municipality and the county has been entered into, municipal prisoners may be committed to that part of the county jail used and occupied under the contract and that part of the county jail becomes the city jail. *Attorney General's Biennial Report for 1928-30*, Page 446. In a subsequent opinion, the Attorney General advised that a sheriff should not receive municipal prisoners in the absence of a contract entered into under the provisions of Section 11-80-3, Code of Alabama 1975. *Attorney General's Biennial Report for 1930-32*, Page 290. This opinion also states that, in the event of such a contract, a municipality should be charged with the expense of housing the prisoners and that such expense can in no way be made a charge against the state or the county. Both the county commission and the sheriff should be parties to any contract to house prisoners in the county jail. All fees, commissions, percentages, allowances, charges and court costs collected for the use of the sheriff and his deputies, excluding the allowances and amounts received for feeding prisoners, should be deposited into the county general fund. AGO 2011-020. The decision to accept municipal prisoners lies within the discretion of the sheriff, unless there is a current agreement between the county, the sheriff and the municipality for the sheriff to accept municipal prisoners. AGO 2003-032.

AGO 1999-160 holds unless there is an agreement to the contrary, a municipality must pay the housing and costs of indigent prisoners who are charged with the violation of a municipal ordinance and are housed in the county jail. *See also*, AGO's 2000-013 and 2003-025. The expenses of a municipal inmate are to be assessed against the inmate. If the inmate is indigent and has been convicted of violating a municipal ordinance, the municipality is responsible for the costs and expenses of housing indigent municipal prisoners in the county jail.

The use of a county jail by a municipality is a matter of contract between the county and the municipality. Usually,

the feeding expenses are a matter of agreement between the municipality and the sheriff. AGO to Hon. T. O. Rolling, August 13, 1971. Feeding prisoners in the county jail is an official part of the duties of the office of the sheriff. The sheriff may contract with a private business to feed the prisoners. The business must pay any local license tax. The sheriff may purchase food products and transfer them to the business to be used for feeding the prisoners without incurring sales tax. AGO 2008-061 and AGO 2008-062

The county is responsible for the medical expenses of county inmates housed in the county jail. Section 14-6-19, Code of Alabama 1975. A municipality; however, is not responsible for the medical costs of a municipal inmate housed in a county jail unless the municipality has contracted to provide such services. AGO 2004-196. A county is not responsible for the medical costs of an indigent municipal prisoner simply because the county has agreed to house municipal prisoners. AGO 2008-029.

Considering the statutes quoted above and the opinions of the Attorney General, it is essential that a city and county agree on the use of jails. This contract must be finalized before it is lawful to incarcerate municipal prisoners in a county jail. Since this is a contract between two instrumentalities, the original contract and all subsequent additions or extensions should be carefully drawn to avoid misunderstandings between the parties.

Review of Alabama Statutes

Chapter 6 of Title 14 of the Code of Alabama 1975, addresses jails. Although these sections deal principally with county jails, the statutes are briefly reviewed for guidance. Section 14-6-1 states that the sheriff has charge of the jail and all county prisoners. Section 14-6-3 lists persons which may be committed. Section 14-6-13 provides that men and women prisoners, except husband and wife, must not be kept in the same room or apartment. Statutes on segregation of races in jails were ruled invalid by the federal courts in *Washington v. Lee*, 263 F.Supp. 327 (M.D. Ala. 1966). Section 14-9-3, which authorizes a reduction in the sentence of a prisoner who donates blood to the Red Cross, does not apply to prisoners in a city jail. AGO 1992-113. Under 14-6-1, Code of Alabama 1975, the sheriff has legal custody and charge of the jail in his county and all prisoners committed thereto. Additionally, Section 14-6-40, requires that the sheriff feed the prisoners of the county jails unless otherwise provided by law. The sheriff should seek funds from all applicable sources as provided by law for feeding prisoners in county jails. Feeding prisoners in the county jail is an official part of the duties of the office of the sheriff. The sheriff may contract with a private business to feed the prisoners. The business must pay any local license tax. The sheriff may purchase food products and transfer

them to the business to be used for feeding the prisoners without incurring sales tax. AGO 2008-061 and AGO 2008-062. Any surplus in the food service allowance for feeding prisoners in the county jail should be retained by the County Sheriff's Office unless the county commission has adopted a resolution directing that the allowance be paid into the county general fund. If the county adopts such a resolution, it assumes the duty to feed the prisoners. The sheriff should seek funds from all applicable sources as provided by law for feeding prisoners. The state, county, municipalities, and federal government should cooperate in obtaining and providing adequate funding to feed prisoners from their jurisdictions which are housed in the county jail. AGO 2011-053.

Section 14-6-17 allows any person committed to jail to furnish his or her own support, under such precautions as may be adopted by the jailer to prevent escapes. The sheriff must furnish support for those prisoners who do not provide it for themselves. Section 14-6-19 requires the sheriff, at county expense, to furnish necessary clothing and bedding to prisoners who are unable to provide for themselves. The section further requires the county to provide necessary medical attention and medical supplies to those prisoners who are sick or injured when they cannot provide them for themselves. No prisoner shall be furnished with any spirituous, malt or vinous liquors, except on written order of a physician, and the jail may be punished for furnishing these substances. Section 14-6-18, Code of Alabama 1975. Prisoners may be removed because of fires and the court can order removal of seriously ill prisoners. Sections 14-6-8 and 14-6-9, Code of Alabama 1975.

The sheriff may summon as many guards as necessary to prevent escapes and may remove prisoners, under approval of the court, if the jail is not secure or is insufficient for the safekeeping of prisoners. Sections 14-6-6, 14-6-7, and 14-6-11, Code of Alabama 1975. Statutes also require certain bookkeeping, recording and reporting of all prisoners.

Sections 14-6-40 through 14-6-50, Code of Alabama 1975, cover the feeding of prisoners.

Section 14-6-22 requires the court to assess a charge up to \$20 per day plus actual medical expenses for the time prisoners convicted of misdemeanors are incarcerated. This fee is used to defray the costs of housing the prisoner. The fee is waived for indigent prisoners. These fees are assessed as costs of court.

Regional Jail Authority

Sections 14-6A-1 through 14-6A-9, Code of Alabama 1975, allow for multi-county regional jail authorities to construct, maintain and operate a regional jail facility for the participating counties. Sections 14-6A-30 through 14-6A-39, Code of Alabama 1975, provide that the municipal

council of two or more municipalities, by resolution and with the initial consent of their respective mayors, may establish a regional jail authority for the purpose of constructing, maintaining, and operating a regional jail facility for the municipalities participating in the regional jail authority. Additionally, these statutes allow a municipality which desires to join an existing regional jail authority, to adopt a resolution and with the initial consent of the mayor, to request participation in the existing regional jail authority. A regional jail authority, by resolution, may approve the requesting municipality's participation in the authority, and if approved, the municipality shall participate with all rights and obligations of the original municipalities participating in the regional jail authority.

Supervision of Jails in Cities of More than 10,000 Population

Section 14-6-80, Code of Alabama 1975, imposes duties on the Department of Corrections regarding municipal jails in cities of more than 10,000 in population. The Department of Corrections is required to inspect such municipal jails at least twice a year or more often if deemed necessary. The Department shall aid in securing the just, humane and economic management of such institutions; shall require the erection of sanitary buildings; and shall investigate the management of such institutions and the conduct and efficiency of the persons charged with their management. The Department has an affirmative duty to require that jails and their grounds be kept in a sanitary condition and it must report results of inspections to the governor. A copy of the report must be furnished to the city council. Section 14-6-81, Code of Alabama 1975.

Cleanliness

A city council must provide adequate janitorial service for, and enforce cleanliness in, the jails. Bathing facilities, soap and towels, hot and cold water, clean and sufficient bedding and clean clothes must be provided. Section 14-6-93, Code of Alabama 1975. Prisoners may be compelled to bathe when entering jail and at least once a week while confined. Section 14-6-94, Code of Alabama 1975.

Court Costs

Section 11-47-7.1 allows a municipal governing body to assess an additional court cost equal to the amount charged in district court for similar offenses. These funds must be used for the purchase of land for, and the construction, equipment, operation and maintenance of the municipal jail or other correctional facilities or juvenile detention center or for a court complex. These costs cannot be waived unless all other costs are waived. Court costs assessed under

this section may be used to defray the expense of housing municipal prisoners in municipal jails. AGO 1995-179.

Other Attorney General's Opinions on use of these funds include:

- Expenses such as salaries, office machines and repairs. AGO 1996-236.
- An appropriation to a county to pay for housing municipal prisoners. AGO 1996-243.
- The purchase of a computer system, if the computer is to be used exclusively by the municipal court. AGO 1998-076.
- These funds **cannot** be used by a municipality to build or construct a police facility with or without a court complex. AGO 1999-012.
- Corrections Fund monies may be used to remodel the city hall auditorium, where the municipal court is located, even though there may be an incidental benefit to the municipality when the remodeled facility is used for city council meetings. AGO 2000-124
- Corrections Fund monies may be used to repair, remodel and renovate a city's court complex. AGO 2000-136.
- Neither Municipal Court Corrections Funds nor Capital Improvement Trust funds may be used to purchase police car video systems. AGO 2001-024.
- Corrections Fund monies may be used to remodel and refurnish the magistrate's office located in the town hall. AGO 2001-213.
- Corrections fund monies may be used to hire an additional magistrate for a municipal court, but cannot be used to furnish and employ personnel to staff a planned police substation. AGO 2003-054.
- The provisions of Section 11-47-7.1 of the Code of Alabama 1975 allow for a municipality to contract to pay a fee from the corrections fund to a county E911 center to enter and maintain the municipality's warrants into the NCIC database. To do so, the municipality must determine that the payment of the fee is a necessary expenditure for the operation and maintenance of the jail and court system. AGO 2005-193.
- Corrections Fund monies may be used to pay the cost of police officers transporting prisoners from the county jail to municipal court and for the magistrate to travel to the jail for 48-hour hearings. Provided however, the governing body must determine that the expenditures are necessary for the operation and maintenance of the jail and court. The determination of the appropriate costs, including mileage rate, per diem, or actual

expenses, is in the discretion of the governing body. AGO 2006-066.

- A City may use Corrections Fund monies collected pursuant to Section 11-47-7.1 of the Code of Alabama to purchase a computer-aided dispatch system to be housed in the City Public Safety Facility. Corrections Fund monies should be contributed or used only to the extent that the jail or court complex benefits from the use of this dispatch system. AGO 2008-127.
- A municipality may use Corrections Fund monies for the eCite traffic citation system if the city determines the expenditures are necessary for the operation and maintenance of the court. Corrections Fund monies should be contributed or used only to the extent that the court benefits from the use of this citation system. AGO 2011-079.
- A city may use corrections fund monies to purchase metal detectors, scanning equipment, and to pay officers and other related expenses to secure the city hall building which houses the municipal court. AGO 2017-027.

Federal Courts and Prisons

In addition to state laws applicable to prisons and county and city jails, federal courts have placed other requirements on entities operating jails. Federal courts have become increasingly involved in the operation of prisons and jails in the state as well as in the interpretation of the rights guaranteed to prisoners by the Constitution and laws of the state and nation.

Attorney General's Opinions and Court Decisions on Jails

- A municipality is responsible for the medical expenses of an indigent who is injured while working out a fine in the custody of the municipality. AGO 1992-009.
- Use of excessive force on a prisoner may constitute cruel and unusual punishment even though the inmate is not seriously injured. *Hudson v. McMillian*, 503 U.S. 1 (1992).
- Individuals providing community service in lieu of incarceration are not covered under municipal workers compensation. AGO 1994-161. Similarly, persons convicted in municipal court and sentenced to community service are not eligible for workers compensation benefits. AGO 1994-238.
- While a county commission is not required to pay the funeral expenses of a prisoner killed in the county jail, it has the discretion to pay the claim if it wishes to do so. AGO 1994-182.

- If a defendant must be transported to municipal court from state incarceration, the municipality must provide for transportation. AGO 1995-045.
- A municipality may house municipal prisoners arrested in one county in a facility maintained by another county. AGO 1995-304.
- In *Stark v. Madison County*, 678 So.2d 787 (Ala.Civ. App.1996), the Court of Civil Appeals held that a county owes no duty to an inmate to keep jail floors free of water or other foreign material, and, thus, is not liable when an inmate slips and falls in the jail bathroom.
- The costs of incarceration mandated by Section 14-6-22, Code of Alabama 1975, must be assessed against a misdemeanor unless the court remits the costs upon a finding that the payment would impose a manifest hardship on the defendant or his or her immediate family. In this case, the court may order the costs of incarceration to be paid in installments or in some other manner. AGO 1996-331.
- In *Lanford v. Sheffield*, 689 So.2d 176 (Ala.Civ. App.1997), the Court of Civil Appeals held that a municipal court prisoner was not an employee for workers compensation purposes.
- DNA specimens for the DNA database may be collected from youthful offenders. DNA specimens may be collected from persons found guilty of violating municipal ordinances which have adopted state misdemeanors. AGO 1998-024.
- A municipality is not responsible for the medical and transportation expenses of indigent prisoners who are in the custody of the county and are charged with state law felonies. AGO 1998-078.
- In *Loxley v. Coleman*, 720 So.2d 907 (Ala.1998), the Alabama Supreme Court held that although the town and its employee were entitled to sovereign immunity because they acted as state agents when transporting a state prisoner on work release, allegations against the employee for wanton behavior were entitled only to qualified immunity. Since the employee was not performing a discretionary function when driving a vehicle to avoid pot holes, neither she nor the town was entitled to immunity from this claim.
- A person who is arrested by a municipal police officer for a felony is a municipal prisoner until placed into the custody of the county. However, a person arrested by a municipal police officer for a felony may be taken to the county jail for detention. Under Section 12-14-1, Code of Alabama 1975, municipalities do not have jurisdiction over persons arrested for a felony; however, municipal officers have the authority to make arrests for felonies. AGO 2001-149.
- A municipality is not responsible for the medical expenses incurred as a result of the hospitalization of an inmate incarcerated in its jail. *Baptist Health Systems v. Midfield*, 792 So.2d 1095 (Ala.2001).
- Discipline of prisoners who provide legal advice to other prisoners in violation of prison regulations is constitutionally permissible if the regulations are reasonably related to legitimate penological interests under the test of *Turner v. Safley*, 482 U.S. 78 (1987). *Shaw v. Murphy*, 532 U.S. 223 (2001).
- It is within the sheriff's discretion to accept municipal prisoners, other than when required by law, unless there is a current agreement between the sheriff, county and the city for the sheriff to accept the prisoners. Both the county commission and the sheriff should be parties to any contract to house municipal prisoners. A city or a county may locate prisoners outside the city's or county's borders. Cities have authority to contract with a private firm for the operation of jails. AGO 2002-248.
- Alabama law does not provide any statutory procedure for disposing of any unclaimed personal property of inmates. Therefore, unclaimed personal property abandoned by transferred inmates may be disposed of by any reasonable method of trash disposal. This opinion holds that 30 days is reasonable. AGO 2002-032.
- Funds placed on deposit with the custodian for a municipal jail by an inmate therein must be returned to the inmate when he or she is released from jail. If the money deposited remains unclaimed by the prisoner for more than five years, the jail may consider the money abandoned property. AGO 2003-175.
- The Prison Litigation Reform Act provides that "[no] action shall be brought with respect to prison conditions...by a prisoner...until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a), applies to all inmate suits about prison life, including those that allege excessive force and those that involve particular episodes rather than general circumstances. *Porter v. Nussle*, 534 U.S. 516 (2002).
- A sheriff or jailer, acting as an agent for an inmate, may deliver prescription drugs prepackaged by dosage to an inmate when the drugs have been dispensed by a licensed pharmacist. AGO 2003-096.
- County inmate work details may be assigned to remove trees and shrubs donated from private property for use

on public lands if the commission so directs. AGO 2004-023.

- An inmate taking part in the community-corrections program may be charged with escape under the appropriate circumstances. *State v. Bethel*, 55 So.3d 377 (Ala.Crim.App.2010).
- Section 12-15-208(d) Code of Alabama 1975 does not require a person who is alleged to be delinquent and is not yet adjudicated as such, who turns 18 while being detained in a youth facility, to be treated as an adult and transferred to an adult jail. AGO 2010-082 and AGO 2010-083.
- A correctional officer who is the spouse of the owner of a bail bonding company has a direct or indirect financial interest in the bail company. Thus, if the duties of the correctional officer include the authority to approve appearance bonds, the bail bond company should not be approved to execute bonds in the jail where the spouse is employed as a correctional officer. AGO 2011-024.
- There is no authority to remit restitution owed by a criminal defendant for serving time in prison and/or jail for nonpayment. Rule 26.11(i)(1)(i) of the Alabama Rules of Criminal Procedure is limited solely to fines. AGO 2014-067.
- To avoid violating section 22 of the Constitution of Alabama, the county commission must award a contract to provide inmate telephone service in the Morgan County Jail pursuant to competitive bidding. AGO 2013-012.
- Subject to the limitations of Rule 26.11 of the Alabama Rules of Criminal Procedure, the court may place a non-indigent defendant in jail for failure to pay a fine after the defendant has completed his or her sentence or probation for the underlying offense. The defendant may serve time until the fine is paid or no longer than one day for each \$15 of the fine, no longer than the maximum term of imprisonment for the offense, and no longer than one year if the offense is a felony. AGO 2012-027.
- There is no statutory authority for the sheriff to transport prisoners charged with crimes in other states to and from those states. AGO 2012-026.
- Excess funds from the additional ad valorem tax levied for the new county jail in Hale County may be used to repay debt incurred in funding the sheriff's office if the Hale County Commission adopts a resolution determining that these expenditures are for law enforcement purposes. 2012-022.
- A city may use Corrections Fund monies for the

eCite traffic citation system if the city determines the expenditures are necessary for the operation and maintenance of the court. Corrections Fund monies should be contributed or used only to the extent that the court benefits from the use of this citation system. AGO 2011-079.

- Any surplus in the food service allowance for feeding prisoners in the county jail should be retained by the Sheriff's Office unless the county commission has adopted a resolution directing that the allowance be paid into the county general fund. If the county adopts such a resolution, it assumes the duty to feed the prisoners. Based on the facts presented, neither the sheriff nor the county may use the surplus for any purpose other than future expenses in feeding prisoners. The sheriff should seek funds from all applicable sources as provided by law for feeding prisoners. The state, county, municipalities, and federal government should cooperate in obtaining and providing adequate funding to feed prisoners from their jurisdiction that are housed in the county jail. AGO 2011-053.

66. Emergency Management and Preparedness

Alabama is certainly not immune from natural and man-made emergencies, and municipalities and their first-responders and officials are usually on the front-line in dealing with them. Therefore, it is imperative that municipal governments take proactive action and implement policies protecting the health, safety and welfare of their citizens.

Alabama laws on Emergency Management can be found in Chapter 9 of Title 31 of the Code of Alabama of 1975, as amended. For purposes of this article we will refer to this law as the Alabama Emergency Management Act. The Act outlines the authority and procedures of the state for declaring and dealing with disasters as well as the specific powers granted to local governments during such times. In addition, one of the primary purposes of the Alabama Emergency Management Act is to assist and encourage emergency management and emergency preparedness activities on the part of any political subdivisions of the state by authorizing the state to make grants, as funds are appropriated, to those political subdivisions to assist in the costs associated with emergency preparedness and response. It is vital that municipalities understand and comply with this act if they wish to receive financial assistance from the state with regard to emergency preparedness and response.

In addition to the Alabama Emergency Management Act, Section 11-45-1, Code of Alabama 1975, states, “Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances.”

These powers are commonly known as “police powers” and should be used advisedly as to not interfere with the civil liberties of citizens; however, in emergency situations, fundamental rights may be temporarily limited or suspended. See *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); see also *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

It is important to keep in mind that all laws of the state must continue to be followed during disaster preparation, response and recovery. For example, Section 94 of the Alabama Constitution of 1901, provides, “The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to

grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise.” In 1994, the Alabama Supreme Court decided *Slawson v. Alabama Forestry Commission*, 631 So. 2d 953 (1994) which held that a public entity such as a city may give money or something of value to non-public entities and organizations if the public entity determines the appropriation will serve a public purpose. The court went on to define a “public purpose” as one promoting the health, safety, morals, security, prosperity, contentment and general welfare of the community. Further, the court determined that the decision as to whether an expenditure serves a public purpose or confers a public benefit is wholly within the discretion of the legislative body making the decision. To determine whether a public purpose is served, the governing body must look to the statutes setting forth the powers of the governmental entity. If within such powers there exists the authority to promote the action at issue, then the governing body need only decide whether the appropriation will help accomplish that purpose. AGO 2012-002.

A municipality’s ability to carry out an emergency operating procedure stems from its police power. It is important for a municipality to have an emergency operating procedure in writing and in place **prior to** a disaster. The policy should be adapted for each municipality’s unique needs and give guidance and direction to municipal employees and officials on actions to be taken before, during and after a disaster. A written policy should be adopted either by motion or resolution. In light of the constant changes to state and federal laws and the unpredictable nature of disasters, emergency operating procedures should be reviewed frequently – at least annually – to be sure they are up to date.

In addition to an emergency operating procedure for employees and officials, a city should have an emergency operating ordinance outlining what to do in the event of an emergency. Unlike an emergency operating procedure, the adoption of an ordinance allows a municipality to enforce penalties for any violations. Much like the emergency operating procedure, the emergency ordinance should be reviewed frequently and both the emergency operating procedure and ordinance should correspond.

This article outlines the various considerations that must be made when preparing and developing emergency operating procedures and ordinances.

Local Emergency Management Organization and Director

The Alabama Emergency Management Act authorizes and directs municipalities to establish a local organization for emergency management in accordance with the state emergency management plan. In creating such an organization, the council may appoint a director who shall have the direct responsibility for the organization, administration and operation of the organization subject to the direction and control of the council. The organization formed shall perform emergency management functions within the territorial limits of the municipality.

Declaration of Emergency

The proclamation of a state of emergency pursuant to the Alabama Emergency Management Act is the first step in activating the disaster and recovery aspects of state, local, and inter-jurisdictional disaster emergency plans. The Alabama Emergency Management Act provides that either the Governor or the Legislature by joint resolution, has the authority to declare that a state of emergency exists. There is no authority under state law for mayors to declare an emergency in the face of a disaster. The only similar authority a mayor has is found in Section 11-43-82, Code of Alabama 1975, which gives mayors the authority, in time of riot, to close businesses in the vicinity of the municipality which sell arms and ammunition.

There is certainly a strong argument backed up by public policy that under its police powers, a city council has the discretion to declare an emergency in order to protect the health, safety and welfare of its citizens. If such a situation arises whereby a municipality cannot obtain a declaration by the Governor or the Legislature because immediate action is needed, the council should convene to declare an emergency.

If the situation is such that the council cannot convene, the emergency operating procedure and ordinance should provide for an alternative. The council, in the procedure or ordinance, should confer upon the mayor or the emergency management director the authority to declare a state of emergency in the event a meeting of the council cannot take place. The declaration by the mayor or the emergency management director should be subject to ratification, alteration, modification or repeal by the council as soon as they can convene. The ordinance should state that subsequent actions of the council will not affect the validity of prior actions of the mayor or other city officials. The declaration should be made as early as possible, especially if evacuations are necessary. All declarations should be made and attested to by the city clerk to the extent feasible.

When dealing with the declaration of a disaster, it is important to remember that unless and until your municipality is declared to be under a state of emergency by the Governor or the Legislature pursuant to the Alabama Emergency Management Act, funding may not be available for assistance.

With regard to funding available, it cannot be emphasized enough the need to document any expenditures made during the time of a disaster. For example, you will need to carefully keep up with every man-hour your employees work and every equipment hour utilized. Also keep up with every purchase order or invoice for materials, rentals of equipment, contracts entered into for assistance, landfill tickets etc... related to clean up. It is also very helpful to take pictures and to document where they are, what they are of and when they were taken.

Emergency Alert System

The municipality should have a plan in place to exercise the Emergency Alert System (EAS), which can be activated to warn and inform the public during emergency situations. The system can also be used as a public information tool during an evacuation.

Evacuation Plan

Section 31-9-10, Code of Alabama 1975 states that municipalities have no authority to provide for and compel the evacuation of an area except by the direction and under the supervision of the Governor or the Alabama Emergency Management Agency (AEMA), or both. The council should carefully design a plan of evacuation prior to the onset of a natural or manmade disaster and this plan should be coordinated with and approved by the AEMA. The plan may be accomplished in a variety of ways. It should be tailored to the needs of the individual municipality and the circumstances surrounding the disaster.

The availability of public transportation should also be considered when designing an evacuation plan. The plan should include schools, special-care facilities, hospitals and those industries handling extremely dangerous materials. Part of the evacuation plan may include a list or registry of the municipality's disabled citizens. The plan should include procedures for re-entry as well.

Remember that while it is important to have an evacuation plan, a municipality may not order an evacuation without the approval of the Governor or the AEMA as provided in Section 31-9-8, Code of Alabama 1975.

Emergency Powers

The Alabama Emergency Management Act provides for specific powers of municipalities during times of disaster. Specifically, the city council has the power, pursuant

to Section 31-9-10, Code of Alabama 1975, to do the following:

1. To appropriate and expend funds, make contracts, obtain, and distribute equipment, materials, and supplies for emergency management purposes; to provide for the health and safety of persons and property, including emergency assistance to the victims of any disaster; and to direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.
2. To appoint, employ, remove, or provide, with or without compensation, air raid wardens, rescue teams, auxiliary fire and police personnel, and other emergency management workers; provided, that compensated employees shall be subject to any existing civil service or Merit System laws.
3. To establish a primary and one or more secondary control centers to serve as command posts during an emergency.
4. To assign and make available for duty the employees, property, or equipment of the subdivision relating to fire fighting, engineering, rescue, health, medical and related service, police, transportation, construction, and similar items or services for emergency management purposes, within or outside of the physical limits of the subdivision.
5. In the event that the governing body of the political subdivision determines that any of the conditions described in Section 31-9-2(a) has occurred or is imminently likely to occur, the governing body shall have the power:
 - a. To waive procedure and formalities otherwise required by law pertaining to the performance of public work, entering into contracts, the incurring of obligations, the employment of temporary workers, the utilization of volunteer workers, the rental of equipment, the purchase and distribution with or without compensation of supplies, materials, and facilities, and the appropriation and expenditure of public funds.
 - b. To impose a public safety curfew for its inhabitants. If a public safety curfew is imposed as authorized herein, it shall be enforced by the appropriate law enforcement agency within the political subdivision. A public safety curfew imposed under this subsection shall not apply to employees of utilities, cable, and telecommunications companies and their contractors engaged in activities necessary to maintain or restore utility, cable, and telecommunications services or to

official emergency management personnel engaged in emergency management activities.

To close, notwithstanding Section 11-1-8, Code of Alabama 1975, any and all public buildings owned or leased by and under the control of the political subdivision where emergency conditions warrant, whether or not a local state of emergency has been declared by the governing body of the political subdivision. In the event that any documents required to be filed by a time certain deadline cannot be filed in a timely manner due to the closing of an office under this subdivision, the deadline for filing shall be extended to the date that the office is reopened as provided in Section 1-1-4 of the Code of Alabama 1975.

Section 31-9-10, Code of Alabama 1975 further authorizes that in the event that the Governor or the Legislature proclaims a state of emergency affecting a political subdivision, the chair or president of the governing body for the political subdivision may execute a resolution on behalf of the governing body declaring that any of the conditions described in Section 31-9-2(a), Code of Alabama 1975 (enemy attack, sabotage, or other hostile action, or from fire, flood, earthquake, or other natural causes) has occurred or is imminently likely to occur.

The emergency powers and duties of the mayor and/or emergency management director should be specifically described in the ordinance and procedure; however, due to unforeseeable circumstances, they should not be limited only to the ordinance and procedure. In addition to the specific powers provided for under the Alabama Emergency Management Act, a municipality may want to consider powers that would fall under their police power. For example, a list of powers may include: closing businesses; suspending alcoholic beverage sales; closing roadways; ordering continuation, disconnection or suspension of public utilities; controlling or allocating the distribution of relief supplies; applying for local, state or federal assistance; and others as needed. A chain of command should be established within the procedure and ordinance. In addition, employees should understand exactly what may be required of them during a disaster, both natural and manmade.

Preprinted Orders, Forms and Resolutions

In the interest of quick administration of the declaration and other procedures during a state of emergency, the council should consider drafting preprinted orders, forms and resolutions. Some sample forms include: declaration of emergency; evacuation and reentry control orders; curfew declarations; orders limiting or controlling re-entry to affected areas; state of emergency extension forms; and refusal to evacuate forms. Refusal to evacuate forms may

protect the city from liability in the event a citizen refuses to follow a mandatory evacuation order.

Interlocal Agreements

Interlocal agreements with other governmental entities coordinating emergency management procedures should be in place well before the disaster. Except as otherwise provided or prohibited by law, any county or incorporated municipality of the State of Alabama may enter into a written contract with any one or more counties or incorporated municipalities for the joint exercise of any power or service that state or local law authorizes each of the contracting entities to exercise individually. Section 11-102-1 *et. seq.*, Code of Alabama 1975. In accordance with the federal Disaster Mitigation Act of 2000, all counties are required to have approved and adopted a multi-hazard mitigation plan in order to receive future mitigation grant assistance. If a municipality participated in the development of their county's local hazard mitigation plan and is not sanctioned by the National Flood Insurance Program, that municipality must have passed a National Incident Management System (NIMS) resolution adopting the county's hazard mitigation plan.

The resolution should be transmitted to FEMA through the local EMA office. Failure to pass a resolution prior to receiving a presidential disaster declaration places the municipality at risk of becoming ineligible for future FEMA hazard mitigation grants. All municipal officials and disaster coordinators should coordinate with local emergency management agency personnel during a disaster response and recovery period.

Regular meetings between the city-county emergency management coordinator/director, the mayor, the municipal emergency management coordinator and the municipal department heads should be conducted on a regular basis.

Mutual Aid

Under Section 11-80-9, Code of Alabama 1975, municipalities in Alabama have the authority to provide "assistance, by means of gift or loan, to the governing body of any other municipality or county located within the state when such county or municipality has been declared a disaster area by the Governor of the State of Alabama or by the President of the United States." In order to provide mutual aid, an agreement, in writing, shall be drafted and approved by the assisting governing body and the recipient governing body.

Section 11-80-9, Code of Alabama 1975, does not guarantee reimbursement by any governmental agency unless provided for by contract.

Emergency Procurements

During times of disaster, Alabama's competitive bid laws still apply to the procurement of goods and services and if a contract can be competitively bid, it should be. However, under the competitive bid law, a municipal council has the authority to let contracts without advertisement in emergency situations when public health, safety or convenience is involved in the delay of acquiring needed equipment. See Section 41-16-53, Code of Alabama 1975.

A municipal governing body can only declare an emergency in response to an actual emergency. Under the provisions of the competitive bid law, an emergency must be declared by the municipal governing body prior to the performance of any work by contractors. A municipal council may not declare an emergency after work has been performed by a contractor. However, after a contract has been performed, the council may, under certain circumstances, provide funds to pay the contractor if the purchasing officer properly authorized the contract to be made on a negotiated basis because of an emergency. See Attorney General's opinion to Hon. Carl H. Kilgore, May 12, 1975.

Purchases should be streamlined through the mayor and/or emergency coordinator. A list of emergency purchases should be maintained by the mayor and/or emergency coordinator, and as soon as is possible, should be formally communicated to the municipal governing body.

Municipalities located in disaster-prone areas should consider seeking competitive bids and awarding contracts for debris removal and other services in preparation for disasters. Such contracts can be let for those services for all such disasters, but they cannot exceed three years. See Section 41-16-57(f), Code of Alabama 1975.

Section 31-9-120, Code of Alabama 1975 authorizes AEMA to provide obsolete equipment or items to local emergency management agencies for emergency purposes.

The Facilitating Business Rapid Response to Declared Disasters Act of 2014 (Sections 40-31-1 through 40-31-4, Code of Alabama 1975) provides that an out-of-state employee or business performing disaster or emergency related work on public infrastructure is not considered to have established residency or a presence in this state that would require the person or his or her employer to file income taxes or be subject to tax withholdings during a disaster period, as defined by the act. The act also specifies that an out-of-state employee or business is not exempt from paying transaction-based taxes and fees, such as fuel taxes, lodging taxes, or automobile leasing taxes, during the disaster period or from securing and paying applicable license and related fees to professional licensing boards of the state.

Emergency Spending Plan

It is important the emergency operating procedure and ordinance implement an emergency spending plan during disaster operations. This plan should include activation authority and payment methods not requiring high technologies (such as computers), which may be offline in a disaster.

Emergency Control Centers and Temporary Emergency Meeting Locations

Emergency control centers and temporary emergency meeting locations should be established in the event it becomes impossible to conduct governmental affairs at the regular and usual locations. These locations may be set by the council before or after the emergency. If possible, these locations should be within the municipal corporate limits. If temporary emergency locations are established prior to the disaster, they should be incorporated into the emergency operating procedure and ordinance.

Police and Fire Departments

The emergency operating procedure and ordinance should have a provision granting both the police and fire departments power to enter onto any property or premises as may be necessary to protect the public health, safety and welfare as well as to maintain order. The police department should be granted the authority to bar, restrict or remove all unnecessary traffic, both vehicular and pedestrian, from all local roadways. The fire department should be granted the authority to do whatever is reasonably necessary to protect persons and property while rendering first aid. It is important to note, however, that there is no authority to grant firefighters any police powers.

Work Hour Limits

The city council, mayor and emergency management coordinators should keep in mind overtime pay of non-exempt employees will be compensable under certain circumstances pursuant to federal law. It is important that the mayor and emergency management coordinators work together to ensure employees are assigned shifts and managed in a way that minimizes the amount of overtime worked by each employee. This will keep the overall costs of the disaster down as well as reduce employee exhaustion and injury, leading to a more efficient disaster recovery effort.

Compensation During Disaster

Non-exempt municipal employees under the Fair Labor Standards Act are entitled to overtime pay during a disaster; however, exempt employees are not. The mayor and council should take into consideration the amount of work that may be required of exempt employees during times of

disaster. The council should also consider circumstances under which additional compensation may be granted to exempt employees for tireless efforts and work on preparation, response and recovery. If the council chooses to grant overtime compensation for exempt employees, the emergency operating procedure and ordinance should state the council's intentions.

Personal Property Protection Plan

The emergency operating procedure should include a plan to protect municipal personal property. The plan should address technological failures including protection and recovery procedures. The plan should address all types of breakdowns, including power, computer and telephone failures. It should also cover complete loss of municipal personal property.

If time clocks are used to maintain personnel working hours, it is important to prepare and implement a plan of paper record keeping to ensure the municipality adequately complies with federal law.

The council should consider a disaster recovery plan for technological data. Many public entities store data in secure, off-site locations. In the event a disaster strikes one of these locations, the municipality can download the data from another location.

Single-Media Contact

The council should designate an employee or municipal official as the single-media point of contact for the disaster plan. This can be the emergency management coordinator, the mayor, or another municipal employee. By establishing a single-media point of contact, the municipality will cut down on confusion during the preparation, response and recovery stages of the disaster. A single-media point of contact and timely dissemination of information to the public will both serve the needs of the citizens and help the municipality operate in the most efficient manner before, during and after the disaster.

Debris Removal

Natural and manmade disasters can generate substantial amounts of debris that can overwhelm existing solid waste disposal facilities. With this in mind, a municipality should design a long-term debris removal plan that prepares for worst case scenarios. When designing the plan, the council should consider federal and state aid, interlocal mutual aid agreements, equipment, recycling, collection and storage sites, hazardous waste, contracts, state bid laws and federal reimbursement options.

Emergency Exercises

Emergency exercises are an excellent way to ensure personnel adhere to an emergency operating procedure. Emergency exercises familiarize employees with the plan and assist the local governing body in developing a more comprehensive and workable plan tailored to the needs of the municipality. When conducted, emergency exercises should include schools, special care facilities, hospitals and industries handling extremely dangerous materials.

Penalties

The emergency operating ordinance should proscribe penalties for ordinance violations and violations of any powers or orders granted pursuant the ordinance. Municipalities are given the power to enforce their ordinances by Section 11-45-9, Code of Alabama 1975.

Termination of Emergency Powers

Declarations, policies, rules and orders enacted pursuant to the emergency operating procedure and ordinance shall remain in effect until the council or other issuing individual withdraws the declaration, rule or order. In any event, all actions taken pursuant to any declaration, rule or order should cease once the conditions which gave rise to the emergency end.

Federal and State Assistance for Emergency Management

While local government is primarily responsible for the emergency response, there are times when a disaster overwhelms the local government's capacity to effectively respond. The operations functions of the AEMA includes those activities essential to a coordinated response in support of the local jurisdiction, such as warning, alerting, emergency communications, damage assessment and recovery assistance. The state's emergency operations center is the command post during disasters. Warning and coordination of the emergency is conducted in coordination with federal and local governments based on the state emergency operations plan.

An invaluable resource during a disaster are the state agency personnel trained to assess damage to public and privately-owned facilities; to aid local government in warning and notification and, if necessary, the evacuation of the threatened populace; to open and operate shelters; and to assist in other response and recovery operations.

AEMA administers a number of grants provided by FEMA and state sources, including the Hazard Mitigation Assistance grant programs. These programs and grants help local governments identify risks and vulnerabilities associated with natural disasters, and to develop long-term strategies for protecting people and property in future hazard events. The Alabama legislature also allocates funds

for local emergency management organizations through AEMA. Several other grants for local emergency planning committees and local emergency management organizations are also available.

Numerous training, planning and exercise services are available from AEMA for city-county management organizations. Courses are delivered in the field and at the Emergency Management Institute for emergency preparedness and cover executive development/management, natural hazards, radiological preparedness, hazardous materials and national emergency preparedness.

Sticking to the Plan

The most important aspect of crafting both an emergency operating procedure and ordinance is making sure the procedure and ordinance are followed. Doing so ensures that employees, officials and residents understand how their municipality will prepare for, respond to and recover from a disaster.

Conclusion

Disaster preparation, response and recovery can be overwhelming. Having a detailed emergency operating procedure and ordinance in place prior to the occurrence of a natural or manmade disaster can be the difference between an efficient and effective recovery and a long and tedious one. The city council and mayor must have positive interaction with county, state and federal emergency management officials to ensure the municipality can provide for its citizens before, during and after an emergency. With a sound emergency operating procedure and ordinance in place, a municipality can weather any storm.

Additional Information

Additional information concerning emergency preparedness activities can be obtained from the Alabama Emergency Management Agency, P. O. Drawer 2160, Clanton, Alabama 35046-2160. Telephone number: 205-280-2200. Fax number: 205-280-2495. Website: www.ema.alabama.gov

Attorney General's Opinions

- The State Emergency Management Agency may loan necessary equipment to county agencies during an emergency. AGO 1985-403 (to Hon. Dan Turner, June 26, 1985).
- Volunteers performing services without pay for the Alabama Emergency Management Agency are protected by the Volunteer Service Act, Section 6-5-336, Code of Alabama 1975. AGO 1993-147.
- Under Section 31-9-16(b) of the Code of Alabama

1975, individuals and entities have immunity from tort liability for emergency management services rendered on behalf of the State and under the authority of the Alabama Emergency Management Agency, even in the absence of a declared emergency. AGO 2006-010.

- Section 11-102-1 of the Code of Alabama supports the right of a municipality to make purchases through the purchasing cooperative contained in Section 41-16-51(a) of the Code, but does not affect the right of an Emergency Management Agency to make such purchases. There is no authority for entities covered by the Competitive Bid Law to make purchases through a purchasing cooperative other than the one sponsored by NACo as listed in Section 41-16-51(a)(16) of the Code of Alabama. AGO 2007-011
- An emergency management agency has no inherent right to control an emergency management communications district. AGO 1997-228.

67. Advance Planning for Civil Disturbances

Every Alabama municipality must be prepared to prevent civil disturbances within its boundaries. Such occurrences can usually be avoided by keeping lines of communication open between the municipal governing body and the groups which could cause such disturbances. Every effort should be made to prevent civil disturbances, but preparation is needed in case prevention measures fail. Lack of preparation might also act as an invitation to groups which would otherwise not attempt disturbances.

Homeland Security

The Alabama Department of Homeland Security was established by the Alabama Homeland Security Act of 2003. *See*, Sections 31-9A-1 et seq., Code of Alabama 1975. The Alabama Department of Homeland Security works to assist local entities in preventing acts of terrorism in Alabama, to protect lives and safeguard property, and if required, to respond to any acts of terrorism occurring in Alabama. To accomplish this, the Alabama Department of Homeland Security works closely with both the public and private sector in a wide range of disciplines: law enforcement, emergency management, emergency medical, fire services, public works, agriculture, public health, public safety communications, environmental management, military, transportation, and more.

Basic Preparations

A municipal governing body should consider certain basic preparations to forestall and quell civil disturbances.

First, the mayor and the municipal governing body should make every effort to establish a solid line of communication with all segments of the population within the community. A way to communicate grievances and to help resolve them should be established. Lack of communication could result in a municipal governing body not knowing about or being unprepared to cope with pending dangerous situations. Good communication between groups requires constant and continual work and effort by all concerned.

Communication should be established with state and county law enforcement agencies and a working arrangement should be made with neighboring municipalities. All of these agencies are equipped to render assistance if needed.

The mayor and municipal governing body should be acquainted with the procedures for contacting the state militia if National Guard troops are needed.

The municipal governing body should consider establishing an auxiliary police force which could be called

to duty to assist the regular force in emergency situations.

The mayor and the municipal governing body should be familiar with emergency powers available to them such as a curfew, shelter in place and quarantine orders, and the closing of establishments which sell firearms, alcoholic beverages, gasoline and explosives.

Steps should be taken to provide necessary equipment to the local police force.

The mayor and police chief should carefully prepare plans of action to be followed in coping with emergencies. The entire police force, together with the auxiliary force, should be thoroughly acquainted with such plans. Assistance in making such plans and preparations is available from the district offices of the state troopers and from commanding officers of National Guard posts located throughout the state. All municipal personnel should be adequately equipped and trained to carry out the plans which are adopted after careful study.

The mayor and the police chief might consider contacting their counterparts in other municipalities which have had disturbances. The experience of such persons may be of great value in planning or in dealing with problems which may arise. The exchange of information and ideas on “do’s and don’ts” could prove most useful.

Statutory Emergency Authority

Section 11-43-55, Code of Alabama 1975, authorizes municipal governing bodies to establish police forces. Section 11-43-210 provides for the establishment of an auxiliary police force in conjunction with the full time regular force. Requirements for forming an auxiliary police force are discussed in the article entitled “State Mandated Training for Municipal Personnel” found in the *Selected Readings*.

Under the provisions of Section 11-43-60, Code of Alabama 1975, a municipal governing body is authorized to regulate, control or prohibit the erection of powder magazines within police jurisdiction and to prevent explosives or dangerous substances from being stored in the municipality. A municipality may also regulate the manner in which explosives are handled or kept in the city or its police jurisdiction.

The mayor is given the power, under the provisions of Section 11-43-82, Code of Alabama 1975, whenever any riot or turmoil has occurred or if there is reasonable cause to suspect disturbances, to issue a proclamation ordering the closing of places selling firearms, ammunition, dynamite or other explosives. The proclamation may also forbid

the disposal of such items until such time as the mayor, following his or her best judgment, believes business may be carried on without danger to the public.

Section 11-51-102, Code of Alabama 1975, provides that a municipality has the power to license, tax, regulate, restrain or prohibit theatrical and other amusements, billiard and pool tables, nine or tenpin alleys, box or ball alleys, shooting galleries, theatres, parks and other places of amusement when, in the opinion of the council or other governing body the public good or safety demands it. To refuse to license any or all such businesses and to authorize the mayor or other chief executive officer by proclamation to cause any or all houses or places of amusement or houses or places for the sale of firearms or other deadly weapons to be closed for a period of not longer than the next meeting of the city or town council or other governing body is within the municipality's power.

Section 31-2-111, Code of Alabama 1975, authorizes the mayor to report facts concerning riots to the governor and to request assistance. Perhaps of more importance is Section 31-2-112 of the Code which allows a mayor, under circumstances where timely application cannot be made to the governor, to directly request assistance from the highest commissioned officer of the National Guard to call out and report with his commander to enforce the laws and preserve the peace of the community.

Under authority of Section 11-45-1, Code of Alabama 1975, the Attorney General has held that cities and towns in Alabama have the authority to establish curfew ordinances. AGO to Mayor Max A. Wood, September 3, 1959. Great care should be taken in drafting a curfew ordinance, however, especially if the ordinance will apply in non-emergency situations.

Under authority of Sections 11-47-131 and 22-12-12, Code of Alabama 1975, the Attorney General recognized the authority of cities and towns to establish "shelter in place" and quarantine ordinances, but a recommendation from the county board of health, where applicable, is advisable and strongly preferred. Attorney General's Guidance for Municipalities, March 25, 2020.

Parades and Demonstrations

It is clear from the foregoing protection powers granted to the cities and towns of Alabama that a municipal governing body may adopt ordinances requiring permits for parades and demonstrations. Such ordinances may mandate obedience to the lawful commands of police officers during emergency situations which may require the closing of streets. These ordinances may also forbid the possession of dangerous instrumentalities and weapons during emergency situations.

In addition, Section 13A-11-59, Code of Alabama 1975, prohibits possession of firearms by persons participating in or attending demonstrations in public places.

Key State Personnel

Key state personnel and departments who may be contacted for assistance are as follows:

- Alabama Law Enforcement Homeland Security Department - **334-517-2812**
- Alabama Law Enforcement Department of Public Safety - **334-517-2763**
- Alabama Law Enforcement Highway Patrol Division, Division Chief - **334-242-0700**
- Adjutant General of Alabama - **334-271-7200**

Emergency Equipment

A municipal governing body might consider providing the following equipment for times of civil disturbance – tear gas devices, mobile communications systems, riot batons, hard hats, cameras, mobile public-address systems, portable tape recorders, stretchers, mobile floodlights, fire hoses, ambulances, arrest ID forms, smoke producing apparatuses, special vehicles for transporting arrested persons, taser devices, mace gas grenades, pepper spray and other riot gear.

Specific regulations should be established to protect and control special riot equipment. Personnel who might handle such equipment should be given special training to ensure that the equipment is used safely and effectively.

Protection of Vital Installations

Riot situations call for planning and a need to protect vital facilities such as water towers, water pumps, butane/propane storage plants, bulk oil and gasoline plants, sewage treatment plants, radio transmitting stations and electrical telephone installations. A municipal governing body and executives of private utilities should agree formally, in advance, on the protection and immediate repair of equipment damaged or destroyed in riot situations. Although these duties may not fall directly under the specific areas of authority reserve officers have under Section 11-43-210, it may be necessary to assign reserve police officers to protect utility installations. This may be permitted due to the emergency nature of the situation, but caution should be exercised here. Reserve police officers may need to be used principally for this type of work, in addition to traffic control, record-keeping and similar duties which are not in the center of the riot or demonstration area. Using auxiliary forces permits the trained regular forces to

be deployed in full strength to control demonstrators and to police the demonstration area.

Mayor's Authority

It is recommended that the mayor have a sample proclamation prepared and ready for immediate release. An emergency might arise on such short notice that little time is available to spend in drafting such a proclamation. The proclamation should cite the authority to issue the ordinances, declare that a state of emergency exists, and provide for the regulations deemed necessary by the mayor. Among the items covered in the mayor's proclamation, depending on the circumstances, are a curfew, a list of businesses to be closed and the ordering to duty of all regular and auxiliary police and firefighters.

Proclamations issued by the mayor shall, by their terms, be effective immediately upon issuance and dissemination to the public and to the news media. It is suggested that an emergency be limited to a period of 48 hours unless there is a need to extend it. An ordinance authorizing the declaration of an emergency would establish penalties for violations. Such an ordinance may be passed at any time as a preparatory step and as a standby measure.

Conclusion

It is hoped that no municipality in Alabama will ever be required to use the emergency measures outlined in this article. Experience has taught, however, that disturbances do occur and that it is prudent to be prepared. Good preparation often prevents civil disturbances and prompt action tends to curb the duration and extent of such disturbances.

68. The Municipal Court

The 1973 Regular Session of the Alabama Legislature proposed a Constitutional Amendment to restructure the state court system. The proposal was submitted to the electorate on December 18, 1973 and was declared ratified on December 27, 1973. The new Judicial Article became Amendment 328 to the Alabama Constitution. The 1975 Regular Session of the Alabama Legislature adopted Act 1205 to implement the new Judicial Article. This implementation legislation is found in Title 12 of the Alabama Code of 1975.

Major Constitutional Provisions

The Constitutional Amendment carried an effective date of December 27, 1977. Prior to this date, municipalities were required to decide whether to abolish their municipal courts and go under the newly-formed district court system or to retain their municipal courts operating under procedures found in Chapter 14 of Title 12 of the Code. Section 6.21(c) of Amendment 328, Alabama Constitution, 1901. On December 27, 1977, most municipalities in Alabama established new municipal courts which, for the first time, had constitutional status. Section 6.01(a) of Amendment 328, Alabama Constitution, 1901.

Section 6.065 of Amendment 328 further provided that, after the effective date, all municipal judges were required to be licensed attorneys, the jurisdiction of municipal courts was limited to cases arising under municipal ordinances, municipal judges could serve more than one municipality at the same time and municipalities could abolish or re-establish their municipal courts at any time in the future.

The District Court

Section 12-12-1(a) establishes the district court system. Section 12-12-32 provides that the district courts shall have *exclusive* jurisdiction to hold preliminary hearings for felonies. Municipal courts have no felony jurisdiction.

Section 6.05 of Amendment 328 to the Alabama Constitution and Section 12-12-1 of the Code state that, if a municipality elects to go into the district court system, the district court is required to sit in all municipalities with a population of 1,000 or more which has no municipal court.

Section 12-14-18 states that when a municipal court is abolished as provided for by law, the court costs, fines and forfeitures collected by the district court clerk as a result of enforcement of ordinances of the municipality shall be remitted as follows: 90 percent of the fines and forfeitures and 10 percent of the costs exclusive of earmarked funds shall be paid to the municipality with the balance going to the state. For example, a fine of \$100 with \$10 costs would

be payable as follows: \$90 in fines and \$1 in costs to the city and \$10 in fines and \$9 in costs to the state. Salaries of judges and court employees and other incidental costs will be paid by the state.

Section 12-14-7 requires the district court to take judicial notice of the ordinances of the municipality in which it sits.

Establishment of Municipal Courts

Section 12-14-1(a), Code of Alabama 1975, (hereinafter cited by section only) provides that on and after December 27, 1977, the municipal courts of this state will operate pursuant to the requirements set forth in Chapter 14 of Title 12, Code of Alabama 1975, unless a municipality adopts an ordinance abolishing its municipal court.

Section 12-14-17 provides that the municipal governing body of any municipality having a municipal court may at any time, by ordinance, abolish its municipal court. The jurisdiction of the court so abolished will be transferred to the district court under the following conditions and effective dates: (a) Municipalities of 5,000 or less inhabitants – 90 days after adoption of the ordinance abolishing the municipal court; (b) Municipalities of 5,001-50,000 population – 12 months after adoption of the ordinance abolishing the municipal court; and (c) Municipalities of 50,000 or more population – two years after adoption of the ordinance abolishing the municipal court.

Section 12-14-19 states that any municipality which abolishes its municipal court may thereafter by ordinance re-establish the court by following certain procedures set forth in the section. The section further requires municipalities of 5,000 or less in population to give 90 days' notice of the re-establishment of its municipal court. Cities of 5,001-50,000 inhabitants are required to give 12 months' notice, and cities of 50,000 or more inhabitants must give five years notice.

Section 12-14-2 requires a municipality to provide appropriate facilities and necessary support personnel for the municipal court. A municipality may provide for probation services, clerks and municipal employees designated as magistrates. Pursuant to Section 12-14-50 of the Code of Alabama 1975, a municipal judge has the authority to supervise all court employees generally and pursuant to Rule 18 of the Alabama Rules of Judicial Administration, the municipal court clerk, not the city clerk, has the authority to supervise all court magistrates and other court personnel regarding administrative matters. AGO 2005-098.

The Municipal Prosecutor

Pursuant to Section 12-14-2, Code of Alabama 1975, municipalities are required to furnish prosecutorial services in municipal courts and in appeals from such judgments and orders.

A duty rests upon the prosecuting attorney to prosecute in his county or district, on behalf of the people, all public offenses. Where a statute so provides, the prosecuting attorney must initiate proceedings for the prosecution of persons charged with or reasonably suspected of public offenses, when he has information that such offenses have been committed. But, as a general rule, if a prosecutor has possible cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring rests entirely in his discretion. In other words, the duty to prosecute is not absolute, but qualified, requiring of the prosecuting attorney only the exercise of a sound discretion, which permits him to refrain from prosecuting whenever he, in good faith and without corrupt motives or influences, thinks that a prosecution would not serve the best interests of the state, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof. 63A Am.Jur.2d *Prosecuting Attorneys* § 24 (1984).

Great care must be exercised by the courts not to usurp the functions of other departments of government. Section 43, Alabama Constitution, 1901. No branch of the government is so responsible for the autonomy of the several governmental units and branches as the judiciary. Accordingly, the Alabama Supreme Court has held that courts cannot and will not interfere with the discretion vested in other units or branches of government. *Finch v. State*, 124 So.2d 825 (Ala. 1960).

The municipal prosecutor must receive proper notice of a trial setting. The prosecution did not receive proper notice that a trial would occur and, thus, the prosecution's right to procedural due process was violated. It is generally understood that an opportunity for a hearing before a competent and impartial tribunal upon proper notice is one of the essential elements of procedural due process. The record did not indicate that the prosecution received notice that the trial court intended to conduct a trial on same date as a hearing on a motion for reconsideration, at which it would consider evidence pertaining to charges pending against defendant, and the prosecutor was unaware that the matter was set for trial. *State v. Smith*, 23 So.3d 1172 (Ala. Crim.App. 2009).

A prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings; he is protected from judicial oversight

by the doctrine of separation of powers. *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So.2d 907 (Ala. 1992).

Indigent Defense

Section 12-14-9 requires all municipalities which retain municipal courts to provide indigent defense services as otherwise provided for by law. Chapter 12 of Title 15 of the Code is devoted entirely to the subject of indigent defense. Section 15-12-1 defines the terms "indigent defendant," "appointed counsel," "public defender" and "indigent defense system." Section 15-12-2 allows a municipal governing body to select its system of indigent defense – a defender system, an appointed system, or a combination system. The indigent defense system selected is supervised by the presiding circuit judge.

Section 15-12-5 requires a municipal judge to inquire into the indigency of a defendant and to see that the defendant is properly represented. This section further sets the criteria for determining indigency.

A criminal defense attorney has a duty under the Sixth Amendment to inform a noncitizen client of the adverse immigration consequences of a guilty plea. A defendant's claim that his counsel provided ineffective assistance by failing to advise him that his guilty plea could result in deportation was subject to the "*Strickland*" ineffective assistance test, not only to the extent that he alleged affirmative bad advice, but also to the extent that he alleged omissions by counsel. *Padilla v. Kentucky*, 130 S.Ct. 1473 (U.S. 2010).

Section 12-19-250 requires the collection of \$16 on every case tried by a municipal court. Section 12-19-251.1 of the Code requires the court clerk to pay the receipts from this court cost into the general fund of the municipality. The governing body of the municipality shall use and expend as much of those funds as is necessary to defray the costs of providing representation for indigent defendants in municipal court. The remainder of the funds collected shall be paid into the state treasury.

Probation Services

Section 12-14-13 provides that municipal courts may suspend execution of sentences and place defendants on probation for varying times not to exceed two years. A municipality may provide for probation services in municipal court. Section 12-14-2, Code of Alabama. A municipality may enter into a contract with a private probation service to fulfill the needs of the municipal court. The municipal judge should carefully scrutinize the private probation service to make certain the probation fees are proper. Furthermore, the judge may assess a supervision fee upon each probationer as a condition of probation. This fee, however, cannot exceed the probationer's ability

to pay. AGO 98-00043. A municipal judge may authorize municipal probationers to pay restitution directly to the probation officers if the council has a contract with a private probation company and if the company agrees to be liable for the funds collected. AGO 2001-257. A municipality may contract on a contingency fee basis with a private collection agency for the collection of delinquent court fines and costs. Municipal judges may impose an additional fine on persons whose guilt has not yet been determined to help defray the costs of the contract, as long as the total fine does not exceed the statutory maximum in municipal court. *Wilkins v. Dan Haggerty & Associates, Inc.*, 672 So.2d 507 (Ala. 1995). **Note:** Municipalities considering entering into these arrangements should read this case in full.

Municipal Court Judges

Section 12-14-3 provides that a municipal court shall have the number of judges and shall hold court at the times and places specified by the municipal governing body.

Section 12-14-30 provides that municipal court judges shall be appointed by a majority vote of the members of the municipal governing body. The term of office for a full-time judge shall be four years and the term for a part-time judge shall be two years. If the municipality has more than one judge, the mayor shall designate a presiding judge who will have such additional powers and duties and be entitled to receive additional compensation as provided by ordinance.

Each judge must be a qualified elector of the state and licensed to practice law in this state. A judge must not be otherwise employed by the municipality during the term of office. Each municipal judge, before assuming office, shall take and sign the oath required by the Alabama Constitution and file a copy as set out in Section 12-14-30. No full-time municipal judge shall, while serving as judge, engage in the practice of law or receive any compensation for judicial service except the salary and allowance as authorized by the municipality.

Section 12-14-33 requires that the salary of the judge shall be fixed from time to time by the municipal governing body. However, a municipal governing body may not diminish the salary of a judge during the term of office. If a general raise is given to most or all employees of a municipality, the raise must be applied proportionately to the judge's salary. The municipal governing body may provide for retirement of municipal judges with such conditions, retirement benefits, and pensions for them and their dependents as it may prescribe.

The municipal judge is tasked with the general authority to supervise all municipal court employees. A municipality may provide for the appointment of court personnel by ordinance. If state law or the municipal ordinance does not address the appointing authority for court personnel,

the mayor is the appointing authority. The magistrates are considered the chief officers of the municipal court administrative agency under the supervision of the judge. In 2018, the Attorney General's Office issued an opinion stating a city employee may not serve in a supervisory position in the municipal court system, nor may a single person serve as both city clerk and municipal court clerk. AGO 2018-033. Where the mayor is not the appointing authority, the mayor may temporarily remove the court clerk/magistrate, for good cause, and then must report such removal and the reasons therefore to the council at its next regular meeting, when, the council may sustain the act of removal by the mayor by a majority vote of those elected to the council. AGO 2009-103.

Section 12-14-34 states that in the absence from the city, death, disability, or disqualification of a municipal judge, for any reason, the mayor of the municipality has the authority to designate a person, licensed to practice law in the state and a qualified elector of the state, not otherwise employed in any capacity by the municipality, to serve as acting municipal judge with all of the power and authority of a duly appointed municipal judge. No acting judge may serve for more than 30 successive days or a total of 60 days in any calendar year with certain exceptions.

Powers and Duties of the Court

Section 12-14-1 provides that, effective December 27, 1977, municipal court jurisdiction shall be limited to cases tried for violation of municipal ordinances or state offenses adopted as municipal ordinance violations. The municipal court will not have jurisdiction to hold preliminary hearings and it cannot sit as an ex officio county court and try strictly state cases. All cases in municipal courts will be tried by a judge without a jury. Section 12-14-6, Code of Alabama 1975.

The municipal court has jurisdiction over traffic offenses committed by persons 16 years of age or older, including offenses committed on waterways within the municipality's jurisdiction. The juvenile court has jurisdiction over traffic violations committed by persons under 16 years of age. A traffic citation or summons issued to a person under 16 years of age is sufficient to invoke the jurisdiction of the juvenile court. AGO 2001-027.

Any minor found in possession of tobacco or tobacco products may be prosecuted under Section 28-11-14, Code of Alabama 1975. Disposition of any violation of this statute shall be within the jurisdiction of the district or municipal court and not the juvenile court. Juveniles who fail to appear on a citation for possession of tobacco contraband in municipal court may be arrested for contempt. Violation of this statute shall not be considered a criminal offense, but shall be administratively adjudicated. AGO 2008-047.

Section 12-14-5 states: “Municipal judges shall admit to bail any person charged with violation of any municipal ordinance by requiring an appearance bond, with good security, to be approved by the respective municipal judges or their designees, in an amount not to exceed \$1,000, and may, in their discretion, admit to bail such person on a personal recognizance bond ...”

Section 12-14-12 authorizes municipal ordinances to impose penalties of fines, imprisonment and hard labor or one or more such penalties for violation of ordinances. The judgment may stipulate that, if the fines and costs are not paid within the time prescribed, the defendant shall work out the amount of the judgment under the direction of the municipal authority, allowing not less than \$10 for each day of service.

Section 11-45-9, Code of Alabama 1975, states that fines shall not exceed \$500 and that no sentence of imprisonment or hard labor shall exceed six months. However, there are exceptions. One is made for adopting DUI offenses found in Section 32-5A-191, Code of Alabama 1975, where such fine shall not exceed \$5,000 and such sentence of imprisonment or hard labor shall not exceed one year.

Another exception is found in Section 11-45-9(d), Code of Alabama 1975, which provides that the maximum fine for every person either convicted of violating any of a list of enumerated misdemeanor offenses adopted as a municipal ordinance violation or adjudicated as a youthful offender shall be \$1,000. The offenses covered by this provision are:

- Criminal mischief in the second or third degree (§§13A-7-22 and 13A-7-23)
- Theft of property in the third degree (§13A-8-5)
- Theft of lost property in the third degree (§13A-8-9)
- Theft of services in the third degree (§13A-8-10.3)
- Receiving stolen property in the third degree (§13A-8-19)
- Tampering with availability of gas, electricity or water (§13A-8-23)
- Possession of traffic sign; notification, destruction, defacement, etc., of traffic sign or traffic control device, defacement of public building or property ((§13A-8-71 and §13A-8-72)
- Offenses against intellectual property (§13A-8-102)
- Theft by fraudulent leasing or rental, (§13A-8-140 through §13A-8-144)
- Identity Theft (§13A-8-192)
- Charitable fraud in the third degree (§13A-9-75)
- Illegal possession of food stamps (§13A-9-91)

The penalty imposed upon a corporation that violates a municipal ordinance shall consist of the fine only, plus costs of court. Section 11-45-9(e), Code of Alabama 1975.

Section 11-45-9(f), Code of Alabama 1975, provides that the enforcement of a Class A misdemeanor, including a domestic violence offense, the fine may not exceed five thousand dollars (\$5,000) and the sentence of imprisonment may not exceed one year.

Section 12-14-11 states that, upon conviction, the court may, upon showing of inability to make immediate payment of fines and costs, accept defendant’s bond with or without surety and with waiver of exemption as to personally payable within 90 days upon nonpayment of which execution may issue as upon judgments and state court.

Section 12-14-10 gives a municipal court the authority to continue cases to permit the payment of fines and costs; remit fines, costs and fees; impose intermittent sentences; establish work release programs; suspend driving privileges for such time and under such conditions as provided by law; and order hearings to determine competency to stand trial.

Further, the court may enter an order authorizing defendant to drive under conditions set forth in the order.

Section 12-14-13 provides that municipal courts may suspend execution of sentences and place defendants on probation for varying times not to exceed two years.

Section 11-45-9 provides that the penalty to be imposed upon a corporation shall consist of only the fine and costs. Section 12-14-15 allows the mayor to remit fines and commute sentences imposed by municipal judges. However, the mayor may not remit fines and costs due to the state. AGO 1995-022.

Section 12-14-14 makes enactment of an ordinance necessary to establish court costs, which may not exceed \$10. This section requires municipalities to assess an additional court cost of \$12. Section 32-5-313 sets out an additional penalty to be collected upon conviction of a traffic infraction.

Section 12-19-180 assesses a criminal history processing fee of \$30 upon every person convicted of a crime in municipal, district or circuit court, except traffic offenses not involving alcohol or controlled substances. Ten dollars of the fee is deposited into the Public Safety Automated Fingerprint Identification System Fund; \$5 is deposited into the Court Automation Fund; \$10 goes to the Criminal Justice Information System Automation Fund; and \$5 goes to the Department of Forensic Sciences Forensic Services Fund.

Section 32-6-18 assesses an additional penalty of \$50 on any person found guilty of driving a motor vehicle with a revoked, suspended or cancelled driver’s license. This penalty is sent to the State Comptroller, who will

distribute the money as follows: \$25 to the Traffic Safety Trust Fund and \$25 to the Peace Officers Standards and Training Commission Fund. If the court fails to assess this fee, the clerk shall automatically assess it upon conviction.

Act 2012-535, codified in Sections 12-19-310 through 12-19-315, Code of Alabama 1975, added an additional docket fee of \$40 and in traffic cases (not including parking violations) an additional docket fee of \$26. The fee is distributed according to the Act with the first \$10 of each fee in municipal court to be retained by the presiding judge or the municipal court clerk for operation of the municipal court. Act 2012-535 also provides that, in addition to all other charges, costs, taxes, or fees levied by law on bail bonds, additional fees shall be imposed on every bail bond in all courts of this state. The fee shall not be assessed in traffic cases, except for enumerated serious traffic offenses. Where multiple charges arise out of the same incident, the bond fee pursuant to this section shall only be assessed on one charge. Where the charge is negotiating a worthless negotiable instrument, the fee shall not be assessed more than three times per year per person. These fees may not be waived or remitted by the court unless all docket fees associated with the case are waived or remitted.

Section 11-47-7.1 authorizes a municipal governing body to assess an additional court cost equal to the amount charged in district court for similar offenses. These funds must be used for the purchase of land for, and the construction, equipment, operation and maintenance of, the municipal jail or other correctional facilities or juvenile detention center or for a court complex. These costs cannot be waived unless all other costs are waived. Court costs assessed under this section may be used to defray the expense of housing municipal prisoners in municipal jails. AGO 1995-179.

Section 12-14-31 gives a municipal judge the authority to administer oaths, compel the attendance of witnesses, compel the production of books and papers and punish by fine, not exceeding \$50 and/or imprisonment not exceeding five days, any person found and judged to be in contempt of court. The section further states that the municipal judge shall have power co-extensive with the jurisdiction of the district court to issue writs and other process and to approve and declare bonds forfeited. The municipal judge shall designate any other municipal officers who shall be authorized to approve appearance and appeal bonds.

Section 14-6-22 states that, “the court shall require a convicted defendant in a misdemeanor case to pay housing, maintenance and medical costs associated with his or her incarceration in a county or city jail...” Such costs shall not exceed \$20 for each day that the defendant is incarcerated plus actual medical expenses incurred on behalf of the

defendant. Such costs shall be taxed as costs of court and shall be in addition to any and all other costs of court.

At the time of sentencing, a defendant may petition the court for remission of the payment of these costs or any portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his or her immediate family, the court may remit all or part of the amount due in such cases.

The court may allow costs to be paid in a specified period of time or in specified installments. If this permission is not included in the order, the costs shall be payable immediately.

Sections 15-26-1 through 15-26-6 authorize the use of audio-visual communications systems at any criminal pre-trial proceeding to allow the judge or magistrate to see and converse simultaneously with the defendant, his or her counsel or any other person.

Section 11-103-1, Code of Alabama 1975, authorizes a municipal governing body to contract for the acceptance of credit cards to pay debts to the municipality, “including, but not limited to, taxes, license and registration fees, fines, and penalties.” Presumably, if the council authorizes the court to accept credit card payments and enters into an agreement with a credit card company, this would allow those convicted in municipal court to pay their fines and costs by credit card.

Court Costs and Fees

Municipalities in Alabama presently have authority to establish punishment, for violation of municipal ordinances, not exceeding \$500 and six months in jail, either or both. The fine and prison term for DUI offenses may be in excess of the above amounts. *See*, Section 32-5A-191, Code of Alabama 1975. Municipal court costs cannot exceed \$10 per case. *See*, Sections 11-45-1, 11-45-9, and 12-14-14, Code of Alabama 1975. Section 12-14-14 requires municipalities to assess an additional court cost of \$12. Of this amount, \$5 is remitted to the state general fund; \$5 is remitted to the municipal general fund where the court is located; and \$2 is remitted to the Alabama Peace Officers Annuity and Benefit Fund. In addition, in all violations of municipal ordinances involving traffic offenses, there shall be assessed and collected as other costs and charges \$8.50 to be disbursed to the State Driver’s Fund. Section 32-5-313, Code of Alabama 1975, sets out an additional penalty to be collected upon conviction of a traffic infraction.

Section 12-19-172(d) provides that in addition to the fees now authorized by law, an additional fee of thirty dollars (\$30) shall be assessed in municipal courts upon conviction of a municipal ordinance violation, excluding parking violations. The fees shall be distributed as follows:

Nine dollars (\$9) to the Fair Trial Tax Fund; two dollars (\$2) to the municipal general fund; three dollars (\$3) to the Advanced Technology and Data Exchange Fund; and sixteen dollars (\$16) to the State General Fund. These fees shall be collected by the court clerk and remitted monthly in accordance with Rule 4 of the Alabama Rules of Judicial Administration. The two dollars (\$2) which is distributed to the municipal general fund shall be used only for equipment, training, and certification of municipal court officials and employees and the fees shall not supplant existing funds designated by municipalities for equipment, education, and training of court personnel. Also, Section 12-19-180, Code of Alabama 1975, levies, in addition to all other costs, a criminal history processing fine of \$30 upon each person convicted in municipal court, except for traffic cases which do not involve driving under the influence of alcohol or controlled substances and conservation cases and juvenile cases. Ten dollars of this fine is deposited into the state treasury to the credit of the Public Safety Automated Fingerprint Identification System Fund created in the state treasury and \$5 is deposited into the Court Automation Fund, \$10 to the Criminal Justice Information System Automation Fund and \$5 to the Department of Forensic Sciences Forensic Services Fund.

In Section 12-19-310(b)(2), the municipal court can assess an additional \$10 docket fee which shall be used exclusively for the operation of the municipal court.

Additional court costs and fees are authorized in Section 11-47-7.1, Code of Alabama 1975. This act authorizes the council to assess in addition to any court costs and fees now existing, individually or jointly by contract with one or more municipalities in the county, additional court costs and fees up to an amount not to exceed the court costs and fees in the district court of the county for a similar case on each case hereafter filed in any municipal court of the municipality or municipalities. The cost or fee shall not be waived by any court unless all other costs, fees, assessments, fines or charges associated with the case are waived. The costs and fees when collected shall be paid into a special municipal fund designated as the "corrections fund." The affected governing body shall allocate the funds exclusively for the operation and maintenance of the municipal jail or jails, other correctional facilities, if any, any juvenile detention center or any court complex.

Notwithstanding any other provision of law, in municipal court, the maximum fine for every person either convicted for violating any misdemeanor adopted as a municipal ordinance violation or adjudicated as a youthful offender shall be one thousand dollars (\$1,000). Section 11-45-9(d), Code of Alabama 1975. The offenses covered by this provision are: criminal mischief in the second and third degree (Sections 13A-7-22 and 13A-7-23); theft of property

in the third degree (Section 13A-8-5); theft of lost property in the third degree (Section 13A-8-9); theft of services in the third degree (Section 13A-8-10.3); theft of receiving stolen property in the third degree (Section 13A-8-19); tampering with availability of gas, electricity or water (Section 13A-8-23); intentionally knocking down, removing, defacing or altering a traffic sign (Section 13A-8-72); identity theft (Section 13A-8-192); charitable fraud in the third degree (Section 13A-9-75); and illegal possession of food stamps (Section 13A-9-91).

Warrants

The authority of a municipal judge to issue arrest and search warrants is somewhat broader than the power of the court to try cases. Municipal judges are authorized to issue arrest and search warrants for municipal ordinance violations returnable to the municipal court and for violations of state law which occurred within the corporate limits and police jurisdiction of the municipality returnable to any state court. Section 12-14-32, Code of Alabama 1975.

Warrants issued for state crimes must be returned to a state court. However, in *Palmer v. State*, 426 So.2d 950 (Ala. Crim. App. 1983), a search warrant that was properly issued and served was improperly returned to the municipal judge who issued the warrant. The Alabama Court of Criminal Appeals held that this did not invalidate the warrant because the return was merely a ministerial act and the case could be transferred to the proper state court. *See also, Merton v. State*, 500 So.2d 1301 (Ala. Crim. App. 1986).

In *Hicks v. State*, 437 So.2d 1344 (Ala. Crim. App. 1982), a municipal judge in Birmingham issued a search warrant directed to the chief of police or any police officer of the City of Birmingham. The search was conducted solely by municipal police officers without the assistance of the sheriff or any of his deputies. The defendant challenged his conviction, arguing that because there is no code section specifically authorizing municipal police officers to execute warrants, the warrant was invalid.

The Court of Criminal Appeals disagreed. The court cited Section 12-14-4, Code of Alabama 1975, which states, "The sheriffs of the counties and law enforcement officers of the municipalities of the state of Alabama shall obey the municipal judge in faithfully executing warrants and processes committed to them for service."

The Alabama Supreme Court affirmed. *Ex parte Hicks*, 437 So.2d 1346 (Ala. 1983). The court stated that city courts have territorial jurisdiction over the city and police jurisdictions. The court held that Sections 12-14-32 and 12-14-4 do not violate constitutional provisions which establish the jurisdiction of a municipal court. Instead, these sections merely authorize the exercise of territorial jurisdiction in the execution of warrants. Therefore, the court ruled that

municipal judges have the authority to issue warrants for felony violations within the municipality.

In an opinion dated November 18, 1980 to Hon. Grady Rose, Sheriff of Lawrence County, the Attorney General opined that municipal judges may issue search warrants for the seizure of evidence from any person or place in the county. Section 12-14-31 gives municipal judges powers which are co-extensive with the district court for the issuance of warrants and other process. Since district courts have county-wide jurisdiction, the Attorney General opined that for the issuance of warrants, municipal courts retain a similar countywide jurisdiction.

However, in *State v. Brown*, 591 So.2d 113 (Ala. Crim. App. 1991), the Alabama Court of Criminal Appeals held that municipal judges do not have the jurisdiction to issue search warrants for violations of state law outside the police jurisdiction. The judge may still issue warrants for both ordinance violations and state violations but only within the police jurisdiction and the municipal limits.

The power of municipal magistrates is probably even more limited. Rule 18, Alabama Rules of Judicial Administration, states that municipal magistrates may issue arrest warrants for municipal ordinance violations. Because Section 12-14-32 specifically says that the municipal judge has the power to issue warrants returnable to state court, it seems that only the municipal judge and not the magistrate has this authority.

Pre-Trial Diversion Programs

During the 2013 legislative session, the legislature passed two acts related to pre-trial diversion programs. These acts, Act 2013-353 and 2013-361, provide enabling authority for the creation of pre-trial diversion programs in state as well as municipal courts in Alabama.

Act 2013-353, codified in Sections 12-14-90 through 12-14-92 Code of Alabama 1975, authorizes the governing body of any municipality to establish a discretionary pretrial diversion program and sets basic operating standards for the program.

The governing body of any municipality may establish or abolish a pretrial diversion program for that municipality and may provide for the assessment and collection of fees for the administration of such program. Any pretrial diversion program established pursuant to this article must be under the supervision of the presiding judge for the municipality pursuant to any rules and regulations established by the municipal governing body. The presiding judge, with approval of the municipal governing body and the municipal prosecutor, may contract with any agency, person, or business entity for any service necessary to accomplish the purpose of this article. The presiding municipal judge, acting in consultation with the municipal

prosecutor, is given the authority to establish all rules and terms necessary for the implementation of a pretrial diversion program. Section 12-14-90, Code of Alabama 1975.

A person charged with a criminal offense under the jurisdiction of the municipal court in a municipality that has established a pretrial diversion program may apply to the court for admittance to the program. Upon receipt of the application and recommendation of the municipal prosecutor, the judge shall determine whether to grant the individual admittance to the program. Upon admittance to the program, the individual shall be required to enter a plea of guilty at which time the case shall be placed in an administrative docket until the offender has completed all requirements of the pretrial diversion program. Imposition of the sentence is deferred until the offender either completes the pretrial diversion program or is terminated from the program. In the event the offender does not satisfactorily complete the program, the court shall impose an appropriate sentence in the same manner as with any guilty plea. Upon successful completion of the program, the court shall dismiss the case pursuant to the rules established by the municipality. Section 12-14-91, Code of Alabama 1975.

A holder of a commercial driver's license, an operator of a commercial motor vehicle, or a commercial driver learner permit holder who is charged with a violation of a traffic law in Alabama shall not be eligible for a pretrial diversion program. Section 12-14-91(f), Code of Alabama 1975.

Absent wantonness, gross negligence, or intentional misconduct, the municipality, or its officers or employees, shall have no liability, criminal or civil, for the conduct of any offender while participating in a pretrial diversion or of any service provider or its agents that are contracted to or who provide services to the pretrial diversion program. Further, the municipality, or its officers or employees, shall have no liability, criminal or civil, for any injury or harm to the offender while the offender is a participant in any pretrial diversion program administered pursuant to this article. The municipal prosecutor may require written agreed upon waivers of liability as a prerequisite for admittance into the pretrial diversion program. Section 12-14-91, Code of Alabama 1975.

If, on May 24, 2013, a municipal pretrial diversion program, or an equivalent, had been established by local law, the municipal governing body of the municipality governed by the local law may choose to come under the provisions of this article or continue under the provisions of the local law. Section 12-14-92, Code of Alabama 1975.

Act 2013 -361 specifically provides for the creation of a pre-trial diversion database. This provision has been codified as Section 12-17-226.17, Code of Alabama 1975. Pursuant to Section 12-17-226.17, every "existing

or newly created pretrial diversion program” must collect and upload certain data regarding individuals who are admitted into the pretrial diversion program. Section 12-17-226.17 also requires that the municipality pay a one-time fee of \$7.00 per offender for the creation, maintenance, and administration of the pretrial diversion offender database. This should be remitted to the Office of Prosecution Services in Montgomery within 30 days of entry of an applicant into the Pretrial Diversion Program. **This fee may be passed on to the offender and is the only fee required.**

The purpose of the database is to allow prosecutors and courts the ability to determine whether an offender has previously been admitted into another pretrial diversion program. This information is critical to help prosecutors and judges make informed decisions about whether an offender should be admitted into a pretrial diversion program. **The Pretrial Diversion Database can be accessed at www.alabamaprosecutor.com/pretrial.**

Appeals

Section 12-14-70, Code of Alabama 1975, as amended, allows a defendant to appeal in any case, within 14 days from the entry of judgment, by filing a notice of appeal and giving bond, with or without surety approved, by the court or the clerk in the amount of not more than twice the amount of the fine, or \$1,000 where no fine is stipulated, and costs as fixed by the court. A municipal court may waive the appearance bond upon a satisfactory showing that the defendant is indigent or otherwise unable to provide a surety bond. If the appeal bond is waived, a defendant sentenced to imprisonment shall not be released from custody but may obtain release at any time by filing a bond approved by the municipal court. If the defendant is not released, the prosecutor shall notify the circuit clerk and the case shall be set for trial at the earliest practical time.

The rule requiring a defendant to reserve a particular issue on appeal is not to be applied to appeals from a municipal court or a district court judgment to the circuit court for a trial de novo. A defendant is not required to file a motion to withdraw his guilty plea before he can proceed to the circuit court for a trial de novo. Application of the rule would limit the statutory authority of the circuit court to conduct a de novo review, and, thus, would affect the jurisdiction of the circuit court. *Ex parte Sorsby*, 12 So.3d 139 (Ala. 2007). A defendant who escapes after conviction, but before sentencing, and is later returned to custody before filing a notice of appeal, would not have his or her appeal automatically dismissed, but the defendant may forfeit his statutory right to appeal his convictions. *Dubose v. State*, 47 So.3d 831 (Ala.Crim.App. 2009).

When an appeal has been taken, the municipality shall,

within 15 days, file the notice and other documents in the court to which the appeal is taken. If the municipality fails to meet this deadline, the municipality shall be deemed to have abandoned the prosecution. The defendant shall be discharged and the bond shall be automatically terminated.

Upon receipt of payment of fines and costs upon appeals, the clerk of the circuit court shall, within 30 days, pay 90 percent of the fines and forfeitures and 10 percent of the costs to the treasurer of the municipality. Other provisions relating to the appeals process are set out in Section 12-14-70, as amended.

Reports by Municipal Courts

Section 12-14-16, Code of Alabama 1975, requires municipalities to report on the proceedings of their municipal courts as required by law or rule. The personnel designated by the judge or judges of the municipal court for the accounting of uniform traffic tickets or complaints and magistrates shall be considered as officials of the municipal court administrative agency. Such officials shall be vested with judicial power reasonably incident to the accomplishment of the purposes and responsibilities of the administrative agency. Section 12-14-50, Code of Alabama 1975.

Warrant Clerks

Within the District Court Magistrates’ Agency, provision has been made for a class of magistrates to issue warrants to be called warrant clerks. These warrant clerks are expressly authorized to issue arrest warrants and if licensed to practice law, search warrants returnable to the appropriate district or circuit court. *See*, Section 12-17-251 of the Code and Rule 18-I(A)(2) of the Alabama Rules of Judicial Administration.

These warrant clerks are appointed by the Administrative Director of Courts and, although a part of the District Court Magistrates’ Agency, may be municipal officers or employees of the municipal court. The Alabama Supreme Court has, by rule, provided that the city clerk of all municipalities of more than 1,000 in population may be appointed as a warrant clerk by the Administrative Director of Courts. Rule 18-I(A)(1)(d), Alabama Rules of Judicial Administration. Warrants issued by these warrant clerks are returnable only to state courts.

Municipal Court Magistrates

Section 6.01(b) of Amendment 328 to the Alabama Constitution provides for the creation of judicial officers with authority to issue warrants. In effect, the Constitutional provision mandated legislation granting these officers the powers and responsibilities necessary to carry out this function.

The state Legislature fulfilled this mandate by enacting provisions now codified at Sections 12-14-50 through 12-14-52 of the Code. These sections provide for the creation of two separate magistrate agencies — one for the district court and one for the municipal court.

Section 12-14-51(b) of the Code of Alabama 1975 states that the Supreme Court of Alabama may provide for the appointment of magistrates by class or position. The Court has exercised this power by adopting Rule 18 of the Alabama Rules of Judicial Administration.

Judicial Rule of Administration 18-I(B)(1) states that the following individuals shall serve as magistrates for the municipal court:

- All clerks of municipal courts;
- Any person within the office of the municipal court clerk so designated by the Administrative Director of Courts upon recommendation of the clerk of the municipal court; and
- Any person designated by the Administrative Director of Courts upon the recommendation of the municipal judge.

Appointments of all municipal court magistrates are made by the Administrative Director of Courts in Montgomery. Inquiries or nominations should be directed to the Administrative Office of Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741. The AOC has a toll-free telephone number: 1-800-392-8077. The fax number is (334) 242-2099.

Magistrates Must be “Neutral and Detached”

Prior to submitting nominations to the Administrative Director of Courts for appointment as a magistrate, the person making the recommendation should ensure that the nominee is “neutral and detached” from the law enforcement function.

As early as 1948, the United States Supreme Court determined that persons issuing warrants must be sufficiently removed from law enforcement activities to ensure that warrants issued meet constitutional standards. In that 1948 decision, the court held that a warrant may not be issued by a police officer or a government law enforcement agent. *Johnston v. U. S.*, 333 U.S. 10 (1948).

In 1958, the U. S. Supreme Court again ruled that a finding of probable cause must be determined by someone other than a law enforcement officer engaged “in the often competitive enterprise of ferreting out crime.” *Giordenello v. U.S.*, 357 U.S. 480, 486 (1958). Again, the U.S. Supreme Court reiterated its position in 1963 when it held in another case:

“The arrest warrant procedure must insure that the deliberate, impartial judgment of a judicial officer will

be interposed between the citizen and the police to assess the weight and credibility of the information which the complaining officer adduces as probable cause.” *Wong Sun v. U S.*, 371 U.S. 471 (1963).

The question arose again in 1972 when arrest warrants issued by a municipal court clerk came under attack. In *Shadwich v. Tampa*, 407 U.S. 345 (1972), the Court held that magistrates issuing warrants must be “severed from and disengaged from activities of law enforcement in order to be neutral and detached.” In establishing a standard for determining neutrality, the court determined that “whatever else neutrality and detachment might entail, it is clear that it requires severance and disengagement from activities of law enforcement.” In finding the Tampa magistrate competent to issue warrants, the court looked to:

- The possibility of affiliation with prosecution and police;
- Assignment to police; and
- Connection with law enforcement activities.

This appears to be the test of “neutrality and detachment.” These elements appear to lend themselves to inquiries regarding employment, duties, source of compensation and administrative and supervisory control of candidates for the position of magistrate.

In some instances, the only person available to issue warrants and perform the other duties required of a magistrate are in some way related to law enforcement activities. However, attention should be called to a case arising out of New Hampshire in which the U. S. Supreme Court rejected the argument by the state that the practicalities of the situation in question in New Hampshire justified the issuance of warrants by a state officer closely associated with the prosecution. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

These cases should be reviewed before submitting recommendations to the Administrative Office of Courts for appointment as municipal court magistrates. For more information on this subject, see the article entitled “Magistrates and the Duty of Impartiality” elsewhere in this publication.

Powers and Duties of Municipal Court Magistrates

Section 12-14-50, Code of Alabama 1975, provides that magistrates shall operate under the supervision of the municipal court and are empowered to provide expeditious service in connection with the administrative adjudication of ordinance violations and the issuance of arrest warrants. The Legislature specifically prohibited municipal magistrates from issuing search warrants.

Rule of Judicial Administration 18-I(B)(2) specifically

provides that the power of magistrates shall be limited to:

1. Issuance of arrest warrants for municipal ordinance violations;
2. Setting bail in accordance with the discretionary bail schedule and approving property, cash, and professional surety bonds upon a municipal judge's approval;
3. Releasing defendants charged with municipal ordinance violations on their personal recognizance;
4. Receiving pleas of guilt in municipal ordinance cases where a schedule of fines has been prescribed pursuant to Rule 20, Alabama Rules of Judicial Administration;
5. Accountability to the municipal court for each Uniform Traffic Ticket and Complaint ("UTTC") issued, moneys received as the result of the issuance of UTTCs, and records of UTTC offenses;
6. Accepting and screening affidavits of substantial hardship upon a municipal judge's approval and, if authorized by court order, assigning attorneys to represent indigents on a rotating basis from a list approved by the court;
7. Conducting arraignments and setting nonguilty pleas for trial, upon a municipal judge's approval;
8. Opening court and calling the docket, upon a municipal judge's approval;
9. Granting continuances in municipal ordinance violation cases, upon a municipal judge's approval;
10. Dismissing violations based on no driver's license, pursuant to § 32-6-9, Ala. Code 1975, where the defendant shows proof that he or she had a valid driver's license at the time the citation was written;
11. Dismissing mandatory liability insurance violations pursuant to § 32-7A-20, Ala. Code 1975, where the defendant has produced satisfactory evidence that at the time of the citation the motor vehicle was covered by a liability insurance policy in accordance with § 32-7A-4, Ala. Code 1975;
12. Dismissing equipment violations where a municipal ordinance allows and where the law enforcement officer signs the UTTC verifying that the equipment has been replaced; and
13. Accepting payment for municipal parking tickets pursuant to Rule 19(B), Alabama Rules of Judicial Administration, and rendering administrative decisions regarding such tickets, in the event a dispute arises.

Also, pursuant to Rule 20(A), Alabama Rules of Judicial Administration, the Supreme Court has suggested a fine schedule for certain traffic infractions with the proviso

that a municipality may, by ordinance, expand this schedule to include other minor ordinance violations. Rule 20(C), Alabama Rules of Judicial Administration.

Arrest warrants issued by municipal court magistrates are returnable only to the municipal court.

Summons and Complaint

Section 11-45-9.1, Code of Alabama 1975, allows municipalities, by ordinance, to authorize any "law enforcement officer" to issue a summons and complaint to any person charged with violating any municipal ordinance on littering, animal control or any Class C misdemeanor or violation not involving violence, threat of violence, alcohol or drugs. Section 11-45-9.1 enumerates a specific procedure which must be followed in order to adopt such an ordinance.

When a person is charged with one of the enumerated offenses, the defendant may elect to appear before the municipal court or the district court magistrate, depending on whether the municipal court has been abolished and enter a plea of guilt and pay the fine and court costs.

Alternatively, the defendant may post bail and, upon a plea of not guilty, will be tried as provided by law. When a person wishes to be heard in court, the court clerk or magistrate shall receive and issue receipts for cash bail, enter the time of their appearance on the court docket and notify the arresting officer and witnesses to be present.

If the defendant fails to appear as specified in the summons and complaint, the judge or magistrate having jurisdiction of the offense may issue a warrant for his or her arrest. Any person who willfully violates a written promise or bond to appear pursuant to Section 11-45-9.1, Code of Alabama 1975, is guilty of the separate misdemeanor offense of failure to appear.

If a defendant fails to appear on a parking ticket, a municipal judge may issue a supplemental summons advising that the defendant will be subject to arrest for contempt for again failing to appear. If the defendant fails to appear on the supplemental summons the municipal judge may issue a warrant for the arrest of the defendant, and if found in contempt, the defendant may be fined and placed in jail for up to five days. If the defendant appears and a fine is imposed, but the defendant fails to pay, a municipal judge may issue a warrant. The municipal judge may place the defendant in jail until the fine is paid (or no longer than one day for each \$15 of the fine), he may order the defendant's employer to withhold payments from wages to pay fines or he may reduce the fine. A municipality may bring a civil action to recover a fine on an adjudicated ticket subject to the twenty-year statute of limitations for an action on a judgment. A municipality may not impose a late fee. AGO 2007-103. The remedies available to the municipal court for the failure to appear or pay the fine on a parking ticket,

are equally available to the district court in municipalities without municipal courts, except that contempt may be punished by the district judge with a fine of up to \$100 and a jail sentence of up to five days. AGO 2010-077

Selected Attorney General's Opinions and Court Decisions on Municipal Courts

- The requirement that municipal courts try cases without a jury is constitutional. *Holderfield v. Birmingham*, 380 So.2d 990 (Ala. Crim. App. 1979).
- A majority vote of the members of the municipal governing body is required to appoint a municipal judge. *Murphy v. Mobile*, 504 So.2d 243 (Ala. 1987).
- The term of a municipal judge is not automatically renewed. The municipal judge merely holds office until the governing body can appoint a new judge. *Prichard v. Smith*, 477 So.2d 375 (Ala. 1985).
- Municipal court prosecutors may represent criminal defendants in other courts. AGO to F.D. Gray, November 14, 1977.
- A full-time district attorney may not serve as a municipal judge. AGO 1984-286 (to Ronald Thompson, May 24, 1984).
- The brother of a councilmember may be appointed as defense attorney in municipal court. AGO 1985-124 (to Ernest McCall, December 10, 1984).
- An attorney for an incorporated utility board may be appointed municipal judge if no municipal funds are given to the utility board. Members of a law firm cannot serve, respectfully, as city attorney and municipal judge if earnings of either position become firm, rather than individual, revenues. AGO 1988-381.
- Municipal judges file their oaths of office with the secretary of state, the Administrative Office of Courts and the municipal clerk. Municipal court magistrates file their oaths with the probate judge if the municipality is located in one county, and with the secretary of state if the municipality is located in more than one county. AGO 1988-397.
- A municipal court clerk may issue failure to appear warrants in cases which have been on the docket for a year or more. AGO 1979-051 (to Mrs. Betty Ayers, February 5, 1979).
- The municipal judge does not take orders from the mayor. AGO to Herman Smith, March 28, 1973.
- A person who is sentenced by the municipal judge but fails to pay the assessed fine within the time allowed by the court may be required to work out the fine at hard labor, provided the term of hard labor and any sentence rendered in addition to the fine do not exceed the maximum hard labor sentence. AGO to Phillip Green, August 2, 1976.
- The mayor may not dismiss cases in municipal court. AGO dated August 8, 1974.
- The mayor may not order the dismissal of an ordinance violation before trial. Following conviction, however, the mayor may remit municipal fines and costs, commute sentences, and grant probation. AGO to Arthur Lee Taylor, June 17, 1977.
- A municipal judge may be included in a municipality's health insurance plan AGO to Johnny Mott, January 19, 1978.
- A municipal judge may serve as judge of more than one municipality. AGO to J.H. Summerlin, November 23, 1977.
- An assistant district attorney may serve as municipal judge only if he or she has no contact as assistant district attorney with defendants in municipal court where he or she sits as a judge. AGO 1980-131 (to Fitzhugh A. Burttram, December 14, 1979); AGO 1985-084 (to John C. Jay, November 20, 1984).
- A municipal resolution which precludes the municipal judge from receiving a general increase in compensation paid to other municipal employees is invalid. AGO 1980-220 (to James S. Garrett, February 13, 1980).
- A municipal council may not establish a work release program. The municipal judge may do so, however. AGO 1980-323 (to John Hodnett, Jr., April 8, 1980).
- A councilmember has no authority to parole municipal prisoners. AGO 1982-157 (to Frankie Fields Smith, January 26, 1982).
- A municipal judge cannot be fired before the expiration of his or her term. AGO 1982-214 (to William J. Underwood, February 24, 1982).
- A district attorney may prosecute criminal cases in municipal courts in his or her district, but is under no obligation to do so. AGO 1982-454 (to Roy L. Johnson, July 16, 1982).
- A police officer may not act as prosecutor in municipal court. AGO 1983-336 (to H.A. Alexander, May 30, 1983).
- The municipal judge's term begins to run at the time of appointment. The term does not expire until a successor is named. AGO 1984-065 (to Hugh H. Williamson, November 17, 1983).

- Section 14-6-22, Code of Alabama 1975, requiring a court to assess costs of incarceration against non-indigent misdemeanor violators, applies to municipal courts. AGO 1984-164 (to Guy Gunter, III, February 17, 1984).
- Municipal courts may issue warrants for failure to appear pursuant to Section 15-11-5 of the Code. The judge may consider the failure to appear when setting bond. AGO 1985-146 (to George C. Simpson, January 3, 1985).
- Municipal court records as to the name of the defendant, the charge and the fine are public. However, the court may reasonably limit access. AGO 1987-303.
- Once an order of the municipal court is appealed to the circuit court, the municipal court loses jurisdiction and cannot modify its order. AGO 1988-098.
- A municipal judge may not expunge a defendant's record of conviction, even if the defendant receives a pardon from the mayor. AGO 1988-410.
- Municipal prisoners housed in the county jail may be placed on work release by a municipal parole board pursuant to Section 15-22-70 of the Code, or by the municipal judge pursuant to Section 12-14-20. AGO 1986-232.
- The municipal court does not have the power to condemn unclaimed weapons possessed by the police department. The municipality must follow the procedure set out in Section 11-47-116, Code of Alabama 1975. AGO 1991-036.
- Municipal court judges and magistrates have no jurisdiction to conduct initial appearance hearings for persons charged with felonies. AGO 1991-329.
- A municipal magistrate may authenticate the municipal code. *Ex parte Dothan*, 607 So.2d 1283 (Ala. 1992).
- A new complaint is not necessary to confer jurisdiction on the circuit court when a DUI conviction is appealed from municipal court. *Ex parte Rainbow City*, 623 So.2d 347 (Ala. 1993).
- Municipal courts must appoint interpreters to assist non-English-speaking defendants who cannot understand the charges against them. AGO 1993-273.
- A municipal clerk/magistrate may issue arrest warrants for municipal probation violators. *Fletcher v. State*, 621 So.2d 1010 (Ala. Crim. App. 1993).
- The district attorney is responsible for the prosecution of municipal ordinance cases when the municipal court has been abolished and its cases have been transferred to the district court. AGO 1994-028.
- On appeal from municipal court to circuit court, if the municipal court clerk fails to timely transmit the record to the clerk of the circuit court, the municipality is deemed to have abandoned the prosecution. *Ex parte Fort Payne*, 639 So.2d 1347 (Ala. 1994).
- A municipal court judge may dismiss the charges against a defendant without prejudice conditioned on the payment of court costs. AGO 1992-257.
- A municipal court magistrate may subpoena telephone records to corroborate a complainant's testimony in order to find probable cause to issue an arrest warrant in a telephone harassment case. AGO 1995-038.
- A municipal court may not conditionally sentence an indigent prisoner who was not appointed an attorney to imprisonment for being unable to pay a fine and court costs. *Williams v. Phenix City*, 659 So.2d 1004 (Ala. Crim. App. 1995).
- No crime victim's assessment is authorized for municipal ordinance violations, regardless of the court of conviction. AGO 1996-097.
- Section 15-23-60, et seq., Code of Alabama 1975, (the Crime Victims Rights Act) does not apply in municipal courts. AGO 1996-104.
- A circuit court may impose a harsher sentence on appeal than was imposed by the municipal court. *Holden v. Florence*, 665 So.2d 1004 (Ala. Crim. App. 1995).
- Administrative costs collected in municipal court pursuant to Acts 93-323, 95-733 and 95-784 should be deposited into the municipal general fund. AGO 1996-196.
- A municipality may not refund to past violators fines and costs paid for parking violations when the municipal council lowers the fine due for the violation. AGO 1996-127.
- In *Daugherty v. Silverhill*, 672 So.2d 813 (Ala. Crim. App. 1995), the Alabama Court of Criminal Appeals held that where a municipality has abolished its court and the district court is acting as the municipal court, the district court may take judicial notice of that municipality's ordinances.
- Final forfeiture cases which are not docketed as separate cases are not subject to the Fair Trial Tax or the Cost Assessment Fee. The DNA database fee must be collected in bond forfeiture proceedings whether or not the case is separately docketed. When a final forfeiture on a cash bond is entered, the clerk should determine which court costs and fees are applicable under the circumstances. Court costs should be collected in a

bond forfeiture proceeding at the time the bond is forfeited, resulting in a final disposition of the case. Court costs are to be assessed in addition to the forfeited bond. AGO 1996-219.

- The United States Supreme Court has held that the Sixth Amendment right to trial by jury does not apply to defendants charged with petty offenses, such as those carrying a maximum sentence of six months or less. *Lewis v. United States*, 518 U.S. 322 (U.S. 1996).
- For purposes of Section 11-47-7.1, Code of Alabama 1975, the authorized uses of the increase in court costs would include expenses such as salaries, office machines and repairs. AGO 1996-236.
- Pursuant to Section 11-47-7.1, Code of Alabama 1975, a municipality may increase its court costs to an amount not exceeding court costs in district court for similar cases. These funds may be appropriated to a county to pay for housing municipal prisoners. AGO 1996-243.
- In *Miller v. Dothan*, 675 So.2d 509 (Ala. Crim. App. 1995), the Alabama Court of Criminal Appeals held that probation could not be extended where more than two years had passed from the date of the conviction of a misdemeanor offense.
- In *Cox v. Atmore*, 677 So.2d 818 (Ala. Civ. App. 1996), the Alabama Court of Civil Appeals held that because the defendant filed a motion arguing that his failure to file a timely appeal from a municipal court order was due to ineffective assistance of counsel, the court must hold an evidentiary hearing on the matter before dismissing the motion.
- In *Deming v. Mobile*, 677 So.2d 1233 (Ala. Crim. App. 1995), the Alabama Court of Criminal Appeals held that the defendant's conviction for driving with a revoked license was improper because the trial court failed to submit the issue of guilt to the jury.
- The DNA database fee in Section 36-18-32(h), Code of Alabama 1975, is assessed upon each type of bond forfeiture proceeding when the final bond forfeiture is entered. AGO 1997-012.
- On an appeal from a municipal court conviction, the Alabama Court of Criminal Appeals remanded the case back to the circuit court because there was no evidence that the defendant waived his right to a jury trial. *Lucas v. Tuscaloosa*, 680 So.2d 1027 (Ala. Crim. App. 1996).
- Every alcohol or drug abuse education program used in a court referral program must be certified by the Administrative Office of Courts and by the Alabama Department of Mental Health and Retardation or the

Joint Commission on Accreditation of Health-Care Organizations. AGO 1997-030.

- There is no specific authority for a municipal court to impose fees for the issuance and service of witness subpoenas or for the issuance of warrants. AGO 1997-049.
- Where an offense may constitute both a state violation and a municipal ordinance violation, if the defendant is charged with violating the state law, the violation must be tried in district court. AGO 1997-051.
- In *Ex parte Gilham*, 684 So.2d 164 (Ala. Crim. App. 1995), the Alabama Court of Criminal Appeals held that a circuit court judge did not have the authority to deny a defendant release on bond pending an appeal from a municipal court conviction.
- Section 11-47-7.1, Code of Alabama 1975, authorizes a municipality to assess and collect fees for witness subpoenas and for issuance of alias warrants. Funds collected from these sources must be spent as set out in Section 11-47-7.1. AGO 1997-086.
- Section 14-6-22(d), Code of Alabama 1975, directs the clerk of a sentencing court to pay the costs of incarceration directly to the county or city in whose jail the defendant was incarcerated. AGO 1997-096.
- The Sixth Amendment right to counsel does not extend to indigent defendants who do not receive jail time. *Jowers v. Selma*, 688 So.2d 278 (Ala. Crim. App. 1996).
- A defendant is entitled to a trial by jury in circuit court on an appeal from a municipal court ruling. *Thomas v. Montgomery*, 690 So.2d 546 (Ala. Crim. App. 1997).
- Additional \$50 penalty on unlicensed drivers provided by Act 97-494 does not apply in municipal courts. AGO 1997-246.
- Court-ordered settlement funds can be used only for the purposes set out in the court's order and do not revert to the general fund at the end of the year. AGO 1997-289.
- Amendment 530, Alabama Constitution, 1901, authorizes the Macon County Commission to assess additional court costs only in circuit and district courts in the County. It does not apply to municipal courts. AGO 1997-293.
- In *Parker v. Tuscaloosa*, 698 So.2d 1171 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals held that defendants have no right to appeal their convictions in municipal court directly to the Court of Criminal Appeals. The court also held that the municipal court did not have to provide a court reporter

to create a transcript that could be used in a direct appeal to the Court of Criminal Appeals.

- DUI defendants must be punished as set out in Section 32-5A-191, Code of Alabama 1975. A municipal court does not have jurisdiction over a fourth DUI offense. AGO 1998-015.
- A municipal judge may not require cash-only bail with regard to an initial arrest for a misdemeanor offense, an appearance bond on a continuance or on an appeal bond. The judge may, however, require a cash bond on a failure to appear warrant, if the judge deems it necessary and appropriate. AGO 1998-026.
- A municipality may enter into a contract with a private probation service to fulfill the needs of the municipal court. Furthermore, the judge may assess a supervision fee upon each probationer as a condition of probation. This fee, however, cannot exceed the probationer's ability to pay. AGO 1998-043.
- In *Coughlin v. Birmingham*, 701 So.2d 830 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals held that the handwritten word "fury" written in the margin of a defendant's appeal form from municipal court was sufficient to notify the circuit court that he was demanding a jury trial.
- Act 97-473, establishing the offense of unauthorized handicapped parking does not preempt municipal handicapped parking ordinances. Persons charged with the violation of a municipal handicapped parking ordinance which does not adopt the penalty provisions of Act 97-473 do not have to appear in court. AGO 1998-061.
- A municipality may use funds from the correction fund (Section 11-47-7.1 of the Code) to reimburse the general fund for the purchase of a computer system, if the computer is to be used exclusively by the municipal court. AGO 1998-076.
- Municipal courts have the power to administratively adjudicate violations defined in Section 28-11-13 of the Code, which concerns juvenile possession of tobacco, if the municipality has adopted the offense as a municipal ordinance violation. Appeals from municipal court are to the appropriate circuit court. Only law enforcement officials may issue citations pursuant to Section 28-11-14. AGO 1998-102.
- A municipal judge may order the taking of a blood sample from a defendant, even if circumstances require taking the defendant outside the jurisdiction to be tested. AGO 1998-109.
- Municipal court referral officers are appointed by the

Administrative Office of Courts. Because drug-testing is ordered by the courts and not the referral officer, there is no conflict of interest when court referral programs recoup the costs of drug testing from tested defendants. AGO 1998-167.

- The Alabama Supreme Court held in *Ex parte McLeod*, 725 So.2d 271 (Ala. 1998), that a trial judge does not have a duty to reveal that a party before the court contributed money to the judge's campaign, since contributions are a matter of public record.
- In *Fort Payne v. Bouldin*, 717 So.2d 883 (Ala. Civ. App. 1998), the Alabama Court of Criminal Appeals held that a municipality did not have the authority to appeal from a municipal court decision dismissing its criminal charges against a defendant.
- Correction Fund revenues collected pursuant to Section 11-47-7.1, Code of Alabama 1975, cannot be used by a municipality to build or construct a police facility with or without a court complex. AGO 1999-012.
- Municipal court records must be retained and/or disposed of in accordance with the records retention schedule in Rule 31, Alabama Rules of Judicial Administration. AGO 1999-035.
- Municipal courts have no jurisdiction over juveniles except traffic offenses, other than DUI, committed by 16 and 17 year olds, and municipal curfew violations. AGO 1999-147.
- The additional court costs imposed by Act 99-252 are applicable to traffic offenses prosecuted in municipal courts in Autauga County. AGO 2000-046. **Note:** This act applies only in Autauga County.
- A district court does not have the authority to enter into a contract with a private probationary corporation. **Note:** This opinion states that a municipality itself does have the authority, although nothing authorizes a court to do so. AGO 1999-117.
- The criminal history processing fee found in Section 12-19-180(a) is a "court cost" as that phrase is used in Section 12-19-150 and may be assessed against the defendant if a criminal case (except a non-DUI traffic, conservation or juvenile case) is dismissed upon payment of the docket fee and the other court costs by order of the judge. AGO 1999-287.
- Notice of a final order of bond forfeiture should be served pursuant to Rules 77(d) and 5(b) of the Alabama Rules of Civil Procedure. AGO 1999-276.
- The city council appoints the municipal judge. AGO 1999-067.

- The Code does not authorize municipal judges to appoint interpreters to accompany deaf defendants to court-ordered referral rehabilitative or probationary programs. AGO 1999-103.
- Upon abolishment of its municipal court, a municipality with a population of 1,000 or more may be required to maintain a separate facility for the district court at a location within the corporate limits of the city other than the district court presently provided. When the district attorney requests the assistance of the municipality in prosecuting municipal ordinance violations in district court, the district attorney should pay the city a sum agreed upon for these services. Provided the city and county commission contractually agree, sessions of the municipal court may be held in a county facility, and “Corrections Fund” monies may be spent by the municipality in furtherance of that contract. AGO 2000-015.
- In *Williams v. Montgomery*, 739 So.2d 515 (Ala. Civ. App. 1999), the Alabama Court of Civil Appeals held that the city’s bail policy, under which only cash bail or complete payment of outstanding fines would be available under *capias* warrants did not violate the constitutional provision that secured to incarcerated defendants the right to non-excessive bail before conviction.
- In *Benson v. Sheffield*, 737 So.2d 1059, the Alabama Court of Criminal Appeals ruled that a defendant did not have the Sixth Amendment right to counsel in a municipal prosecution where the sentence did not include actual imprisonment and where there were no conditions that resulted in the defendant’s imprisonment before he was placed on probation.
- The Alabama Court of Criminal Appeals held in *Ex parte Montgomery*, 721 So.2d 261 (Ala. Crim. App. 1998), that the 30-day period during which a circuit court may reinstate a dismissed appeal from a municipal court is jurisdictional. At the end of that period, the judgment of the lower court becomes final.
- Judicial Inquiry Commission Synopsis 99-74: Due to the appearance of impropriety, after an appointment by the city council of a part-time judge, the judge may not continue to represent city council members in a lawsuit filed against them by the mayor. *See*, Canon 2A of Judicial Rules and Section 12-14-30(d), Alabama Code 1975.
- All felony charges and misdemeanors or municipal ordinance violations, which are lesser-included offenses within a felony charge or arise from the same incident as a felony charge, are to be prosecuted in circuit court. *See*, Rule 2.2 of the Alabama Rules of Criminal Procedure. AGO 2000-124.
- Corrections fund monies may be used to remodel the city hall auditorium, where the municipal court is located, even though there may be an incidental benefit to the municipality when the remodeled facility is used for city council meetings. AGO 2000-124.
- Corrections fund monies may be used to repair, remodel and renovate a city’s court complex. AGO 2000-136.
- The plain language of Section 15-13-190, Code of Alabama 1975, provides that the maximum length of time a defendant may be held without being released on bond is 12 hours from the time of the arrest. A defendant held for more than 12 hours without seeing a judicial officer must be released on bail set at the minimum amount provided in the bail schedule of the Supreme Court. If a defendant is unable to post the minimum amount of bail as set forth in the bail schedule, then he or she must remain in jail until bail is posted or is subsequently released by a judge or magistrate in accordance with the Alabama Rules of Criminal Procedure. A personal appearance before a judge or magistrate is not mandated by the Act after the 12 hours have elapsed from the time of the defendant’s arrest. The Act clearly does not authorize a judge or magistrate to require a defendant to appear within 12 hours of arrest and also hold him or her an additional 12 hours before releasing him or her on bail. The Legislature must amend the act or establish other legislation to define the meaning of “domestic violence protection order registry” and which entity is responsible for its maintenance. An attempt or threat to commit domestic violence is covered by Section 15-13-190. Since Alabama’s Constitution provides that bail is a matter of right for non-capital offenses, a judge or magistrate may not keep a defendant in custody awaiting trial more than 12 hours after arrest even where the defendant is determined to be a threat to others by being at large. A defendant may not be released if he or she refuses to sign the release order promising to comply with the bail provisions. If no appearance is provided before a judge or magistrate, no conditions of release can be set, other than the condition that the defendant post bail to the minimum amount in the Supreme Court’s bail schedule. Since the act authorizes only that the judge or magistrate determine conditions of release for the defendant, the defendant is not entitled to confront his or her accusers or cross-examine witnesses. District and municipal court judges should use UJS Form CR-48, “Conditions of Release Domestic Violence Case,” to make findings on the record as required by the act.

Arrests for domestic violence offenses executed by warrant are not subject to the release procedures of the act. AGO 2000-034.

- While the municipal courts have the authority to order perpetrators of domestic violence to counseling programs, these statutes do not require that the courts order the perpetrator to such programs. AGO 2001-051.
- The municipal court has jurisdiction over traffic offenses committed by persons 16 years of age or older, including offenses committed on waterways within the municipality's jurisdiction. The juvenile court has jurisdiction over traffic violations committed by persons under 16 years of age. A traffic citation or summons issued to a person under 16 years of age is sufficient to invoke the jurisdiction of the juvenile court. AGO 2001-027.
- A full-time assistant district attorney is prohibited by Section 12-17-184(11) of the Code of Alabama from contracting privately with a municipality to provide prosecutorial services in the municipal court. AGO 2001-082.
- A city which has contracted with the county to provide dispatching services cannot use its municipal court magistrate as the dispatcher because magistrates must maintain neutrality and detachment from law enforcement activities. AGO 2002-150.
- The district attorney's restitution recovery division has the authority to collect court costs, fines and other enumerated sums on behalf of municipal courts that wish to contract with the district attorney's office for such collection. AGO 2003-139.
- Corrections fund monies may be used to hire an additional magistrate for a municipal court, but cannot be used to furnish and employ personnel to staff a planned police substation. AGO 2003-054.
- Unlike circuit courts and district courts, municipal courts are not courts of record and no rule or statutory law requires municipal courts to appoint an official court reporter upon a defendant's request. *Ex parte Burnsed v. Evergreen*, 844 So.2d 526 (Ala. 2001).
- Mandamus is the proper remedy, after jeopardy has attached, for review of a circuit court's dismissal of charges against a defendant due to a city's failure to timely transmit records from municipal court. *Ex parte Tarrant*, 850 So.2d 366 (Ala. Crim. App. 2002).
- When a district attorney refuses to prosecute a felony charge, regardless of whether it was transferred from municipal court to the district attorney or otherwise, the prosecution of that charge is effectively abandoned.

As such, a municipal court does not have jurisdiction to hear the case. However, under Section 36-15-14 of the Code of Alabama 1975, the city attorney or other investigating agency may refer the case to the Attorney General, and the Attorney General will review the matter and determine whether or not to prosecute. AGO 2004-097.

- Where a city has adopted state misdemeanors as municipal ordinance violations, municipal courts have jurisdiction to hear cases charged under Section 13A-9-13.1, Code of Alabama 1975, because negotiating a worthless negotiable instrument is a Class A misdemeanor. AGO 2004-109.
- Where it is determined that the municipal general fund is currently receiving no more than seven dollars (\$7) per case, a city council is authorized to increase court costs distributed to the general fund by ten dollars (\$10). AGO 2005-194. NOTE: Pursuant to Sections 12-14-14 and 12-19-172 (d) of the Code of Alabama 1975, the maximum amount a municipal court may distribute per case into a municipality's general fund is seventeen dollars (\$17).
- Corrections fund monies may be used to pay the cost of police officers transporting prisoners from the county jail to municipal court and for the magistrate to travel to the jail for 48-hour hearings. Provided however, the governing body must determine that the expenditures are necessary for the operation and maintenance of the jail and court. The determination of the appropriate costs, including mileage rate, per diem, or actual expenses, is in the discretion of the governing body. AGO 2006-066.
- Acts performed by municipal court clerk/magistrate to ensure that arrest warrants were recalled constituted a judicial function involving the exercise of judgment, and, thus, clerk/magistrate had absolute judicial immunity from negligence and wantonness claims brought by arrestee after she was arrested because one of the arrest warrants had not been put back into the National Crime Information Center computer by a third party. *Ex parte Greensboro*, 948 So.2d 540 (Ala. 2006).
- The funds collected by the clerk of the municipal court for inmate housing, maintenance and medical costs under Section 14-6-22 of the Code of Alabama shall be remitted to the county, and the county may give credit to the city for payment of such funds. Amounts collected and distributed to the county directly by the municipal court clerk in accordance with Section 14-6-22 should be excluded in computing any increase of costs to be

assessed against all defendants under Section 11-47-7.1. AGO 2007-084.

- The Alabama Court of Criminal Appeals does not have jurisdiction to consider an appeal from an action in which a defendant seeks to purge, modify or supplement criminal records. Jurisdiction for such an appeal is proper in the Court of Civil Appeals, rather than the Court of Criminal Appeals. *Ex parte Teasley*, 967 So.2d 732 (Ala. Crim. App. 2007).
- Alabama law gives sheriffs and their deputies law enforcement authority over the entirety of their respective counties. This authority is not limited or restricted inside the city limits of a municipality that is located within the sheriff's respective county. A county sheriff is not required to obtain permission or prior approval of a municipal government or police department before it may perform law enforcement operations within the limits of a municipality. If a speed limit is set by state statute or by the Alabama Department of Transportation, a citation could be prosecuted as either a municipal offense (where state offenses are adopted by reference) or a state offense. But if the posted speed limit was set or altered by municipal ordinance, the case would have to be initially prosecuted as a municipal offense. AGO 2008-063.
- Absent a constitutional amendment, Section 96 of Article IV of the Constitution of Alabama prohibits the Legislature from enacting legislation that would increase court costs, fees, and charges in less than all of the counties in the state. AGO 2008-096.
- It is the duty of the trial court to take some affirmative action, either by a statement recorded in the record or by written order, to state its reasons for revoking probation, with appropriate reference to the evidence supporting those reasons. The trial court's failure to set forth in the record its reasons for revoking probation will warrant remand. *Gerstenschlager v. State*, 999 So.2d 590 (Ala. Crim. App. 2008).
- A defendant may waive the right to be present in court at any proceeding, including trial, upon meeting one of the following conditions: (1) with consent of the court, by an understanding and voluntary waiver in open court or by a written consent executed by the defendant and by the defendant's attorney of record, filed in the case, or (2) by the defendant's absence from any proceeding, upon the court's finding that such absence was voluntary and constitutes an understanding and voluntary waiver of the right to be present, and that the defendant had notice of the time and place of the proceeding and was informed of the right to be present. *Thompson v. State*, 12 So.3d 723 (Ala. Crim. App. 2008).
- A trial judge did not abuse his discretion in denying a defendant's request for recusal where the defendant did not raise the issue of the trial judge's alleged bias until he had received an adverse judgment, failing therefore to afford the judge an opportunity to recuse himself before he heard the case. *Price v. Clayton*, 18 So.3d 370 (Ala. Civ. App. 2008).
- The prosecution may charge both retained and appointed counsel a reasonable fee for copying discovery materials. With regard to indigency status, the rules of discovery require that the prosecution allow the defendant to inspect and copy documents specified in the rule. The rule does not require that the prosecution provide the copies. AGO 2009-065.
- The Circuit Court lacked authority to order that the record of a petitioner's Municipal Court conviction for carrying a pistol without a permit, be completely removed and deleted. Even if the court was satisfied that the legislature's terminology defining the offense was misleading in suggesting that the petitioner carried the weapon on his person and not merely in a vehicle, statutes relating to purging, modification, or supplementation of criminal records were directed at making them accurate, not making them disappear. *Ex parte City of Dothan*, 18 So.3d 930 (Ala. 2009).
- In a criminal prosecution for violation of a city ordinance, the pertinent city ordinance is an essential element of the city's case and must be considered by and proven to the jury. When the city does not introduce the ordinance into evidence and it is not considered by the jury, the city has failed to make out its case against the defendant. The defendant challenged his conviction for DUI in violation of a city ordinance that adopted the Alabama Code by reference. Although the city filed the ordinance with the circuit court, the record does not reflect that the city moved to admit the ordinance into evidence or that the circuit court admitted the ordinance into evidence (merely showing the ordinance to the court is insufficient). *Cole v. City of Bessemer*, 26 So.3d 488 (Ala. Crim. App. 2009).
- The City of Chickasaw may use Corrections Fund monies for the eCite traffic citation system if the city determines the expenditures are necessary for the operation and maintenance of the court. Corrections Fund monies should be contributed or used only to the extent that the court benefits from the use of this citation system. AGO 2011-079.
- District and municipal courts within Alabama are

courts of limited jurisdiction. A district court is without authority to transfer a misdemeanor violation, made by a deputy sheriff or state trooper that cites state law and not a municipal ordinance violation, to a municipal court for subsequent disposition. A district court is authorized to prosecute violations of state law and, in certain instances, municipal law. A district court, however, will not have jurisdiction over a misdemeanor ordinance violation when a municipal court exists and the violation does not involve a felony. AGO 2012-063.

- Resident failed to state equal protection claim against police officer or city magistrate, stemming from altercation with officer over a blast of loud music from her son's car stereo system and magistrate's refusal to accept resident's criminal complaint against officer, absent allegations defining an identifiable group to which resident and her son belonged. *Waters v. City of Geneva*, 47 F.Supp.3d 1324 (M.D.Ala.2014).
- Section 155 of article VI of the Constitution of Alabama prohibits a person from being appointed as a full-time or part-time municipal judge after the person reaches the age of 70. A person serving as a municipal judge who reaches the age of 70 during his or her term may continue to serve as a municipal judge until the end of that person's term of office or until a successor is appointed. AGO 2014-002.
- State law does not prohibit the spouse of a police captain from serving as a court clerk and magistrate for the municipal court. If appointed, the magistrate should recuse himself or herself in matters where the police-officer spouse is involved in the matter being presented to the magistrate. AGO 2015-005.
- When a defendant is arrested without a warrant for an offense committed in the presence of a law enforcement officer and a complaint is issued, the judge or magistrate is not required to issue a warrant. AGO 2016-008.
- Possession of an "e-cigarette" or electronic cigarette is possession of an alternative nicotine product under section 28-11-13(a) of the Code of Alabama. A municipal court has authority to administratively adjudicate a complaint against a person under 19 for possession of an "e-cigarette" under section 28-11-13(a) if the municipality has adopted the offense as a municipal ordinance violation. AGO 2016-031.
- If the Union Springs Municipal Court ("Court") assesses any court costs in a case, then it must assess the additional costs and fees in section 45-6-81(a) of the Code of Alabama. The Court may retain, use, and expend the additional costs and fees in section 45-6-

81(a) under the terms designated by the city council. AGO 2016-038.

- The income tax setoff provisions may be used to collect fines and court costs, but not restitution, assessed by the municipal courts. AGO 2017-015.
- The City of Decatur may use corrections fund monies to purchase metal detectors, scanning equipment, and to pay officers and other related expenses to secure the Decatur City Hall building which houses the municipal court. AGO 2017-027.
- A part-time municipal judge is not required to resign or take a leave of absence in order to qualify and run for the office of probate judge. AGO 2018-013.
- A municipal court's standing order directing the release from custody of a defendant who executes an appearance bond in an amount prescribed in a bail schedule constitutes an "order of release" as contemplated under Rule 7.3 of the Alabama Rules of Criminal Procedure. A standing order setting a bail schedule must contain the four mandatory conditions set out in Rule 7.3(a) and a defendant's release may be revoked for violating such conditions. A defendant released pursuant to a standing order setting a bail schedule may be given notice of the mandatory conditions through a separate document. AGO 2018-029.
- A municipal employee may not oversee the administrative functions and personnel in municipal court. A city clerk may not also perform the functions of a municipal court clerk. AGO 2018-033.
- The city manager has the authority to appoint and remove officers and employees, including the deputy city attorney, the public defender, and their assistants. If it determines that special consideration is required to handle a specific case or cases pending in municipal court, the city council may hire outside counsel to assist the deputy city attorney. AGO 2019-030.
- Funds designated for the operation of the municipal court in the Municipal Judicial Administrative Fund pursuant to section 12-19-310 of the Code of Alabama may be used to pay for the renovation of the court's administrative offices. AGO 2019-042.
- A violation of section 32-5A-191.4(j) of the Code of Alabama is a traffic offense; thus, the court costs that should be assessed are those imposed for traffic offenses in addition to any fines required to be imposed. AGO 2020-022.

69. Magistrates and the Duty of Impartiality

One of the most fundamental principles in the American judicial system is that a person accused of a crime has the right to be heard by an impartial decision maker.

To satisfy the constitutional guarantee of due process, the person judging the accused – which includes judges and magistrates and others responsible for determining guilt or innocence – must not have a personal interest in the case. Personal feelings and concerns should have no bearing on the outcome of a criminal case. This article examines the duty of judicial impartiality and the unique problem posed by magistrates.

Canons of Judicial Ethics

Alabama has a strong history of support for the independence of the judiciary. The first Code of Legal Ethics in the United States was formulated and adopted by the Alabama State Bar Association in 1887. This first code was adopted by other states, and finally by the American Bar Association in 1908.

The present Canons of Judicial Ethics require judges and their support staff – which includes magistrates and court clerks – to act in a manner that promotes public confidence in the courts. In fact, Canon 1 states that, “a judge should uphold the integrity and independence of the judiciary.” This canon recognizes that an independent and honorable judiciary “is indispensable to justice in our society.”

Canon 2 requires the judge “avoid impropriety and the appearance of impropriety in all his activities.” This canon demands that the judge avoid any conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute. The committee comments to this canon make it clear that a judge will be the subject of constant scrutiny and therefore must avoid engaging in any activity which has a negative impact on the reputation of the court. The comment states, “[P]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges.”

Canon 3 governs the impartiality of judges. This canon provides that, “the judicial activities of a judge take precedence over his other activities.” The canon goes on to prohibit partisan influence on judges, and to require that they be patient, courteous and dignified toward litigants, according them the full right under the law to be heard. This canon also restricts public comment by judges on matters which are before his or her court.

Canon 3 also controls when a judge must refuse to hear a case. Essentially, any bias or financial interest – by the

judge or the judge’s family – requires recusal. Additionally, the judge is disqualified if he or she served as a lawyer or with a lawyer in the case or if he or she is a material witness. This canon goes even further, requiring that the judge refuse to hear a matter when the judge, the judge’s spouse, or any person within the fourth degree of kinship to either of them, or the spouse of the relative, is named as a party or represents a party in the case, is known by the judge to have an interest in the case or is a material witness in the matter.

Canon 3 does allow the parties to consent to let the judge hear the case, regardless of the judge’s interest. This consent must be given in writing, signed and made a part of the record.

Canon 5 requires a judge to minimize extra-judicial activities to avoid any conflict with judicial duties and responsibilities. The judge may engage in outside activities only if they “do not detract from the dignity of his office or interfere with the performance of his judicial duties.”

A special exception is created for part time judges. Most municipal judges fall into this category. Part time judges – those who serve on a continuing basis but who are permitted to engage in other activities – are not required to comply with Canon 5D, E, F, and G, and Canon 6C. These canons govern the financial activities of a judge and require the filing of an annual financial disclosure statement.

The Duty of Impartiality

Court officers must maintain a balance between the interests of the state and those of the accused. There must not even appear to be such a likelihood or appearance of bias that the decision maker is not able to maintain that balance. While this may eliminate some judges who have no actual prejudice, “due process of law requires no less.” *Taylor v. Hayes*, 418 U.S. 488 (1974).

It is easy to recognize the potential for abuse when the decision maker has a direct, pecuniary interest in finding the accused guilty. For instance, if a justice of the peace receives a fee for each conviction but receives nothing if he finds the defendant innocent, it is clear that remuneration – or the loss of it – might color the decision of the justice of the peace.

It is perhaps more difficult to see a problem where no financial benefit accrues to the decision maker. However, due process embraces more than just the decision maker’s financial benefit. A person accused of a crime is presumed innocent. The prosecution carries the burden of proving the defendant guilty beyond a reasonable doubt. Any conflict

which causes the decision maker to tilt the scales of justice in favor of the prosecution violates due process.

The Fourteenth Amendment to the United States Constitution guarantees that no person shall be “deprived of life, liberty or property without due process of law.” This amendment applies to state and local governments.

The Due Process Clause accords both procedural and substantive protection from invalid government action. Substantive due process assures individuals that in order to not deprive them of life, liberty or property, the governmental action will be reasonable, not arbitrary or capricious and bear a real and substantial relation to a legitimate governmental purpose. The procedural component of due process generally relates to the process by which a government deprives someone of life, liberty or property. Procedural due process challenges generally target whether a person was given adequate notice and a meaningful hearing opportunity.

In order to satisfy these constitutional requirements, a judicial decision maker must be detached from law enforcement functions. He or she cannot be controlled or directed by members of the police department or the prosecutor. When a request for a search warrant is presented, for example, a magistrate must determine for himself or herself that probable cause exists to justify issuing the warrant or must deny the request. Due process guarantees that the liberty or property interests of the accused are protected by requiring a fair hearing before an untainted decision maker.

The Florida Court of Appeals discussed the duty of impartiality in *State v. Steele*, 348 So.2d 398 (Fla. App. 1977). The court held that every litigant is entitled to nothing less than the “cold neutrality of an impartial judge.” Courts must scrupulously guard this right and refrain from any action which brings neutrality into question. The court stated that under no circumstances should any judge whose impartiality is even questioned try a case. A judge has a duty to recuse himself or herself if for any reason he or she cannot be impartial. *State v. Washington*, 266 N.W.2d 597 (Wis. 1978).

A part-time municipal court magistrate should not act as an attorney in any proceeding in which he or she has issued a warrant or obtained information by virtue of his or duties as magistrate. AGO 1993-129.

Personal Financial Interest in the Outcome

In *Tumey v. Ohio*, 273 U.S. 510 (1927), the defendant was convicted by the mayor of the Village of North College Hill, Ohio, for unlawful possession of alcoholic beverages. The mayor ordered the defendant to be imprisoned until the fine and costs were paid.

Under state law and city ordinance, the mayor received

\$12 for each conviction. He received nothing if he found the defendant innocent.

The United States Supreme Court held that it violates due process to subject a defendant to the rulings of a judge with a direct, substantial, pecuniary interest in reaching a conclusion against him. Although \$12 was not a substantial amount of money, the court stated that “every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter of due process.”

This same issue has arisen in several Alabama cases. In *Bennett v. Cottingham*, 290 F.Supp. 759 (N.D. Ala. 1968), and *Callahan v. Sanders*, 339 F.Supp. 814 (M.D. Ala. 1971), justices of the peace received a fee for each traffic conviction and nothing if they found the defendant not guilty. The courts held that this practice violated due process.

Detachment from Law Enforcement Activities

The need to keep court operations separate from police functions was discussed by the United States Supreme Court in *Shadwick v. Tampa*, 407 U.S. 345 (1972). In *Shadwick*, the defendant was arrested for impaired driving on a warrant issued by a municipal court clerk. The defendant argued the warrant was not valid because court clerks do not qualify as judicial officers under the Fourth Amendment. Instead, because the court clerks were members of the civil service and were appointed by the city clerk and had no specific tenure in office, they lacked the institutional independence associated with the judiciary.

The Court disagreed and affirmed the conviction. The Court found that there was no showing of partiality or affiliation with prosecutors or police, nor was there any connection with law enforcement activities that might distort the independent judgment of the clerks. The Court was also influenced by the fact that the clerks were assigned to, and supervised by, the municipal court judge and the police or prosecutor.

A city which has contracted with the county to provide dispatching services cannot use its municipal court magistrate as the dispatcher because magistrates must maintain neutrality and detachment from law enforcement activities. AGO 2003-150. A municipal court magistrate does not have the authority to endorse a warrant of arrest under Section 15-10-10, Code of Alabama 1975. AGO 2002-251.

Magistrates

Alabama municipal courts are maintained at the expense of the municipality. Amendment 328, Section 145,

Alabama Constitution, 1901. The municipality shall provide appropriate facilities and necessary support personnel for the municipal court and may provide for probation services, clerks and municipal employees designated as magistrates. *See*, Section 12-14-2, Code of Alabama 1975.

Amendment 328, Section 139, Alabama Constitution, 1901, mandates the creation of judicial officers with authority to issue warrants and vests those officers with judicial powers incidental to their purposes. Sections 12-14-50 through 12-14-52, Code of Alabama 1975, carry this mandate into effect, creating a municipal court administrative agency under the direct control of a magistrate.

Rule 18, Alabama Rules of Judicial Administration, provides for the appointment of municipal magistrates which include all municipal court clerks and any person within the clerk's office designated by the Administrative Director of Courts (ADC), upon the written recommendation of the clerk to serve as magistrate; and all persons appointed to serve as magistrates by the ADC upon the written recommendation of the municipal judge or judges. This rule requires all magistrates to remain neutral and detached from all law enforcement activities. The comment to Rule 18 states, "no person who is affiliated with the prosecution or the police, assigned to police or connected with law enforcement activities should be considered for appointment as a magistrate." Pursuant to Section 12-14-50, Code of Alabama 1975, a municipal judge has the authority to supervise all court employees generally and pursuant to Rule 18 of the Alabama Rules of Judicial Administration, the municipal court clerk, not the city clerk, has the authority to supervise all court magistrates and other court personnel regarding administrative matters. AGO 2005-098. Likewise, a municipal employee may not oversee the administrative functions and personnel in municipal court. AGO 2018-033. In 2018, the Attorney General's Office also issued an opinion stating that a city clerk may not also perform the functions of a municipal court clerk. AGO 2018-033.

It is important to note the court system could not operate as efficiently without the services of magistrates. Magistrates help ensure expeditious adjudication of ordinance violations and the issuance of warrants by handling many of the administrative functions for which the court is responsible. Many of the functions and powers of a magistrate are the same as those of a municipal judge. A magistrate's powers include issuing arrest warrants, granting bail in minor prosecutions, taking guilty pleas in minor cases where a schedule of fines has been provided and accounting for the moneys received by the court. While magistrates do not have to be attorneys, they must be knowledgeable about the law and legal procedures.

Magistrates are subject to the same due process requirements as judges. Their decisions – whether to issue warrants or set bond or any other use of power – must be free from personal prejudice and interest. Like judges, they must always be aware of the duty to balance the interests of the prosecutor and the accused and to ensure that the rights of the accused are fully protected by avoiding even the appearance of allowing outside forces to influence their decisions.

But magistrates pose a unique problem. In many municipalities, magistrates have been part of the police department for years. Yet, in order to protect due process, magistrates cannot be supervised by the police department. Instead, they must serve under the municipal court. Only by remaining detached can a magistrate ensure that the accused has a fair opportunity to have his side of the case heard.

The key to protecting due process appears to be avoiding anything other than the facts of the case at hand that might influence the magistrate's independent determination of guilt or innocence. If the magistrate's supervisor is a police chief or prosecutor, the possibility of unpleasant working conditions or even being fired for ruling against the police might influence the magistrate's decisions. Or, the magistrate, seeing himself or herself as part of the prosecution, may not give an accused the benefit of the doubt and might consider him or her guilty unless he or she proves himself or herself innocent. Magistrates, like judges, must not favor the prosecution over the defendant. *U.S. v. Gower*, 447 F.2d 187, cert. denied, 404 U.S. 850 (1971).

This is not always an easy task. In AGO 1990-251, the Attorney General was asked if anything prohibited appointing the wife of the chief of police as the municipal court clerk. The Attorney General ruled that no general laws prohibited this appointment. However, the Attorney General pointed out that prior to making the appointment, to ensure impartiality and detachment, the city should strongly consider the clerk's possible affiliation with the prosecution and police, the possibility of police supervision and her connection with law enforcement activities. Many times this will be difficult to determine and it may be better to appoint someone with no potential conflicts to the position.

Immunity

In the performance of any official duty provided for by Section 12-14-51, Code of Alabama 1975, a municipal magistrate shall have absolute judicial immunity from any liability arising from the execution of those duties.

Problems Caused by Unfair Trials

No conviction will be affirmed where the decision maker was not impartial. In *State v. Steele*, *supra*, the

prosecution argued that it was harmless error for the judge to sit in judgment because the evidence of guilt was overwhelming. The court rejected this argument, stating that, “any argument based on the sufficiency of the evidence ‘presupposes that an impartial judge evaluated the evidence at trial level and found against the party appealing the judgment.’” Evidence permitted by a biased judge might have been ruled inadmissible by an impartial judge.

So, at the very least, municipalities which assign magistrates to police departments face the probable added cost of retrying the case, as well as wasting the costs of the original trial.

There is also the possibility of damage awards under Section 1983. Section 1983 prohibits a municipality from having a policy or custom that deprives anyone of their constitutional or federal statutory rights. *Callahan v. Sanders*, cited above, permitted maintaining an action under Section 1983 where the decision maker was not impartial. Although the court in *Callahan* did not permit a damage award, it left open the door to such awards as well as the awarding of attorneys’ fees.

Satisfying the constitutional requirements of due process through the impartiality of the judge and magistrate is not always easy. It requires sacrifice by judicial officials. Protecting the integrity of the judicial system demands no less. Officials must remain vigilant to any potential influences on their decisions. This means more than just refusing bribes. They must work to ensure that justice is done. This requires avoiding any improper influence on their judicial decisions. They must remain neutral until all the facts are in and avoid even the appearance of impropriety.

70. Adoption of State Offenses by Reference

Cities and towns in Alabama are empowered to adopt ordinances to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of the inhabitants of the municipality and to enforce such ordinances by fines and imprisonment. To enforce obedience to most ordinances, a municipality has the authority to provide penalties by fine not exceeding \$500, for most offenses, and by imprisonment or hard labor not exceeding 6 months, or both. *See*, Section 11-45-9 Code of Alabama 1975.

However, there are several exceptions to this authority provided by state law in Section 11-45-9(d), Code of Alabama 1975. Notwithstanding any other provision of law, the maximum fine for every person either convicted for violating any of the following misdemeanor offenses adopted as a municipal ordinance violation or adjudicated as a youthful offender shall be one thousand dollars (\$1,000): Criminal mischief in the second and third degree (§§13A-7-22 and 13A-7-23); Theft of property in the fourth degree (§13A-8-5); Theft of lost property in the third degree (§13A-8-9); Theft of services in the fourth degree (§13A-8-10.3); Receiving stolen property in the fourth degree (§13A-8-19); Tampering with availability of gas, electricity or water (§13A-8-23); Possession of traffic sign; notification, destruction, defacement, etc., of traffic sign or traffic control device, defacement of public building or property (§13A-8-71 and §13A-8-72); Offenses against intellectual property (§13A-8-102); Theft by fraudulent leasing or rental (§13A-8-140 through §13A-8-144); Charitable fraud in the third degree (§13A-9-75); and Illegal possession of food stamps (§13A-9-91).

In the enforcement of the DUI laws found at Section 32-5A-191, Code of Alabama 1975, a municipal court may set a fine not to exceed \$5,000 and a sentence of imprisonment not to exceed one year. Section 11-45-9(c), Code of Alabama 1975.

The penalty imposed upon a corporation that violates a municipal ordinance shall consist of the fine only, plus costs of court. Section 11-45-9(e), Code of Alabama 1975.

In the enforcement of a Class A misdemeanor, including a domestic violence offense, the fine may not exceed \$5,000 and the sentence of imprisonment may not exceed one year. Section 11-45-9(f), Code of Alabama 1975.

The responsibility for the maintenance of the peace and quiet of the community is of fundamental importance and it presents an awesome challenge to municipal officials, especially those of small cities and towns. The average municipal governing body does not include a Hammurabi

or Justinian who can hand down a code of laws for the maintenance of the peace and quiet of the community. Even if such a person was on the municipal governing body, there is the question of paying the cost for printing the code. Fortunately, there is a convenient and economical answer to this problem.

One simple ordinance is available for Alabama municipalities which is practically a code of offenses in itself. It is an ordinance which makes the violation of state offenses, other than felonies, within the corporate limits and police jurisdiction of the municipality offenses against the municipality. The governing body of every municipality, large and small, should make sure that this ordinance is available to its law enforcement officials and should update the ordinance as necessary when state law is amended.

Authority for Ordinance

It has long been established that a city or town in Alabama may adopt an ordinance which makes the violation of state misdemeanor statutes within the jurisdiction of the city or town, an offense against the municipality. *Montgomery v. Davis*, 74 So. 730 (Ala. App. 1917); *Sloss Sheffield Steel & Iron Co. v. Smith*, 57 So. 29 (Ala. 1911); *Birmingham v. Edwards*, 93 So. 233 (Ala. App. 1922).

In explaining this type of ordinance, the Supreme Court of Alabama has said:

“The thought behind the ordinance is that he who offends the peace and dignity of the parent state, by infraction of her penal laws, offends also against the laws of the local government.

“Such a general or reference ordinance serves two purposes: one of convenience, the avoidance of expenses in enacting and promulgating a volume of penal ordinances in the same terms as well-known public statutes; the other is the element of certainty.

“The meaning of the brief ordinance is not in doubt. The citizen, not required to be advised upon two parallel codes of laws, can look to one, of which he is already required to take notice, and whose construction has often been well settled, to keep himself within the law of both jurisdictions. Again, it assures that the city ordinance is not in conflict with the state laws, nor violative of public policy, and puts the local government behind the suppression of evils defined and made public offenses by state law.” *Casteel v. Decatur*, 109 So. 571 (Ala. 1926).

In *Langan v. Winn Dixie*, 173 So.2d 573 (Ala. 1965), the court held that the City of Mobile could not be enjoined from enforcing the state Sunday closing law which had been adopted by reference in a municipal ordinance.

On January 1, 1980, the Alabama Criminal Code, which is codified as Title 13A of the Alabama Code of 1975, as amended, came into effect. This code rewrote many of the criminal laws of the state. Under this system of criminal law, offenses are classified as either felonies, misdemeanors or violations. In addition to these three classes of offenses, other volumes of the Alabama Code contain some criminal offenses which are not classified.

The Attorney General in an opinion to Hon. B. C. Hornady, dated May 9, 1980, advised that municipal courts have jurisdiction over violations of municipal ordinances when those ordinances have adopted state misdemeanors. However, the language of Section 12-12-30(2) of the Code of Alabama indicates that where there is a possibility that the prosecution could involve a felony offense the person should be charged with the state offense rather than with a violation of the municipal ordinance. Rule 2.2 of the Alabama Rules of Criminal Procedure requires that all felony charges and misdemeanor or ordinance violations which are lesser included offenses within a felony charge or which arise from the same incident as a felony charge shall be prosecuted in circuit court, except that the district court shall have concurrent jurisdiction to receive guilty pleas and to impose sentences in felony cases not punishable by sentence of death, including related and lesser included misdemeanor charges. See AGO 2000-124. The “same incident” language should be construed and interpreted to mean the “same act” for purposes of the statute providing that the circuit court has exclusive original jurisdiction of all misdemeanor violations which arise from the “same incident” as a felony charge. *Ex parte City of Tuscaloosa*, 636 So.2d 692 (Ala.Crim.App.1993).

In AGO 1980-362 the Attorney General specifically listed certain misdemeanors for which a defendant should not be charged with violation of a municipal ordinance, including criminally negligent homicide; sexual abuse in the second degree; arson in the third degree; forgery in the third degree; and criminal possession of a forged instrument in the third degree. This list, according to the opinion, is not exclusive, since each offense is judged individually with due regard to the particular facts surrounding the act committed and whether the elements of the offense could also constitute a felony offense.

In summary, municipalities have the authority to adopt ordinances making all misdemeanors, violations and unclassified offenses, offenses against the municipality. Municipalities do not have the authority to make a felony an offense against the municipality nor should municipalities adopt by reference those misdemeanors covered by AGO 1980-362. *See also, Barbour v. Montgomery*, 104 So.2d 300 (Ala. App. 1958) and AGO’s to Hon. J. Wagner Finnell, June 19, 1975, and Col. George S. Harrington, August 17, 1977.

Sample Ordinance

An example of an ordinance to adopt offenses by reference is printed below:

BE IT ORDAINED BY THE CITY [TOWN] COUNCIL OF THE CITY [TOWN] OF _____, ALABAMA, AS FOLLOWS:

SECTION 1. Any person or corporation committing an offense within the corporate limits of the city [town] of _____, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the state of Alabama now existing or hereafter enacted to be a misdemeanor, shall be guilty of an offense against the city [town] of _____, Alabama.

SECTION 2. Any person or corporation committing an offense within the corporate limits of the city [town] of _____, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the state of Alabama now existing or hereafter enacted to be a violation, shall be guilty of an offense against the city [town] of _____, Alabama.

SECTION 3. Any person or corporation committing within the corporate limits of the city [town] of _____, Alabama, or within the police jurisdiction thereof, an offense as defined by Section 13A-1-2 of the Alabama Criminal Code, which offense is not declared by a law or laws of the state of Alabama now existing or hereafter enacted to be a felony, misdemeanor or violation, shall be guilty of an offense against the city [town] of _____, Alabama.

SECTION 4. Any person found to be in violation of Section one, two or three of this ordinance shall, upon conviction, be punished by a fine of more than \$500, except where otherwise provided by state law for the violation of municipal offenses, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding six months, at the discretion of the court trying the case. Any corporation found to be in violation of Sections one, two or three of the ordinance shall, upon conviction, be punished by a fine of not more than \$500, except where otherwise provided by state law for the violation of municipal offenses, at the discretion of the court trying the case.

SECTION 5. Any person found to be in violation of Section one, two or three of this ordinance, where the offense is a misdemeanor listed in subsection (d) of Section 11-45-9 of the Code of Alabama, shall be punished by a fine of not more than \$1,000, except where otherwise provided by state law for the violation of municipal offenses, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding six months, at the discretion of the court trying the case. Any corporation found to be in violation of Sections one, two or three of the ordinance shall, where the offense is a misdemeanor listed in subsection (d) of Section 11-45-9 of the Code of Alabama, upon conviction, be punished by a fine of not more than \$1,000, except where otherwise provided by state law for the violation of municipal offenses, at the discretion of the court trying the case.

SECTION 6. Any person found to be in violation of this ordinance for the commission of an offense that would also constitute an offense as defined in Section 32-5A-191, Code of Alabama 1975, as amended, shall, upon conviction, be punished by a fine of not more than \$5,000, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding one year.

SECTION 7 Any person found to be in violation of Section one, two or three of this ordinance, where the offense is a Class A misdemeanor, including a domestic violence offense listed in subsection (f) of Section 11-45-9 of the Code of Alabama, shall be punished by a fine of not more than \$5,000, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding one year.

SECTION 8. Any ordinance heretofore adopted by the city [town] council of the city [town] of _____, Alabama, which is in conflict with this ordinance is hereby repealed to the extent of such conflict.

SECTION 9. If any part, section or subdivision of this ordinance shall be held unconstitutional or invalid for any reason, such holding shall not be construed to invalidate or impair the remainder of this ordinance, which shall continue in full force and effect notwithstanding such holding.

SECTION 9. This ordinance shall become effective on _____.

ADOPTED AND APPROVED THIS THE ____ DAY OF _____, 20__.

_____, Presiding Officer

ATTEST: _____ City Clerk

Punishment by Courts

When a case is brought before a judge for the violation of a municipal ordinance that adopts certain state offenses a municipal court cannot impose a penalty in excess of what is authorized by Section 11-45-9 of the Alabama Code, except in DUI offenses, even though the penalty for violating the same law tried as a state offense might be greater. Where a city ordinance calls for a fine higher than the limit set by Section 11-45-9, the ordinance is not void and the penalty may be imposed to the extent that it does not exceed the lawful limit. *See, Sconyers v. Coffee Springs*, 160 So. 552 (Ala. 1934).

The punishment, which is limited by the municipal ordinance, generally cannot exceed \$500, except for those offenses listed in (c) and (d) of Section 11-45-9, Code of Alabama, and six months at hard labor for the municipality, either or both, at the discretion of the court. When a defendant is charged with the violation of an ordinance of the municipality, including an ordinance which adopts certain state offenses by reference, then all of the fines and costs, except as otherwise provided for by law, are kept in the municipal treasury. *State v. Springville*, 125 So.387 (Ala. 1929); AGO to Hon. Peyton Tutwiler, August 21, 1956.

It is extremely important for a municipal judge to see that the warrant and affidavit and the judgment entry reveal clearly that the defendant is charged with the violation of a described ordinance duly adopted by the governing body of the municipality and in force at the time the offense was committed and also that the punishment established is within the limits prescribed by Section 11-45-9. Care should also be taken to determine that the municipality has jurisdiction to prosecute a particular offense. We have briefly discussed instances where municipal courts would lack jurisdiction where a misdemeanor or ordinance violation is associated with a felony, but jurisdiction may come into play where the offense is created by ordinance alone. For instance, if a speed limit is set by state statute or by the Alabama Department of Transportation, a citation could be prosecuted as either a municipal offense (where state offenses are adopted by reference) or a state offense. But if the posted speed limit was set or altered by municipal ordinance, the case would have to be initially prosecuted as a municipal offense. AGO 2008-063.

In a criminal prosecution for violation of a city ordinance, the pertinent city ordinance is an essential element of the city's case and must be considered by

and proven to the judge or jury. When the city does not introduce the ordinance into evidence and it is not considered by the judge or jury, the city has failed to make out its case against the defendant. In one case the defendant challenged his conviction for DUI in violation of a city ordinance that adopted the Alabama Code by reference. Although the city filed the ordinance with the circuit court, the record did not reflect that the city moved to admit the ordinance into evidence or that the circuit court admitted the ordinance into evidence (merely showing the ordinance to the court is insufficient). *Cole v. City of Bessemer*, 26 So.3d 488 (Ala.Crim.App.2009).

Double Jeopardy?

If a municipality adopts state misdemeanors and a defendant is tried in both municipal and state courts for the same act, is the constitutional protection against being twice placed in jeopardy for the same offense violated? Where the courts have concurrent jurisdiction the answer seems clear. In *Waller v. State of Florida*, 397 U.S. 387, re'h, den., 398 U. S. 914, (1970), the U.S. Supreme Court held that where a state charge was based on the same acts as an earlier municipal court conviction for the lesser included offenses, the second trial constituted double jeopardy in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. However, cases in Alabama indicate that where the municipal court lacked jurisdiction because the misdemeanor or ordinance violation was a lesser included offense within a felony or arose from the same incident as a felony charge, there can be no valid conviction in the municipal court and therefore jeopardy would not attach. The statute vesting the circuit court with exclusive original jurisdiction of felony prosecutions and misdemeanor or ordinance violations arising from same incident as a felony charge precluded municipal court consideration of charges that defendant had violated municipal ordinances by drinking in public and possessing drug apparatus. *Matthews v. Birmingham*, 581 So.2d 15 (Ala. Crim. App. 1991). It is essential to constitute jeopardy that the court in which the accused is put upon his trial shall have jurisdiction; if it is without jurisdiction, there can be no valid conviction, and hence there is no jeopardy. *Dutton v. State*, 807 So.2d 596 (Ala. Crim. App. 2001), *Benjamin F. Cox v. State*, 585 So.2d 182, 192 (Ala. Crim. App. 1991).

Enforcement of Laws

A municipal governing body that has adopted an ordinance making certain state offenses as offenses against the municipality has gone a long way toward meeting its responsibility to maintain the peace and quiet of the community. The final step is providing an adequate police

force with sufficient equipment and training to enforce the ordinance.

Proper enforcement demands that police officers of the municipality become familiar with the laws governing the residents of the city or town. When a municipality adopts such laws by reference, police officers must be familiar with the Alabama Code sections which prescribe such offenses in addition to the provisions of special ordinances which establish other offenses within the municipality and its police jurisdiction. When an officer makes an arrest, the person arrested has a right to demand information as to what the arrest is for. It is the duty of the officer to give this information. When a defendant is brought before a judge, unless he or she demands a written affidavit and warrant setting out the charges, the defendant is deemed to have waived this right. *Chaney v. Birmingham*, 21 So.2d 263 (Ala. 1944). Conversely, if the defendant demands a written warrant based on the affidavit, he or she is entitled to it as a matter of right. While a written affidavit and warrant need not be letter perfect and technically correct in every respect unless demurred to in writing, it does have to meet all of the requirements necessary to confer jurisdiction on the court.

71. Municipal Liability

What is a Tort?

Ballentine's Law Dictionary with Pronunciations defines a tort as an "injury or wrong committed ... to the person or property of another." *Tort*, Ballentine's Law Dictionary (2d ed. 1948). There are three basic types of torts – intentional torts, negligent torts and strict liability torts.

Municipal liability is usually based on negligence, pursuant to Ala. Code 1975, § 11-47-190. Essentially, this code section establishes a negligence standard for municipalities. It states that a municipality can be held liable for the torts of its officers and employees which are due to "neglect, carelessness or unskillfulness." In its simplest terms, a negligent tort arises if the plaintiff can prove four elements:

1. the defendant owed (or assumed) a duty to the plaintiff to use due care;
2. the defendant breached that duty by being negligent;
3. the plaintiff was injured; and
4. the defendant's negligence caused the plaintiff's injury.

The courts have held that the established rules relating to negligence apply in cases involving municipalities. *Birmingham v. Latham*, 162 So. 675 (1935). Thus, all four elements must be satisfied for liability against the municipality to arise. The plaintiff must plead and prove negligence on the part of the municipality. *Montgomery v. Quinn*, 19 So. 2d 529 (1944). It must also be shown that the negligence of the city breached a duty owed to the plaintiff. *Modlin v. Miami Beach*, 201 So. 2d 70 (1967).

A negligent tort can arise by nonfeasance, by malfeasance, or by misfeasance. **Nonfeasance** is the "omission to perform ... duties that the person owes to his principal." That is, failing to perform a required duty. An example of nonfeasance is the failure of a city clerk to record a paper which the clerk is required by law to record. **Malfeasance** is "the doing of an act which the person ought not to do at all." This is a situation where a person acting exceeds their authority. For instance, when a city police officer arrests a person the officer has no reason to believe committed a crime, the officer commits an act of malfeasance. **Misfeasance** is the "improper doing of an act which a person might lawfully do." An example would be the reckless operation of a fire truck by a firefighter authorized to operate the vehicle.

Although § 11-47-190 creates a negligence standard of care for municipalities, several court decisions that will be discussed later indicate that municipalities must also be concerned with intentional torts. An intentional tort is

a willful tortious action taken by the defendant towards the plaintiff. Examples of intentional torts are assault, battery, false imprisonment, false arrest, trespass on real and personal property and so forth.

Strict liability torts rarely apply to municipalities. A strict liability tort is a liability imposed by law on a person even though he has not been guilty of any negligent act or any wanton, willful or intentional wrongdoing. Such liability is usually imposed upon owners of animals for damage done by the animals and upon those who either maintain conditions or engage in activities which are highly dangerous and threaten injury to the general public. The idea is that although neither party is to blame, in balancing the social equities and in determining who can best bear the loss, the loss is shifted by law from plaintiff to the defendant.

The two major types of civil actions filed against municipalities are tort actions filed in state courts and civil rights actions filed in federal court under Section 1983 of the Civil Rights Act of 1971. The Civil Rights Act of 1971, 42 U.S.C. § 1983.

State actions generally commence at the circuit court level. The circuit court has exclusive jurisdiction of all cases involving claims for more than \$10,000 and has concurrent jurisdiction with the district court of all cases involving claims above \$3,000. Ala. Code 1975, § 12-11-30. Punitive damages cannot be recovered against a municipality. Ala. Code 1975, § 6-11-26.

Claims under Section 1983 generally start in federal district court, although the Alabama Supreme Court held in *Terrell v. City of Bessemer*, that state courts in Alabama must accept Section 1983 cases if the plaintiff elects to file in state court. 406 So. 2d 337 (Ala. 1981).

Municipal Liability in General

Prior to 1975, municipalities in Alabama were liable under state law only for the tortious actions of their agents committed in the exercise of corporate or proprietary functions. Cities and towns were immune from suit if the tort was committed while the municipality was acting in its governmental capacity. *Dargan v. Mayor*, 31 Ala. 469 (Ala. 1858). Each case turned upon whether the court construed the function the municipality was performing was governmental or proprietary in nature. In many cases, the distinction was by no means clear.

In 1906, the Alabama Legislature partially abrogated the doctrine of municipal tort immunity by passing what is now Ala. Code 1975 § 11-47-190. This section states that a municipality can be held liable for the torts of its officers and employees which are due to "neglect, carelessness

or unskillfulness.” However, in *Bessemer v. Whaley*, 62 So. 473 (Ala. Ct. App. 1913), the Court of Appeals held that the Legislature did not intend to totally abolish the governmental-versus-proprietary-functions test and incorporated it into § 11-47-190 of the code. Thus, until 1975, the resolution of each case involving municipal liability continued to turn upon whether the municipality was performing a corporate or a governmental function.

In 1975, the Alabama Supreme Court totally abolished the doctrine of municipal immunity in *Jackson v. City of Florence*, 320 So. 2d 68 (Ala. 1975), “to let the will of the legislature, so long ignored, prevail.” The court held that because the doctrine was judicially created, the court had the power to abolish it. Thus, *Jackson* opened the door for suits against municipalities regardless of the function being performed by the municipality. However, the court noted that it was within the power of the Legislature to limit municipal liability in any manner it deemed necessary.

Statutory Limitations and Defenses

In response to *Jackson*, the Legislature enacted several statutes limiting the tort liability of municipalities. For instance, Ala. Code 1975, § 11-93-2, limits the amount of damages awardable against a municipality to \$100,000 per person and \$300,000 per occurrence for claims based on personal injuries and \$100,000 for a property loss.

This section protects municipalities from losses they incur either on their own or through indemnification of their officers or employees. Section 11-47-190 states that no recovery above this amount may be had against a municipality under any judgment or combination of judgments, whether direct or by way of indemnity arising out of a single occurrence. *See also Benson v. City of Birmingham*, 659 So. 2d 82 (Ala. 1995). Despite this limitation, though, a plaintiff may recover interest on a judgment, even if the interest is in excess of the statutory cap. *Elmore Cty. Comm’n v. Ragona*, 561 So. 2d 1092 (Ala. 1990). In *City of Birmingham v. Bus. Realty Inv. Co.*, 739 So. 2d 523 (Ala. 1998), the Alabama Supreme Court held that a municipality must raise the defense of municipal immunity under Ala. Code 1975, § 11-47-190, at trial as an affirmative defense. It cannot be raised for the first time on appeal.

In *Smitherman v. Marshall Cty. Comm’n*, 746 So. 2d 1001 (Ala. 1999), the Alabama Supreme Court held that summary judgment was proper as to the county commissioners and the county engineer in their *individual capacities*. In the alternative, claims against county commissioners and employees in their *official capacities* are, as a matter of law, claims against the county and are subject to the \$100,000 cap contained in § 11-92-2 of the Alabama Code. Ala. Code 1975, § 11-92-2. Thus, damages

against officials of protected entities for official actions are limited as well. However, in *Suttles v. Roy*, 75 So. 3d 90 (Ala. 2010), the court held that statutes which capped damage awards against cities, towns, and governmental entities at \$100,000 did not apply to a personal injury action which was brought against a police officer in his individual and personal capacity. Municipal peace officers are deemed to be officers of the State for purposes of the statute that affords them immunity when sued in their individual capacity. Whether they have such immunity depends upon the degree to which the action involves a State interest. This is a developing area of the law that the League is following closely.

The constitutionality of § 11-93-2 of the code was upheld in *Home Indem. Co. v. Anders*, 439 So. 2d 836 (Ala. 1984). In this case, the court also found that, for purposes of this section, all injuries that stem from a single incident are the result of a single occurrence. But, if the chain of causation is broken by an intervening cause, more than one occurrence has taken place. These maximums were also upheld in *Carson v. City of Prichard*, 709 So. 2d 1199 (Ala. 1998), where the Alabama Supreme Court held that 14 plaintiffs were not limited to total damages of \$100,000, although each individual claim could not exceed the statutory cap.

Unfortunately, the Alabama Supreme Court has held that these liability damage limits do not apply to property damage cases, holding that an amendment to § 11-47-190 did not expand the protection of the caps to property damage cases. *See City of Prattville v. Corley*, 892 So. 2d 845 (Ala. 2003). The court held that the statute “places no aggregate limit on a local governmental entity’s liability for property-damage claims payable on multiple judgments arising from the same occurrence.” The Court has also held that the cap applies only to cases involving tangible personal property, not those involving lost profits. Damages cap applied only to tangible property, and developers’ action sought lost profits. *Lee v. Houser*, 148 So. 3d 406 (Ala. 2013).

The Court has also ruled that the cap on damages for claims against a municipality did not limit the recovery on a claim against a municipal employee in his or her individual capacity. The recovery that was capped was the recovery from a municipality in those limited situations in which a municipality could be held liable in a negligence action. *Wright v. Cleburne Cty. Hosp. Bd., Inc.*, 255 So. 3d 186 (Ala. 2017); *Morrow v. Caldwell*, 153 So. 3d 764 (Ala. 2014). The Court further determined that city is not obligated to indemnify municipal employee for negligent actions that occurred outside the performance of his official duties. *Ala. Mun. Ins. Corp. v. Allen*, 164 So. 3d 568 (Ala. 2014).

The statutory caps may also limit a municipality’s authority to settle claims for more than the cap. The

Attorney General has ruled that if claims against a health care authority created under Ala. Code 1975, § 22-21-310, et seq. are subject to the statutory caps for governmental entities, the authority must pay or settle liability claims within the maximum amounts set by statute; however, for claims not covered by the statutory caps, an authority may pay or settle amounts in excess of the caps. Ala. Op. Att’y Gen. 2005-094.

A further limitation is found in Ala. Code 1975, § 11-47-23. This section states that in order for a plaintiff to recover damages against a municipality, he or she must file a claim with the municipality within six months. If the plaintiff fails to do so, the claim is barred, unless the municipality waives the requirement in this section. *Downs v. City of Birmingham*, 198 So. 231 (1940). It is important to remember that a municipality must raise the plaintiff’s failure to comply with this section as an affirmative defense or the court will deem it waived. *Alexander City v. Cont’l Ins. Co.*, 80 So. 2d 523 (1955). The filing of an action within the six-month period was held to constitute sufficient notice to a municipality of the claim against it in *Diemert v. City of Mobile*, 474 So. 2d 663 (Ala. 1985).

Closely related to § 11-47-23 is § 11-47-192, which states that a person who has been injured by a municipality must file a sworn statement with the city clerk stating the manner in which the injury occurred; the day, time and place where the accident occurred; and the damages claimed. *Waterworks & Sewer Bd. v. Brown*, 105 So. 2d 71 (1958). In *Howell v. Dothan*, 174 So. 624 (Ala. 1937), the Alabama Supreme Court stated that the six-month limitation period in § 11-47-23 must be read into this section. Therefore, written notice must be given to a municipality within six months of the accrual of a claim for personal injuries or it is barred. See *Locker v. City of St. Florian*, 989 So. 2d 546 (Ala. Civ. App. 2008).

The notice of claim must be filed within 6 months of the date the plaintiff’s cause of action accrues; that is, the date when the plaintiff could first bring an action against the municipality. *City of Mobile v. Cooks*, 915 So. 2d 29 (Ala. 2005). In this case, a property owner’s claim against a city for negligently issuing a building permit to a contractor, who was unlicensed and who purported to be an owner of the property, accrued, and the six-month period to file notice of a claim began to run pursuant to Section 11-47-23 of the Code of Alabama 1975, when the city issued the building permit and not the date the city issued the stop work order.

Compliance with § 11-47-192 is mandatory. *City of New Decatur v. Chappel*, 56 So. 764 (Ala. Ct. App. 1911). However, only substantial compliance is required. As long as the information required by the statute is presented in writing to the municipality, a plaintiff will be deemed to have complied with the requirements of this section.

Hunnicut v. City of Tuscaloosa, 337 So. 2d 346 (Ala. 1976).

In *City of Bessemer v. Brantley*, 65 So. 2d 160 (1953), the Alabama Supreme Court stated that the purpose of the notice of claim statutes is to allow a municipality time to investigate and determine the merits of the claim. The notice of claim statute was upheld in *Fortenberry v. City of Birmingham*, 567 So. 2d 1343 (Ala. 1990). And, in *Stabler v. City of Mobile*, 844 So. 2d 555 (Ala. 2002), the Alabama Supreme Court held that a former police officer who sued city and its police department for libel, tort of outrage and negligent supervision, did not substantially comply with statutory requirement of filing notice of claim with the city by simply filing a charge of discrimination against the city with the EEOC although many of the factual allegations in the EEOC claim were the same or similar to claims made in former officer’s complaint.

The notice of claim must also be properly filed. For example, in *Perry v. City of Birmingham*, 906 So. 2d 174 (Ala. 2005), the Alabama Supreme Court held that an injured pedestrian’s mailing of a notice of claim against a city did not constitute “filing” a claim with the city clerk for purposes of the requirement that a tort claim against a city be filed within six months of the date of injury.

The protection of the notice sections is limited, however. In *Swope Alabaster Supply Co. v. City of Alabaster*, 514 So. 2d 927 (Ala. 1987), the Alabama Supreme Court held that the six-month notice of claim statute does not act to bar contract actions. Nor does it apply to separately incorporated municipal boards. *Williams v. Water Works and Gas Bd. of the City of Ashville*, 519 So. 2d 470 (Ala. 1987). The notice of claim statute does, however, apply to unincorporated municipal entities, such as the Von Braun Civic Center Authority. *Ex parte Von Braun Civic Center*, 716 So. 2d 1186 (Ala. 1998).

It is also important to note that the notice of claim statute does not apply to federal claims brought pursuant to § 1983, as discussed below. *Morrow v. Town of Littleville*, 576 So. 2d 210 (Ala. 1991).

Another legislative protection is found in Ala. Code 1975, § 6-3-11. This section restricts the venue of tort actions against municipalities to the county in which the municipality is located or the county where the cause of action accrued. Although originally held invalid, § 6-3-11 was upheld in *Ex parte Alabama Power Co.*, 640 So. 2d 921 (Ala. 1994). It was also applied favorably in *Ex parte Talladega Cty.*, 632 So. 2d 473 (Ala. 1994), and in *Ex parte City of Greensboro*, 730 So. 2d 157 (Ala. 1999).

A 10-year statute of limitations governs actions brought by public agencies against public officers for nonfeasance, misfeasance or malfeasance. Ala. Code 1975, § 6-2-33. Other statutes of limitations govern actions filed by individuals against public officers.

Ala. Code 1975, § 6-5-336, grants immunity to municipal volunteers engaged in certain activities for governmental entities. The Court has held that donations made by a city to a volunteer fire department do not alter its status as a volunteer fire department. The Volunteer Services Act in Ala. Code 1975, § 6-5-336, immunizes volunteer firefighters from liability and as a result, protects the city from vicarious liability for the firefighters' negligent acts. *Ex Parte Labbe*, 156 So. 3d 368 (Ala. 2014).

Section 6-5-338 of the Code creates a special category of protection for municipal police officers. *See Hollis v. City of Brighton*, 950 So. 2d 300 (Ala. 2006). This Section extends immunity in the performance of their discretionary functions to police officers and the municipalities which employ them for actions taken in the line and scope of the officer's authority. It does not, however, protect an officer who exceeds the authority given in a particular case. *Newton v. Town of Columbia*, 695 So. 2d 1213 (Ala. 1997). *See also* Ala. Op. Att'y Gen. 95-00059. This protection also extends to the municipality; that is, if the officer is entitled to discretionary-function immunity pursuant to § 6-5-338, the city is protected from liability as well. *City of Birmingham v. Sutherland*, 841 So. 2d 1222 (Ala. 2002) and *City of Hollis v. Brighton*, 950 So. 2d 300.

Although it is not actually a protection from liability, § 6-5-338 also requires every private, nongovernmental person or entity who employs a peace officer to perform any type of security work or to work while in uniform during that officer's "off-duty" hours to have in force at least \$100,000 of liability insurance. This insurance must indemnify for acts the "off-duty" peace officer takes within the line and scope of the private employment. The failure to have in force the insurance herein required shall make every individual employer, every general partner of a partnership employer, every member of an unincorporated association employer and every officer of a corporate employer individually liable for all acts taken by an "off-duty" peace officer within the line and scope of the private employment.

These Code sections provide limited protection to a municipality faced with tort claims. A municipality must be sure that a plaintiff has complied with all requirements prior to agreeing to pay a claim.

Scope of Municipal Tort Liability

Municipal liability in tort actions often depends upon the cause of the damage – is it the necessary consequence of an authorized act or work? Is it nonfeasance, trespass, nuisance or negligence? Liability may also be influenced by the type of property damaged and by the fact that the damage consists wholly of injuries to the life or limb of a person.

Generally, a municipality will not be held liable for

injuries which occur beyond its boundaries and result from acts which are ultra vires or beyond the scope of authority of the officials or employees involved. *See McQuillin, Municipal Corporations* § 53.06a (3d ed. 1982). But a municipality is liable for torts committed in performing authorized work, even beyond the limits of the municipality. *Kenny v. New York*, 28 F. Supp. 175, aff'd, 108 F. 2d 958 (1940).

Failure to act (nonfeasance) where there is no mandatory duty and where there is no negligence is no grounds for recovery against a municipality according to most courts. *Koerth v. Borough of Turtle Creek*, 49 A. 2d 398 (1946). This applies, for example, to the passage of ordinances and the exercise of police power. However, a municipality may be held liable for negligently failing to act or for failure to perform a mandatory duty. Additionally, a municipality may assume a duty, thus opening itself to liability. For instance, in *Ziegler v. City of Millbrook*, 514 So. 2d 1275 (Ala. 1987), the Alabama Supreme Court held that, although a municipality does not have to maintain a fire department, if it does so, it can be held liable for failing to provide fire protection. By creating a fire department, the municipality assumed a duty to operate that department reasonably.

If the proof is sufficient, a municipality may be held liable for injuries to property belonging to another where the injury done to plaintiff's property by an act of the municipality is not the necessary result of the public work authorized by law but is caused by negligence in doing the work. *Moore v. Nampa*, 276 U.S. 536 (1928).

Many tort cases filed against municipalities involve personal injuries inflicted upon employees and others. As a general rule, most courts require the plaintiff to prove the following in order to recover:

- That the plaintiff was injured by a servant of the municipality;
- That the act in connection with which the tort was committed was within the corporate powers of the municipality and not ultra vires;
- That the offending officer or servant was acting within the scope of his or her authority, or, if not, the act was ratified by the municipality; and
- That if negligence is required for recovery, the plaintiff must show that he or she was free from contributory negligence and was not precluded from recovery by other tort principles such as assumption of the risk.

See McQuillin, Municipal Corporations § 53.10; *See also Tyler v. City of Enterprise*, 577 So. 2d 876 (Ala. 1991).

Generally, a municipality is liable for a trespass committed by its officers or servants in the course of their duties, such as when a municipality is constructing a public improvement and its officers or servants trespass upon abutting private property. *Belgarde v. Natchitoches*, 156 So. 2d 132 (1963). Negligence is not a necessary element to this cause of action. *Robinson v. Wyoming Twp.*, 19 N.W. 2d 469 (1945). However, a city is not liable if the trespass is wholly ultra vires or is beyond the scope of authority of the trespassing officer or servant and remains unratified. *Roughton v. Atlanta*, 39 S.E. 316 (Ga. 1901).

In a proper case, municipality can be held liable in damages for conversion. *Crowe v. City of Athens*, 733 So. 2d 447 (Ala. Civ. App. 1999). Municipalities have also been found liable for loss of consortium. *City of Lanett v. Tomlinson*, 659 So. 2d 68 (Ala. 1995).

It is well established that a municipality can be found liable for the creation of a nuisance, the same as an individual or as a corporation. See *McQuillin, Municipal Corporations* § 53.12. In *Hendrix v. Maryville*, 431 S.W. 2d 292 (Tenn. 1968), a Tennessee court held that a city operating a garbage dump was guilty of creating a nuisance. See also *City of Birmingham v. Leberte*, 773 So. 2d 440 (2000).

Alabama has a wrongful death statute (Ala. Code. 1975, § 6-5-410), which has been held to apply to cities and towns. *Anniston v. Ivey*, 44 So. 48 (1907). However, see *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) as to wrongful death actions under 42 U.S.C. § 1983. In *City of Tarrant v. Jefferson*, 682 So. 2d 29 (Ala. 1996), the Alabama Supreme Court held that § 1983 claims against Alabama municipalities, which resulted from a death, survive the plaintiff due to the state's wrongful death statute.

In the exercise of administrative functions, a municipal corporation is generally regarded as having a duty to provide a safe place for its employees to work. Liability attaches for a breach of this duty. However, absolute liability does not apply. The plaintiff must show that the city breached some duty to the employee and that the injury was not strictly the result of an accident. *Oklahoma City v. Hudson*, 405 P. 2d 178 (Okla. 1965). This doctrine has been held to apply not only to the physical place of work but also to tools and equipment used. *Urmann v. Nashville*, 311 S.W. 2d 618 (Tenn. 1958).

Municipalities in Alabama must provide their employees with a safe workplace. Although Alabama municipalities are not subject to OSHA regulations, Ala. Code 1975, § 25-6-1, makes employers liable to employees who are injured in the workplace if:

1. the injury was due to a defect in equipment, etc., used in the workplace;

2. the injury was caused by the negligence of a supervisor appointed by the employer;
3. the injury was caused by the negligence of another employee acting pursuant to orders or directions of the employer; or
4. the injury was caused by the negligence of another employee or other person acting in obedience to instructions given to someone who has been delegated that authority by the employer.

Applying this statute, in *City of Birmingham v. Waits*, 706 So. 2d 1127 (Ala. 1997), a sharply-divided Alabama Supreme Court held that the city of Birmingham could be found liable for failing to provide a safe workplace for its jail employees. In *Waits*, the plaintiff, a city of Birmingham correctional officer, was injured during an altercation between two jail inmates who were returning to their cell following a cleaning detail. 706 So. 2d 1127.

Alabama courts have held that a municipal corporation is generally not liable for the acts of an independent contractor hired by the city or town. *Mobile v. Reeves*, 31 So. 2d 688 (1947). However, *McQuillin*, in Sections 53.76(10) through 53.76(50), lists the following exceptions to the general rule where a municipality could be held liable for the acts of independent contractors:

- Where control of the work is reserved by the municipality;
- Where there is a positive act cast upon the municipality which cannot be delegated by it;
- Where the work is inherently dangerous and will probably result in injury to third persons unless methods are adopted by which such consequences may be prevented;
- Where the independent contractor was employed to do an act unlawful in itself; or
- Where the municipality failed to take precautions within a reasonable time after notice of the defect caused by the act of the independent contractor.

Usually, courts will not hold an officer personally liable for damages caused by his or her preventing or abating a nuisance, if the officer acts in a proper manner. *Carter v. City of Gadsden*, 88 So. 2d 689 (1955).

In *Caldwell v. City of Tallassee*, 679 So. 2d 1125 (Ala. Civ. App. 1996), the Court of Civil Appeals held that a municipality cannot act maliciously, therefore summary judgment in its favor was appropriate in a case involving issuing a citation for building code violations.

Sewers and Drains

Alabama municipalities have always been liable for

damages caused by their negligence in the operation and maintenance of sewers and drains under their control. However, liability is restricted to public sewers which the corporation controls and does not extend to private sewers and drains which the municipality did not construct or accept. *Irvine v. Smith*, 202 S.W. 2d 733 (1947). In *Montgomery v. Gilmer*, 33 Ala. 116 (1858), the Court pointed out that under common law, a city is under no obligation to provide drainage or sewerage to its citizens unless rendered necessary by its own act. For example, in *City of Dothan v. Sego*, 646 So. 2d 1363 (Ala. 1994), the city had no drainage easement and did not routinely maintain the ditch in question. The city did, however, respond to emergency calls when the ditch flooded. The Alabama Supreme Court held that under these facts, the city had no duty to prevent flooding of the plaintiff's property. If a municipality has never accepted the dedication of a drainage easement, it has neither the authority nor the duty to maintain the easement. Ala. Op. Att'y Gen. 97-00249.

The Alabama Court of Civil Appeals agreed, in *Langley v. City of Saraland*, 776 So. 2d 814 (Ala. Civ. App. 1999). In this case, the court found that a city does not have a duty to correct a defect on private property or in a sewer line owned by an individual and not the city. The city does not have a duty to inspect the sewer lines of private landowners. Therefore, the court upheld the city's motion for a summary judgment.

In *Kennedy v. City of Montgomery*, 423 So. 2d 187 (Ala. 1982), the Alabama Supreme Court held that a city has no duty to provide and maintain proper drainage of surface water from a resident's property to prevent flood damage of the property as this is discretionary with the governing body. Once such authority to maintain a drainage system is exercised, a duty of care exists, and a city may be held liable for damages caused by its negligence. However, a city's occasional cleaning and periodic maintenance of a creek may not constitute an assumption of a duty to maintain the creek. *Royal Auto., Inc. v. City of Vestavia Hills*, 995 So. 2d 154 (Ala. 2008).

If there is actual negligence (something more than mere error in judgment) in the adoption of a plan for a sewage or drainage system, a municipality may be liable. If a sewer, as planned, proves to be insufficient or defective by actual experience, then it has been held to be the duty of the municipality to remedy the situation, if possible. *Birmingham v. Greer*, 126 So. 859 (1930); *Birmingham v. Crane*, 56 So. 723 (1911). Alabama courts have held that if, through negligence, a drainage or sewage system is not sufficient to take care of the sewage and water reasonably expected to accumulate under ordinary circumstances, the municipality will be liable for the resulting injuries. *City*

of Anniston v. Isbell, 144 So. 2d 18 (1962); *Morgan v. City of Tuscaloosa*, 108 So. 2d 342 (1959).

In another Alabama case, *Aycock v. City of Decatur*, 122 So. 664 (1929), the Court held that if a municipality itself changes the natural flow of water and constructs ditches or drains which are inadequate for the purpose, it will be liable for damages thereby created. And, in *Jackson v. Carr & Assocs. Engineers*, 710 So. 2d 441 (Ala. Civ. App. 1997), the Court of Civil Appeals held an engineer who altered a drainage system pursuant to an order from the city could be held liable. The Alabama Supreme Court also held in *Lee v. City of Anniston*, 722 So. 2d 755 (Ala. 1998), that when Anniston built a portion of a drainage system on state property, it assumed a duty to maintain the new portion.

However, in *City of Birmingham v. Jackson*, 155 So. 527 (1934), the court held that a municipality is not liable for damages caused by an overflow of its sewers occasioned by extraordinary rains or floods. Nor is a municipality liable for increasing the flow of surface water over property from changes in the character of the surface unless the municipality is negligent. *Glissom v. City of Mobile*, 505 So. 2d 315 (Ala. 1987).

Although Alabama courts have held that a municipality is not an insurer of its sewers, the courts have held that a municipality assumes the duty of keeping in good condition and repair the sewers it installs or over which it assumes jurisdiction. *Sisco v. City of Huntsville*, 124 So. 95 (1929). A municipality is responsible for damages which occur as a result of negligence in the construction, maintenance or operation of its sewer system. *City of Birmingham v. Norwood*, 126 So. 616 (1929).

For instance, in *City of Birmingham v. Leberte*, 773 So. 2d 440 (2000), the Alabama Supreme Court upheld a landowner's claim against a city for negligence, nuisance, trespass, inverse condemnation and injunctive relief, after the landowners alleged that their property was damaged in multiple flooding as a result of the city's failure to operate or reasonably maintain an adequate drainage system. The court further held that each incident of flooding that occurred less than six months before the action was filed was a separate, compensable occurrence. In *Long v. City of Athens*, 24 So. 3d 1110 (Ala. Civ. App. 2009), the Court held that a property owners' cause of action for inverse condemnation accrued, and the applicable two-year statute of limitations began to run, at the time that the taking was complete, which was when their property first flooded as a result of nearby development and increase in drainage to their property.

And, in *Reichert v. City of Mobile*, 776 So. 2d 761 (Ala. 2000), the Alabama Supreme Court found that plaintiff's negligent construction and negligent design claims against a city for the city's drainage system were barred by the

statute of limitations because all of the plaintiffs had sued more than two years after they had experienced their first floods after the construction. However, each flood event, thereafter, gave rise to a separate cause of action for negligent maintenance and fact issues existed as to whether the city had failed to provide appropriate upkeep for a storm-drainage system. Therefore, the court reversed the trial court's granting of a summary judgment as to the negligent maintenance claim only.

The Supreme Court of Alabama has held that notice is not a prerequisite to holding a city or town liable for negligence in the construction of sewers. *Jasper v. Barton*, 56 So. 42 (1911). However, in other cases, as in the case of failure to make necessary repairs, notice is ordinarily necessary. *Kershner v. Town of Walden*, 355 P. 2d 77 (Colo. 1960). The existence of a defect for a number of years has been held to constitute sufficient notice. *Craig v. City of Mobile*, 658 So. 2d 438 (Ala. 1995).

Alabama courts have held a municipality liable when a municipal sewer or drain becomes a nuisance and causes an injury. *City of Jasper v. Lacy*, 112 So. 307 (1927); *Bieker v. City of Cullman*, 59 So. 625 (1912).

It has been held that the damages for which a municipality is liable, due to negligence in the care and maintenance of its sewers, and damages arising from injuries to property, do not extend to death, sickness and physical discomfort not associated with property damage caused by the negligence. *Metz v. Ashville*, 64 S.E. 881 (N.C. 1909); *Triplett v. Columbia*, 96 S.E. 675 (S.C. 1918). However, in a case involving stream pollution, the Alabama Supreme Court held that where there is an injury to property rights and also to health, damages for the latter may be included. *Howell v. City of Dothan*, 174 So. 624 (Ala. 1937).

And in *City of Mobile v. Taylor*, 938 So. 2d 407 (Ala. Civ. App. 2005), homeowners filed an action against city to recover for mental anguish allegedly incurred as result of repeated flooding. The homeowners testified that they were afraid of being injured, electrocuted, or drowned in knee-high flood waters and alleged they lost sleep whenever rain was threatened. They also stated a fear that snakes or other animals might enter their homes during floods. The Court of Civil Appeals held that in negligence actions in which the plaintiff seeks compensatory damages for emotional distress, Alabama follows the "zone of danger test," which limits recovery of mental anguish damages to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. The court stated that the issue of whether elderly homeowners were placed in a "zone of danger" by the city's failure to properly maintain the storm-water drainage system was for jury to decide.

Numerous courts have held municipalities liable for damages caused by discharging the outflow of a sewer upon the property of another. These decisions are based upon the reasoning that this discharge constitutes a private nuisance for which action may be maintained by the person injured. *Gibson v. City of Tampa*, 154 So. 842 (Fla. 1934); *Thompson v. McCorkle*, 171 S.E. 186 (Ga. 1933); *Hodges v. Town of Drew*, 159 So. 298 (Miss. 1935). However, in *Paradise Lake Ass'n v. Jefferson Cty.*, 585 So. 2d 812 (Ala. 1991), the Alabama Supreme Court held that the county could not be held liable under a theory of inverse condemnation for discharging raw sewage into a stream which fed into a lake.

Compliance with federal regulations may relieve a municipality of liability for drainage maintenance. For instance, in *Furin v. City of Huntsville*, 3 So. 3d 256 (Ala. Civ. App. 2008), the Court held that a city did not breach a duty to maintain a creek basin, when the city did all it could do to prevent flooding, but was limited by federal regulations.

Actions of Officers and Employees

Under the doctrine of respondeat superior, a municipality will be held liable for the torts of its officers and employees if: (1) the relation of master and servant exists between the municipality and the tortfeasor and (2) the act was within the scope of the officers or employees duties and was not ultra vires. In the case of *McSheridan v. City of Talladega*, 8 So. 2d 831 (Ala. 1942), the Alabama Supreme Court held that the rule of respondeat superior applies to Alabama cities and towns. However, a plaintiff must name a negligent municipal officer or employee in order for a municipality to be found liable under respondeat superior. *Coleman v. City of Dothan*, 598 So. 2d 873 (Ala. 1992). Further, as discussed below, respondeat superior may not be used to hold a municipality liable under § 1983.

Unless a statute expressly declares a municipality liable, the general rule stated by the courts is that a municipality is not liable for the completely personal torts of its officers, employees or agents. *McCarter v. Florence*, 112 So. 335 (Ala. 1927). In *Bessemer v. Whaley*, 62 So. 473 (Ala. Ct. App. 1913), the court held that in order to create liability certain statutes require that the act or omission causing the damage must have arisen while the agent, officer or employee of the city or town was acting in the line of duty. And, in *Wheeler v. George*, 39 So. 3d 1061 (Ala. 2009), the Court ruled that a municipality cannot be held liable for the intentional torts of its employees, pursuant to Ala. Code 1975, § 11-47-190.

The general rule is well settled that if the alleged tortious act is wholly ultra vires (i.e. beyond the power of the municipality), no liability for damages arises against the municipality. This rule, with rare exceptions, has quite

uniformly prevailed in all courts. See *McQuillin, Municipal Corporations* § 53.60. The courts have held that the defense of ultra vires can only be used where the act complained of was wholly beyond the powers of the municipality which the municipality had no right to do under any circumstances. *Lucas v. Louisiana*, 173 S.W. 2d 629 (Mo. 1943).

The Alabama Supreme Court has held that municipalities are not responsible for the acts of their officers, agents or servants for instituting malicious prosecution actions. The Court said that Ala. Code 1975, § 11-47-190, limits the liability of cities and towns to injuries suffered through “neglect, carelessness or unskillfulness.” See *Neighbors v. City of Birmingham*, 384 So. 2d 113 (Ala. 1980).

Some of these rules may, however, change depending on the circumstances. For instance, in *City of Birmingham v. Thompson*, 404 So. 2d 587 (Ala. 1981), the court was confronted with the issue of whether the words “neglect, carelessness and unskillfulness” in § 11-47-190 meant that an action can be maintained against the municipality only for negligent acts of employees and not intentional acts. In that case, the plaintiff was allegedly beaten by police officers while he was incarcerated in the city jail. Plaintiff sued the city, claiming that the officers had committed a battery (which is ordinarily an intentional tort) against him and that the city was therefore liable under Ala. Code 1975, § 11-47-190.

The majority opinion narrowed the issue in the case to whether a battery could be considered a negligent tort. The majority held that if the battery occurred as a result of a lack of skill on the part of the employee, the city could be held liable. The case was remanded for a trial on this issue. The dissent hotly contested this holding. In the opinion of the dissenting justices, the Legislature clearly intended § 11-47-190 to preclude suits for intentional torts against municipalities. Therefore, plaintiff’s suit against the city for battery, which is an intentional tort, should have been barred.

Under the majority opinion, though, a municipality may be liable for the intentional torts of its officers and employees if the tort is committed due to a lack of skill on the part of the tortfeasor. This opens municipalities to a wide range of torts which are not normally considered to be negligent torts. Only if a municipality can demonstrate that the act of its agent was intentional and due in no way to carelessness or unskillfulness, can the municipality avoid liability.

The court used a similar line of reasoning in order to hold a municipality liable for false arrest in *Franklin v. City of Huntsville*, 670 So. 2d 848 (Ala. 1995).

These cases have led courts to also, in some instances, hold a municipality liable for its own negligence arising from the actions of the officer or employee. See, e.g., *Couch*

v. City of Sheffield, 708 So. 2d 144 (Ala. 1998); *Scott v. City of Mountain Brook*, 602 So. 2d 893 (Ala. 1992). This type action does not depend on the usual respondeat superior standards. This usually arises from a failure in hiring, assigning or training a police officer. Or the municipality may be liable for retaining an employee in the face of evidence that he is incompetent. This might be shown by a failure to discipline the officer for his actions.

This is also the rule in federal court, under 42 U.S.C. § 1983. Here, as will be pointed out below, the first issue that must be resolved is whether the officer’s action violated federal statutory or constitutional rights. If so, then the plaintiff must demonstrate that the officer acted pursuant to an official policy or custom. Once these two requirements are met, the municipality may be held liable. Under § 1983, a municipality may be liable for either an expressed or implied policy that is invalid on its face. An implied policy might be shown by the municipality’s own acts of negligence, as in state court, by failure to properly train or assign its officers. Further, a municipality may be held liable if it later ratifies the officer’s action. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

In some cases, though, the existence of a policy or custom is not required under federal law for a municipality to be liable for the actions of its employees. In *Margan v. Niles*, 250 F. Supp. 2d 63 (N.D.N.Y. 2003), a federal district court in New York noted that under the Driver’s Privacy Protection Act (DPPA), an employee does not have to act pursuant to a policy or custom in order to be held liable for the improper release of a person’s driver’s license information. The court also held that the DPPA makes the municipality vicariously liable for this improper action, regardless of their policies.

And, in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998), the United States Supreme Court ruled that employers will be held vicariously liable for the unlawful sexual harassment of employees by supervisors. Employers, though, may raise as an affirmative defense that (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

State Court Immunities

State law cloaks public officers and employees with two distinct types of immunity. First is absolute immunity. Absolute immunity generally applies only to legislative and judicial acts by officers and employees. Absolute immunity is defined as the total protection from civil liability arising out of the discharge of judicial or legislative power. Under

the doctrine of absolute immunity, the actor is not subject to liability for any act committed within the exercise of a protected function; the immunity is absolute in that it applies even if the actions of the judicial officer are taken maliciously or in bad faith. *Absolute Immunity*, BLACK'S LAW DICTIONARY (5th ed. 1979).

But, once it is determined that absolute immunity applies to the official function being performed, how far does the protection extend? Provided that the protected official acted within the scope of his or her duties, the protection is total. Courts will not inquire into the motives behind a protected action. The Alabama Supreme Court has held that town officers who enacted zoning ordinances were entitled to absolute legislative immunity for any damages in association with the passage of the ordinances, even if the officers had impure motives in enacting the ordinance. *Peebles v. Mooresville Town Council*, 985 So. 2d 388 (Ala. 2007).

It is not always easy, however, to determine whether an official is acting within the sphere of protected activities. Absolute immunity does not shield protected officers from suit for all actions, only those taken while acting in a protected capacity. As the court noted in *Bryant v. Nichols*, 712 F. Supp. 887, 890 (M.D. Ala. 1989), "It is the official function that determines the degree of immunity required, not the status of the acting officer. A court must examine the specific activity undertaken by the officials and assess whether it was performed in the course of an activity justifying absolute immunity."

Although councilmembers acting in a legislative capacity are entitled to absolute immunity, simply because an action was performed by a municipal council does not entitle the councilmembers to absolute immunity. Clearly, a municipal governing body has both legislative and administrative duties. See *Ex parte Finley*, 20 So. 2d 98 (1945). For example, although the adoption of an ordinance or resolution by a municipal governing body is ordinarily a legislative action, such an activity may be more administrative in nature. It is the essential purpose behind a resolution which guides a court in determining whether a particular action is legislative or administrative and whether absolute immunity applies.

In many cases, the answer is clear. For instance, when a municipality enacts a zoning ordinance, it is obviously performing a legislative function. *Carroll v. City of Prattville*, 653 F. Supp. 933 (M.D. Ala. 1987). However, at other times, the answer may not be so obvious. The Court in *Carroll*, for instance, found a distinction between enacting a zoning ordinance and implementation of the ordinance. Also, in *Bryant v. Nichols*, 712 F. Supp. 887 (M.D. Ala. 1989), the federal district court ruled that where the alleged action was a vote on an employment matter, absolute

immunity did not protect councilmembers from liability.

One would ordinarily assume that mayors of Alabama municipalities act as executives whose actions are not protected by absolute immunity. However, in municipalities with populations of less than 12,000, the mayor serves as a member of the council and his or her vote on ordinances and resolutions is protected to the same extent as that of other councilmembers. Also, in *Hernandez v. City of Lafayette*, 643 F. 2d 1188 (5th Cir. 1981) cert. denied, 455 U.S. 907 (1982), the Fifth Circuit Court of Appeals held that a mayor's veto is a part of the legislative process and is entitled to absolute immunity.

It is also clear that absolute immunity protects those who perform judicial acts. For instance, in *Ex parte City of Greensboro*, 948 So. 2d 540 (Ala. 2006), the Court held that acts performed by municipal court clerk/magistrate to ensure that arrest warrants were recalled constituted a judicial function involving the exercise of judgment, and, thus, clerk/magistrate had absolute judicial immunity from negligence and wantonness claims brought by arrestee after she was arrested because one of the arrest warrants had not been put back into the National Crime Information Center computer by a third party.

Absolute immunity, though, is rarely applied. Instead, Alabama courts in the past have followed what used to be called discretionary function immunity. This was considered sufficient to protect public defendants. Under discretionary function immunity, the good faith of the defendant became relevant. Stated simply, discretionary function immunity protected public defendant officers when they in good faith performed a discretionary act that was within the line and scope of their duties.

Alabama Court decisions, though, have made clear that municipalities and their officers and employees can no longer rely on discretionary function immunity. In *Blackwood v. City of Hanceville*, 936 So. 2d 495 (2006), for example, the Alabama Supreme Court noted that § 6-5-338 of the Code essentially replaced discretionary function immunity for municipal police officers with "state-agent" immunity as provided for in *Ex parte Cranman*, 792 So. 2d 392 (2000). In *Cranman*, the Alabama Supreme Court restated the rule governing state-agent immunity, stating:

"A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's (1) formulating plans, policies, or designs; or (2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as: (a) making administrative adjudications;

(b) allocating resources;
(c) negotiating contracts;
(d) hiring, firing, transferring, assigning, or supervising personnel; or
(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or
(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons, or serving as peace officers under circumstances entitling such officers to immunity pursuant to Ala. Code 1975, § 6-5-338(a) (modified in *Hollis v. City of Brighton*, 950 So. 2d 300 (Ala. 2006)); or
(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent *shall not* be immune from civil liability in his or her personal capacity (1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or (2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.”

Rather than depending on discretionary function immunity, defendants must fit their actions into one of the listed *Cranman* categories in order to claim immunity. Strict reliance on these standards can lead to disturbing results. In *Blackwood*, the defendant police officer exceeded the speed limit in response to an emergency call involving a serious accident. In route, the officer's vehicle struck another vehicle, injuring the passenger.

The Court gave the actions of the police officer an extremely narrow interpretation under the *Cranman* analysis, finding that driving to the scene of an accident does not fall within any of the listed *Cranman* categories. The closest, they stated, would be Category (4), listed above.

Even though the Court noted that this list is not intended to be exhaustive, but instead provides mere categories of immunity, the Court applied a very narrow construction to the application of these categories. They noted that Category

(4) applies only to the enforcement of criminal laws and driving to the scene of an accident does not implicate the criminal laws. Thus, the Court stated that the officer had no immunity from suit based on § 6-5-338. Although this decision might be different now that the Court has modified the *Cranman* standards to recognize the different immunity standard in § 6-5-338, the Court's narrow construction of these categories to the functions of law enforcement officers is bothersome.

The discretionary part of § 6-5-338(a) is working its way back into the court's analysis, however. In *Ex parte Kennedy*, 992 So. 2d 1276 (Ala. 2008), the Court held that officers involved in a fatal shooting of a suspect were entitled to state agent immunity in a wrongful-death action. A state agent is immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, municipal law-enforcement officers' arresting or attempting to arrest persons, or serving as peace officers under circumstances entitling such officers to immunity pursuant to Ala. Code 1975, § 6-5-338(a). *See also Ex parte Coleman*, 145 So. 3d 751 (Ala. 2013).

Regardless, it is now clear that rather than relying on the protection of discretionary function immunity when performing their discretionary acts, municipal actors must fit their actions into one of the listed *Cranman* categories to entitle the officer or employee to claim immunity.

Cranman, then, created a burden-shifting process. When a defendant raises state-agent immunity as a defense, the state/city agent bears the initial burden of showing that the plaintiff's claims arise from a function that entitles the state/city agent to immunity. Once this is established, the burden shifts to the plaintiff to show that the law requires finding the actor liable, or that the state/city agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his/her authority. *See, Ex parte City of Montgomery*, 99 So. 3d 282 (Ala. 2012).

Examples of state agent immunity cases include:

- Arresting officer and police dispatcher who searched the National Crime Information Center (NCIC) database for outstanding warrants, as well as the city employing both, had state agent immunity from tort liability for the mistaken arrest of an individual on a warrant for a different individual who had a similar name. Both the officer and the dispatcher were exercising judgment in the enforcement of criminal laws of the state as law enforcement officers, and the city's immunity derives from their status as law enforcement officers. *Swan v. City of Hueytown*, 920 So. 2d 1075 (Ala. 2005).

- In a case involving the execution of an arrest warrant, the Alabama Supreme Court held that summary judgment was proper for issues related to the operation of the police department and courts that involved legal issues but was premature for issues that required the development of facts. The Court also held that the city was immune from vicarious liability for the alleged acts of malice or acts of bad faith committed by its officers in the execution of the warrant. *Ex parte City of Tuskegee*, 932 So. 2d 895 (Ala. 2005).
 - In *City of Crossville v. Haynes*, 925 So. 2d 944 (Ala. 2005), the Alabama Supreme Court held that because a police chief was immune from suit by state-agent immunity for an alleged jail suicide, the employing municipality was also immune from being sued.
 - Any alleged negligence by a police officer in initiating and continuing a high-speed pursuit of a motorist did not proximately cause the motorist's wreck and resulting fatal injuries. The officer followed policies and procedures reflected in the city's police department manual. The motorist wrecked because he lost control of his vehicle as a result of his excessive speed during the pursuit. The officer was more than 200-300 yards from the motorist's vehicle when it wrecked, and the motorist could have slowed down and stopped at any time during the chase. *Gooden v. City of Talladega*, 966 So. 2d 232 (Ala. 2007).
 - City and the city's planning director were immune from liability to landowner for flooding of property as a result of construction of a subdivision. Immunity applies to employees of municipalities in the same manner that immunity applies to employees of the state. *City of Birmingham v. Brown*, 969 So. 2d 910 (Ala. 2007).
 - A police officer who was part of team that processed arrestees in a prostitution sting had statutory and state-agent immunity on tort claims by a plaintiff whose name, date of birth, and address were falsely given to the officer by one arrestee as being her own, and who was later incorrectly identified in a press release to news media as one of the arrestees. Even if the city's police department had a policy regarding the verification of an accused's identity, the policy did not include detailed rules or regulations that the officer violated. *Ex parte City of Montgomery*, 19 So. 3d 838 (Ala. 2009).
 - A state agent acts beyond authority and is therefore not immune when he or she fails to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist. A child abuse investigator acted beyond her authority by failing to visit a mother's home and was not entitled to state-agent immunity. *Ex parte Watson*, 37 So. 3d 752 (Ala. 2009).
 - State workers acted outside their authority by disregarding federal mandates requiring them to repair, mark, or light the remains of a coastal pier structure that was damaged in a hurricane three years prior, and therefore, the state workers were not entitled to "state agent immunity" from a negligence and wantonness suit brought by speedboat passengers who were injured in a collision with the pier remains, regardless of whether the suit concerned a function that would otherwise entitle the state workers to state agent immunity. *Ex parte Lawley*, 38 So. 3d 41 (Ala. 2009).
 - Since a police officer is not entitled to immunity for an unlawful arrest claim, Alabama's statutory, discretionary-function immunity under Ala. Code 1975, § 6-5-338 does not extend immunity to the city. Since the alleged conduct of a police officer's assault was intentional, the city is entitled to protection under Ala. Code 1975, § 11-47-190. There is no Alabama state law claim for negligent training or supervision against a city. Since the police chief is entitled to discretionary-function qualified immunity for failure to train, supervise or monitor a subordinate under § 6-5-338, the city is entitled to qualified immunity as well. *Black v. City of Mobile*, 963 F. Supp. 2d 1288 (S.D. Ala. 2013).
 - City's police officers were "peace officers" for the purposes of state-agent immunity under § 6-5-338(a) and their alleged misconduct occurred while in performance of a discretionary function within the line and scope of their law enforcement duties. The city was immune to the claims as to which the officers were entitled to state-agent immunity. The city failed to establish immunity on the claim of negligent training and supervision, since it did not identify the individual or individuals specifically charged with training and supervision of the police officers. *Ex Parte City of Midfield*, 161 So. 3d 1158 (Ala. 2014).
- The Court has also made a distinction between state-agent immunity and state or sovereign immunity. In *Ex parte Donaldson*, 80 So. 3d 895 (Ala. 2011), the Court stated that state immunity and state-agent immunity are two different forms of immunity, and those who qualify for state immunity are treated differently under Alabama law because they are constitutional officers. The Court reached a similar conclusion regarding board of education members, holding that members of a city board of education were entitled to sovereign immunity because the board is

an agency of the state. *Ex parte Boaz City Bd. of Educ.*, 82 So. 3d 660 (Ala. 2011).

Many of these distinctions are very difficult to rectify. This is a developing area of law that the League will follow closely.

The Substantive Immunity Rule

One area of municipal tort immunity deserves special consideration. This is the substantive immunity rule. The Alabama Supreme Court has recognized that in certain circumstances, public policy considerations override the general rule that municipalities are liable for the negligence of their employees. In *Rich v. City of Mobile*, 410 So. 2d 385 (Ala. 1982), the court adopted the substantive immunity rule as the law of Alabama and stated that no municipal liability could result “in those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the city’s legitimate efforts to provide such public services.” *Rich*, 410 So. 2d at 387.

In *Rich*, the plaintiff alleged that the city negligently failed to inspect, or negligently inspected, the sewer lines and connections to the plaintiff’s residence. *See id.* The plaintiff claimed that during three preliminary inspections, city inspectors failed to discover the lack of an overflow trap in the line leading to the residence and that the inspectors failed to make a final inspection of the lines and connections. The elevation of the plaintiff’s residence was lower than the system and, due to the lack of the overflow trap, a sewer line backup overflowed into the home.

The court quoted with favor from *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W. 2d 158 (1972):

“The purpose of a building code is to protect the public ...

“Building codes, the issuance of building permits, and building inspections are devices used by municipalities to make sure that construction within the corporate limits meets the standards established. As such, they are designed to protect the public and are not meant to be an insurance policy by which the municipality guarantees that each building is built in compliance with building codes and zoning codes ...

“... a building inspector acts exclusively for the benefit of the public. The act performed is only for public benefit, and an individual who is injured by any alleged negligent performance of the building inspector in issuing the permit does not have a cause of action [citations omitted].”

The court recognized that, while an individual homeowner may be incidentally affected by the discharge of the sewer inspector’s duty, the city owes a larger obligation to the general public. The court stated that to allow an individual to maintain a suit against the municipality for negligent inspection threatens the benefits the general population receives from such inspections.

It is important to remember that substantive immunity must be raised at the trial level. In *Breland v. Ford*, 693 So. 2d 393 (Ala. 1996), the Alabama Supreme Court held that failure to raise the issue of substantive immunity at the trial court level barred the appellate court from considering the issue.

Areas Protected by Substantive Immunity

In two other cases, the court extended the substantive immunity rule to municipal police departments. In *Calogrides v. City of Mobile*, 475 So. 2d 560 (Ala. 1985), the plaintiff attended a fireworks display sponsored in part by the city of Mobile. While there, the plaintiff was attacked by a gang of teenagers and stabbed several times. He sued the city, alleging that it failed to assign a sufficient number of police officers to patrol the crowd attending the display.

The court held that the plaintiff’s action was barred by the substantive immunity rule. The court recognized the fact that the city’s duty was to provide adequate police protection to the public at large rather than to a particular individual and that to find the city liable would threaten the benefits the public received from police protection.

Similarly, the plaintiff in *Garrett v. City of Mobile*, 481 So. 2d 376 (Ala. 1985), was injured by the same group of teenagers that injured the plaintiff in *Calogrides*. However, because he was injured several minutes later, the plaintiff in *Garrett* argued that a special duty had been created for him as an individual. Again, the court refused to hold the city liable despite notice of the attack on *Calogrides*.

The Court also followed the substantive immunity rule in *Nunnelee v. City of Decatur*, 643 So. 2d 543 (Ala. 1993), upholding a summary judgment in favor of two officers who were sued for releasing a drunk driver who later killed another motorist. Substantive immunity has also been used to protect a municipality from liability from failing to destroy a building which had been condemned. *Belcher v. City of Prichard*, 679 So. 2d 635 (Ala. 1995).

However, in *Williams v. City of Tusculumbia*, 426 So. 2d 824 (Ala. 1983), the Alabama Supreme Court declined to apply the substantive immunity rule to a municipal fire department that failed to respond immediately when notified of a fire. The reason for this failure was because the driver of the fire truck had gone home sick and the city had no one with which to replace him. The court found that the failure to have a backup driver on hand was negligent.

The reason for the distinction between fire protection and police protection is not immediately clear from the facts of the case in the reported decision. As pointed out by Justices Maddox and Torbert in their dissent, “the same public policy considerations that the court found applicable in [*Rich*], are even more compelling in the present case.” Hopefully, the court will rethink this position.

In *City of Mobile v. Sullivan*, 667 So. 2d 122 (Ala. Civ. App. 1995), the Court of Civil Appeals held that the substantive immunity rule does not bar a suit against the city for negligent misrepresentations regarding the city’s zoning laws. However, some zoning matters are protected by substantive immunity. In *Payne v. Shelby Cty. Comm’n*, 12 So. 3d 71 (Ala. Civ. App. 2008), the Court stated a governmental entity is entitled to substantive immunity from tort claims related to enforcement of a conditional zoning resolution. Similarly, in *Bill Salter Advertising, Inc. v. City of Atmore*, 79 So. 3d 646 (Ala. Civ. App. 2010), the Alabama Court of Civil Appeals held that enactment of a sign ordinance and enforcement of the ordinance by the city and a city building official, in his official and individual capacities, through the refusal to permit an advertising company to rebuild signs damaged in a hurricane, were an exercise of legislative zoning powers, such that the city and the official did not owe a duty to the company, and, thus, the city and the official were entitled to substantive immunity from the company’s action for damages arising out of interpretation and enforcement of the ordinance. The ordinance was enacted to benefit the municipality as a whole.

Overcoming the Substantive Immunity Rule

To overcome the substantive immunity rule, it must generally be shown that the municipality owed some special duty to the plaintiff that it did not owe to the public as a whole and the municipality breached this duty in some way. This issue was raised in *Garrett*, but the court held that the police were not on notice of the attack against him just because of the earlier attack on Calogrides. Generally, a municipality, through its officers or employees, must acknowledge the existence of a special duty in order for it to arise. For instance, in at least one case, a special duty was found to exist when a police department assured a caller that help was on the way and the caller relied upon that assertion to his detriment. *Chambers-Castanes v. King’s Cty.*, 100 Wn. 2d. 275, 669 P. 2d 451 (Wash. 1983).

In *City of Kotzebue v. McLean*, 702 P. 2d 1309 (Ala. 1985), a municipality was held liable for the failure of its police department to respond to a call informing them of an impending homicide. Further, in one case, a special relationship was found to exist simply because police

protection was provided in the area of a penitentiary. *Cansler v. State*, 675 P. 2d 57 (Kan. 1984).

In a California case, the court held that the police owe duties of care only to the public at large and, except where a “special relationship” has been established, have no duty to offer affirmative assistance to anyone in particular. Without a special relationship, the police owed no duty to the plaintiff. Without a duty, no negligence cause of action can be stated. *Benavidez v. San Jose Police Department*, 71 Cal. App. 4th 853, 84 Cal. Rptr. 2d 157, 99 Daily Journal D.A.R. 3919 (6th Dist. April 27, 1999).

Hilliard v. City of Huntsville

An excellent discussion of the substantive immunity rule appears in *Hilliard v. City of Huntsville*, 585 So. 2d 889 (Ala. 1991). This case involved an allegedly negligent electrical inspection by the city of Huntsville. The city inspected the wiring in an apartment complex. Just over a month later, three people died in an electrical fire at the complex.

The plaintiff argued that the substantive immunity rule adopted in *Rich* should not apply in this case, arguing that *Rich* should be limited to facts identical to those in that case.

The court rejected this interpretation of *Rich*, ruling instead that “the present case is precisely the type of case in which the substantive immunity rule applies.” The court found that the city of Huntsville, like most municipalities, performs electrical inspections as a benefit to itself and to the general public. While individuals receive a benefit from these inspections, the benefit is merely incidental to the true goal of the inspection. Just as an individual driver benefits by the state testing and licensing drivers of motor vehicles, the state does not guarantee to individual drivers that all licensed drivers are safe. *Cracraft v. City of St. Louis Park*, 279 N.W. 2d 801, 805 (Minn. 1979).

The court was not persuaded that any distinction exists between sewer inspections and electrical inspections. The plaintiff argued that the sewer inspection in *Rich* involved a duty owed to the public at large, whereas the inspection in the present case, because it was of the electrical system in one apartment building, was a duty owed to individual apartment residents. However, as pointed out by the court, the purpose behind both inspections is the same; that is, to ensure compliance with municipal codes.

The court noted that the cases cited by the plaintiff to indicate that courts in Alabama have declined to extend the holding in *Rich* were based on facts substantially different than those present from *Rich* and the present case. None of the cited cases involved an alleged negligent inspection. For instance, the court cited *Town of Leighton v. Johnson*, 540 So. 2d 71 (Ala. Civ. App. 1989), where the town of Leighton created the defect which caused the injury by knocking a

hole in a manhole which allowed raw, untreated sewage to flow into a drainage ditch near the plaintiff's property. Alabama municipalities have long been liable for damages caused by negligent operation and maintenance of sewers and drains under their control. *Sisco v. City of Huntsville*, 124 So. 95 (1929); *City of Birmingham v. Norwood*, 126 So. 616 (1929). Thus, the court held that *Johnson* merely stands for the proposition that the substantive immunity rule did not change the tort laws governing municipal operations.

Besides reaffirming the substantive immunity rule, *Hilliard* is important for several other reasons. First, the court stated that, "Although inspections performed by the city's electrical inspectors are designed to protect the public by making sure that municipal standards are met, and although they are essential to the well-being of the governed, the electrical code, fire code, building code and other ordinances and regulations ... are not meant to be an insurance policy or a guarantee that each building is in compliance." By lumping these regulations together, the Court makes clear an intention to insulate municipalities from liability for providing these vital services as well.

A second benefit provided in *Hilliard* is the recognition that Ala. Code 1975, § 11-47-190, will not support claims for wantonness against a municipality.

Finally, the court in *Hilliard* ruled that nuisance claims are governed by § 11-47-190 as well. Thus, if a negligence claim is barred by the substantive immunity rule, any alleged nuisance is also precluded.

Handling Claims

In handling claims, municipal officials must remember that the purpose of the notice of claims statutes is to allow them time to fully investigate the allegations against the municipality to determine the validity of the claim. Therefore, claims should be treated seriously and dealt with promptly. This may involve submitting the claim to the municipal attorney or to the insurance company. Regardless of whether municipal officials intend to investigate the claim or have legal representatives do so, certain steps should be followed in determining the merits of the claim. These risk management procedures may help the municipality avoid costly litigation by negotiating a settlement with valid claimants and by refusing to pay on non-meritorious claims.

Bear in mind that the following information is not meant to substitute for internal methods of obtaining information regarding potential claims before a claim is ever filed. Employees with knowledge of injured citizens or private property should report, to their supervisors, the incident which caused the damage. Supervisors should then report to the municipal clerk, mayor or legal department. A written policy instructing employees to take these measures may give the municipality with even more time

to investigate and determine the merits of potential claims. The earlier the municipality receives the notice and the earlier the municipality acts on that notice, the fresher the recollections of witnesses and, perhaps, the more weight a jury will apply to the testimony later should trial result. Additionally, quick notice allows municipal decision-makers to view the accident site before time changes the circumstances surrounding the accident.

When a Claim is Presented

A municipality must take a claim seriously and treat it with the respect it is due. Deal with it promptly. Don't just put it in a file to handle later.

When a claim is presented to the clerk, he or she should stamp it with the date and time it was received. It may also be a good idea to give the presenter a photocopy of the claim, showing the time and date as well.

A citizen's tort claims against a city accrued, and limitations period began to run, on the date of his injuries. The citizen's tort claims for false arrest and false imprisonment against city and its police chief in his official capacity arising out of an altercation with the police chief at a town hall meeting accrued, and the six-month period for presentation of claims against municipalities began to run, on the date of the citizen's arrest. *Locker v. City of St. Florian*, 989 So. 2d 546 (Ala. Civ. App. 2008)

The claim should be filed along with a statement of the clerk's action – assigning it to the insurance company, legal department or municipal attorney, for instance. Some municipalities assign the claim to the municipal department involved. If the claim involves damages caused by a pothole, for example, the clerk would send the claim to the street department for an investigation. Whatever the clerk's duty, the file should indicate that the appropriate action was taken.

If a municipality conducts its own investigation, the file should also show the results. Was the claim determined to be valid? If not, why was it rejected? The names of any witnesses interviewed, their testimony and any remedial action taken could also be added to the file, or at the very least, made available to the municipal attorney and the insurance carrier.

Is the Claim Valid on its Face?

To be valid, a claim must be filed no more than six months following the accrual of the claim. A claimant need not follow a particular form in filing the claim. However, the claim must give the municipality sufficient information to determine the time and place of the accident. The claim should contain a statement of the damages the injured party seeks. Additionally, the claim must be filed with the appropriate person. Statutes require filing the claim with the

municipal clerk. However, in *Fortenberry v. Birmingham*, 567 So. 2d 1342 (Ala. 1990), the Alabama Supreme Court upheld presenting the claim to the mayor. The clerk, or other investigating officer, should verify that the claim provides adequate information to investigate the merits.

Another issue that should be considered is whether the notice of claim has to be a sworn statement. The plain language of Ala. Code 1975, § 11-47-192 specifically provides that the notice provided to the city shall be “a sworn¹ statement filed with the clerk by the party injured or his personal representative in the case of his death.” Despite the plain language of the statute, the Alabama Supreme Court has determined that requiring a complaint filed against a city within six months in lieu of a notice of claim pursuant to § 11-47-192 to be a sworn complaint conflicts with the fact that no civil complaint, other than a stockholder’s derivative action, is required to be sworn to in Alabama. See generally Ala. R. Civ. P. 8. Consequently, there is no need for a complaint to be sworn to in order to comply with either § 11-47-23 or § 11-47-192. *Diemert v. City of Mobile*, 474 So. 2d 663 (Ala. 1985).

The *Diemert* case involved an individual filing a lawsuit within the six month time period rather than filing a separate notice with the city first. The decision in the *Diemert* case does not address the necessity of the notice filed with the clerk being a sworn statement but rather simply addresses the issue of whether a complaint, serving as notice within six months, must be a sworn complaint.

Montgomery v. Weldon, 195 So. 2d 110 (Ala. 1967), indirectly addresses the issue of whether a notice of claim filed with the clerk pursuant to § 11-47-192 must be a sworn statement. In *Weldon* the Alabama Supreme Court held that when a city actively misleads a claimant by continually representing to the claimant that their claim was sufficiently noticed and urges the claimant not to seek legal advice or take any further action for a year, the city is *estopped* from asserting that the claim filed with the city did not comply with the statutory requirements. By way of dicta, the Alabama Supreme Court noted that the plaintiff could not have satisfied the requirements of § 11-47-192 (previously codified at Tit. 37, Section 504, Code 1940) because he failed to provide a sworn statement. However, the court ruled against the city because the facts were such that the city was *estopped*, due to its own actions, from asserting the claimant’s failure to file a sworn statement.

Arguably, because there is no specific guidance other than the plain language of the statute and the dicta of *Weldon*, a notice of claim filed with a municipality must

be a sworn or verified notice. This argument is countered, however, with the line of cases allowing for “substantial compliance” (*infra*) and the *Diemert* case, decided after *Weldon*, holding that a complaint, serving as notice, does not have to be a sworn complaint.

If the facts as presented in the claim are true, the next step is to determine if the municipality is liable. The facts in the claim may reveal that the municipality was not responsible for the injury at all. For instance, an automobile accident may have occurred on a private roadway. If the claimant alleges that the road was not adequately maintained, the municipality is not liable because it has no duty to keep private roads in repair.

If the facts indicate potential municipal liability, the municipality should conduct a complete and thorough investigation. Once the investigation is finished, the results should be reported to the council for a determination of payment, to begin the negotiation process or to deny the claim altogether. However, state law does not require the council action for the plaintiff to perfect his or her claim. *Stewart v. City of Northport*, 425 So. 2d 1119 (Ala. 1983). Thus, even if the council does not act, the plaintiff may still sue the municipality for acts alleged in the claim.

Municipal Liability Under Section 1983

42 U.S.C. § 1983 states:

“Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.”

Municipalities and their officials have been subject to liability under 42 U.S.C. § 1983 since the United States Supreme Court handed down its landmark decision in *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). Section 1983, which makes municipalities liable for violations of civil rights resulting from customs or policies of the municipality, has become one of the broadest bases for challenges to municipal actions. These next sections discuss § 1983 and the impact it continues to have on municipalities.

Overview of Section 1983

42 U.S.C. § 1983 is not designed as a substitute for state court tort actions. In *Monell*, the Court held that if an employee or officer acted pursuant to an official policy, the municipality could be sued for the civil rights

1 *Black’s Law Dictionary*, 6th ed., defines “sworn” as being synonymous with the word “verify” which is defined as “To confirm or substantiate by oath or affidavit.”

violation. However, the court rejected an argument that a municipality could be held liable under the theory of respondeat superior and required that the municipality's custom or policy actually cause the alleged deprivation of civil rights. A municipality "cannot be held liable solely because it employs a tortfeasor." *See also Cremeens Search Term End v. City of Montgomery*, 779 So. 2d 1190, 1191 (Ala. 2000).

The most difficult hurdle facing a plaintiff under § 1983 is demonstrating that the deprivation of civil rights was due to a policy or custom. However, it is clear that the existence of a written policy is not necessary to impose liability on a municipality. Conversely, the U. S. Supreme Court has held that a "single egregious incident" cannot establish a policy or custom under § 1983. *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985). Yet, in the *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), the Court found the city liable for a single act by someone the court felt had authority to set policy for the city. And, in *Todd v. Kelley*, 783 So. 2d 31 (Ala. Civ. App. 2000), the Alabama Supreme Court held that where a mayor has the final decision-making authority to fire a police officer under the municipality's rules, the mayor's actions may subject the municipality to liability under § 1983.

Courts have held that Section 1983 protects both constitutional and statutory rights. This was made clear in *Maine v. Thiboutout*, 488 U.S. 1 (1980), where the U. S. Supreme Court stripped away the defense of good-faith immunity from a local government which allegedly violated a right granted to the plaintiffs not by the Constitution, but by regulations made pursuant to a federal law. The Court held that "Section 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."

In addition, the Court in *Thiboutout* held that the plaintiff was entitled to attorneys' fees under the Civil Rights Attorneys' Fees Awards Act of 1976 (to be codified at 42 U.S.C. § 1988).

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the U. S. Supreme Court held that municipalities are immune from punitive damages in civil rights cases brought under 42 U.S.C. § 1983. The Alabama Supreme Court has held that state courts must accept § 1983 cases if the plaintiff selects a state court as the forum. *Terrell v. City of Bessemer*, *supra*. The appropriate statute of limitations for § 1983 claims is two years. *Owens v. Okure*, 488 U.S. 235 (1989). However, in *Felder v. Casey*, 487 U.S. 131 (1988), the U. S. Supreme Court held that state notice-of-claim statutes do not apply to § 1983 actions. Thus, a plaintiff suing under § 1983 does not have to provide the municipality with notice of his claim within six months. *Morrow v. Town of Littleville*, 576 So. 2d 210 (Ala. 1991).

Section 1983 Immunities

In discussing immunities under § 1983, it is important to draw a distinction between immunities which protect the municipality from those which protect the individual actor. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the court held that municipal defendants in § 1983 actions cannot take derivatively the good-faith immunities of their officers, who are usually co-defendants in § 1983 actions. The good-faith of the defendant municipality is now irrelevant. The only issue is whether the defendant municipality deprived the plaintiff of federal constitutional or statutory rights. Whether the deprivation was intentional, inadvertent, malicious or benign is not an issue.

However, the court in *Owen* made clear that a public officer may be personally immune from liability. The official's good faith is relevant in such cases because it transfers the financial burden of liability from the individual officer to the city or town.

Thus, while municipalities cannot take the immunities claimed by their officials, common law immunities continue to protect officials performing certain functions from § 1983 liability. Courts have recognized that this protection is necessary to preserve independent decision-making by guarding municipal officials from the distracting effects of litigation. *See, e.g., Gorman Towers, Inc. v. Bogoslavsky*, 626 F. 2d 607 (8th Cir. 1980); *Bruce v. Riddle*, 631 F. 2d 272 (4th Cir. 1980).

As in state court, there are two types of immunity available to municipal officials, depending upon the function being performed. First, there is absolute immunity. A municipal official cannot be held liable for taking an action that entitles him or her to absolute immunity. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). Whether a person is entitled to absolute immunity depends on the function he or she is performing. If it qualifies as legislative or judicial, he or she is probably entitled to absolute immunity.

The official claiming absolute immunity bears the burden of proving that such immunity is warranted. *Forrester v. White*, 484 U.S. 219 (1988). As the United States Supreme Court noted in *Burns v. Reed*, 500 U.S. 478 (1991), the presumption is that qualified immunity is sufficient to protect government officials.

If the officer or employee's action is not legislative or judicial in nature, he or she may only be granted qualified immunity. Qualified immunity protects municipal officials when acting within their discretionary authority. Generally, this type immunity requires a good faith showing on the part of the official. This form of immunity protects the actor from liability for a discretionary action only if the employee or officer acted in a good faith, reasonable manner.

Qualified immunity operates somewhat differently in federal court than discretionary function immunity

does in state court, however. As in state court, qualified immunity is an affirmative defense. This means that it must be pled by the official or the court will deem it to have been waived. While the degree of protection afforded by qualified immunity is not as great as that provided by absolute immunity, qualified immunity still protects official conduct in many areas.

Qualified immunity represents a balancing approach taken by the courts. On the one hand, courts are concerned with the need to provide a damages remedy to protect the rights of citizens. On the other hand, courts must protect officials who are required to exercise their discretion in the public interest. The fear is that officials subject to unbridled liability for discretionary actions, will refuse to make tough decisions that might later be second-guessed by a court.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the United States Supreme Court ruled that governmental officials performing discretionary functions are generally immune from liability for civil damages, provided their conduct does not violate a clearly established law. The court established this test so that insubstantial lawsuits would be disposed of on summary judgment, rather than subjecting officials to the expense of a full-blown trial. The court stated that:

“[r]eliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption on government and permit the resolution of many insubstantial claims on summary judgment.”

Thus, the goal of the test set out in *Harlow* is to protect government officials from either the costs of trial or the burdens of broad-reaching discovery. To this end, the court stated that more was needed to proceed to trial than “bare allegations of malice.”

Harlow, then, established an objective method of determining the good faith of a governmental official. The court further explained this standard in *Anderson v. Creighton*, 483 U.S. 635 (1987). Here, the court made clear that the test is not based solely on the alleged violation of a clearly established right, but also on the official’s reasonable belief that the violation was justified in light of the surrounding circumstances. As the court stated in *Anderson*:

“whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the “objective legal reasonableness” of the action, assessed in light of the legal rules that were clearly established at the time it was taken.”

That is to say, would a reasonable governmental official have believed, in light of the clearly established law and all objective facts present, that the action taken was justified? In order to defeat a motion for summary judgment, a plaintiff must demonstrate that the action not only violated his or her rights but that the government official’s action was unreasonable.

The Eleventh Circuit Court of Appeals defines the test like this:

“could a reasonable official have believed his or her actions to be lawful in light of clearly established law *and* the information possessed by the official at the time the conduct occurred?”
Nicholson v. Georgia Dep’t of Human Res., 918 F. 2d 145, 147 (11th Cir. 1990). And,

“A governmental official proves that he acted within the purview of his discretionary authority by showing ‘objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.’”
Hutton v. Strickland, 919 F. 2d 1531, 1537 (11th Cir. 1990). (Citations omitted).

The reasonableness inquiry is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to underlying intent or motivation. *Hutton*, 919 F. 2d at 1540. (Citations omitted).

Thus, as long as the action taken was reasonable under the circumstances, courts will not inquire into motive. Courts anticipate that public officials will apply their own experiences when exercising their discretionary powers and are loathe to substitute their opinions for that of the governmental official.

Hutton v. Strickland provides an excellent example of the analysis courts use to determine whether a particular action justifies granting qualified immunity. In *Hutton*, local sheriff’s officers arrested plaintiffs when plaintiffs attempted to repossess ranch property, and they contended reverted to them through recordation of a quitclaim deed. They argued that the purchasers of the ranch property had defaulted on the terms of the land sale contract and that the plaintiffs were entitled to automatic possession of the land. Although the facts bore them out, the courts ruled in their favor due to qualified immunity.

First, though, the district court refused to grant the sheriff’s motion for summary judgment. The Eleventh Circuit then reversed. The first inquiry, according to the court in *Hutton*, is whether the public officers were acting within the scope of their discretionary authority. Once this is established, the inquiry shifts to an analysis of whether

there was a lack of good faith or the violation of a clearly established law. There are two parts to this analysis. First, the court must determine whether applicable law was clearly established when the action occurred. Next, the court must decide whether a genuine issue of fact exists regarding the alleged violation.

A similar analysis was applied in *Dees v. City of Miami*, 747 F. Supp. 679 (S.D. Fla. 1990). There, Dees, a police officer who was arrested for perjury after making certain statements, filed suit against the city, assistant police chiefs and police investigators. The court described the analysis as to whether the defendant's actions were protected by qualified immunity as follows:

"In this case, the plaintiff does not dispute that the defendants were performing discretionary functions. ... Clearly established at the time of Dees' arrest and prosecution, moreover, was Dees' right to be free from arrest and prosecution absent probable cause ... The critical inquiry with respect to the qualified immunity defense, therefore, is whether the defendant's actions connected with his arrest and prosecution for perjury were objectively reasonable in light of plaintiff's right to be free from arrest and prosecution absent probable cause ... Probable cause in this case, therefore, does not hinge on whether the officers had probable cause to arrest the plaintiff. Instead, it depends on whether 'arguable probable cause' existed." *Id.*, at 684. (Citations omitted).

In *Dees*, the court held that if defendants could raise a set of circumstances which justified the arrest, qualified immunity barred the action. Thus, qualified immunity protects an officer if either the law with respect to his actions was unclear, or if a reasonable officer could have believed the action to be lawful in light of the information the official possessed. *McDaniel v. Woodard*, 886 F. 2d 311, 314 (11th Cir. 1989).

The Alabama Supreme Court has confirmed this rule in a similar case. In *City of Birmingham v. Major*, 9 So. 3d 470 (Ala. 2008), the Court noted that a police officer had probable cause to arrest a man for third-degree domestic violence. The Court stated that a civil rights action under §1983 for impermissible arrest is barred if probable cause existed at the time of the arrest. The officer need not have enough evidence or information to support a conviction, in order to have probable cause for arrest.

A public official asserting that he is protected by qualified immunity from liability on a civil rights complaint must establish that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. A civil rights plaintiff attempting to defeat a

public official's qualified immunity defense must make two showings: (1) that official violated a constitutional right; and (2) that the illegality of the official's conduct was clearly established. Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause. *Griffin Indus., Inc. v. Irvin*, 496 F. 3d 1189 (11th Cir. 2007).

An individual may also be entitled to qualified immunity even if he is not an employee of the public entity. In *Filarsky v. Delia*, 566 U.S. 377 (2012), the Supreme Court held that an attorney who was retained by a city to assist in conducting an official investigation into a firefighter's potential wrongdoing was entitled to seek the protection of qualified immunity in the firefighter's § 1983 claim alleging his Fourth Amendment rights were violated during the investigation, even though the attorney was not a permanent, full-time employee of the city. Affording immunity under § 1983 not only to public employees but also to others acting on behalf of the government serves to ensure that talented candidates are not deterred by the threat of damages suits from entering public service.

Antitrust Liability

Until 1978 local governments and their attorneys were not overly concerned with antitrust litigation. In 1904, the U.S. Supreme Court turned aside a challenge to Texas legislation which permitted only state licensed harbor pilots to operate in the ports of Texas by ruling that this action did not violate the antitrust statutes. *Olsen v. Smith*, 195 U.S. 332 (1904).

In *Parker v. Brown*, 317 U.S. 341 (1943), the decision which articulated the so-called "Parker State Action Doctrine," the Supreme Court held that actions taken pursuant to the authorization of state legislation were exempt from federal antitrust laws.

Although *Parker* and *Olsen* concerned the activities of state rather than local governments, most observers assumed that a federal antitrust challenge of the activities of a political subdivision of a state would lead to the same result as in *Parker*. However, the Supreme Court's decision in *City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389 (1978), marked the beginning of the end of the complacency of local governments toward antitrust legislation.

In *City of Lafayette, supra*, a severely split Supreme Court concluded that a local government may, in fact, be violating antitrust laws in the operation of municipally-owned activities. The Court's plurality concluded that the only way *Parker* immunity would attach was if there was adequate state involvement in the municipal activity.

In a decision handed down by the U. S. Supreme Court in January 1982, the liability of municipalities for antitrust claims was greatly expanded. The case, *Cnty. Communications v. City of Boulder, Colorado*, 455 U.S.

40 (1982), held that an ordinance adopted by the City of Boulder prohibiting the further expansion of cable television business within the city for three months, during which time the city council was to draft a model cable television ordinance and to invite new businesses to enter the market under the terms of that ordinance, was not entitled to antitrust immunity under the state action doctrine of *Parker v. Brown, supra*.

In its ruling, the Supreme Court made the following points:

- Cities are not sovereign and are not entitled to the same deference as states under the antitrust laws;
- The *Parker* state action exemption only insulates the actions of city government if those actions are in furtherance of state policy;
- Home rule powers are not sufficient to give cities the standing of states under the antitrust laws;
- The state must affirmatively address the subject in order for the city's actions to be considered as "comprehended within the powers granted" by the state; and
- Municipal actions may be judged by a different standard than that which governs the actions of private businesses (the courts may develop special rules for determining whether a municipal regulatory action violates the antitrust laws). For a city to be immune from antitrust liability, the state must adopt an affirmative policy of substituting local regulation for competition.

The *Boulder* case suggests that a state legislature, in order to give its political subdivisions *Parker* immunity, must establish a policy having statewide application. It may not be enough under the *Boulder* decision for a state statute to provide that political subdivisions may engage in specified anti-competitive practices, because permitting each municipality to elect whether to act or not could be viewed as a position of neutrality on the part of the state.

It is interesting to note the case of *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), where the U.S. Supreme Court held that *Parker* immunity is available only if the activities were compelled by the state and not merely prompted or passively accepted. This case involved private litigants attempting to defend antitrust challenges on the grounds that their actions were authorized by the state.

But see *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986), where the Eleventh Circuit Court of Appeals held a legislative grant of power to exercise "exclusive jurisdiction, control, supervision and management over all airports in" the county was sufficient to confer state action immunity for the Authority's limitation on the number of limousines allowed to operate at the airport. The U.S. Supreme Court ruled

similarly in *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365 (1991).

The Local Government Antitrust Act of 1984, 15 U.S.C. § 34, effectively limits municipal antitrust liability to declaratory and injunctive relief. Hopefully, future legislation will help to clarify the limits of municipal antitrust liability.

Stitch in Time

The old proverb "A stitch in time ..." is certainly applicable in the case of preventing liability actions and losses. In answer to the question, "Where do we make the first stitch?" it is recommended that a municipality and its incorporated boards use risk management principles to help eliminate and reduce the liability of a municipality. An in-depth risk analysis is complicated and risk management requires time and effort. But most municipalities can benefit from applying these principles to their daily operations.

Other Significant Tort Liability Decisions

- In *J.M.R. v. Cty. of Talladega*, 686 So. 2d 209 (Ala. 1996), the Alabama Supreme Court held that where a youthful offender consents to a negotiated plea but refuses to appeal any defects in the plea, governmental officials are protected by discretionary immunity from a § 1983 claim. The county is also immune.
- In *Nelson By and Through Sanders v. Meadows*, 684 So. 2d 145 (Ala. Civ. App. 1996), the Court of Civil Appeals held that a municipality owes a duty to passengers on an intersection maintained by the state because the municipality had a contract requiring it to notify the state of needed adjustments and changes to the traffic lights at the intersection.
- A municipality may, and in certain circumstances must, provide a defense for and indemnify municipal employees who are sued for the official performance of their duties. Al. Op. Att'y Gen. 97-00073.
- In *Montoute v. Carr*, 114 F.3d 181 (11th Cir. 1997), the Eleventh Circuit Court of Appeals held that in a § 1983 action against a police officer for excessive force, an arrestee has the burden of proving that no reasonable officer could have believed that the arrestee either had committed a crime involving serious physical harm or that the arrestee posed a risk of serious physical injury to the officer or others.
- In *Ex parte City of Geneva*, 707 So. 2d 626 (Ala. 1997), the Alabama Supreme Court held that the City was protected from liability by Ala. Code 1975, §§ 35-15-1-28, for the operation of a recreational facility at which a child was seriously injured.

- In *Tuscaloosa Cty. v. Henderson*, 699 So. 2d 1274 (Ala. Civ. App. 1997), the Court of Civil Appeals held that a license inspector was not protected by qualified immunity when he had the plaintiff arrested for conducting business without a license without first conducting an investigation.
- In *Barnette v. Wilson*, 706 So. 2d 1164 (Ala. 1997), the Alabama Supreme Court held that a police chief may be sued for defamation for stating to the press that the department had successfully removed four “dirty cops,” and then naming the officers involved.
- In *McCool v. Morgan Cty. Comm’n*, 716 So. 2d 1201 (Ala. Civ. App. 1997), the Court of Civil Appeals held that because a municipality had exercised sole control over an intersection that had been annexed into the municipality nine years earlier, the municipality, not the county, was responsible for maintaining the intersection even if the procedures in Ala. Code 1975, §§ 11-49-81 and 11-49-81, had not been followed.
- In *Williams et al. v. Crook and the City of Bay Minette*, 741 So. 2d 1074 (Ala. 1999), the Alabama Supreme Court held that the immunity from tort liability granted by § 6-5-338(a) to the driver of an “authorized emergency vehicle” applies only when the driver is using an audible signal meeting statutory requirements and is meeting the requirements of any law requiring that visual signals be used on emergency vehicles.
- Neither a county board nor a board member who voted with the board to eliminate certain county positions allegedly in retaliation for employee’s support of a political adversary is entitled to absolute legislative immunity under § 1983 for the member’s pre vote activities taken in an executive or legislative capacity. *Carver v. Foerster*, 102 F. 3d 96 (3rd Cir. 1996).
- In *Mays v. East St. Louis, Mo.*, 123 F. 3d 999 (7th Cir. 1997), the Seventh Circuit Court of Appeals held that an injury caused by a police officer’s high-speed chase may be actionable under the Fourth Amendment rules regarding search and seizure, but it is not actionable as a § 1983 claim under the due process clause.
- The United States Supreme Court has held that a high-speed police chase that ends in death does not shock the conscience unless the police act with the intent to cause harm unrelated to the legitimate object of arrest. *Sacramento Cty. v. Lewis*, 523 U.S. 833 (1998).
- In *City of Birmingham v. Bus. Realty Inv. Co.*, 722 So. 2d 747 (Ala. 1999), the Alabama Supreme Court held that damages based on a claim of intentional interference with business relations are not subject to the municipal statutory damages cap.
- The Court of Civil Appeals held in *Roberts v. Baldwin Cty. Comm’n*, 733 So. 2d 406 (Ala. Civ. App. 1999), that a county commissioner was not entitled to absolute immunity from personal liability when he or she votes to continue a county road easement. The court held that a vote on the passage of a resolution concerning the maintenance of a roadway is executive in nature, not legislative.
- Theories of negligence and inverse condemnation, as asserted by homeowners in action against city to recover for damages to houses due to settling that was allegedly caused by the city’s repair work on a street, were mutually exclusive and therefore the jury, if it found for the homeowners, was properly required to choose between the two theories. While an inverse condemnation claim requires a showing of causation, it does not require a showing of negligence. Further, the homeowners were not entitled to recover damages for mental anguish absent evidence that they were potentially at risk of physical injury as a result of the city’s negligence. *City of Mobile v. Patterson*, 804 So. 2d 220 (Ala. Civ. App. 2001).
- Summary judgment was not appropriate in a road defect case where evidence was put forth in opposition to city’s motion for summary judgment providing that at least two people had complained to the city about the road condition and numerous accidents had occurred at the particular intersection involved. Either actual or constructive notice will suffice to impose upon a municipality the duty to correct a dangerous condition on public roads or to provide warning signs. *Hollingsworth v. City of Rainbow City*, 826 So. 2d 787 (Ala. 2001).
- The Eleventh Circuit Court of Appeals held that the suspension of a public high school student who displayed the Confederate flag did not violate any clearly established law in 1995 regarding a student’s First Amendment right; therefore, the public high school’s officials enjoyed qualified immunity from a civil rights suit arising from his suspension for displaying the flag. *Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F. 3d 1267 (11th Cir. 2000).
- Pursuant to Ala. Code 1975, § 11-93-2, a health care authority established pursuant to Ala. Code 1975, § 22-21-310, et seq. and its facilities, have the protection of the liability caps for the recovery of damages for bodily injury, death or damage to property. Ala. Op. Att’y Gen. 2003-058.
- Summary judgment was not appropriate in a road

defect case where evidence was put forth in opposition to city's motion for summary judgment providing that at least two people had complained to the city about the road condition and numerous accidents had occurred at the particular intersection involved. Either actual or constructive notice will suffice to impose upon a municipality the duty to correct a dangerous condition on public roads or to provide warning signs. *Hollingsworth v. City of Rainbow City*, 826 So. 2d 787 (Ala. 2001).

- Although railroad was statutorily required to maintain railroad crossing and "the streets between their rails and for 18 inches on each side," city owed a duty to motorists to warn them of danger posed by "ditch" that had been dug across road in front of railroad crossing if the city knew or should have known that the danger existed. *Ex parte CSX Transp., Inc.*, 938 So. 2d 959 (Ala. 2006).
- A City industrial development board (IDB) is a "governmental entity" as defined in the Volunteer Service Act, and, thus, a person volunteering for the IDB is immune from civil liability if the damages or injury were not caused by the volunteer's willful or wanton misconduct. A City IDB could not be held vicariously liable for acts of its chairman who was immune from liability under the Volunteer Service Act. *Wheeler v. George*, 39 So. 3d 1061 (Ala. 2009).
- Assistant fire chief for volunteer fire department was acting in good faith and within the scope of his volunteer-firefighter duties with the fire department, a nonprofit organization under the Volunteer Service Act, and, thus, would be liable to occupants of car, who were injured when fire truck collided with their car, only if he engaged in willful or wanton misconduct. The assistant fire chief did not act willfully or wantonly, and thus, the assistant chief was entitled to immunity. *Ex parte Dixon Mills Volunteer Fire Dep't., Inc.*, 181 So. 3d 325 (Ala. 2015).
- The \$100,000 municipal damages cap did not apply in action brought by driver and passenger, who were injured in automobile accident, against police officer in his individual capacity for negligence that occurred outside his employment, where accident occurred while officer was on his way to work and was late for his shift. The city was not obligated to indemnify police officer for negligent actions that occurred outside the performance of his official duties, and the city was not considered the real party in interest in the action, even though it sought to intervene to satisfy judgments

against officer. *Alabama Mun. Ins. Corp. v. Allen*, 164 So. 3d 568 (Ala. 2014).

- City council's actions in voting to suspend or revoke contractor's building permit to refurbish a Confederate memorial located in city cemetery, considered in conjunction with the actions of city police chief in threatening to arrest contractor's employees if they resumed work on the memorial, could be said to constitute a "deprivation" through interference with contractor's use of the building permit, as required to satisfy element of § 1983 procedural due process claim. *KTK Min. of Virginia, LLC v. City of Selma, Ala.*, 984 F. Supp. 2d 1209 (S.D. Ala. 2013).
- City police department's standard operating procedure (SOP), which allegedly did not contain written procedures for use of force when interacting with mentally ill persons, was not a custom or practice of deliberate indifference to the right of mentally ill van passenger to be free from excessive force that could serve as basis for § 1983 claim against city, where city police officers had not used excessive force against other mentally ill persons, such that city would have been aware of alleged inadequacy of its SOP. Even if a cause of action against a municipality for a supervisor's negligent training or supervision of a subordinate existed under Alabama law, city and police chief were protected by state-agent immunity in mentally ill van passenger's negligent supervision action based on allegedly excessive use of force by police officer. *Howard v. City of Demopolis, Ala.*, 984 F. Supp. 2d 1245 (S.D. Ala. 2013).
- Genuine issues of material fact as to whether police officer activated his siren when responding to emergency dispatch and slowed to an appropriate speed through intersection, as would support claim for peace-officer immunity, precluded summary judgment in favor of city and officer in injured driver's action for damages following driver's collision with police car. *Kendrick v. City of Midfield*, 203 So. 3d 1200 (Ala. 2016).
- No statute of limitations applied to bar declaratory judgement claims challenging the validity of a city's permitting ordinances when the ordinances presented a current and ongoing infringement of property rights. *Breland v. City of Fairhope*, 229 So. 3d 1078 (Ala. 2016).
- City police officers were immune from passenger's claims alleging that the officers were negligent during a high-speed pursuit of a vehicle. *Ex parte City of Homewood*, 231 So. 3d 1082 (Ala. 2017).
- City police officers were entitled to state-agent immunity in action stemming from police call related to

repossession of motor vehicle. *Ex parte City of Selma*, 249 So. 3d 494 (Ala. 2017).

- City was entitled to immunity for reckless misrepresentation claim, but not negligent misrepresentation claim, brought by the wife of decedent firefighter, who was the decedent's life insurance beneficiary based on alleged misrepresentations regarding the amount of life insurance the firefighter was allowed to keep in place. Park patron failed to establish city had actual knowledge of diagonal crossbar in park presented a condition involving an unreasonable risk of death or bodily harm. *Ex parte City of Guntersville*, 238 So. 3d 1243 (Ala. 2017).
- Ala. Code 1975, § 11-47-190, the immunity statute, limited the city's liability for claims arising from wanton misconduct. *Miller v. City of Birmingham*, 235 So. 3d 220 (Ala. 2017).
- A police officers did not violate a clearly established right when, during the course of a legitimate investigation into a noise complaint, he obtained consent to enter into a private residence and interrupted the investigation to order the resident to stop engaging in the religiously-motivated conduct of praying before issuing a citation. Thus, the officer was entitled to qualified immunity from the residents § 1983 claim alleging the officer's actions violated her First Amendment rights. *Sause v. Bauer*, 859 F. 3d 1270 (Kan. 2017).
- Statute providing for a cap on damages recoverable against government entities is not applicable to individual capacity claims. *Wright v. Cleburne Cty. Hosp. Board, Inc.*, 255 So. 3d 186 (Ala. 2017).
- City was entitled to municipal immunity in negligence action brought by invitee after the invitee fell through a broken drain gate in a city-owned park. *Ex parte City of Muscle Shoals*, 257 So. 3d 850 (Ala. 2018).
- A municipal utility did not have substantive immunity from a personal injury action concerning an electrocution incident on a bridge-repair project. *Ex parte Utilities Bd.*, 265 So. 3d 1274 (Ala. 2018).
- Police officer was entitled to state-agent immunity from claims of negligence and wantonness made by motorist involved in a collision with a patrol car. *Ex parte City of Montgomery*, 272 So. 3d 155 (Ala. 2018).
- Under the property test for evaluating comparator evidence at the prima facie stage of the Supreme Court's McDonnell Douglas burden-shifting framework, in an action asserting an intentional-discrimination claim under Title VII, the Equal Protection Clause, or section 1981, a plaintiff must demonstrate that she or

her proffered comparators were similarly situated in all material respects. In so holding, the Eleventh Circuit abrogated circuit precedent apply a "nearly identical" standard or a "same of similar" standard, and declined to adopt the Seventh Circuit's standard, which requires distinctions that are not so significant that they render the comparison effectively useless. *Lewis v. City of Union City, Georgia*, 918 F. 3d 1213 (11th Cir. 2019).

72. Risk Management: Avoiding and Reducing Municipal Tort Liability

What is Risk Management?

Risk management is the identification, analysis and evaluation of potential losses in order to develop methods to reduce or eliminate them. Risks are identified and then steps are taken to avoid them. This may be as simple as continuing to operate as usual or as complicated as restructuring or abolishing an entire department. Employing risk management principles will not always prevent a city or town from being sued or from suffering some other loss, but the resulting financial burdens can often be reduced.

Risk Identification

The first step in the risk management process is to identify all potential losses facing a municipality. Risk identification is an ongoing process that changes with each new situation.

Risk identification, or exposure identification, requires the development of an inventory of all municipal operations, knowledge of the potential liabilities that may be imposed by either statute or common law and knowledge of the worth of all municipal assets and sources of revenue. This step must include an evaluation of all potential events that might adversely affect the finances of a municipality. Contracts should be reviewed thoroughly prior to being signed to ensure the municipality is obtaining the best deal possible. In some cases, risks can be transferred to the contracting party.

Potential losses of income and extra expenses that a municipality might incur are two areas often overlooked in risk identification. These risks must be considered even though they tend to be speculative.

Other areas where risk management principles should be applied include vehicle usage, maintenance of property and facilities, public use of facilities, use of independent contractors and consultants, personnel questions and personal injury and property injury exposure. All municipal activities should be evaluated, and facilities inspected.

Court decisions and legislation affecting municipalities must be reviewed. Insurance and risk management publications should be studied for the latest information on loss avoidance. Attending courses on risk management may also prove beneficial.

The importance of the human element cannot be overemphasized when identifying risks. Ask employees and supervisors for their input, as they are usually in the best position to identify risks. It is also important to communicate with people in other municipalities who are

involved in risk management. They may have faced and solved a similar problem in the past.

Obviously, a great amount of guesswork is involved in risk identification and some potential losses may be overlooked. However, by making a conscientious effort, the most common losses can be reduced or perhaps totally avoided.

Analysis

The next step is to calculate the potential severity and frequency of losses facing the municipality in each of the identified risk areas. A review of the past experience of the municipality, as well as statistical information and probability analysis, is necessary.

Obviously, the impact of a particular risk on a municipality is difficult to determine. The use of statistics and probability analysis involves guesswork. To determine where a municipality should concentrate its risk management efforts, the risk analysis should be performed carefully. Some risks may involve such a small amount or probability of loss that the municipality will decide to absorb any losses which occur. Or the potential loss may be so large and difficult to avoid that insurance might be the only recourse.

Risk Control

Once the risk areas are identified and analyzed, the next step is to eliminate, reduce or transfer the risk. This process is called risk control. Steps toward risk control are taken prior to suffering a loss, with the primary goal being loss prevention. However, when a loss cannot be prevented, risk control principles may help reduce the financial liability suffered by a municipality.

Elimination of a risk is the most desirable goal. If a municipality discovers a way to eliminate a risk, there is no need to worry about its future effect or to insure against it. But risks cannot always be eliminated. For instance, abolishing the police force will eliminate all loss exposure in that area but in most cases, that action is not desirable. After an analysis, a municipality may decide to stop performing some activities or transfer the risk to a private operator.

If a risk cannot be eliminated, the next choice is to attempt to reduce the risk. Risk reduction primarily involves safety. Some common techniques for reducing risks include adoption of policies for and proper training of personnel, particularly for the police and fire protection services, and proper inspection and maintenance of equipment and

facilities. Segregation of equipment may also help avoid the loss of all equipment at one time during a disaster such as a fire at a storage site.

If the risk cannot be eliminated or reduced, two final options are available. First, if the risk is not large, a municipality may decide the best option is to retain the risk and fund it itself. The municipality must be aware of its financial condition, its cash flow and the availability of additional funds before deciding to assume a risk.

Retaining the risk is the appropriate action in many cases. Studies have shown that municipalities retain far fewer risks than they are financially able to. By deciding to retain a risk rather than purchasing insurance, a municipality may save money in the long run. Again, this decision can only be made after the financial condition of the municipality has been analyzed in detail.

Second, a municipality may be able to transfer the risk to another party. This does not always mean obtaining insurance. The most common form of risk transference is probably the “hold-harmless agreement,” in which a supplier or contractor agrees in the contract to assume risks for which the municipality would normally be responsible. Of course, the added cost to the supplier or contractor of obtaining insurance or otherwise guarding against loss may be passed on to the municipality. In such cases, a municipality must calculate costs to determine if transferring the risk in this manner is the best option.

In some instances, insurance remains the ultimate solution to a risk management problem. A municipality may want to retain some of the risk of an activity and transfer another part to an insurance carrier.

Developing a Risk Management Program

On a practical level, the first step in developing a municipal risk management plan is to define the scope of the program. This definition should be in writing and should set out the objectives or reasons for establishing the program.

Second, it is important to delineate the responsibilities of all persons involved in the risk management function. All persons engaged in identifying and analyzing the risk and implementing the risk management program should be included in this step. Cooperation is one of the keys to successful risk management.

Third, a municipality must develop a formal risk retention policy. Once the retention limits are established after a thorough survey of the financial strength of the community, the working policy should be drawn up as a formal policy and approved by the city council.

A municipality or board may want to form a safety committee which will be responsible for conducting a mandatory safety program for employees. This committee should recommend safety policies to be carried out by

administrative personnel and should review all accidents and claims against the municipality. Most accidents and claims usually result from the performance of only a few activities. Concentrated efforts can be devoted to the correction of procedures in these areas, thereby minimizing possible losses.

The second principal duty of the committee should be the inspection of municipal procedures and installations, concentrating the search on possible defects which might cause injury and liability. Finally, the committee should confer with insurance carriers and their representatives for the cost of insurance coverage in areas where liability dangers are greatest.

Beyond this point, professional input and guidance become necessary. A professional consultant is best suited to help a municipality determine what steps should be taken to protect itself.

Assistance through League Affiliated Programs

The Municipal Workers Compensation Fund was created by the League to provide workers compensation insurance coverage for municipalities and their agencies. For more information, contact Richard Buttenshaw, P.O. Box 1270, Montgomery, AL 36102, or phone 334-262-2566. Web: <http://www.almwcf.org/>.

The Alabama Municipal Insurance Corporation has been formed to provide liability insurance coverage for municipalities and their agencies. For more information, contact Steve Wells, President, 110 North Ripley St., Montgomery, AL 36104, or phone 334-386-3863, or 1-866-239-AMIC (2642). Web: <http://www.amicentral.org/>.

Jointly, in connection with the League, these two entities operate a Loss Control program that has successfully helped municipalities in Alabama save millions of dollars by successfully managing their risks. You can learn more about the Loss Control program at <http://www.losscontrol.org/>.

— 73. Municipalities and the Workers Compensation Law —

Alabama statutes on workers' compensation are codified in Chapter 5 of Title 25, Code of Alabama 1975. Workers' compensation laws replaced employee/employer adversary court proceedings under common law. Simply stated, workers' compensation is a system under which an employee who has become diseased, injured, or killed by an accident arising out of and in the course of employment is entitled to medical treatment and monetary compensation as a matter of right and without regard to fault.

Under workers' compensation, an employer forfeits the right to common law defenses and automatically assumes, as an inherent cost of doing business, the financial liability for an employee's injuries or death with limited exceptions. The employee, in turn, forfeits the right to sue and recover any amount greater than is stipulated by the law, thereby providing the exclusive remedy for bodily injuries or death that occur within the line and scope of employment. Properly implemented, workers' compensation should establish an equitable balance – the worker receives timely compensation for injuries, while the employer is protected by limitations on the claims amount for which it is liable.

A secondary benefit of the system is the promotion of occupational safety through economic incentives for employers. If the incidence of work-related injuries is low, the improvement is reflected in the reduction of workers' compensation insurance costs. Thus, efforts by the employer to create a safer work environment can reduce the total cost of doing business.

Co-Employee Provisions

Sections 25-5-1(4), 25-5-11, 25-5-51 and 25-5-53, Code of Alabama 1975, restrict the right to bring co-employee lawsuits to cases involving willful conduct which results in, or proximately causes, an injury or death. "Willful conduct" is defined in Section 25-5-11, Code of Alabama 1975, to include:

- A purpose or intent or design to injure another;
- The willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from such removal if the removal did, in fact, increase the danger in the use of the machine and was not done for the purpose of repair of the machine or was not part of an improvement or modification of the machine which rendered the safety device unnecessary or ineffective;
- The intoxication of another employee of the employer

if the conduct of that employee has wrongfully and proximately caused injury or death to the plaintiff or the plaintiff's decedent, but no employee shall be guilty of willful conduct on account of the intoxication of another employee or other person; or

- Willful and intentional violation of a specific safety rule of the employer after written notice of the violating employee by another employee who, within six months after the date of receipt of the written notice, suffers injury resulting in death or permanent total disability as a proximate result of the willful and intentional violation. The written notice to the violating employee shall state with specificity all of the following:
 - a. the identity of the violating employee;
 - b. the specific written safety rule being violated and the manner of the violation;
 - c. that the violating employee has repeatedly and continually violated the specific written safety rule referred to in section (b) above with specific reference to previous times, dates and circumstances;
 - d. that the violation places the notifying employee at risk of greater injury or death.

A notice that does not contain all of these elements shall not be valid notice for purposes of the law.

An employee shall not be liable for his or her willful conduct if the injured employee personally violated a safety rule or otherwise contributed to his or her own injury. No employee shall be held liable under this section of the law for the violation of any safety rule by any other employee or for failing to prevent any violation by any other employee.

An employee's acceptance of workers' compensation benefits triggered immunity provisions for an action against a co-employee, noting specifically that immunity is extended to co-employees who are entitled to receive workers' compensation benefits unless the injured employee can prove that the injury was caused by willful conduct on the part of the co-employee. *Brunson v. Lucas*, 5 So.3d 1274 (Ala.Civ.App.2008).

Who is Covered by the Law?

All cities of 2,000 or more in population and all incorporated municipal boards, regardless of the population of the municipality, are covered by the workers' compensation law and coverage is compulsory.

Coverage Exclusions

Following are exclusion to coverage under workers' compensation law:

- Municipalities and related agencies with populations of 250,000 or more;
- Any employer who regularly employs less than five employees in any one business; and,
- Persons whose employment at the time of injury is casual and not in the usual course of the trade, business, profession or occupation of the employer.
- Municipalities having a population of less than 2000 according to the most recent federal decennial census and employers employing less than 5 employees may voluntarily elect to be covered under the Alabama Workers' Compensation Act through following a process proscribed by law. Larger municipalities and related agencies with populations of 250,000 or more do not have this option.

Benefit Exclusions/Defenses

Where an injury or death was caused by the willful misconduct of the employee or the employee's intention to bring about the injury or death of himself or another, by an accident due to the injured employee being intoxicated from the use of alcohol or impaired by the use of illegal drugs, or by the employee's willful failure or willful refusal to wear safety appliances provided by the employer or due to the willful refusal or willful neglect of the employee or the willful violation of the law by the employee or his or her willful breach of a reasonable rule or regulation of the employer of which rule or regulation the employee has knowledge an employee is precluded from receiving compensation benefits under the workers' compensation laws. Under most conditions medical benefits would be payable.

Benefits Payable

Alabama law provides for the payment of:

- All hospital, medical and surgical expenses of the injured employee. If vocational or physical rehabilitation is required, the law requires the employer to pay the costs of such rehabilitation.
- If the employee is disabled, either temporarily or permanently, totally or partially, the law requires the employer to make weekly compensation payments to the injured employee.
- In cases where the employee dies as a result of an on-the-job injury, his or her dependents or estate are

entitled to receive death benefits and burial expenses in such amounts as provided by the law.

Responsibilities of Employers Covered by the Law

An employer subject to the provisions of the law – either by law or by election – has several alternative methods of covering the risks. The employer can:

- Insure the risk with a workers' compensation insurance carrier authorized to do business in the State of Alabama;
- Become a self-insurer and pay all workers' compensation claims when they occur;
- Purchase an excess and aggregate policy to cover all claims above a certain monetary amount and self-insure all claims or a portion of claims below that amount; or
- Join with other employers in a plan of pooled coverage.

If an employer elects to insure the risk with a private insurance company, premiums are based on the payroll of the employer. The idea is that if one business has a \$500,000 payroll and another has a \$50,000 payroll, then the former is 10 times as big and is likely to have 10 times as many accidents. A rate per \$100 of payroll is used. The rate varies according to the risk of the job involved. Occupations with a bad history of accidents will have a higher assigned risk, creating a higher premium per \$100 of payroll for that employee. For example, in one state the rate for office workers is 16 cents per \$100 of payroll. For stunt fliers and parachute jumpers the rate is \$17 per \$100 of payroll. All rates and classifications are strictly controlled by state law. Most insurance carriers use the rate classifications furnished by a rating bureau.

Section 25-5-8, Code of Alabama 1975, requires all employers who elect not to cover their risks by insurance to furnish satisfactory proof to the director of the Department of Labor of their financial ability to pay directly such compensation in the amount and manner and when due as required by law. If the director is satisfied, he or she shall authorize the employer to operate as a self-insurer. This privilege can be revoked by the director whenever the employer fails to meet the obligations under the law.

In November 1976, the Municipal Workers Compensation Fund (MWCF) was formed as a separate corporation to give Alabama municipalities and their incorporated boards the opportunity to pool their workers' compensation obligations at a savings. This program is available to all member municipalities and boards regardless of population. For more information please contact MWCF at (334)262-2566.

Procedures Following an Injury

Section 25-5-78, Code of Alabama 1975, requires every injured employee to give or cause to be given, to the employer written notice of the accident within five days after the occurrence. If an injured employee, or his or her personal representative in case the injury caused the death of the employee, fails to give such notice to the employer, the worker shall not be entitled to physician or medical fees or to any compensation due under the Act, unless it can be shown that the person required to give notice was prevented from doing so by reason of physical or mental incapacity, other than minority or by fraud, deceit or equally good reasons. However, no compensation shall be payable unless written notice is given within 90 days after the occurrence of the accident or within 90 days after death in cases where death occurs. While statutory language requires written notice, case law has modified this to some degree. Notice of an injury, whether written or verbal, will suffice for meeting the notice obligations.

Upon receiving notice of the injury, the employer should immediately notify their workers' compensation provider regarding the injury. If the employer is self-insured, the Department of Labor should be immediately notified of the injury using forms approved by the Department. As the claim is administered, several other reports are required to be filed with the Department of Labor. These reports should be filed by the employer's insurance carrier. However, if the employer is self-insured, the employer must file these reports.

Section 25-5-4, Code of Alabama 1975, requires all employers to keep records of all injuries – fatal or otherwise – received by his or her employees in the course of their employment, for which compensation is claimed or paid.

Safety Committees

Section 25-5-15, Code of Alabama 1975, states that upon the written request of any employee, each employer subject to the law shall appoint a safety committee. The safety committee shall consist of not less than three committee members, one of whom must be a non-supervisory employee. The safety committee shall advise the employer regarding safety in the workplace, including suggestions from employees regarding safety conditions in the workplace. Any employee shall have the right to notify the committee of an unsafe condition in the workplace. The safety committee shall develop procedures by which an employee may give such notification. The provisions of the law relating to safety committees shall not apply to any employer who now or in the future has an established safety committee pursuant to contract or agreement with its employees or their representative.

Retaliatory Actions Against Employees

Section 25-5-11.1, Code of Alabama 1975, states that no employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers compensation benefits as provided by the law. No employee shall be terminated by an employer solely because the employee filed a written notice of a safety rule as provided by law. Any such actions are not protected by the exclusivity provisions of the workers' compensation laws.

Responsibilities of Employers Not Covered by the Law

A municipality with less than 2,000 inhabitants which elects not to cover its employees with workers' compensation is subject to common law remedies. Under common law, the employer owes certain legal duties of protection to employees:

- To provide and maintain a reasonably safe place to work, as well as safe appliances, tools and equipment;
- To provide a sufficient number of suitable and competent fellow employees to permit safe performance of work; and
- To establish and enforce proper safety.

If a municipality refuses to pay an injured employee's claim for damages resulting from job injuries, the only recourse for the employee is to sue the employer for damages in court. In suing, the employee has the burden of proving that the employer's negligence caused the injury. In defense, the employer could invoke one or more of three common law defenses:

1. **Contributory Negligence:** That the accident was the result of contributory negligence on the part of the employee – that is, the employee was either partially or wholly responsible for the accident;
2. **Fellow Servant Doctrine:** That the accident resulted from negligence on the part of the employee's co-workers; or
3. **Assumption of the Risk:** That the accident resulted from an understood risk of the job, and the employee knew of the hazard when employment was accepted.

If a judge or jury hearing the case agrees that the employee's injury or death occurred under one of these three conditions, the employer could be held free from any obligation to compensate the worker for the injury and the worker would receive nothing.

Municipalities in Alabama without workers' compensation coverage must also provide their employees with a safe workplace. Although Alabama municipalities are

not subject to OSHA regulations, Section 25-6-1, Code of Alabama 1975, makes employers liable to employees who are injured in the workplace if:

1. the injury was due to a defect in equipment, etc., used in the workplace;
2. the injury was caused by the negligence of a supervisor appointed by the employer;
3. the injury was caused by the negligence of another employee acting pursuant to orders or directions of the employer; or
4. the injury was caused by the negligence of another employee or other person acting in obedience to instructions given to someone who has been delegated that authority by the employer.

An exception states that employers are not liable for conditions known to the employee that are not communicated to the employer. This law is generally superseded by the worker's compensation laws, except in cases where an exception is created in the workers' compensation laws. *C.F. Halstead Contractor v. Lowery*, 51 Ala. App. 86, 282 So.2d 909 (Ala. App. 1973). Thus, municipalities with workers' compensation coverage are, generally, not subject to this statute.

Additional Information

More information can be obtained from League headquarters; from Millennium Risk Managers, P.O. Box 43769, Birmingham, Alabama 35243; or from the Workers Compensation Division, Department of Labor, State Government Office, 649 Monroe St., AL 36131.

74. Volunteers in Municipal Government

Municipalities have long relied on volunteers to provide extra services or to supplement existing services. Volunteers perform many essential governmental tasks, such as fire protection, police protection, and recreation. Without such unpaid assistance, many of these services would have to be eliminated or operated at a much lower capacity.

However, along with the benefits volunteers provide, there are drawbacks. Municipalities remain liable for the actions of their volunteers. Protection of the volunteers themselves is a priority. Child labor laws must be observed, if the volunteer is a minor. Volunteers may need to be trained to perform certain functions and may be statutorily prohibited from performing others.

Taking proper precautions can reduce the risks of using volunteers. This article points out the pitfalls and suggests steps municipalities should take before using volunteers.

Advantages

In 1987, the League of Kansas Municipalities surveyed its members concerning their use of volunteers. When asked what they considered the greatest benefit volunteers provide, 82.4 percent of the responding officials mentioned the reduction of costs. Other responses included:

- Volunteers give detailed attention to people;
- Volunteers support programs in which they work;
- Volunteers provide a good supplement to paid staff and allow better allocation of resources;
- Provides volunteers with better understanding of municipal problems and constraints;
- Good public relations; and,
- Brings pride in citizenship.
- Municipal officials listed the drawbacks as:
 - Problems in supervision;
 - Obtaining insurance;
 - Difficulties working with paid staff;
 - Absenteeism;
 - Getting volunteers in needed areas; and,
 - Getting firm time commitments.
- These concerns are just as valid today.

Liability Issues

The use of volunteers opens municipalities up to three large areas of potential liability. First is the dangers

presented to the volunteers themselves. How likely is a volunteer to be injured and what will you do if it happens?

The other liability issues are related. One is the concern about liability of the municipality for potential injuries to third parties. The other is the potential liability of the volunteers themselves, and the deterrence effect this has on volunteerism. Each of these topics will be examined separately.

Injuries to Volunteers

It goes without saying that municipalities should take steps to reduce the possibility of injury to volunteers. Just as with paid employees, municipalities must maintain a safe work environment for volunteers.

Municipalities should also look to see if paid employees should perform certain functions. Municipalities should limit the scope of a volunteer's duties so that they are not engaging in hazardous activities.

Precaution is the key here. It may be a good idea to purchase some type of insurance to cover volunteers. Volunteers should also be required to sign a waiver of liability form. While this will not protect the municipality in all cases, it will indicate that the volunteer understood the risks and assumed them.

Liability of Volunteers for Injuries to Others

In 1991, the Alabama Legislature protected volunteers from personal liability when it enacted the Volunteer Service Act. This Act is codified at Section 6-5-336, Code of Alabama 1975. The Act specifically provides:

- a. This section shall be known as "The Volunteer Service Act."
- b. The Legislature finds and declares that:
 1. The willingness of volunteers to offer their services has been increasingly deterred by a perception that they put personal assets at risk in the event of tort actions seeking damages arising from their activities as volunteers;
 2. The contributions of programs, activities and services to communities is diminished and worthwhile programs, activities and services are deterred by the unwillingness of volunteers to serve either as volunteers or as officers, directors or trustees of nonprofit public and private organizations;
 3. The provisions of this section are intended to

encourage volunteers to contribute their services for the good of their communities and at the same time provide a reasonable basis for redress of claims which may arise relating to those services.

- c. For the purposes of this section, the meaning of the terms specified shall be as follows:
 1. **GOVERNMENTAL ENTITY.** Any county, municipality, township, school district, chartered unit or subdivision, governmental unit, other special district, similar entity, or any association, authority, board, commission, division, office, officer, task force or other agency of any state;
 2. **NONPROFIT CORPORATION.** Any corporation which is exempt from taxation pursuant to section 501(a) of the Internal Revenue Code, 26 U.S.C. Section 501(a);
 3. **NONPROFIT ORGANIZATION.** Any organization which is exempt from taxation pursuant to section 501(c) of the Internal Revenue Code, 26 U.S.C. Section 501(c), as amended;
 4. **VOLUNTEER.** A person performing services for a nonprofit organization, a nonprofit corporation, a hospital or a governmental entity without compensation, other than reimbursement for actual expenses incurred. The term includes a volunteer serving as a director, officer, trustee or direct service volunteer.
- d. Any volunteer shall be immune from civil liability in any action on the basis of any act or omission of a volunteer resulting in damage or injury if:
 1. The volunteer was acting in good faith within the scope of such volunteer's official functions and duties for a nonprofit organization, a nonprofit corporation, hospital or a governmental entity; and
 2. The damage or injury was not caused by willful or wanton misconduct by such volunteer.
- e. In any suit against a nonprofit organization, nonprofit corporation or a hospital for civil damages based upon the negligent act or omission of a volunteer, proof of such act or omission shall be sufficient to establish the responsibility of the organization therefore under the doctrine of "respondent superior," notwithstanding the immunity granted to the volunteer with respect to any act or omission included under subsection (a).

Liability of Municipalities for Injuries to Others

Unless a statute expressly declares a municipality liable, the general rule stated by the courts is that a municipality is

not liable for the completely personal torts of its officers, employees or agents. *McCarter v. Florence*, 216 Ala. 72, 112 So. 335 (1927). In *Bessemer v. Whaley*, 8 Ala. App. 523, 62 So. 473 (1913), the court held that in order to create liability certain statutes require that the act or omission causing the damage must have arisen while the agent, officer or employee of the city or town was acting in the line of duty. Subsection (e) of the Volunteer Service Act makes it clear that the Act does not insulate the municipality from suit based on negligent acts or omissions of a volunteer; therefore, the municipality must take measures to guard against the tortious actions of its volunteers. However, the Alabama Supreme Court has held that a municipality may not be held vicariously liable for acts of an agent who is immune from liability under the Volunteer Service Act. In *Wheeler v. George*, 39 So.3d 1061, (Ala. 2009), the Court ruled that a municipality cannot be held liable for the intentional torts of its employees, pursuant to §11-47-190, Code of Alabama 1975.

A municipality should start by assessing its operation to determine where volunteers would make the most positive impact. As part of this assessment, the municipality should take into account the dangers associated with various duties volunteers will be expected to perform.

The municipality must weigh the benefits provided by volunteers against the potential liabilities. In many cases, the best answer is to simply refuse to assign volunteers in certain areas, or to define their duties to eliminate the hazardous activity. If volunteers must be used, the municipality should develop written job descriptions for volunteers.

Next is the recruitment stage. This should not be done in a haphazard manner. The municipality should develop an application procedure. The supervisor or manager of the volunteers, if there is one, should participate actively in this process and in the decision of which persons should be used. Municipalities should examine volunteers to see who best fits their needs.

Municipalities should bear in mind that many individuals volunteer from a desire to be needed, or a goal of contributing in a worthwhile manner to the community. Although they may have a desire to work in one area, they would be willing to serve wherever needed.

The interest of the volunteer should not solely determine whether they are permitted to perform a specific job. Although this is certainly a key factor – after all, if they weren't interested, they wouldn't volunteer – everyone has specific talents which the municipality should seek to utilize. There is no promise that if they volunteer, they will be used like they want. If they aren't suited for the area in which they wanted to work, suggest alternatives or promise to keep their name on file for future reference.

Once the volunteers have been appointed, the municipality should train them. Training is available from the state for volunteer firefighters, reserve police officers and others. Private companies conduct seminars on an infinite variety of topics. Additionally, colleges and universities hold training sessions.

At the very least, volunteers should be instructed on their duties, and warned about straying from their assignments. Before they begin, the municipality should provide all volunteers with a written list of what is expected of them, so there can be no doubt concerning the limits of their powers.

Closely related to the subject of training is supervision. Too often, volunteers are given assignments with little or no instruction and or supervision. This leads to confusion, delay, frustration and the possibility of improper or illegal actions. Although direct supervision may not always be possible, volunteers must have someone available to answer questions at any time. This may be a city employee, a third person or even another volunteer.

Whoever performs this function must understand the duties the volunteers are performing. He or she must be able to give explanations clearly and understandably. This person should listen if the volunteer suggests a different approach and be able to determine if there are any potential hazards. And, this person should follow up to ensure that the instructions were both understood and performed properly.

Keep records of the work performed by volunteers. These records may prove vital if there is a conflict regarding duties or concerning services provided by the municipality.

Municipalities must also be willing to discipline volunteers when needed. If a volunteer is not performing up to expectations, the municipality must be willing to correct the problem, either through warnings or dismissal. While volunteers are a valuable commodity, in many respects they should be treated like any employee. The municipality is just as liable for their actions.

Finally, municipalities must be aware that the activities of certain types of volunteers are governed by statutes, which must be followed. For instance, the duties and powers of reserve police officers are limited by Section 11-43-210, Code of Alabama 1975. The use of children as volunteers is governed by both state and federal law.

Failure to comply with a statutory requirement may result in fines and the potential expansion of liability for the municipality. Not following a statute may be a showing of negligence per se, meaning that the municipality becomes liable merely by a failure to comply with the statute.

Citizens volunteer due to civic-mindedness and a desire to help. Municipalities can benefit a great deal from encouraging a spirit of volunteerism. However, they

must anticipate potential legal problems and take steps to eliminate and reduce them.

Volunteer Status

The Fair Labor Standards Act (FLSA) requires all covered employers to pay their “employees” at least the federal minimum hourly wage every workweek. If a person is compensated for volunteer work, that person could be considered an “employee” for purposes of the FLSA. The remuneration a volunteer receives is only one factor in a common-law agency test for determining whether the individual is an “employee.” *Bryson v. Middlefield Volunteer Fire Dept., Inc.*, 656 F.3d 348 (6th Cir.2011).

The FLSA recognizes the generosity and public benefits of volunteering and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. In this spirit, in enacting the 1985 FLSA Amendments, Congress sought to ensure that true volunteer activities are neither impeded nor discouraged. Congress, however, also wanted to minimize the potential for abuse or manipulation of the FLSA’s minimum wage and overtime requirements in “volunteer” situations.

Section 3(e)(4)(A) of the FLSA and 29 C.F.R. §§ 553.101 and 553.103 indicate that an individual is a volunteer, not an employee of a public agency, when the individual meets the following criteria:

1. Performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.... Although a volunteer can receive no compensation, a volunteer can be paid expenses, reasonable benefits or a nominal fee to perform such services;
2. Offers services freely and without pressure or coercion, direct or implied, from an employer; and
3. Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

Section 3(e)(4)(A) of the FLSA, 29 U.S.C. § 203(e)(4)(A), also permits public agency employees to volunteer their services to their employing public agency, as long as there is no coercion or undue pressure on the employee, and they do not provide the same type of services for which they are employed. The phrase “same type of services” means “similar or identical services.” 29 C.F.R. § 553.103(a). *See*, Wage and Hour Opinion Letter FLSA2009-35.

Neither the FLSA nor the 1985 FLSA Amendments define the term “nominal fee.” However, the Department of Labor has issued regulations providing guidance in this area. The regulations focus on preventing payment

for performance, which is inconsistent with the spirit of volunteerism contemplated by the FLSA. Thus, a fee would not be considered nominal if it is, in fact, a substitute for compensation or tied to productivity. See 29 C.F.R. § 553.106(e); see also Wage and Hour Opinion Letter FLSA2005-51. Generally, a key factor in determining if a payment is a “substitute for compensation” or “tied to productivity” is “whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities.” Wage and Hour Opinion Letter FLSA2005-51. If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal. See *id.*; see also 29 C.F.R. § 553.106(e). Whether the nature and structure of payments made to individuals would result in their losing volunteer status is determined by examining the total amount of payments made (expenses, benefits, and fees) in the context of each particular situation. See, Wage and Hour Opinion Letter FLSA2008-16.

Further, when a public agency employee volunteers, the Department of Labor will presume the fee paid is nominal as long as the fee does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time employee for the same services. This 20 percent rule is derived from the FLSA and implementing regulations. See, Wage and Hour Opinion Letter FLSA2005-51. A willingness to volunteer for 20 percent of the prevailing wage for the job is also a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. See, Wage and Hour Opinion Letter FLSA2006-28.

Selected Cases, Attorney General’s Opinions and Ethics Opinions

- A county could be subject to suit in tort for injuries sustained by volunteer workers on county road maintenance. AGO 1985-348 (to Hon. W.C. Buttram, May 20, 1985).
- Act No. 91-439, the Volunteer Service Act, provides immunity for commissioners of public housing authorities appointed by the mayor. AGO 1992-097.
- Individuals who serve on local emergency planning committees are immune from liability under Section 6-5-336, Code of Alabama 1975, the Alabama Volunteer Services Act. AGO 1992-146.
- Uncompensated members of a board established to advise an E911 board are protected from liability by the Volunteer Service Act, Section 6-5-336, Code of Alabama 1975. AGO 1992-292.
- Funds raised by a group of volunteers for industrial development must be used for that purpose once they

are deposited in an account under the control of the industrial development board. Funds which remain under the control of the volunteers may be spent for other purposes. AGO 1993-081.

- Reserve law enforcement officers who serve without compensation appear to be protected from tort liability by the Volunteer Service Act, Section 6-5-336(d), Code of Alabama 1975. AGO 1993-085.
- Volunteers performing services without pay for the Alabama Emergency Management Agency are protected by the Volunteer Service Act, Section 6-5-336, Code of Alabama 1975. AGO 1993-147.
- A municipal governing body must determine whether reimbursing mileage to volunteers serves a municipal purpose. AGO 1995-134.
- A library organized by Sections 11-90-1, et seq., Code of Alabama 1975, may accept donations from volunteer library members who will operate a second-hand antique shop for the purpose of raising funds which will be donated to the library. No library property or funds may be used in this endeavor. AGO 1997-151.
- A mayor and a councilmember who serve on a volunteer fire department without compensation may vote on matters related to the operation of the department. They may vote on fire call compensation only if they do not receive fire call compensation themselves. AO NO. 1997-76.
- A municipality is not required to place a private ambulance service in rotation with a volunteer rescue squad for dispatch by municipal police. AGO 1999-108.
- An absentee elections manager may appoint individuals, including members of his or her staff, or unpaid volunteers, to assist in the performance of the manager’s duties. AGO 1996-177.
- A city councilman, who is the owner and operator of a surveying and engineering firm, may design plans and specifications for a new town hall at no cost to the town of which he serves as councilman; provided, that no particular course of action is required as a condition to the receipt of the volunteer services. AO NO. 1999-31.
- An attorney, volunteering his or her time to review and comment on a draft business license ordinance proposed by a municipality is not required to register as a lobbyist with the Alabama Ethics Commission if the activities undertaken do not rise to the level of promoting, opposing, influencing or attempting to influence the introduction, defeat, or enactment of legislation or a regulation. AO NO. 2003-31.

- An uncompensated president of a local volunteer fire department does not hold an office of profit. Therefore, a member of the Barbour County Board of Education may therefore serve in that position. AGO 2006-138.
- A reserve police officer was not entitled to summary judgment on the ground that he was immune from liability, for allegedly beating an arrestee, under Alabama's Volunteer Service Act (Act) because immunity provided to volunteers was limited to good faith actions and cases in which the damage or injury was not caused by willful or wanton misconduct by the volunteer, and the arrestee's complaint alleged actions outside of the protections of the Act. *Johnson v. Clanton*, 2005 WL 1364376, ---F.Supp.2d ---, (M.D. Ala. 2005).
- Uncompensated county park and recreation board members serving on a board created pursuant to Section 11-22-1, et seq., of the Code of Alabama, 1975, do not hold an office of profit. AGO 2009-064.
- Volunteer fire department, whose truck collided with car, injuring car's occupants, was a "nonprofit organization," as defined in the Volunteer Service Act and entitled to immunity under the Act and foreclosed from vicariously sharing immunity with the firefighters based on the master-servant relationship. The assistant fire chief did not act willfully or wantonly and, thus, was entitled to immunity under Volunteer Service Act. *Ex parte Dixon Mills Volunteer Fire Dep't, Inc.*, 181 So. 3d 325 (Ala. 2015).
- Volunteer fire department did not become professional fire department not entitled to immunity because the city donated money to it. Since the volunteer fire department and its firefighters were immune from liability, the city could not be vicariously liable for firefighters' alleged negligence or liable for wanton or intentional conduct. *Ex Parte Labbe*, 156 So. 3d 368 (Ala. 2014).
- Although the Volunteer Service Act (VSA) protects volunteer members of the industrial development board (IDB) from liability in tort so long as their actions were not willful and wanton and renders the IDB itself immune from vicarious liability, the VSA does not prevent the IDB from being sued and facing liability for breach of contract suits. *Indus. Dev. Bd. of City of Montgomery v. Russell*, 124 So. 3d 127 (Ala. 2013).
- Where a state, county or municipal board is authorized by state legislation and no compensation is authorized for members of the board, these people are considered volunteers. Such a board qualifies as a governmental entity pursuant to section 6-5-336 of the Code of Alabama, and its members are immune from civil lawsuits based on this same statutory authority. AGO 2010-067.
- Volunteer firefighters may be granted limited immunity under section 6-5-335 of the Code of Alabama when acting gratuitously and in good faith. AGO 2011-061.



The Alabama League of Municipalities was organized in 1935 and has served since that time as the recognized voice of the cities and towns in Alabama. Representing nearly 460 member municipalities, the League works to secure enactment of legislation enabling all cities and towns to perform their functions more efficiently and effectively; offers specialized training for both municipal officials and employees; holds conferences and meetings at which views and experiences of officials may be exchanged; and conducts continuing studies of the legislative, administrative and operational needs, problems and functions of Alabama's municipal governments.

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