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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 2016-0043.

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 2000-0223.

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 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 1997-0282. 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 91-0340.

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 1989-0050. 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 1999-0236.

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 1989-0045.

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 1988-0207. 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) interpretion 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 1996-0222. 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 1996-0314.

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*, 203 So.3d 1213 (Ala. Civ. App. 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 1999-0230.

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).

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 2002-0028.

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 Daphn*e, 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*, 203 So.3d 1213 (Ala. Civ. App. 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."

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*, found on the League legal team's Selected Readings page, here: https://almonline.org/SelectedReadingsfortheMunicipalOfficial.aspx.

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.

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).

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 1989-0022 and AGO 1989-0027. 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.

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 Daph*ne, 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 2001-0271.

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, 2022, 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 1989-0001 (UAH is not subject to municipal zoning control); AGO 1989-0446 (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).

Military Land Use Planning

For those municipalities with a military installation within the jurisdictional boundaries of the municipality, the Legislature has determined that that it is desirable for local governments in the state to cooperate with military installations located within the state in order to encourage compatible land use, help prevent incompatible urban encroachment upon military installations, and facilitate the continued presence of major military installations within the state. For more information, please review Chapter 106 of Title 11, Code of Alabama 1975.

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 1981-0559 (to Hon. Charles W. Penhale, September 1, 1981) and AGO 1988-0357.
- Amendments to a zoning ordinance apply prospectively only. AGO 1983-0178 (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 1987-0309.
- 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 2002-0314.
- Group homes permitted under Section 11-52-75.1, Code of Alabama 1975, should attempt to comply with all zoning regulations. AGO 1988-0128.
- 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 1990-0286. **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 1990-0319.
- The Attorney General's office cannot determine the constitutionality of a zoning ordinance. AGO 1991-0113.
- Zoning may not be made subject to a referendum. AGO 1991-0262.
- Property owned by the State of Alabama Department of Conservation and Natural Resources is not subject to municipal zoning ordinances. AGO 1992-0373.
- 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 1994-0093.
- 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 2002-0309.
- 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*, 203 So.3d 1213 (Ala. Civ. App. 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 2010-0075.
- 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 2016-0043.
- 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 2016-0034.
- Planning Commission members are not required to be residents of the city. AGO 2016-0034.
- 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 2017-0011.
- The Board of School Commissioners of Mobile County is exempt from local zoning ordinances, local building codes, and local stormwater ordinances. AGO 2020-0024.
- Town council's construction of a public boat launch and pier near a creek was a "governmental function," not a "proprietary one," and thus the wetland-setback provisions of city zoning ordinances and subdivision regulations did not preclude the construction project; municipalities had delegated authority to provide recreational facilities for the well-being of their citizens, and the town's master plan contained several references to providing public water access and boat launches to the community. *Barnes v. Town Council of Perdido Beach,* 375 So. 3d 1 (Ala. 2022).
- Preliminary injunction which found city board of education, as an agency of the State, was not subject to the zoning regulations of neighboring city, and thus stop-work orders issued by neighboring city were void, failed to comply with the rule of civil procedure governing injunctions, and thus had to be dissolved, where the order failed to include the specific reasons for the issuance of the injunction. *City of Helena v. Pelham Bd. of Educ.*, 375 So. 3d 750 (Ala. 2022).
- A small town of about 300 residents may regulate the location of mobile homes and manufactured homes only through the adoption of a comprehensive zoning ordinance which takes into consideration the general welfare of the entire community. AGO 2023-0029.