Municipal Ordinances

Alabama's municipalities have broad authority under Alabama law to pass ordinances regulating people and businesses so long as they do not conflict with state law. Section 11-45-1, Code of Alabama 1975, states: "Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances." Mere differences in detail between a state statute and a municipal ordinance do not create a conflict with state law, and no conflict with state law exists merely because the state law is silent where an ordinance speaks. *Alabama Recycling Ass'n, Inc. v. City of Montgomery*, 24 So.3d 1085 (Ala. 2009).

General and Permanent Nature

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

An ordinance (or resolution) of permanent operation is one which will continue in force until repealed. *Michael v. State*, 438, 50 So. 929, 933 (1909); *City of Pritchard v. Moulton*, 168 So. 2d. 602 (Ala**.** 1964); AGO to Hon. A.J. Cooper, Jr., October 25, 1974. An ordinance of a local or special character is one which, after its end is accomplished, is merely historical and evidentiary. *Pierce v. City of Huntsville*, 64 So. 301, 304 (1913). For example, personnel policies are usually adopted as either a resolution or an ordinance of local or special character. It is not an ordinance of a general and permanent nature since it does not affect the general public. Further, ordinances that constitute municipal legislative acts are considered to be of a general and permanent nature, as distinguished from an enactment dealing with a particular piece of the administrative business of the municipality. *Pierce v. City of Huntsville*, 185 Ala. 490, 490, 61 So. 391 (1913); Quarterly Reports of the Attorney General, Vol. 110, p. 44.

This distinction is important in determining the procedures that must be followed to enact ordinances. For instance, under the provisions of Section 11-45-2, Code of Alabama 1975, an ordinance (or resolution) of general and permanent operation may not be passed at the same meeting it is introduced unless unanimous consent of those present is given for its immediate consideration and then only if, on final passage, the ordinance receives the affirmative votes necessary for passage. See AGO 2008-022.

Note that passage of a general and permanent ordinance or resolution at the first meeting it is introduced requires two votes – a roll call vote for immediate consideration that must be unanimous, followed by another vote on the ordinance itself. In cities of 12,000 or more, general and permanent measures must be approved by a majority of the members elected to the council, not merely a majority of a quorum or a majority of those voting. Section 11-45-2, Code of Alabama 1975. The measure is then sent to the mayor who may either veto the ordinance or approve it according to law. Section 11-45-3, Code of Alabama 1975. The mayor may generally only veto general and permanent measures, not administrative matters.

In cities and towns of less than 12,000, an affirmative vote of a majority of the whole number of members of the council to which the municipality is entitled, including the mayor, is required to enact any ordinance of permanent operation. This consent should be shown by a yea-and-nay vote and entered on the minutes of the municipality. Section 11-45-2, Code of Alabama 1975; *See Bush v. Greyhound Corporation,* 208 F. 2d 540 (5th Cir. 1953). General and permanent ordinances must then be published or posted according to law to become effective. Section 11-45-3, Code of Alabama 1975.

If the council fails to obtain unanimous consent from all members present at the meeting a permanent action is introduced,

the council may vote on passage at any subsequent meeting, including a properly called special meeting. AGO 2004-053. At any subsequent meeting, it would not be necessary to obtain unanimous consent for consideration. Other voting requirements, though, still apply to final passage of the ordinance or resolution. It is mandatory that a governing body follow the procedures for the passage of a mandatory action. *Cooper v. Town of Valley Head*, 101 So. 874 (1924).

In determining whether an action of the council is permanent or not, it is important to remember that what the council calls the action does not matter. For example, a legislative action of the council is an ordinance of permanent operation even though a termination date is placed in the ordinance. AGO to Hon. Charles E. McConnell, February 6, 1957. The important factor is what does the action do? If it has an effect on the general public and is permanent, then it must be enacted following the procedures set out above. Enactment of nonpermanent ordinances or resolutions or other administrative actions such as motions, generally require only approval of a majority of those voting, assuming a quorum is present. AGO 81-00072.

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

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

The Attorney General has ruled that:

- a salary ordinance setting the salary of the mayor and council is of permanent operation. AGO to Hon. Norman K. Brown, January 29, 1968;
- a resolution authorizing the purchase of a specific tract of land by a city is not a resolution of general and permanent operation. AGO to Mrs. Rayvonne W. Thornton, April 21, 1977;
- the election of an individual to fill a vacancy on the council is not done by enacting an ordinance or resolution of a permanent nature. AGO to Atty. Al Tidwell, March 6, 1978;
- the establishment of sewer charges by a municipal council must be an ordinance. AGO to Hon. George W. Roy, July, 12 1978.
- a zoning ordinance is an ordinance of general and permanent operation. AGO 80-00477;
- the method of approval of retail liquor licenses may be established by the City Council. In the absence of an established procedure, adoption of an ordinance of permanent duration a retail liquor license may be approved by a majority of the quorum present. AGO No. 81-00436;
- a resolution appointing or electing person to city office are not "of permanent operation", but mayor may veto salary portion of resolution. AGO 82-00059;
- an ordinance or resolution appropriating funds to the medical clinic board is not of general and permanent operation. AGO 82-00070;
- business license and occupational tax ordinances are permanent in nature, despite containing an expiration date. AGO 88-00214;
- an ordinance establishing a retirement plan for the employees of a town is one of permanent operation. AGO 89-00214;
- an example of an ordinance or resolution not of permanent operation is one accepting bids and fixing assessments for the paving of streets AGO 91-00072;
- an ordinance providing for the creation of city offices such as treasurer, tax collector, or clerk, is an example of an ordinance of a permanent nature." AGO 91-00072;
- the municipal budget is not an ordinance of permanent operation. AGO 91-00180;
- A resolution authorizing the issuance of subpoenas is not a resolution of permanent operation. AGO 99-00076;
- Ordinances adopted pursuant to sections 11-47-20 or 11-47-21, which authorize the disposal or leasing of real property, should be considered ordinances "intended to be of a permanent nature." AGO 2011-069;

Publication of Ordinances

Section 11-45-8, Code of Alabama 1975, requires the publication of all ordinances of a general or permanent nature. Ordinances in municipalities of less than 2,000 in population according to the 1950 census may be published by posting in three public places in the municipality, one of which shall be the post office or the mayor's office. See AGO 2011-005. In municipalities of 2,000 and above in population, publication must be by newspaper if a newspaper is published in the municipality. If no newspaper is published in the municipality, then publication may be by posting in three public places, as described above, or by publication in a newspaper which has general circulation in the municipality. Section 11-45-8, Code of Alabama 1975. A newspaper is published where it is entered into the post office and where it is first put into circulation. AGO 1995-127.

Ordinances that are published in a newspaper are effective at the time of publication. Ordinances that are posted become effective after they have been posted for five days. When an ordinance is published by posting, the municipality shall take reasonable steps to maintain the posting for not less than 30 days. In addition, if the municipality maintains an Internet website, the municipality, at a minimum, shall include a copy of the ordinance or notice of the substance of an ordinance on its website for 30 days. Section 11-45-8(b)(3), Code of Alabama 1975

All ordinances of a general and permanent nature relating to planning or zoning or the licensing or franchising of businesses may be published in a synopsis form in some newspaper of general circulation published in the municipality provided that the synopsis, at a minimum, includes the following information:

a. A summary of the purpose and effect of the ordinance.

b. If the ordinance relates to planning or zoning, a general description of the property or properties affected by the ordinance including the common name by which the property or properties are known and the substance of the ordinance.

c. If the ordinance relates to the licensing of businesses or the granting of a franchise, the categories of businesses affected by the ordinance and the substance of the ordinance.

d. The date upon which the ordinance was passed and, if different from the date of publication, the effective date of the ordinance.

e. A statement that a copy of the full ordinance may be obtained from the office of the city or town clerk during normal business hours. Section 11-45-8 (b)(2), Code of Alabama 1975.

Types of Ordinances

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

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

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

Adoption by Reference

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

Municipalities may also adopt a general and permanent ordinance making the violation of any state misdemeanors a violation of the municipal ordinance. A special article on adopting state offenses by reference can be found elsewhere in this publication.

Effect of Ordinances

A valid ordinance of a municipal corporation is as binding on the inhabitants as the general laws of the state upon the citizens at large. Members of the governing body, duly assembled for the purpose of their legislative functions, when acting within their authority, constitute a miniature general assembly and the ordinances passed under such circumstances have the same binding force, within the sphere of their operation, as any other law. *City of Decatur v. Mohns*, 180 So. 297 (Ala. 1938).

Many municipal ordinances, especially those enacted pursuant to the police power discussed below, may also be made effective in the police jurisdiction of a municipality. For more on this, see the article on the municipal police jurisdiction elsewhere in this publication.

Police Power

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

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

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

Enforcement of Ordinances

To enforce obedience to most ordinances, a municipality has the authority to provide penalties by fine not exceeding $500 and by imprisonment or hard labor not exceeding six months, one or both. However, there are several exceptions to this authority provided by state law. Section 11-45-9, Code of Alabama 1975.

Section 11-45-9(d)-(f) Code of Alabama, 1975 states:

In the enforcement of the penalties prescribed in Section 32-5A-191, the fine shall not exceed five thousand dollars ($5,000) and the sentence of imprisonment or hard labor shall not exceed one year.

Notwithstanding any other provision of law, the maximum fine for every person either convicted for violating any of the following misdemeanor offenses adopted as a municipal ordinance violation or adjudicated as a youthful offender shall be one thousand dollars ($1,000):

1. Criminal mischief in the second degree, Section 13A-7-22.
2. Criminal mischief in the third degree, Section 13A-7-23.
3. Theft of property in the third degree, Section 13A-8-5.
4. Theft of lost property in the third degree, Section 13A-8-9.
5. Theft of services in the third degree, Section 13A-8-10.3.
6. Receiving stolen property in the third degree, Section 13A-8-19.
7. Tampering with availability of gas, electricity, or water, Section 13A-8-23.

8. Possession of traffic sign; notification; destruction, defacement, etc., of traffic sign or traffic control device; defacement of public building or property, Section 13A-8-71 and Section 13A-8-72.
9. Offenses against intellectual property, Section 13A-8-102.
10. Theft by fraudulent leasing or rental, Section 13A-8-140 through Section 13A-8-144.
11. Charitable fraud in the third degree, Section 13A-9-75.
12. Illegal possession of food stamps in the third degree, Section 13A-9-91.

The penalty imposed upon a corporation shall consist of the fine only, plus costs of court.

In the enforcement of a Class A misdemeanor, including a domestic violence offense, the fine may not exceed five thousand dollars ($5,000) and the sentence of imprisonment may not exceed one year.

Requisites of Ordinances

The general requisites of a valid municipal ordinance, one legally binding on all upon whom it is designed to operate, may be summarized as follows:

- the ordinance must be adopted by a legally existing municipal corporation and must emanate by virtue of power in the corporation and must relate to a subject within the scope of the corporation;
- it must be in harmony with the Constitution and laws of the United States, the laws of the state, the municipal charter and the general principles of the common law in force in the state;
- it must be reasonable in its terms and must be adopted by the authorized governing body, legally convened;
- it must be in legal form, precise, definite and certain;
- it must be passed in the manner prescribed, enacted in good faith, in the public interest alone and designed to enable the municipality to perform its true functions as the local government agency.

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

Constitutionality

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

Some constitutional issues will arise when an ordinance creates classifications**.** Classifications, made in municipal ordinances, must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the legislation. *Jefferson Cty. v. Richards*, 805 So. 2d 690, 701 (Ala. 2001). Classifications must be based on some substantial difference between the situation of a class and other individuals or classes to which it does not apply.

Mr. Justice Sayre, in *Bd. of Comm'rs of City of Mobile v. Orr*, 61 So. 920, 922 (1913), stated:

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

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

State Constitution and Laws

Section 89 of the Alabama Constitution, 1901 states: "The Legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state."

Thus, a municipality cannot license, establish or authorize a business which is forbidden by the general laws, nor can the

legislature authorize it to do so. Although this section is not intended to limit the police power, **a city cannot make lawful that which state law has rendered unlawful.** *Ex parte Rowe*, 59 So. 69, 71 (Ala. Ct. App. 1912). Further, in many cases an ordinance may enlarge upon the provisions of a statute by requiring more restrictions than the statute itself requires. This does not create a conflict unless the state statute preempts municipal regulation. *City of Birmingham v. West*, 183 So. 421 (Ala. 1938).

Conformity to Public Policy

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

"Public" in Nature

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

Municipalities are strictly political institutions and all of their objectives are public. The public interest, which will be served by an ordinance, means the interest of all or part of the public to whom it is intended to apply. A municipality may not legally exercise or delegate its powers for the benefit of private individuals. Ordinances must be enacted in good faith and in the interest of the general public while still enabling a municipality to meet its obligations as the local governmental body. 5 McQuillin Mun. Corp. § 15:15 (3d ed. 2016)

Reasonableness

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

Certainty and Definiteness

An ordinance must be definite and certain. *Rochelle v. Lide*, 180 So. 257, 258 (1938). An average person should be able to read an ordinance, with due care and be able to understand and ascertain whether he or she will incur a penalty for a particular act, or acts or course of conduct. There is no hard and fast rule for determining whether any given ordinance is void because of indefiniteness but the rule of reason is generally applied. The article "Tips for Drafting Ordinances" in this publication provides practical guidelines for drafting ordinances.

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

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

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

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

Vesting Discretion in Administrative Officials

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

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

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

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

Amendment of Ordinances

Ordinances are sometimes rendered invalid because of improper attempts to amend them. Section 11-45-6, Code of Alabama 1975, reads as follows:

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

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

Summary

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

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

Revised 2020