

The Alabama Municipal JOURNAL

February 2009

Volume 66, Number 8

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Rutledge's newest water towers built in 2006
By: Beth Rogers, Rutledge
1st Runner Up, 2009 Photo Contest

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Cover Photo: "Water Tower at Sunset"

1st Runner Up, 2009 Photo Contest

Photographer: Beth Rogers, Rutledge

The newest of Rutledge's water towers, erected in 2006, stands in the Rutledge skyline at sunset.

A Message from the Editor



As I reported last month, The National League of Cities (NLC) has been leading the charge on behalf of America's cities and towns to urge the federal

government to fund an economic recovery package accelerating municipal infrastructure investments through programs like federal highway and public transit programs, Amtrak, the Airport Improvement Program, the Community Development Block Grant Program, the Energy Efficiency and Conservation Block Grant Program and the state clean water and drinking water programs. At the time this publication was being prepared for print Congress was finalizing an \$850 billion stimulus package of which Alabama could receive as much as \$800 million. Congress has also indicated that most of this funding will likely require a 20-percent local match (see page 5 for details) and will need to begin within 90 days of approval. Please be vigilant and do not let deadlines or specific requirements – such as 20-percent local matches – catch you off guard when these federal funds are released. ***Be prepared to act immediately.***

The League has planned an important legislative workshop – Municipal Advocacy 101, Municipal Officials' Day at the Alabama Legislature – for Tuesday, February 24th at the Renaissance Hotel & Spa in downtown Montgomery. This seminar is part of the League's CMO Program and is especially important for newly elected officials. Topic include: How a Bill Becomes a Law; Alabama's Political Landscape and the Current Budget Crisis; the Alabama Legislature's Outlook (from key leadership); as well as the League's Legislative Goals. Luncheon speaker Bill Johnson, ADECA Director, will discuss the upcoming federal stimulus legislation I referenced above. The afternoon is reserved for legislative visits at the State House. **SPACE IS LIMITED!** If you've not yet signed up for this CMO session, do so immediately. Registration forms may be downloaded from the League's website at www.alalm.org. For more information, contact Theresa Lloyd, CMO Program Administrator, at 334-262-2566 or via email at theresal@alalm.org.

Mark your calendars! The League's Annual Convention will be held May 2-5 at the Renaissance Montgomery Hotel & Spa the Convention Center in downtown Montgomery. The Convention will begin on **Saturday, May 2** with registration opening at 10 a.m., Resolutions Committee at 11 a.m. and an afternoon general session from 2-5 p.m. The 2009 Annual Municipal Golf Tournament (you must register to participate) will be held Sunday morning at Lagoon Park Golf Course and our ever popular Round Table Discussions will be offered Sunday afternoon from 2:00 until 4:00 followed by the ABC-LEO reception and then a League reception in the Exhibit Hall. Monday's schedule offers a variety of concurrent sessions followed by the evening banquet. The Annual Business Session will be held Tuesday morning from 8:30 until 10:30 followed by a special general session: Ask Your Attorney Panel. The Convention will conclude Tuesday afternoon following the President's Luncheon.

Convention registration materials were mailed this month to all mayors, councilmembers and clerks. The deadline for convention pre-registration is **April 10, 2009**. After that date, you'll have to register on-site in Montgomery. Materials are also available on our website at www.alalm.org. Notifications for Distinguished Service Awards (20, 30 or 40 years in municipal office) *must* be received by League Headquarters *before* March 20, 2009. Awards will be presented during the President's Luncheon on May 5.

Congratulations to Graphic Designer **Beth Rogers** of Rutledge for her striking "Water Tower at Sunset" photo that appears on the cover of this issue of the *Journal*. Beth's entry was 1st runner up in the League's 2009 annual photo contest.

Closing thoughts. Where do you go when you want to quiet the chaos ... to empty your mind ... to exhale? For me, it's one of the well-loved, weather-worn Adirondack chairs in my backyard. This natural, haphazard niche is my sanctuary – comforting and peaceful, enveloped in trees, leaves, critters. It's an authentic yet mysterious setting that never fails to offer an unexpected gift if you allow yourself to just blend – delightfully ghoulish wolf spiders transporting gauzy egg sacs on their backs. Majestic dragonflies of every color and size possible. A reticent copperhead blending effortlessly with the discarded leaves. Migrating black birds squawking through the sky by the thousands. Banana spiders basking in splendid webs. Enormous owls. Green lizards and five-lined skinks. Earthworms butterflies and honey bees ... We all need a sanctuary, a place to calm the screeching monkeys running rampant through our minds. And once we find that place, we need to visit often – not just for our own health and well-being but for those who depend on us to make sound, thoughtful decisions. Sometimes the best we can be can only happen when we allow ourselves a reprieve in a place that doesn't expect us to *be* anything at all.

Carrie



Melvin Duran
Mayor of Priceville

Upcoming Stimulus Package Grants Will Likely Require 20 Percent Local Match

At this writing, Congress is finalizing a proposal to energize our nation's economy with another economic stimulus package totaling \$850 billion. One of the goals of this stimulus package is to put money back into local economies through the creation of jobs from public projects and will include federal funds for local governments to construct water, sewer and road infrastructure, brick and mortar projects, clean energy investment, construction of educational facilities and more.

In early December the League sent a Municipal Stimulus survey to every Alabama city and town asking each municipality to identify area infrastructure projects and projected costs. More than 350 surveys were returned identifying \$650 million in projects.

The League estimates Alabama's share of the federal stimulus package to be approximately \$800 million with the bulk of the funding filtered through ADECA in the form of CDBG grants and ALDOT for road construction projects. Thus far, discussions in Congress have indicated that most of this funding will require a 20 percent local match – allowing funds to be allocated to more projects and forcing local governments to prioritize those projects through a local buy-in of 20 percent.

Congress has also been adamant in its desire for

these funds to be put to *immediate* use. Therefore, local projects must to be prepared to start – “shovels in the ground” – within 90 days of receiving federal funding approval. This requirement makes it imperative that municipalities have their engineering reports, environmental permits, commitments to the 20 percent local funding match as well as any other associated requirement completed before they request funds.

This stimulus package is vital to the future of our communities and will have a tremendous, positive impact on our constituents. As local elected leaders, we must be ready to move forward immediately when the funding becomes available. Critical to that process will be securing the 20 percent local match.

I recommend your municipality consider AMFund, a League-endorsed program, for your local financing match. The Alabama Municipal Funding Corporation, referred to as AMFund, was created by the League to provide an alternative financing resource for municipal members. League members with sufficient constitutional debt authority and that meet applicable credit standards may borrow funds from AMFund on a long-term, tax-exempt basis. Financing is available for water, sewer and road infrastructure, schools,

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(256) 546-0201 Gadsden
(256) 350-4093 Decatur

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417 Cannon House Office Building

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~~\$14~~ Million Dollars



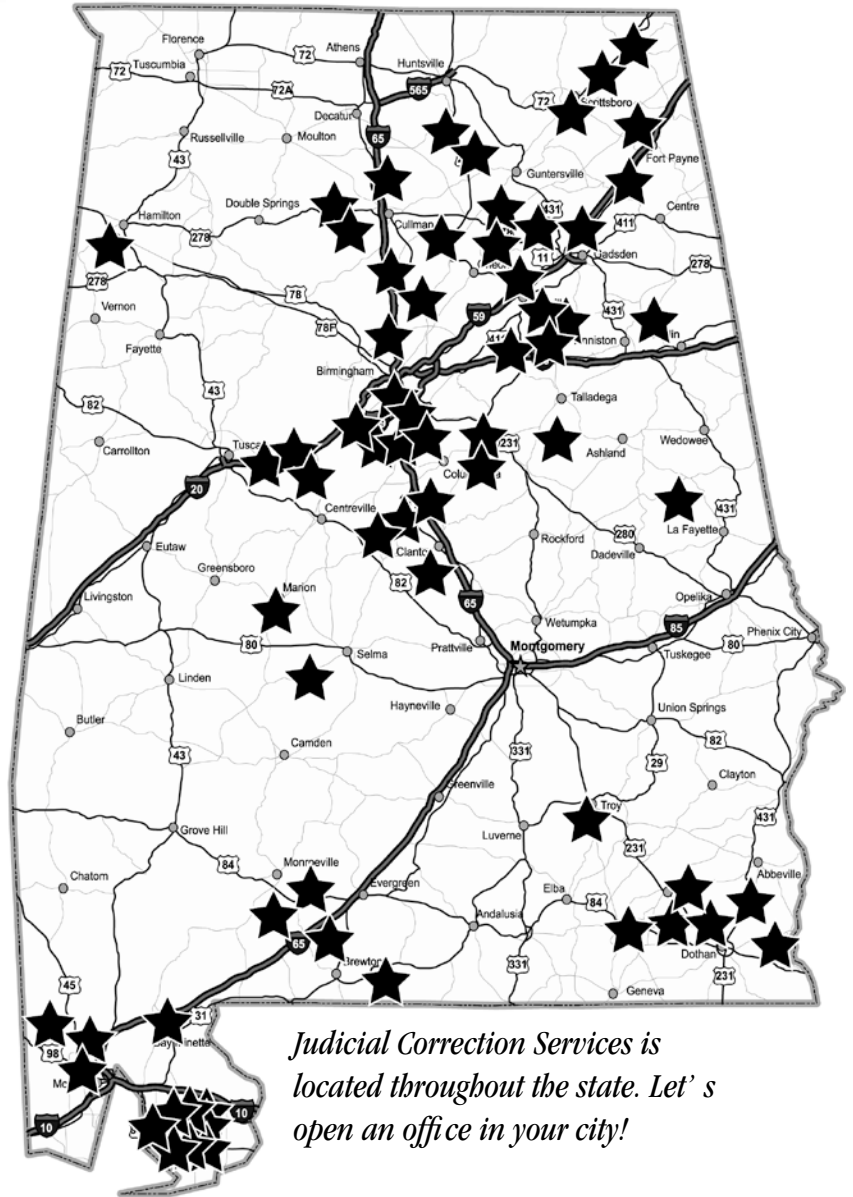
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The Legal Viewpoint

By Ken Smith
Deputy Directory/General Counsel



Municipal Ordinances

Section 11-45-1, Code of Alabama 1975, states: “Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances.”

General and Permanent Nature

Any discussion concerning the adoption of ordinances must begin with a discussion of ordinances of “permanent operation” and ordinances of a “local or special character.” This distinction is important with respect to the procedure of adoption of the ordinances, whether the ordinance is subject to a mayor’s veto (in cities having a population of 12,000 or more), and whether the ordinance requires publication in order to be effective.

An ordinance (or resolution) of permanent operation is one which will continue in force until repealed. *City of Pritchard v. Moulton*, 168 So. 2d. 602 (Ala. 1964); AGO to Hon. A.J. Cooper, Jr., October 25, 1974. An ordinance of a local or special character is one which, after its end is accomplished, is merely historical and evidentiary. For example, personnel policies are usually adopted as either a resolution or an ordinance of local or special character. It is not an ordinance of a general and permanent nature since it does not affect the general public. Further, ordinances that constitute municipal legislative acts are considered to be of a general and permanent nature, as distinguished from an enactment dealing with a particular piece of the administrative business of the municipality.

This distinction is important in determining the procedures that must be followed to enact ordinances. For instance, under the provisions of Section 11-45-2, Code of Alabama 1975, an ordinance (or resolution) of general and permanent operation may not be passed at the same meeting it is introduced unless unanimous consent of those present

is given for its immediate consideration and then only if, on final passage, the ordinance receives the affirmative votes necessary for passage.

Note that passage of a general and permanent ordinance or resolution at the first meeting it is introduced requires two votes – a roll call vote for immediate consideration that must be unanimous, followed by another vote on the ordinance itself. In cities of 12,000 or more, general and permanent measures must be approved by a majority of the members elected to the council, not merely a majority of a quorum or a majority of those voting. The measure is then sent to the mayor who may either veto the ordinance or approve it according to law. The mayor may generally only veto general and permanent measures, not administrative matters.

In cities and towns of less than 12,000, an affirmative vote of a majority of the whole number of members of the council to which the municipality is entitled, including the mayor, is required to enact any ordinance of permanent operation. This consent should be shown by a yea-and-nay vote and entered on the minutes of the municipality. *See Bush v. Greyhound Corporation*, 208 F. 2d 540 (5th Cir. 1953). General and permanent ordinances must then be published or posted according to law to become affective.

If the council fails to obtain unanimous consent from all members present at the meeting a permanent action is introduced, the council may vote on passage at any subsequent meeting, including a properly called special meeting. AGO 2004-053. At any subsequent meeting, it would not be necessary to obtain unanimous consent for consideration. Other voting requirements, though, still apply to final passage of the ordinance or resolution.

In determining whether an action of the council is permanent or not, it is important to remember that what the council calls the action does not matter. For example, a legislative action of the council is an ordinance of permanent operation even though a termination date is placed in the ordinance. AGO to Hon. Charles E. McConnell, February 6, 1957. The important factor is what does the action do? If it has an effect on the general public and is permanent, then it must be enacted following the procedures set out above.

Enactment of nonpermanent ordinances or resolutions or other administrative actions such as motions, generally require only approval of a majority of those voting assuming a quorum is present.

Following proper procedures for passage of a permanent action is mandatory. Failure to follow these procedures means that the ordinance is invalid and cannot be enforced. *Cooper v. Town of Valley Head*, 101 So. 874 (Ala. 1924).

In *Pierce v. Huntsville*, 64 So. 301 (Ala. 1913), the court held that ordinances adopting and accepting bids and fixing assessments for benefits are not of a general and permanent nature. In *Newberry v. City of Andalusia*, 57 So. 2d 629 (Ala. 1952), the court quoted McQuillin, with approval, to the effect that ordinances of a general and permanent nature are “those constituting municipal legislative acts.” In that case, the court held that a resolution, which authorized the issuance of bonds and was not published, was not an action of the city that required publication since it was not of a general or permanent nature.

The Attorney General has ruled that:

- a resolution authorizing the purchase of a specific tract of land by a city is not a resolution of general and permanent operation. AGO to Mrs. Rayvonne W. Thornton, April 21, 1977.
- business license and occupational tax ordinances are permanent in nature, despite containing an

expiration date. AGO 88-00214;

- a zoning ordinance is an ordinance of general and permanent operation. AGO to Hon. Harvel E. Martin, July 28, 1980;
- the municipal budget is not an ordinance of permanent operation. AGO 91-00180;
- a salary ordinance setting the salary of the mayor and council is of permanent operation. AGO to Hon. Norman K. Brown, January 29, 1968;
- an ordinance or resolution appropriating funds to the medical clinic board is not of general and permanent operation. AGO to Hon. Boyd Whigham, November 9, 1981.

Publication of Ordinances

Section 11-45-8, Code of Alabama 1975, requires the publication of all ordinances of a general or permanent nature. Ordinances in municipalities of less than 2,000 in population according to the 1950 census may be published by posting in three public places in the municipality, one of which shall be the post office or the mayor’s office. In municipalities of 2,000 and above in population, publication must be by newspaper if a newspaper is published in the municipality. If no newspaper is published in the municipality, then publication may be by posting in three public places, as described above, or by publication in a newspaper which

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has general circulation in the municipality. A newspaper is published where it is entered into the post office and where it is first put into circulation. AGO 1995-127.

Ordinances that are published in a newspaper are effective at the time of publication. Ordinances that are posted become effective after they have been posted for five days.

It is important to remember, that certain types of ordinances, such as zoning ordinances, have additional publication requirements that must be followed.

Types of Ordinances

Ordinances are normally classified under four general types: **(1) Police ordinances are enacted by virtue of the police power and prescribe penalties for specific commissions and omissions.** This class of ordinances will be treated generally in this article, although many of the comments referring to this type of ordinance are equally applicable to other types; **(2) Franchise or contract ordinances** grant franchises or special privileges; **(3) Public improvement ordinances** provide for public works; and **(4) Administrative ordinances** guide and regulate municipal officers and businesses.

General ordinances have an obligatory force on the entire community and upon the administration of the municipal government. Ordinances are special ordinances when they grant special privileges, provide for public works or improvements or authorize officials to do certain acts on behalf of the city.

Ordinances are further classified as penal or non-penal. A penal ordinance imposes a fine or imprisonment for violation. An example of a non-penal ordinance is one providing for the construction of public improvements.

Adoption by Reference

Section 11-45-8(c), Code of Alabama 1975, provides that certain types of codes which have been published in book or pamphlet form may be adopted by reference. Examples of the types of codes which may be adopted by reference are the standard code for elimination and repair of unsafe buildings, fire codes, standard building codes and plumbing, electrical and gas codes. The other types of codes which may be adopted in this manner are set forth in Section 11-45-8.

Municipalities may also adopt a general and permanent ordinance making the violation of any state misdemeanors a violation of the municipal ordinance.

Effect of Ordinances

A valid ordinance of a municipal corporation is as binding on the inhabitants as the general laws of the state upon the citizens at large. Members of the governing body, duly assembled for the purpose of their legislative functions, when acting within their authority, constitute a miniature

general assembly and the ordinances passed under such circumstances have the same binding force, within the sphere of their operation, as any other law. *City of Decatur v. Mohns*, 180 So. 297 (Ala. 1938).

Many municipal ordinances, especially those enacted pursuant to the police power discussed below, may also be made effective in the police jurisdiction of a municipality.

Police Power

Ordinances passed under the police power are those enacted to preserve and further public peace, order, health, morality and welfare within the municipality. In *City of Homewood v. Wofford Oil Co.*, 169 So. 288 (Ala. 1936), the court said:

“The police powers of a city are among its major governmental functions. Broadly speaking, they extend to all appropriate ordinances for the protection of the peace, safety, health, and good morals of the people affected thereby. The general ‘welfare’ is a generic term often employed in this connection.”

A large percentage of ordinances relate to these broad categories and cover a great variety of subjects. Police ordinances are enacted to preserve public peace, to safeguard public order and tranquility and to protect the public against offenses in violation of public morality and decency. Health measures regulate sanitation in its various aspects, including disposal of garbage and waste and protecting the purity of food and drugs. This power is also exercised when protecting the public from the civil effects of industry, commerce, trade and occupation. These ordinances may relate to zoning or control of air or stream pollution, noises, etc. Fire protection and prevention are a common exercise of the police power, as is the regulation of traffic on public streets. The list is virtually endless but the examples above demonstrate the wide range of ordinances of this nature.

Enforcement of Ordinances

Chapter 45 of Title 11, Code of Alabama 1975, also provides for the enforcement of ordinances and for maximum penalties for violation thereof. Specifically, Section 11-45-1 addresses the authority to enforce and Section 11-45-9 addresses penalties for violation of ordinances. Most general and permanent ordinances are enforced by the assessment of fines up to \$500 and/or jail time of up to six months. There is also a provision allowing for the adoption of an ordinance authorizing the issuance of a citation in lieu of arrest for certain types of violations. See Section 11-45-9.1

Requisites of Ordinances

The general requisites of a valid municipal ordinance, one legally binding on all upon whom it is designed to

operate, may be summarized as follows:

- the ordinance must be adopted by a legally existing municipal corporation and must emanate by virtue of power in the corporation and must relate to a subject within the scope of the corporation;

- it must be in harmony with the Constitution and laws of the United States, the laws of the state, the municipal charter and the general principles of the common law in force in the state;

- it must be reasonable in its terms and must be adopted by the authorized governing body, legally convened;

- it must be in legal form, precise, definite and certain;

- it must be passed in the manner prescribed, enacted in good faith, in the public interest alone and designed to enable the municipality to perform its true functions as the local government agency.

These elements must all be present to ensure the validity of an ordinance.

Constitutionality

Ordinances must not be inconsistent with or repugnant to the federal Constitution. The test of constitutionality is determined by the substance and not the form of the ordinance. It is also tested not only by what has been done but also by what may be done under the provisions of the

ordinance.

Ordinances should be substantially uniform in application to all citizens and afford equal protection to all alike. If rights are granted, the ordinances must provide for the enjoyment of those rights to all upon substantially the same terms and conditions; they cannot penalize one person and, for the same act done under similar circumstances impose no penalty on others. In other words, ordinances may not discriminate in favor of one person or class of persons over others. Ordinances must operate equally upon all persons, for their equal benefit and equal protection. Ordinances do not have to affect every man, woman and child exactly alike in order to avoid the constitutional prohibition of denying equal protection of the laws. Such a requirement would be impossible to obtain. The Equal Protection Clause does not forbid discrimination in ordinances with respect to things which are different.

Some constitutional issues will arise when an ordinance creates classifications. Classifications, made in municipal ordinances, must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the legislation. Classifications must be based on some substantial difference between the situation of a class and other individuals or classes to which it does not apply.



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Mr. Justice Sayre, in *Mobile v. Ore*, 61 So. 920 (Ala. 1913), stated:

“Classification, or discrimination between classes, is allowed if founded upon distinctions reasonable in principle and having just relation to the object sought to be accomplished.”

Courts have allowed great latitude in exercising the discretionary power of classification and, as long as the choice is rational, it is competent for the city to make a choice. Sometimes choices are necessary to protect the public. Under the police power, it is sometimes necessary to restrict certain business operations while leaving other types of businesses free of restrictions.

State Constitution and Laws

Section 89 of the Alabama Constitution states: “The Legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state.”

Thus, a municipality cannot license, establish or authorize a business which is forbidden by the general laws, nor can the legislature authorize it to do so. Although this section is not intended to limit the police power, **a city cannot make lawful that which state law has rendered unlawful.** Further, in many cases an ordinance may enlarge

upon the provisions of a statute by requiring more restrictions than the statute itself requires. This does not create a conflict unless the state statute preempts municipal regulation. *City of Birmingham v. West*, 183 So. 421 (Ala. 1938).

Conformity to Public Policy

Ordinances must conform with and not be inconsistent with the public policy of the state. Ordinances may not prohibit what public policy permits. Public policy is often expressed through enactments of the Legislature; and a municipality, by ordinance, may not prohibit or contravene that expression of public policy. See *Town of Livingston v. Scruggs*, 93 So. 224 (Ala. 1922).

“Public” in Nature

McQuillin states: “The primary object of municipal ordinances is public and not private, and their violation is redressed by the local penalties.”

Municipalities are strictly political institutions and all of their objectives are public. The public interest, which will be served by an ordinance, means the interest of all or part of the public to whom it is intended to apply. A municipality may not legally exercise or delegate its powers for the benefit of private individuals. Ordinances must be enacted in good faith and in the interest of the general public while

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still enabling a municipality to meet its obligations as the local governmental body.

Reasonableness

Authorities agree that a municipal ordinance must be reasonable to be constitutional. To attain reasonableness, an ordinance must be fair, general and impartial in operation, not in conflict with common rights and not unduly oppressive. An ordinance passed under authority of an express or specific legislative grant is regarded as entitled to all presumptions in favor of its validity. However, if the legislature does not prescribe the details of the grant of authority, care must be exercised in drafting an ordinance so as not to exceed the overall purpose of the authorization. Courts condemn ordinances even though the reasonableness of the statute is not subject to question if the ordinance passed is arbitrary, oppressive or partial. Such ordinances may be set aside under the theory that the Legislature never intended to confer the extent of the power exercised and that the manner of exercising the authority plainly abuses the general grant.

Certainty and Definiteness

An ordinance must be definite and certain. An average person should be able to read an ordinance, with due care and be able to understand and ascertain whether he or she will incur a penalty for a particular act, or acts or course of conduct. There is no hard and fast rule for determining whether any given ordinance is void because of

indefiniteness but the rule of reason is generally applied.

In *Conner v. City of Birmingham*, 60 So. 2d 474 (Ala. 1952), the court stated:

“A state (municipality) must so write its penal statute so as to be not so vague and indefinite as to permit the punishment of innocent acts and conduct which are a part of the right of every citizen to pursue, as well as acts evil in nature and effected with the public interest.”

In *City of Mobile v. Weinacker*, 720 So.2d 953 (Ala. Civ. App. 1998), the Court of Civil Appeals held that Mobile’s sign ordinance was unconstitutional because it was vague and ambiguous and provided review boards with unbridled discretion.

Under this rule, courts constantly affirm that ordinances should be certain in their application and operation and their execution not left to the caprice of those whose duty it is to enforce them. Courts will not correct, by construction, a vague and uncertain ordinance.

Vesting Discretion in Administrative Officials

Ordinances often vest in officials or employees of the municipality certain discretion in the enforcement of their provisions. Ordinances have been condemned which vest arbitrary discretion in public officials without prescribing a uniform course of conduct or standard of rules to guide officials. If no standards are imposed to control the officials, the ordinance is suspect. This is true in cases where the

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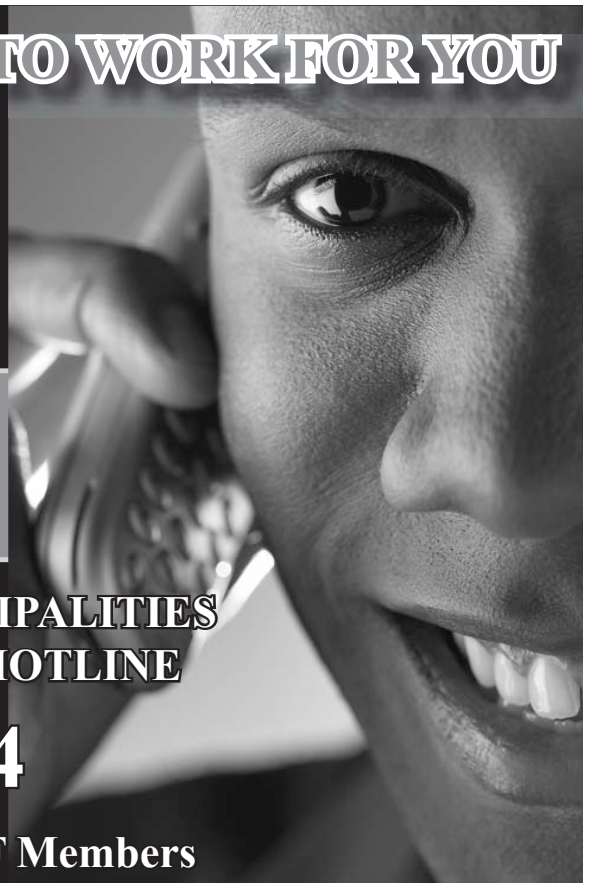
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ordinance refers to the rights of persons, rights of dominion over property or the business of individuals.

Ordinances may not make the absolute enjoyment of property dependent upon the arbitrary will of municipal authorities. Cases on this type of ordinance are largely decided according to the facts and, therefore, decisions may vary in application from court to court. But the courts agree that such ordinances should lay down tests and rules to guide the enforcing officials.

Some ordinances, out of necessity, place discretion in municipal officials, where it is difficult or impracticable to lay down comprehensive rules. Such ordinances may be upheld on administrative grounds if the ordinance is essential to protect public safety, health and welfare. The discretion placed in enforcement should relate to the ministerial, rather than the legislative, duties of the official.

Ordinances have been struck down even though fair on their face and impartial in appearance because of the method of enforcement. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the U.S. Supreme Court held that although a law appeared to be fair on its face, if it is administered by public authority with an evil eye and an unequal hand so as to make illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Amendment of Ordinances

Ordinances are sometimes rendered invalid because of improper attempts to amend them. Section 11-45-6, Code

of Alabama 1975, reads as follows:

“No ordinance shall be amended after its passage by providing that designated words be stricken out or that designated words be inserted, or that designated words be stricken out and other words inserted in lieu thereof, but the ordinance or section or subdivision thereof amended shall be set forth in full as amended.”

A similar rule is used by the legislature to amend existing laws. In other words, if an existing ordinance requires an amendment, the section or subdivision affected can be amended rather than amending the entire ordinance. The same procedures that apply to the initial passage of an ordinance also apply to the passage of any amendments.

Summary

All cities and towns have wide latitude and discretion in passing ordinances designed to protect the public welfare. Legally enacted ordinances are binding on the inhabitants of the community. Statutory requirements must be carefully observed to adopt or amend an ordinance.

An ordinance passed must be in the general public interest and must be reasonable, impartial and fair to all persons affected. The language employed should be precise and definite. The ordinance must not conflict with the federal or state constitutions or with the general laws or public policies of the state. ■



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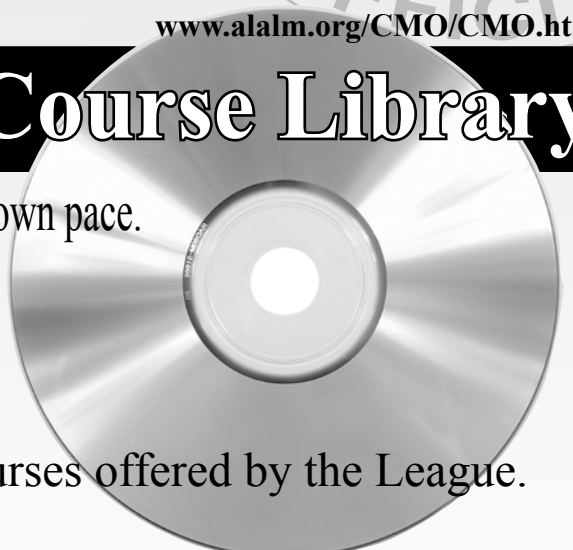
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OBITUARIES

James Abbott Peavy Sr.

James Abbott Peavy Sr., former Greenville city councilmember, passed away in November 2008. He was 92. Peavy served on the council from 1976 until 1984. He was then appointed to the Greenville Planning Commission in 1984 and served in that position until his death. Peavy was an electrical engineer and worked for W.T. Smith, Union Camp and International Paper, retiring after 47 years.

Eldon Milford "Mutt" Green

Eldon Milford "Mutt" Green, former Oak Grove councilmember, died at the age of 82 in December, 2008. Green was a member of Local 312 Union Operating Engineers and served on the Oak Grove town council. He also was a member of Coosa Valley Masonic Lodge 929 and coached Little League Baseball. Green was honorably discharged from the U.S. Army as a sergeant after serving in World War II in the European Theatre with the Third Infantry Division, 15th Regiment in Company E.

Eldred Pritchett

Eldred Pritchett, mayor pro-tem for the City of Atmore, died this past December. He was 81. Pritchett's passion was in education. He taught for more than 50 years in the public school system in Escambia County. He began his service on Atmore City Council in 1974 when he replaced another councilmember who was leaving. He was elected to fill that same position in 1976 and served until 1992. He was re-appointed in January of 2008 to fill a vacancy and was then re-elected to the position in the fall.

Victor Guarisco

Victor Guarisco, former mayor of Daphne has passed away. He was 87. Guarisco first served on the city council as a councilmember in 1952. He served as mayor from 1976 until 1992 and was the longest serving mayor for the city.

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LEGAL CLEARINGHOUSE

NOTE: Legal summaries are provided within this column; however, additional background and/or pertinent information will be added to some of the decisions, thus calling your attention to the summaries we think are particularly significant. We caution you *not* to rely solely on a summary, or any other legal information, found in this column. You should read each case in its entirety for a better understanding.

ALABAMA COURT DECISIONS

Courts: In making a determination as to the extent of discoverability of a company's e-mails the trial court was required to consider whether the e-mails were protected by the work-product rule and whether they were relevant to the action, and also consider the extent to which the e-mails ordered produced were accessible under the new federal guidelines regarding electronic discovery. *Ex parte Vulcan Materials Co.*, 992 So.2d 1252 (Ala.2008)

Elections: The trial court was not barred, in an election contest, from ordering a runoff to be held beyond the time required by law for a runoff election. The Alabama Supreme Court noted that it would render an election contest meaningless if the time limit for holding a runoff election set out in section 11-46-55(d), barred a runoff election following an election contest where no one candidate received a majority of the votes, since a contest could not be completed in such a short time frame. *Long v. Bryant*, 992 So.2d 673 (Ala.2008)

Sales and Use Taxes: The Local Tax Simplification Act superseded a local act and required the local Tax Board to offer an administrative-appeal procedure like that set forth in the Alabama Taxpayers' Bill of Rights. This allowed the taxpayer to pursue an administrative appeal before the time began to run under the local act for filing a notice of appeal in the circuit court. *Pittsburg & Midway Coal Min. Co. v. Tuscaloosa County*, 994 So.2d 250 (Ala.2008)

Tort Liability: Officers involved in a fatal shooting of a suspect were entitled to state agent immunity in a wrongful-death action. A state agent is immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, municipal law-enforcement officers' arresting or attempting to arrest persons, or serving as peace officers under circumstances entitling such officers to immunity pursuant to section 6-5-338(a), Code of Alabama 1975. *Ex parte Kennedy*, 992 So.2d 1276 (Ala.2008)

Zoning: 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)

UNITED STATES COURT DECISIONS AFFECTING ALABAMA

Sales Taxes: Alabama's sales and use tax on diesel fuel is generally applicable and does not target railroads within Alabama, and, thus, does not discriminate against railroads in violation of the Railroad Revitalization and Regulatory Reform Act, notwithstanding that Alabama exempts interstate water carriers as well as some motor carriers from the tax. *Norfolk Southern Ry. Co. v. Alabama Dept. of Revenue*, --- F.3d ---, 2008 WL 5173113 (11th Cir.2008).

DECISIONS FROM OTHER JURISDICTIONS

First Amendment: A city building code inspector's report regarding the fact that a certificate of occupancy for a home constructed by a local builder who was also the mayor had been signed and completed, although the inspector had not yet made the final inspection of the home or approved issuance of the certificate, was on a "matter of public concern" for purposes of his First Amendment retaliation claim. When the inspector went beyond complaining to his supervisors and instead threatened to report to the State Bureau of Investigation, an agency outside of his chain of command, his speech ceased to be merely pursuant to his official duties and became the speech of a concerned citizen. *Thomas v. City of Blanchard*, 548 F.3d 1317 (10th Cir.2008)

Tracy L. Roberts
Assistant General Counsel



First Amendment: A Nevada city violated a political petitioner's First Amendment rights when a police officer removed her, under threat of arrest, from a location on a public sidewalk where she was gathering signatures for a recall petition and registering voters in a festival area. There was no assertion that the volunteer's activities would cause, or did cause, any safety or traffic concerns at her desired location, and there was little chance that the public would have viewed the volunteer's activities as endorsed by the festival. *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892 (9th Cir.2008)

Tort Liability – Attorney Fees: A terminated employee who accepted an employer's offer of \$130,000 judgment in his action under the Sarbanes-Oxley Act's whistleblower protection provision was a "prevailing party" and thus eligible for an award of attorney fees and costs under Act's fee-shifting provision. *Grissom v. The Mills Corp.*, 549 F.3d 313 (4th Cir.2008)

ATTORNEY GENERAL'S OPINIONS

Capital Improvement Fund: Money from the Municipal Capital Improvement Fund may be used to repay a debt incurred for the purpose of renovating city hall. AGO 2009-025

Contracts: Post office projects are provided for in section 11-55-1, et seq., of the Code of Alabama. Municipalities are given broad authority to acquire property suitable for use by the federal government for a "post office" in the corporate limits. Under state law, a town may contract with the United States Postal Service to operate a contract postal unit. AGO 2009-021

Elections: The City of Tuscaloosa is a Class 4 municipality governed by sections 11-44B-1 et seq., Code of Alabama 1975. The general election laws were amended subsequent to the passage of 11-44B-1 et seq. It is only when two laws are so repugnant to or in conflict with each other, that it must be presumed that the Legislature intended that the latter should repeal the former. Therefore newly elected officials in the City of Tuscaloosa should assume the duties of their respective offices on the first Monday in November following their election in accordance with section 11-46-21 of the Code of Alabama. The City of Tuscaloosa must use provisional ballots in accordance with Chapter 10 of Title 17 of the Code of Alabama. AGO 2009-019

Elections: Section 17-5-7 of the Code of Alabama allows a public official to use excess campaign funds to cover the costs for traveling and attending the inaugural events for newly elected officials, including the President of the United States. AGO 2009-023

Gambling: Section 11-65-1, et seq., of the Code of Alabama, authorizes televised racing events in Alabama and pari-mutuel wagering thereon at racetracks, subject to certain restrictions. A computerized machine that replays actual historical races and requires a player to exercise a significant degree of skill in making a pari-mutuel wager on the outcome of the race is permissible in the City of Birmingham within Jefferson County if it has been approved by the Birmingham Racing Commission and if the use is otherwise legally permitted under Alabama's lottery and gambling laws. AGO 2009-020

Gambling: The Calhoun County Bingo Act does not authorize electronic bingo in Calhoun County. AGO 2009-026

Licenses and Business Regulations: A rental store that rents inflatable devices for children is not subject to the license tax under section 40-12-103 of the Code of Alabama. Only the operator collecting fares is subject to this tax. AGO 2009-027

Public Works Bid Law: A contract that exceeds \$50,000 for the construction of a water line to a public school is subject to the bidding requirements of the Public Works Law. AGO 2009-022

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No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.
Contact: T. Bruce McGowin, Esq., RSA Tower, Suite 30200, 11 North Water Street, Mobile, AL 36602.

Company Profiles

RDS- Revenue Discovery Systems

2317 Third Avenue North, Suite 200
Birmingham, Alabama 35203
Phone: 205-324-0088 • FAX: 205-423-4099
Website: www.revds.com

Contact: Yolanda Thomas, 334.272.9995

Email: ywatkins@revds.com

Pete Yonce, 205.423.4110

Email: pyonce@revds.com

RDS is a government services company that provides administrative, management and back-office revenue enhancement support services to state and local governments in the areas of tax administration, revenue discovery/recovery, compliance audit examination and delinquent receivables collection.

RDS is an endorsed service provider of the Alabama League of Municipalities.

Thompson Tractor

PO Box 10367
Birmingham, Alabama 35202-0367
Phone: 205-849-4573
FAX: 205-849-4341 or 205-244-7846
E-mail: mattserotsky@thompsontractor.com
Website: www.thompsontractor.cat.com

Contact: Matt Serotsky

Thompson Tractor Co., Inc. is the full-service Caterpillar dealer for Alabama and northwest Florida. Thompson Tractor Company is headquartered in Birmingham, and also operates from locations in Attalla, Decatur, Dothan, Mobile, Montgomery, Opelika, Oxford, Thomasville, Tuscaloosa, Tuscumbia and Shelby County in Alabama, and in Crestview, Marianna, Panama City and Pensacola in Florida. Since being founded in 1957, Thompson has built a solid reputation for providing industry leading parts and service support for the equipment it sells.

Set your *New Year's* Resolution:
Begin more "Green" habits in 2009

Remarkable Recycling Facts Around The House

- One year's worth of America's holiday cards would fill a football field ten stories high.
- Ten percent of the average grocery bill pays for packaging. That accounts for more than the farmer receives.
- Americans spend more money on the purchase of garage bags than the combined GDP of 90 of the world's developing countries.
- Americans use some 14 billion plastic shopping bags, an average of 425 bags per person.
- Forty-three percent of landfill or incinerated municipal discards, by weight, is packaging and containers, or disposable products such as paper and plastic plates and cups, diapers, junk mail, trash bags, and tissue paper and towels.
- A faucet that drips once each second can waste over 8 gallons of water per day and over 3150 gallons per year.
- Daily indoor per capita water use in the typical single-family home with no water-conserving fixtures is 74 gallons.
- If all US households installed water-saving features, water use could decrease by 30 percent, saving an estimated 5.4 billion gallons per day. This would result in a dollar-volume savings of \$11.3 million per day or more than \$4 billion per year.
- The average household uses over 22,000 gallons of water per year just for showers and baths.
- Americans receive almost 4 million tons of junk mail every year. Most of it winds up in landfills.

Sources: www.ecocycle.org, www.cleanair.org

Local Financing Match continued from page 5

police and fire equipment, and most other municipal brick and mortar and capital improvement projects. In some cases, AMFund may be able to refinance existing tax-exempt general obligation debts. Borrowings from AMFund are evidenced by general obligation warrants pledging the full faith and credit of the municipality.

For initial consideration of loan requests, AMFund requires the completion of a simple four-page application; copies of the previous three years' financial audits; your current budget; and a certificate stating the most recently-available total assessed value of all taxable property located in your city or town (which can be obtained from your county tax assessor).

To secure funds to lend to cities and towns, AMFund uses a Letter of Credit provider, U.S. Bank. Presently, the Letter of Credit effectively provides AA1 credit enhancement for AMFund's borrowings, the benefit of which AMFund can pass on in the form of optimum market interest rates to its municipal borrowers.

Once credit is approved, the city or town council is required to adopt appropriate ordinances and closing authorization documents. Generally, because AMFund

borrow money to make loans to various cities and towns in aggregated amounts (or "tranches"), the time between approval and closing of any particular loan will depend to a degree on the respective approval and council meeting schedules of all the municipalities making borrowings reflected in the tranche. Loans may be financed up to 30 years, depending on the economic life of the financed project; additionally, various principal repayment schedules can be accommodated.

Endorsed by the Alabama League of Municipalities, AMFund's board of directors is comprised of municipal officials. While AMFund is one of several options available to local governments for financing capital projects, it may be a valuable resource to your community as you secure the necessary funding matches for the upcoming federal stimulus grants.

For more information on this unique program, visit www.amfund.com or contact AMFund President Greg Cochran at 334-386-8130 or via email at gregc@amfund.com. ■



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AAMCA Names New Officers



From left: Gina Antolini, Treasurer (Columbiana); Lynette Ogden, President-Elect (Millport); Karen Duncan, President (Pleasant Grove); Lois Williams, Secretary (Selma).

Municipal Advocacy 101

Municipal Officials' Day at the
Alabama Legislature

February 24, 2009

**Renaissance Montgomery
Hotel and Spa at the
Convention Center**

Space is Limited Register Now!



Administered by the Alabama League of Municipalities, AMFund is designed to provide ALM members with low-cost financing to fund almost any municipal project.

To learn how AMFund can help your community meet its infrastructure needs, contact:

Greg Cochran

AMFund President

**at 334-386-8130 or via
email at gregc@amfund.com
www.amfund.com**



Investing in Infrastructure

Municipal Revenue Service

The League's Municipal Revenue Service for collection of delinquent insurance license taxes has more than 50 years experience of responsible and aggressive collection of lost revenue, currently for over 300 communities in Alabama.

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