



A SELECTED READING

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Adoption of State Offenses by Reference

Cities and towns in Alabama are empowered to adopt ordinances to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of the inhabitants of the municipality and to enforce such ordinances by fines and imprisonment. To enforce obedience to most ordinances, a municipality has the authority to provide penalties by fine not exceeding \$500, for most offenses, and by imprisonment or hard labor not exceeding 6 months, or both. *See*, Section 11-45-9 Code of Alabama 1975.

However, there are several exceptions to this authority provided by state law in Section 11-45-9(d), Code of Alabama 1975. Notwithstanding any other provision of law, the maximum fine for every person either convicted for violating any of the following misdemeanor offenses adopted as a municipal ordinance violation or adjudicated as a youthful offender shall be one thousand dollars (\$1,000): Criminal mischief in the second and third degree (§§13A-7-22 and 13A-7-23); Theft of property in the fourth degree (§13A-8-5); Theft of lost property in the third degree (§13A-8-9); Theft of services in the fourth degree (§13A-8-10.3); Receiving stolen property in the fourth degree (§13A-8-19); Tampering with availability of gas, electricity or water (§13A-8-23); Possession of traffic sign; notification, destruction, defacement, etc., of traffic sign or traffic control device, defacement of public building or property (§13A-8-71 and §13A-8-72); Offenses against intellectual property (§13A-8-102); Theft by fraudulent leasing or rental (§13A-8-140 through §13A-8-144); Charitable fraud in the third degree (§13A-9-75); and Illegal possession of food stamps (§13A-9-91).

In the enforcement of the DUI laws found at Section 32-5A-191, Code of Alabama 1975, a municipal court may set a fine not to exceed \$5,000 and a sentence of imprisonment not to exceed one year. Section 11-45-9(c), Code of Alabama 1975.

The penalty imposed upon a corporation that violates a municipal ordinance shall consist of the fine only, plus costs of court. Section 11-45-9(e), Code of Alabama 1975.

In the enforcement of a Class A misdemeanor, including a domestic violence offense, the fine may not exceed \$5,000 and the sentence of imprisonment may not exceed one year. Section 11-45-9(f), Code of Alabama 1975.

The responsibility for the maintenance of the peace and quiet of the community is of fundamental importance and it presents an awesome challenge to municipal officials, especially those of small cities and towns. The average municipal governing body does not include a Hammurabi or Justinian who can hand down a code of laws for the maintenance of the peace and quiet of the community. Even if such a person was on the municipal governing body, there is the question of paying the cost for printing the code. Fortunately, there is a convenient and economical answer to this problem.

One simple ordinance is available for Alabama municipalities which is practically a code of offenses in itself. It is an ordinance which makes the violation of state offenses, other than felonies, within the corporate limits and police jurisdiction of the municipality offenses against the municipality. The governing body of every municipality, large and small, should make sure that this ordinance is available to its law enforcement officials and should update the ordinance as necessary when state law is amended.

Authority for Ordinance

It has long been established that a city or town in Alabama may adopt an ordinance which makes the violation of state misdemeanor statutes within the jurisdiction of the city or town, an offense against the municipality. *Montgomery v. Davis*, 74 So. 730 (Ala. App. 1917); *Sloss Sheffield Steel & Iron Co. v. Smith*, 57 So. 29 (Ala. 1911); *Birmingham v. Edwards*, 93 So. 233 (Ala. App. 1922).

In explaining this type of ordinance, the Supreme Court of Alabama has said:

“The thought behind the ordinance is that he who offends the peace and dignity of the parent state, by infraction of her penal laws, offends also against the laws of the local government.

“Such a general or reference ordinance serves two purposes: one of convenience, the avoidance of expenses in enacting and promulgating a volume of penal ordinances in the same terms as well-known public statutes; the other is the element of certainty.

“The meaning of the brief ordinance is not in doubt. The citizen, not required to be advised upon two parallel codes of laws, can look to one, of which he is already required to take notice, and whose construction has often been well settled, to keep himself within the law of both jurisdictions. Again, it assures that the city ordinance is not in conflict with the state laws, nor violative of public policy, and puts the local government behind the suppression of evils defined and made public offenses by state law.” *Casteel v. Decatur*, 109 So. 571 (Ala. 1926).

In *Langan v. Winn Dixie*, 173 So.2d 573 (Ala. 1965), the court held that the City of Mobile could not be enjoined from enforcing the state Sunday closing law which had been adopted by reference in a municipal ordinance.

On January 1, 1980, the Alabama Criminal Code, which is codified as Title 13A of the Alabama Code of 1975, as amended, came into effect. This code rewrote many of the criminal laws of the state. Under this system of criminal law, offenses are classified as either felonies, misdemeanors or violations. In addition to these three classes of offenses, other volumes of the Alabama Code contain some criminal offenses which are not classified.

The Attorney General in an opinion to Hon. B. C. Hornady, dated May 9, 1980, advised that municipal courts have jurisdiction over violations of municipal ordinances when those ordinances have adopted state misdemeanors. However, the language of Section 12-12-30(2) of the Code of Alabama indicates that where there is a possibility that the prosecution could involve a felony offense the person should be charged with the state offense rather than with a violation of the municipal ordinance. Rule 2.2 of the Alabama Rules of Criminal Procedure requires that all felony charges and misdemeanor or ordinance violations which are lesser included offenses within a felony charge or which arise from the same incident as a felony charge shall be prosecuted in circuit court, except that the district court shall have concurrent jurisdiction to receive guilty pleas and to impose sentences in felony cases not punishable by sentence of death, including related and lesser included misdemeanor charges. See AGO 2000-124. The “same incident” language should be construed and interpreted to mean the “same act” for purposes of the statute providing that the circuit court has exclusive original jurisdiction of all misdemeanor violations which arise from the “same incident” as a felony charge. *Ex parte City of Tuscaloosa*, 636 So.2d 692 (Ala.Crim.App.1993).

In AGO 1980-362 the Attorney General specifically listed certain misdemeanors for which a defendant should not be charged with violation of a municipal ordinance, including criminally negligent homicide; sexual abuse in the second degree; arson in the third degree; forgery in the third degree; and criminal possession of a forged instrument in the third degree. This list, according to the opinion, is not exclusive, since each offense is judged individually with due regard to the particular facts surrounding the act committed and whether the elements of the offense could also constitute a felony offense.

In summary, municipalities have the authority to adopt ordinances making all misdemeanors, violations and unclassified offenses, offenses against the municipality. Municipalities do not have the authority to make a felony an offense against the municipality nor should municipalities adopt by reference those misdemeanors covered by AGO 1980-362. *See also, Barbour v. Montgomery*, 104 So.2d 300 (Ala. App. 1958) and AGO’s to Hon. J. Wagner Finnell, June 19, 1975, and Col. George S. Harrington, August 17, 1977.

Sample Ordinance

An example of an ordinance to adopt offenses by reference is printed below:

BE IT ORDAINED BY THE CITY [TOWN] COUNCIL OF THE CITY [TOWN] OF _____, ALABAMA, AS FOLLOWS:

SECTION 1. Any person or corporation committing an offense within the corporate limits of the city [town] of _____, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the state of Alabama now existing or hereafter enacted to be a misdemeanor, shall be guilty of an offense against the city [town] of _____, Alabama.

SECTION 2. Any person or corporation committing an offense within the corporate limits of the city [town] of _____, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the state of Alabama now existing or hereafter enacted to be a violation, shall be guilty of an offense against the city [town] of _____, Alabama.

SECTION 3. Any person or corporation committing within the corporate limits of the city [town] of _____, Alabama, or within the police jurisdiction thereof, an offense as defined by Section 13A-1-2 of the Alabama Criminal Code, which offense is not declared by a law or laws of the state of Alabama now existing or hereafter enacted to be a felony, misdemeanor or

violation, shall be guilty of an offense against the city [town] of _____, Alabama.

SECTION 4. Any person found to be in violation of Section one, two or three of this ordinance shall, upon conviction, be punished by a fine of more than \$500, except where otherwise provided by state law for the violation of municipal offenses, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding six months, at the discretion of the court trying the case. Any corporation found to be in violation of Sections one, two or three of the ordinance shall, upon conviction, be punished by a fine of not more than \$500, except where otherwise provided by state law for the violation of municipal offenses, at the discretion of the court trying the case.

SECTION 5. Any person found to be in violation of Section one, two or three of this ordinance, where the offense is a misdemeanor listed in subsection (d) of Section 11-45-9 of the Code of Alabama, shall be punished by a fine of not more than \$1,000, except where otherwise provided by state law for the violation of municipal offenses, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding six months, at the discretion of the court trying the case. Any corporation found to be in violation of Sections one, two or three of the ordinance shall, where the offense is a misdemeanor listed in subsection (d) of Section 11-45-9 of the Code of Alabama, upon conviction, be punished by a fine of not more than \$1,000, except where otherwise provided by state law for the violation of municipal offenses, at the discretion of the court trying the case.

SECTION 6. Any person found to be in violation of this ordinance for the commission of an offense that would also constitute an offense as defined in Section 32-5A-191, Code of Alabama 1975, as amended, shall, upon conviction, be punished by a fine of not more than \$5,000, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding one year.

SECTION 7 Any person found to be in violation of Section one, two or three of this ordinance, where the offense is a Class A misdemeanor, including a domestic violence offense listed in subsection (f) of Section 11-45-9 of the Code of Alabama, shall be punished by a fine of not more than \$5,000, and/or may be imprisoned or sentenced to hard labor for the city [town] for a period not exceeding one year.

SECTION 8. Any ordinance heretofore adopted by the city [town] council of the city [town] of _____, Alabama, which is in conflict with this ordinance is hereby repealed to the extent of such conflict.

SECTION 9. If any part, section or subdivision of this ordinance shall be held unconstitutional or invalid for any reason, such holding shall not be construed to invalidate or impair the remainder of this ordinance, which shall continue in full force and effect notwithstanding such holding.

SECTION 9. This ordinance shall become effective on _____.

ADOPTED AND APPROVED THIS THE ___ DAY OF _____, 20__.

_____ Presiding Officer

ATTEST: _____ City Clerk

Punishment by Courts

When a case is brought before a judge for the violation of a municipal ordinance that adopts certain state offenses a municipal court cannot impose a penalty in excess of what is authorized by Section 11-45-9 of the Alabama Code, except in DUI offenses, even though the penalty for violating the same law tried as a state offense might be greater. Where a city ordinance calls for a fine higher than the limit set by Section 11-45-9, the ordinance is not void and the penalty may be imposed to the extent that it does not exceed the lawful limit. *See, Sconyers v. Coffee Springs*, 160 So. 552 (Ala. 1934).

The punishment, which is limited by the municipal ordinance, generally cannot exceed \$500, except for those offenses listed in (c) and (d) of Section 11-45-9, Code of Alabama, and six months at hard labor for the municipality, either or both,

at the discretion of the court. When a defendant is charged with the violation of an ordinance of the municipality, including an ordinance which adopts certain state offenses by reference, then all of the fines and costs, except as otherwise provided for by law, are kept in the municipal treasury. *State v. Springville*, 125 So.387 (Ala. 1929); AGO to Hon. Peyton Tutwiler, August 21, 1956.

It is extremely important for a municipal judge to see that the warrant and affidavit and the judgment entry reveal clearly that the defendant is charged with the violation of a described ordinance duly adopted by the governing body of the municipality and in force at the time the offense was committed and also that the punishment established is within the limits prescribed by Section 11-45-9. Care should also be taken to determine that the municipality has jurisdiction to prosecute a particular offense. We have briefly discussed instances where municipal courts would lack jurisdiction where a misdemeanor or ordinance violation is associated with a felony, but jurisdiction may come into play where the offense is created by ordinance alone. For instance, if a speed limit is set by state statute or by the Alabama Department of Transportation, a citation could be prosecuted as either a municipal offense (where state offenses are adopted by reference) or a state offense. But if the posted speed limit was set or altered by municipal ordinance, the case would have to be initially prosecuted as a municipal offense. AGO 2008-063.

In a criminal prosecution for violation of a city ordinance, the pertinent city ordinance is an essential element of the city's case and must be considered by and proven to the judge or jury. When the city does not introduce the ordinance into evidence and it is not considered by the judge or jury, the city has failed to make out its case against the defendant. In one case the defendant challenged his conviction for DUI in violation of a city ordinance that adopted the Alabama Code by reference. Although the city filed the ordinance with the circuit court, the record did not reflect that the city moved to admit the ordinance into evidence or that the circuit court admitted the ordinance into evidence (merely showing the ordinance to the court is insufficient). *Cole v. City of Bessemer*, 26 So.3d 488 (Ala.Crim.App.2009).

Double Jeopardy?

If a municipality adopts state misdemeanors and a defendant is tried in both municipal and state courts for the same act, is the constitutional protection against being twice placed in jeopardy for the same offense violated? Where the courts have concurrent jurisdiction the answer seems clear. In *Waller v. State of Florida*, 397 U.S. 387, re'h, den., 398 U. S. 914, (1970), the U.S. Supreme Court held that where a state charge was based on the same acts as an earlier municipal court conviction for the lesser included offenses, the second trial constituted double jeopardy in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. However, cases in Alabama indicate that where the municipal court lacked jurisdiction because the misdemeanor or ordinance violation was a lesser included offense within a felony or arose from the same incident as a felony charge, there can be no valid conviction in the municipal court and therefore jeopardy would not attach. The statute vesting the circuit court with exclusive original jurisdiction of felony prosecutions and misdemeanor or ordinance violations arising from same incident as a felony charge precluded municipal court consideration of charges that defendant had violated municipal ordinances by drinking in public and possessing drug apparatus. *Matthews v. Birmingham*, 581 So.2d 15 (Ala. Crim. App. 1991). It is essential to constitute jeopardy that the court in which the accused is put upon his trial shall have jurisdiction; if it is without jurisdiction, there can be no valid conviction, and hence there is no jeopardy. *Dutton v. State*, 807 So.2d 596 (Ala. Crim. App. 2001), *Benjamin F. Cox v. State*, 585 So.2d 182, 192 (Ala. Crim. App. 1991).

Enforcement of Laws

A municipal governing body that has adopted an ordinance making certain state offenses as offenses against the municipality has gone a long way toward meeting its responsibility to maintain the peace and quiet of the community. The final step is providing an adequate police force with sufficient equipment and training to enforce the ordinance.

Proper enforcement demands that police officers of the municipality become familiar with the laws governing the residents of the city or town. When a municipality adopts such laws by reference, police officers must be familiar with the Alabama Code sections which prescribe such offenses in addition to the provisions of special ordinances which establish other offenses within the municipality and its police jurisdiction. When an officer makes an arrest, the person arrested has a right to demand information as to what the arrest is for. It is the duty of the officer to give this information. When a defendant is brought before a judge, unless he or she demands a written affidavit and warrant setting out the charges, the defendant is deemed to have waived this right. *Chaney v. Birmingham*, 21 So.2d 263 (Ala. 1944). Conversely, if the defendant demands a written warrant based on the affidavit, he or she is entitled to it as a matter of right. While a written affidavit and warrant need not be letter perfect and technically correct in every respect unless demurred to in writing, it does have to meet all of the requirements necessary to confer jurisdiction on the court.