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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 nonemergency 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."

In 2021 the Alabama Legislature passed legislation limiting a municipality's authority regarding small wireless facilities located in the right of way. Act 2021-5, Codified in Sections 37-17-1 through 37-17-12, Code of Alabama 1975, specifically allows small wireless facilities to:

(1) Collocate, mount, or install small wireless facilities on or adjacent to existing, new, or replacement poles in the right-of-way. and

(2) Install, modify, or replace its own poles, or, with the permission of the owner, a third party's poles, associated with a small wireless facility, along, across, upon, and under the right-of-way controlled by the authority.

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.

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