



What Every Potential Candidate Should Know About Municipal Government

Lori Lein • General Counsel • ALM

On August 25, 2020, most Alabama municipalities will hold elections for the mayor and council. While candidates cannot officially qualify to be on the ballot until July 7, 2020, many candidates have already announced their intention to run for municipal office and have started their campaigns. The Alabama League of Municipalities prepares a manual titled *Procedures for Holding Elections in Mayor-Council Municipalities* which covers issues related to campaigning and holding a municipal election. Included in the manual is an elections calendar out-lining all of the important dates relating to the election process. This manual will be available for download on the League's website: www.alalm.org after November 15, 2019. Over the next several issues of the Municipal Journal, the League Legal Department will explore various issues relating to municipal elections and the election process.

The goal of this article is to inform potential candidates as to the structure of municipal governments in Alabama as well as to the limitations and restrictions on municipal power. It is not intended as a guide for qualifying and running for municipal office. Candidates must understand the extent of the authority a municipality may exercise before making the decision to run for office. Also, an understanding of these laws and functions can help candidates avoid future embarrassment upon discovering that a campaign promise can't legally be fulfilled.

The provisions discussed in this article apply generally to any municipality with a mayor/council form of government. Many state laws, however, apply to only certain municipalities. It is up to the candidate to be sure

that the rules and regulations set out in this article govern their municipality.

What is a Municipality?

In Alabama, a municipality is a form of local government created by the citizens within a defined area. First, the local government must meet the requirements of state law to incorporate. The laws governing incorporation are found in Article 1 of Chapter 41 of Title 11, Code of Alabama 1975. Following these procedures and an affirmative vote of the majority of citizens in the area proposed for incorporation, a municipality is created.

Historians disagree regarding the reasons municipalities first came into existence. Some reasons include the promotion of commerce, protection from invading armies, convenience, or even just the desire of humans to share time with each other. Regardless of the historical reasons, municipalities today provide many services to their citizens, such as fire and police, utility services, parks and recreation, and historical preservation among others. They also help protect their citizens through these services. Municipalities provide an element of convenience by performing many services which individuals themselves may not be willing to perform, such as construction and maintenance of roads, disposal of garbage and promotion of the arts.

Municipal government provides a means for citizens to have a direct say in which services are needed and how those services should be provided through the process

of electing representatives. Representatives, who are chosen from the pool of willing citizens, meet and discuss how the municipality can best meet the needs and desires of their citizens.

When these elected officials meet, however, it is important for all parties to understand that in Alabama, all municipal powers flow directly from the state legislature. That is to say, Alabama's municipalities do not have "Home Rule" and therefore do not have inherent power to operate as a government independent of the Alabama Legislature. Alabama operates under what is known as the "Dillon rule". This rule provides that municipalities have no powers beyond those that are given to them by the state legislature. The authorization must be either explicit or clearly implied from the language of a state statute or constitutional provision. See generally *Mobile v. Moog*, 53 Ala. 561 (Ala. 1875); *Best v. Birmingham*, 79 So. 113 (Ala. 1918).

Briefly, Alabama is governed by Alabama Constitution of 1901, and any amendments thereto. Laws in the Constitution are passed by the legislature, but only become effective following a vote of the public. The Constitution provides a framework for the adoption of laws by the legislature. Legislative acts cannot conflict with constitutional provisions. If there is a conflict, a new constitutional amendment must be adopted and approved by a vote of the people.

In addition to the Constitution, the legislature meets at least annually--more often if special sessions are needed--to pass general and local laws. Many of these laws apply directly to the operation of municipal governments. Actions taken by a municipal government cannot conflict with state legislation. Beyond that rule, however, is a further limitation on municipal powers. Not only do municipal actions have to comply with these statutes and the Alabama Constitution; under the Dillon rule, there must be legislative authority for the municipality to take the specific action in question.

When potential candidates decide that when they get elected some action needs to be taken, they examine the laws to ensure that the municipality has the power to act in the way desired. If not, authority must be obtained through the Alabama Legislature. Depending on what the official wants to do, this may require either a local act, a general act or possibly even the adoption of a constitutional amendment.

The Extent of Municipal Power

Municipalities are established by incorporation through the procedures set out in the Code. Art.1 of Chap. 41 of Title 11, Code of Ala. 1975. Municipalities grow through annexations. The methods of annexing property are also provided for in the Code. See Chapter 42 of Title 11, Code of Ala. 1975.

Municipalities are divided into cities and towns on the basis of population. Section 11-40-6, Code of Ala. 1975. If

the municipality has less than 2,000 citizens, it is a town. Once the population reaches 2,000, however, the municipality is defined as a city.

Municipalities may exercise two types of power: legislative and corporate. Legislative powers affect the public generally. In exercising these powers, the municipality acts very much as an arm of the state. Corporate powers are more comparable to those of a private corporation and are exercised to benefit the municipality in its proprietary capacity.

Municipalities also have authority to exercise certain powers within their police jurisdictions. The police jurisdiction is a legislatively created area outside the corporate limits of a municipality. Section 11-40-10, Code of Ala. 1975. The size of the police jurisdiction is either a mile-and-a-half, or three miles, depending on the population of the municipality. It ensures orderly development beyond the municipal limits and allows the municipality to protect persons who live within these areas.

Municipalities can levy certain types of taxes in the police jurisdiction in order to pay for services which are provided in the area. See Section 11-51-91, Code of Ala. 1975. Additionally, municipalities can enforce criminal ordinances in the police jurisdiction. Construction and development can be regulated through the application of municipal building codes and subdivision regulations. Municipalities can also provide a wide range of services to citizens within the police jurisdiction, and if the municipality licenses businesses within the police jurisdiction, it must spend those funds to provide services within the police jurisdiction.

Appropriations

Frequently, potential candidates for municipal office make promises to voters that will require some type of appropriation from the municipal treasury. The use of public funds is, of course, of central concern to the voters. Many taxpayers, understandably, want to have a direct say in how their tax money is spent. However, citizens must understand that municipal expenditures are limited by state law.

Perhaps the most common barrier to municipal spending is Section 94 of the Alabama Constitution of 1901. This Section is commonly referred to simply as Section 94. It prohibits municipalities from giving anything of value to any private individual or group of individuals. The prohibition also bars donations to private, nonprofit corporations, even if these organizations benefit the public. Section 94 is the reason municipalities cannot pave driveways or parking lots on private property. The rule is also why government property cannot be given away, unless the use of those funds serves a recognized public purpose.

Section 94 is a frequent source of friction for elected officials, especially for those who are new to the operations

of public entities. This is because often the groups requesting financial help from the municipality do provide a valid community service, and there is an inherent desire to assist them. Many are charitable organizations. For the purposes of Section 94, though, it is crucial to distinguish between the public and private nature of the group, and many traditional entities are considered private, not public. Under Section 94, it doesn't matter that the group is non-profit. If it is private (which generally means that it was not directly created by a public organization), the municipality may not donate funds to it without finding a public purpose behind the donation.

In *Slawson v. Alabama Forestry Commission*, 631 So. 2d 953 (Ala. 1994), the Alabama Supreme Court stated that, "[t]he paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit ..."

Section 94, though, does not prohibit municipalities from contracting with private companies and individuals for services. For example, although a municipality cannot give money to the Girl Scouts of America, the municipality may compensate the Girl Scouts for legitimate services they can perform for the municipality. Bear in mind that the service being performed generally must be a service that the municipality could perform itself.

Similarly, Section 94 does not ban appropriations to public organizations which serve the municipality. For instance, municipalities may contribute funds to public schools their citizens attend. Municipalities may not, however, make donations to band booster clubs or other private clubs organized by students or parents because these are private groups.

Section 94.01 of the Alabama Constitution of 1901, creates a limited exception to Section 94 for economic development projects. The procedures in Section 94.01 must be followed exactly in order to spend public funds under to this provision.

Municipalities must also comply with State bid laws. Generally speaking, the bid law prohibits expenditures (with certain exceptions which are listed in the Code) of more than \$15,000.00 (\$50,000 for public works contracts) without first soliciting competitive bids. See Article 3 of Chapter 16 of Title 50, Code of Ala. 1975 (Competitive Bid Law) and Chapter 2 of Title 39, Code of Ala. 1975 (Public Works Bid Law). Municipalities may, however, contract with other public agencies or purchase items through a state contract without first obtaining bids. AGO 2008-093. In addition, they may make purchases through a purchasing cooperative under certain conditions or off an existing Government Services Administration (GSA) contract. Section 41-16-51(a)(17).

There are other provisions governing municipal expenditures that are too numerous to discuss here. What

is important is for potential candidates to understand that they must examine expenditures carefully to ensure that the expenditures are legal.

Citizen Petitions

Citizens often draft and circulate petitions to be presented to the municipal governing body. What is the legal effect of these petitions?

In some limited cases the Code requires the council to act on petitions which contain a certain percentage of citizen signatures. Some examples include petitioning for certain methods of annexation and petitioning for a wet/dry alcohol referendum. In these cases, the council must follow through on all statutory requirements. These situations, though, are rare. Usually, the council is not required to act on, or even debate, requests submitted by petition. At best, a petition serves as a means of bringing the issue before the council.

Citizens have the right to make requests of the governing body. And, just as clearly, the number of signatures on a petition has a practical political effect. In most cases, however, a council may deny a petitioner's request, or refuse to even consider it.

Even where a municipal council will consider a citizen petition, it is important that candidates realize that duly elected municipal officials cannot delegate the authority to make legislative decisions to the citizens themselves. Frequently, elected officials want to allow citizens to vote on issues. While it may be admirable to seek approval of those who will become subject to a municipal action, the legislative power of a municipality, exercised by the municipal governing body, cannot be delegated to the citizens. For instance, in Opinion No. 91-00262, the Attorney General held that a city council may not make zoning in a particular district subject to a referendum of the residents.

The prohibition on delegation of municipal powers is particularly applicable to taxation. A municipality cannot hold a referendum for the voters to approve most tax increases. Ad valorem taxes are the notable exception. Most other taxes must be approved by the council by passage of a general and permanent ordinance. The city may hold a public hearing to obtain input, but it cannot delegate approval of the tax or tax increase to the citizens.

In fact, a city may not sponsor and hold a non-binding referendum using city employees and officials to work on the election, even if the cost of the referendum is paid for with private funds. AGO 94-00001. But, a private group may conduct a non-binding referendum for a municipality, although the municipality may not participate other than as private citizens and the council cannot agree to be bound by the referendum. AGO 97-00257. Keep in mind that under state law a municipality must submit some questions, as provided for by law, to the voters to make the final decision.

When making campaign promises, a candidate for municipal office must be sure whether a referendum is required, or even allowed, prior to agreeing to allow the public to vote on specific issues should he or she get elected.

The Division of Duties Between Elected Officials

One of the most misunderstood aspects of municipal government is the separation of powers between the mayor and the council. Like government on the state and federal levels, municipal government is divided into three separate but equal branches: executive, legislative and judicial. Each of these branches has distinct duties, powers and restrictions on how far it can intrude into the affairs of the other branches.

At the municipal level, the mayor serves as the head of the executive branch. Section 11-43-81, Code of Alabama 1975. As such, the mayor is responsible for overseeing the day-to-day operations of the municipality. He or she oversees municipal employees, makes sure that bills are paid on time, executes municipal contracts and, in general, performs many of the same functions as a C.E.O. of a private corporation.

In municipalities of less than 12,000 inhabitants, the mayor also presides over council meetings and serves as a member of the council. Section 11-43-40, Code of Alabama 1975. In these cities and towns, the mayor may vote on any issue before the council, introduce measures and participate in debates to the same extent as members of the council.

In cities with populations of more than 12,000, the mayor is not a member of the council. However, he or she has a veto over any permanent action taken by the council. The council can override the veto by a two-thirds votes. Section 11-43-40, Code of Alabama 1975.

The council is the legislative branch. Candidates must understand that individual councilmembers, acting alone, have no greater power or authority than any other citizen of the municipality. The council can only act as a body at a legally convened meeting.

The council has authority over the finances and property of the municipality. The council establishes policies, passes ordinances, sets tax levels, determines what sorts of services the municipality will offer and has authority over all other legislative aspects of municipal government.

Council Meetings & Public Participation

Problems frequently arise over public participation in council meetings. This is probably due to the misconception of a council meeting as a public hearing. It is not. A council meeting is intended as a gathering of elected officials brought together to conduct the affairs of the municipality. It is a business meeting. The meeting is open to the public not so much to obtain citizen input, but to allow the public to observe the affairs of government to ensure appropriate and legal representation by their elected officials. Although most

councils do set aside a time for public comment, Alabama law does not guarantee citizens the right to speak at a council meeting. The Open Meetings Act, found in Chapter 25A of Title 36, Code of Alabama 1975, grants citizens the right to be present at public meetings, but does not grant them an absolute right to express their views at the meeting. And, the municipality may establish reasonable guidelines governing public participation in the meeting. AGO 98-00134.

Public Records

Potential candidates must also be aware that problems often arise over public records. Controversies over what is public and what is not public are common. It is probably best to assume as a starting point that all records a municipality keeps are public. Section 36-12-40 and 36-12-41, Code of Alabama 1975, guarantee every citizen the right to inspect and make copies of all public writings, unless otherwise expressly provided by statute. While most records maintained by a municipality are public, some are not available for public inspection even by elected officials. For example, sensitive tax information is protected by state law and employee withholding information cannot be released. Municipalities are encouraged to establish reasonable procedures governing access to public records. Citizens who wish to view public records must follow these procedures. The custodian of records may ask for a reason for viewing the records, and must be convinced that the reason is legitimate. Also, the municipality may charge for making copies. AGO 2008-073. Additionally, not all records are public. Some records, such as on-going police investigation files, some material in personnel records, confidential tax information and similar records containing information not for public consumption, are not open to the public. For potential candidates, it is important to note that individual councilmembers and the mayor generally have no greater right to inspect municipal records than do any other members of the public. See AGO 2000-053.

Relationships with Boards

Not all municipal services are provided by the municipality itself. Many are provided by municipal boards. Some of these boards are separately incorporated, while others are not. Municipalities have the authority to create a broad range of boards to control particular functions. Perhaps the most common example is a utility board.

Boards are usually created when the governing body takes on the duty of performing so many functions that it needs to give the responsibility to another entity so that it can adequately provide for the other needs of the citizens. Once a board is created, its powers are specified by the statute under which it was organized. The council may not change the duties of the board from those set out in

continued on page 44

Potential Candidate

continued from page 36

the statute. Nor can a council create boards that are not authorized by the legislature. Although a council may create an advisory board, it cannot delegate power over any municipal function in its control unless the legislature has given them that authority. McQuillan, *Municipal Corporations*, 3rd ed., Section 12.38. An advisory board can only make recommendations to the council. The council must determine whether or not to act on those recommendations.

Frequently, municipal officials are asked to remove board members or to order the board to take certain actions. Candidates must understand that once a board is created, it has the sole power to act and the council has no power to make demands on the members of the board. Members of these boards are appointed for terms and generally they cannot be removed until their terms expire. This is especially true for separately incorporated boards. It is particularly important to understand the difference between an incorporated and an unincorporated board. Incorporated boards usually cannot be dissolved until some event defined in the Code occurs. Frequently this is the payment of the debts of the board. Therefore, members of incorporated boards are totally independent from council members. Unincorporated boards are different. They generally can be dissolved by a governing body. The council will then either establish a new board or assume control over the functions themselves. However, the council may not leave the board in existence and change the duties of the board from those set out in the Code.

Conclusion

This article does not answer every conceivable question regarding municipal government, nor could it. Municipal government is multifaceted. It is difficult to even list all the functions performed by municipalities, and even harder to explain the laws which govern their operation. Multi-volume sets of books have been written which provide only a brief overview.

What is often overlooked, however, is the community nature of a municipality. Although municipal governments are legally recognized entities with a certain amount of control over the affairs of their citizens, municipalities are still communities. They are organized by citizens who feel a need for the services and protection the government provides. In order to make the government effective, elected officials, and the citizens they represent, must work together in a spirit of cooperation, cooperation based on an understanding of what the municipality is permitted to do under state law. The League hopes this article will help foster this spirit of cooperation. ■

We are proud to support Alabama's Firefighters through the state's first supplemental cancer benefits policy!



www.alfrbp.com

1-800-23-CANCER

cancerinsurance@alfrbp.com