Due Process Issues in Licensing & Permitting

The Fourteenth Amendment to the United States Constitution guarantees that no person shall be "deprived of life, liberty or property without due process of law." This amendment applies to state and local governments.

The Due Process Clause accords both procedural and substantive protection from invalid government action. Substantive due process prevents governments from imposing arbitrary restrictions or taking arbitrary actions. In order to defeat a substantive due process claim, governmental actions must be reasonable, not arbitrary or capricious, and must bear a real and substantial relation to a legitimate governmental purpose. Of course, due process requirements do not preclude or interfere with the proper exercise of police power.

The procedural component of due process generally relates to the process by which a government deprives someone of life, liberty or property. Procedural due process challenges generally target whether a person was given adequate notice and a meaningful hearing opportunity. However, if an ordinance or resolution provides the means of giving notice or holding a hearing, the ordinance itself may be challenged on procedural due process grounds. In order to defeat a procedural due process claim, notice must be sufficient to apprise interested parties of the pendency of the action and afford them a swift and fair means to present their objections or views. The hearing does not have to be a formal adversarial process but only a fair opportunity for interested parties to be heard.

Why Permit or License?

Licenses and permits act as official government permission to do what would otherwise be unlawful. Essentially, the license or permit is recognition that the laws relating to an activity have been followed. Permits and licenses provide the government with an opportunity to regulate certain activities for the protection of the public's health, safety and welfare. Thus, ordinances that impose a license or permit requirement are frequently based on the government's police power.

Licenses may also be imposed in order to raise revenue. For this reason, licenses are often confused with taxes, which are generally designed solely for the financial support of the government to provide for all public needs. In fact, a license may be construed as a tax when the sole reason for the license is to raise revenue. The regulatory aspects of a license, though, make it different, strictly speaking, from that of a tax. This distinction can often be important when arguing that a permit or license should be upheld by a court. Courts generally allow a wider discretion regarding the amount of the license when it is imposed for revenue purposes instead of police power purposes. Conversely, to justify a police power prohibition, it must be rationally related to a legitimate governmental purpose.

The Ordinance

Due process guarantees that all ordinances must be clear and apprise all who fall within the parameters of the ordinance of what they must do to comply. This restriction applies to license ordinances as well. As with other ordinances, license and permit ordinances are presumed valid, and are construed as are other legislative actions.

Like other tax laws, however, ordinances and resolutions imposing licenses for revenue purposes are construed liberally in favor of citizens and strictly against the government. Thus, if the terms of the ordinance are not clear, or if it is reasonably open to different interpretations due to the indefiniteness of the provisions, all doubts will be resolved in favor of the taxpayer.

According to *McQuillin, Municipal Corporations*, (3d Ed., Rev.), § 26.04, all license and permit regulations should:

> "[S]pecify officials or bodies to issue licenses (under the ordinance), the length of time the licenses will run, the amount of the license fee or tax, and the time and manner of payment ... Ordinances may and usually do prescribe prerequisites and conditions for the obtaining of a license, and conditions upon which it continues in force. Definite rules and terms, or 'fixed standards,' for the guidance and protection of applicants and of municipal officials should

be prescribed in the law, since an ordinance allowing uncontrolled discretion to licensing officials is void."

The ordinance may also impose reasonable conditions, including conditions relating to the character and fitness of applicants, on the granting or holding of a license or permit issued under the police power. These requirements should be spelled out in the ordinance itself to avoid confusion. Again, the ordinance will generally be upheld if the conditions imposed rationally relate to a legitimate governmental interest. To be constitutional, however, license and permit ordinances must be enacted pursuant to legislative authority, be definite and certain, reasonable, uniform in operation and not arbitrary or oppressively discriminatory. It's important to note, however, that courts will not substitute their judgment for that of the government officials regarding the method used to achieve a governmental objective.

Amount of the License or Permit

To comply with due process requirements, a license fee must be definite in amount or dependent on an established, definite and legal measure. Other than imposing a flat rate, two of the most common methods of determining the amount of a license fee include the gross receipts of a business or inventory the business has on hand.

As noted above, there is a general distinction between taxation and licenses or permits imposed for police power purposes. A license may be a tax, if it is imposed solely for revenue purposes. A license fee is not invalid simply because it exceeds the expense of issuing the license. *Birmingham v. Hood-McPherson Realty Co.*, 172 So. 114 (Ala. 1937).

On the other hand, the fee charged for a regulatory – or police power – license or permit should be related to the cost of regulating the business in question. While license fees may be imposed to raise revenue, most permit fees must be related to the cost to regulate, inspect and permit the activity. When a license fee is levied for revenue alone, the ordinance will be upheld only if based on the power to tax. Additionally, a license fee imposed for regulatory purposes becomes a tax when it is out of proportion to the reasonable cost of regulating the business in question.

Courts usually rule that there must only be a fair, approximate and reasonable comparison between the fee exacted and the cost of regulating the business. Due process does not require exact accuracy in the computation. *Hawkins v. Prichard*, 30 So.2d 659 (1947) overruled on other grounds by *State Dept. of Revenue v. Reynolds Metals,* 541 So.2d 524 (Ala. 1988). As such, municipalities should take into account all expenses of regulating and inspecting a business in arriving at an amount to charge as a license fee.

The authority to levy a license fee does not permit the prohibition of a legitimate business. *Ex parte Burnett*, 30 Ala. 461 (1857). In some cases, however, even the outright prohibition of a business has been upheld. For instance, in *Bridewell v. Bessemer*, 46 So.2d 568 (1950), the Alabama Court of Appeals held that, "fortune telling is denominated as a useless calling, and subject to police regulation. This being so, the City of Bessemer had the right to so combine its police power and taxing power as to levy a license tax which would discourage, and to all practical purposes prohibit, persons from engaging in the hocus pocus of fortune telling." *Bridewell*, 46 So.2d at 570. Additionally, the amount of the fee generally will only be disturbed in the case of a manifest abuse of power. *American Bakeries Co. v. Huntsville*, 168 So. 880 (Ala. 1936).

Some jurisdictions have ruled that where a taxpayer is subject to a license tax from two jurisdictions on the same transaction, due process requires the taxing entities to apportion its tax. *See*, *e.g. Short Brothers (USA), Inc. v. Arlington County*, 244 Va. 520, 423 S.E.2d 172 (Va. 1992). However, in *Tuscaloosa v. Tuscaloosa Vending Co.*, 545 So.2d 13 (1989), the Alabama Supreme Court upheld the right of an Alabama municipality to levy a gross receipts license on the entire receipts of a business located within its corporate limits, despite the fact that some of receipts came from transactions conducted outside the municipal limits.

Classifications

License ordinances may classify persons or businesses and treat them differently for licensing purposes, but the regulations and fees applicable to a given class of licensees must be uniform as to any person or occupation that falls within that class. The licensing scheme cannot discriminate, although reasonable distinctions are allowed. Improper classifications in an ordinance may violate both due process and equal protection. Municipalities are required to apply the 2002 North American Industrial Classification System ("NAICS") sectors to define businesses in their municipality – **Each municipality still sets its own rates**. (NOTE: Rates that are restricted under the Code of Alabama for certain businesses are still restricted.). Section 11-51-90.2, Code of Alabama 1975.

The Application Process—Issuance and Denial

As with all other steps in the licensing or permitting process, the application must be reasonable and nondiscriminatory. Section 11-51-90, Code of Alabama 1975, specifies what information must be contained in an application for a municipal business license. Municipalities must accept an application that complies with that section from another taxing jurisdiction

even if the municipality has additional application information that it seeks. Additional items requested on the application must be related to the needs of the governing body in determining who is obtaining the license, what the purpose for the license is and for regulating the business as needed.

In order to be entitled to a license, a person must comply with all legitimate conditions imposed by the licensing jurisdiction. In the absence of a requirement for a hearing prior to issuing a license, the individual responsible for issuing the license should do so upon a showing that all other requirements are met. The ordinance may provide for notice and a hearing to interested third parties prior to issuing the license.

Unless prohibited by state law, where legitimate public protection interests exist, a local government may require applicants for a license or permit to pass an examination. The examination, like the application, must be reasonable and nondiscriminatory as well as related to the occupation for which the license is sought. Examinations may be waived for legitimate reasons, such as for applicants that are licensed in other jurisdictions which require an examination or who have a number of years' experience in the particular occupation.

Local governments may require compliance with other laws, such as franchising or permitting regulations, as conditions to receiving a license. They can, under proper circumstances, place restrictions on the location of a business, such as making sure the business is in the proper zone, or, under certain circumstances, that a business that sells liquor is not within a specified distance of a school or church. An applicant who does not conform to these requirements is not entitled to receive a license.

Where a hearing is required, it is usually conducted before the local governing body. If the licensing ordinance spells out a specific means of providing due process, these steps must be followed. Like all due process hearings, one held to determine whether a license or permit should be given must be fair and impartial and the person must receive adequate notice and an opportunity to be heard.

Municipalities and counties do not have the "irrevisable discretion to deny approval" of licenses. *Black v. Pike County Commission*, 360 So.2d 303 (Ala. 1978). In an opinion to Hon. Oscar Tate, February 18, 1977, the Attorney General discussed a situation where a municipality without a zoning ordinance in place wanted to deny a license to a business the municipality felt would adversely affect surrounding property owners. The Attorney General stated that "it has been concluded by the courts that a license or permit must be granted where the applicant is qualified and has complied with all conditions which must be met and where it would be an abuse of discretion to deny the license."

Many of the cases dealing with denial of licenses involve requests for liquor licenses. In *Black v. Pike County*, the plaintiff's application for a liquor license was denied by the county commission. The plaintiff sued, alleging that the county's action was arbitrary and capricious and denied her rights to due process and equal protection.

The Alabama Supreme Court had previously ruled, in *Paulson's Steerhead Restaurant, Inc. v. Morgan*, 139 So.2d 330 (1962), that the Legislature had granted county commissions the irrevisable discretion to deny liquor licenses. However, the court in *Paulson's* pointed out that it had not considered constitutional issues in *Paulson's*. Now, confronted with constitutional issues, the court held that the Legislature may not constitutionally grant unbridled discretion to the county commission to determine whether to grant or deny a license.

The court noted that two other persons in the county district in question had been granted liquor licenses, and pointed out that the county had no criteria, either written or unwritten, for determining whether a person is qualified to receive a license. Despite the fact that the Twenty-First Amendment gives states broad powers to regulate the possession and sale of liquor, the court stated that this does not excuse state and local governments from following other constitutional limitations on their powers.

Quoting from the U.S. Supreme Court case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court said:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means

of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Thus, even in the context of liquor licenses, despite constitutional authority granting states power to regulate liquor, constitutional guarantees of due process still apply to the granting or denial of licenses.

In *Harrelson v. Glisson*, 424 So.2d 591 (Ala. 1982), the court made clear that unsuccessful applicants bear the burden of demonstrating that the denial of a license or permit is done arbitrarily or capriciously. In *Harrelson*, the plaintiff operated a grocery business at an intersection in the Carolina community in Covington County. He applied for a lounge retail liquor license. The council conducted a hearing and then unanimously denied the application.

At trial, members of the council testified as to their reasons for denying the application. Two members said that the intersection in question was busy, and that there had been several serious wrecks. One also testified that school buses operated on the roads and expressed concern about the safety of school children from the increased traffic. Another councilmember was concerned about the safety of youngsters frequenting a skating rink about a mile from the intersection, and another member, who agreed with the others about safety concerns, said that the location was too close to his church.

The hearing on the license application lasted from forty-five minutes to an hour. Several citizens attended the meeting, and at least two had expressed opposition to granting the license. The plaintiff had had an opportunity to refute their concerns.

The court found that, in this case, the plaintiff had failed to show that the council acted improperly. The court stated that the "fact that some of their factual premises might have been erroneous, or that some considerations might have weighed heavier with some of the council members than others, does not make their decision whimsical or unfounded." The court found merit in the trial court's ruling that considerations of public safety were significant in the minds of the councilmembers when they denied the application and upheld their decision to deny the license.

Similarly, in *Ex parte Trussville City Council,* 795 So.2d 725 (2001), the Alabama Supreme Court held that the council did not act arbitrarily and capriciously by denying an application for a liquor license to operate a "sports grill" restaurant because they noted that the property was located across the street from single-family detached residential zoning, that the property was close to homes, schools, churches, and parks, and that the applicant was only able to meet the minimum parking space allotment by securing an agreement from a neighborhood property owner to permit a limited number of spaces to be used for off-site parking that was remote and not conveniently accessible.

In *Maddox v. Madison County Commission and Madison County*, 661 So.2d 224 (Ala. 1995), the county commission denied a liquor license due to the location of the plaintiff's business. The county had adopted a set of procedures it would apply to liquor applications. Part of this procedure stated that the commission would grant a license only to licensees located in "predominately commercial areas."

The plaintiff's attorney made a brief statement at the public hearing on his liquor application. Another attorney, representing citizens in the area, expressed their opposition. Additionally, 17 other residents opposed the application on traffic safety grounds and the fact that the area was not predominately commercial. The court found that the commission's main objection to the license application was because the property was not sufficiently commercial and upheld their license denial.

In *Sardis v. Wilson*, 465 So.2d 387 (Ala. 1985), however, the court upheld a lower court determination that a denial of a liquor license application was arbitrary and capricious. In this case, the court stated that the plaintiffs had filed four separate license applications, which were denied by the city council. Another applicant, however, who the court found was no more qualified than the plaintiffs, had received a liquor license from the council. Thus, the court found that the plaintiffs had met their burden of showing the decision to deny was improper.

Local governments may also be sued for granting a license or permit. According to *McQuillin, Municipal Corporations* (Third Ed.), § 53.22.50, most of these claims are disposed of under the public duty doctrine. In Alabama, the public duty doctrine is known as the substantive immunity rule.

The Alabama Supreme Court has recognized that in certain circumstances, public policy considerations override the general rule that municipalities are liable for the negligence of their employees. While cases involving the substantive immunity rule deal with alleged negligent inspections, where permits were issued pursuant to those inspections, it would appear, the permitting itself would be protected by substantive immunity in similar circumstances.

In *Baker v. Guntersville*, 600 So.2d 280 (Ala. Civ. App. 1992), however, the city of Guntersville issued a building permit to a cellular telephone company to construct a telecommunications tower on property without notifying adjoining property owners, apparently in violation of a city ordinance. The trial court found that the plaintiff's due process claims were barred by collateral estoppel. The appellate court disagreed but found that the result was proper because of res judicata. The court, though, did not question the right of a member of the public to receive notice of the permit request.

And, in *Ex parte Lauderdale County*, 565 So.2d 623 (Ala. 1990), a county commission disapproved a landfill license after initially approving it. The landfill company (WCI) argued that its due process rights were violated because it was

not afforded a hearing. The court stated, "It is interesting to note that in this case WCI received the initial license without a hearing, but it does not argue that that violated due process. If WCI's due process rights were violated by the subsequent revocation of the license without a hearing, *then certainly the due process rights of the affected citizenry were violated when the license was first issued without a hearing*." (Emphasis added.)

This issue was also raised in *Brown's Ferry Waste Disposal v. Trent*, 611 So.2d 226 (Ala. 1992). In this case, the Alabama Supreme Court held that:

> "It cannot be argued that the interests of the citizens of Limestone County are unaffected by the contract that is the subject of this litigation. The citizens have a vital interest in the disposal of solid wastes within the county, in the site approved for their disposal, and in the contract awarding the right to operate the facility made between the County and a private corporation. Because the Commission failed to supply any notice to the public and totally failed to establish any opportunity for the citizens to be heard, the contract is, as the trial court held, null and void."

Thus, it appears that under certain circumstances, such as where a local rule or regulation requires notice, or where the rights of the public will be affected by the permit in question, the public entity must provide the public with due process prior to acting.

Revocation

Due process requirements may also govern the revocation of a license or permit. In *O'Bar v. Rainbow City*, 112 So.2d 790 (Ala. 1959), the council revoked a nightclub license based on complaints of loud music and other disturbances. The Alabama Supreme Court stated that there is "no contract, vested right or property in a license as against the power of a state or municipality to revoke it in a proper case." The license is a mere privilege extended by the governing body to make lawful certain actions. Thus, no property right exists in the holding of a license. As in the decision to grant or deny the license, courts will generally defer to the judgment of the officials. However, the court went on to point out that the license cannot be arbitrarily revoked.

In *Sanders v. Dothan*, 642 So.2d 437 (Ala. 1994), the city of Dothan revoked a liquor license. The plaintiff had received notice of a public hearing a week prior to the meeting at which the potential revocation would occur. She was informed under which city ordinances the city was pursuing revocation and was informed that she would have a full opportunity to present evidence and call witnesses. The notice also let her know of frequent police calls to her club, complaints with the ABC Board, as well as a shooting at the club. Following a full hearing, the city informed the plaintiff that the council would make a decision a week later. On that date, the council met and revoked the license.

The trial court granted the plaintiff a temporary restraining order. The city opposed this, arguing that as a result of a recent shooting at the club an individual had died. Additionally, the city complained that it had only received notice of the shooting from the hospital, and not from anyone at the club. As a result, the trial court dissolved the TRO. The trial court then affirmed the council's actions.

On appeal, the plaintiff argued that due process required the city to inform her of the specific items of evidence on which it would rely at the revocation hearing. In particular, the plaintiff argued that she should have received copies of police logs. The court found no support for this contention. Additionally, the court, after reviewing the evidence, determined that the city afforded the plaintiff with a full opportunity to be heard, including allowing her to present a petition of individuals who opposed the revocation. The plaintiff was only told that she could not speak further after the council had voted. Therefore, there was no denial of due process.

The court reached the same conclusion in *Spradlin v. Spradlin*, 601 So.2d 76 (Ala. 1992). Here, a municipality revoked a license for the operation of a junkyard business on the grounds that the plaintiff had failed to maintain a surety bond on the property. The city mailed notice to the plaintiff of the impending revocation, but she either did not receive it or failed to notice it among her other mail. Following the revocation, the plaintiff obtained a surety bond, and applied to have the revocation rescinded. The council refused, citing numerous complaints against the business. The plaintiff requested a hearing, which was continued once when her attorney withdrew. On the day scheduled, the plaintiff failed to appear. However, her husband did attend, requesting another continuance on the grounds that his wife was ill. The council refused to grant the continuance and, after reviewing complaints against the business, denied the request to rescind the license revocation. The court stated that where substantial evidence exists which justifies the license revocation, courts cannot find that the council acted arbitrarily or abused their discretion.

And, of course, to satisfy due process, the officials must be acting within their discretionary authority and must be unbiased. In *Maxwell v. Birmingham*, 126 So.2d 209 (Ala. 1961), the plaintiff was denied a license as a master plumber even though he passed the examination required by the city. The city officials felt that the plaintiff had cheated. City ordinances granted him a hearing on the denial. He claimed that the hearing was inadequate. The court disagreed, finding the notice

sufficient, and noting the fact that the plaintiff did not request a continuance, and was granted the opportunity to testify and examine witnesses.

The plaintiff also alleged that one of the city commissioners should have recused himself, but the plaintiff failed to give any reasons why the commissioner should have stepped aside. The court stated that, the mere fact that the commissioner had some prior knowledge of the facts did not require him to recuse himself.

The plaintiff also questioned the fairness of the mayor, as a part of the city commission, because the mayor had made a statement, prior to the hearing before the commission began, that he was willing to sustain the examining board's decision to revoke the license. The court found this improper but said that the mayor's other statements that he would hear all the evidence and rule on it, cured any defects in due process. With the expansion in due process rights since this case was decided, whether the same result would occur today on these facts is a matter of conjecture.

Conclusion

While Alabama courts apparently still maintain that the holder of a license does not have any contract or vested interest in not having the license or permit revoked, the requirement that the decision to revoke not be done in an arbitrary or capricious manner necessitates giving licensees at least minimal protection from improper governmental actions. Due process protections should be afforded at every stage of the licensing process, from the drafting of the ordinance through any necessary revocation proceedings.

Attorney General's Opinions and Cases

- Substantial evidence supported the city council's revocation of a nightclub's business licenses and rescission of its liquor license and dance permit. *Atlantis Entertainment Group, LLC v. City of Birmingham*, 231 So.3d 332 (Ala.Civ.App. 2017).
- Gas station's allegation that the town denied an application for a liquor license based on the owners' race and national origins stated an equal protection claim. *Minesaha, Inc. v. Town of Webb*, 236 So.3d 890 (Ala.Civ.App. 2017).
- An appeal by a property owner whose application for a liquor license was denied based on the claim that the city failed to provide it with equal protection was moot since it did not include a claim for damages under federal law. *Brazelton Properties, Inc. v. City of Huntsville*, 237 So.3d 209 (Ala.Civ.App. 2017).
- Circuit court lacks jurisdiction via certiorari over denial of liquor license by a local government in a different county. *EMBU, Inc. v. Tallapoosa County Com'n*, 263 So. 3d 731 (Ala.Civ.App. 2018).

Revised 2020