# WATER LOG

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# Municipal Authority

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## • UPCOMING EVENTS •

**2022 Coastal & Estuarine Summit**

Dec. 4-8, 2022
New Orleans, LA

https://raesummit2022.estuaries.org

**Alabama-Mississippi Bays & Bayous Symposium**

Jan. 24-25, 2023
Mobile, AL

https://bbs22.baysandbayous.com

**Aquaculture America Conference**

Feb. 23-26, 2023
New Orleans, LA

https://www.was.org/meeting/code/AA2023

# Using Municipal Ordinances To Maintain Quality of Life In Cities

Katriesa A. Crummie

Guest Expert

Credit: Maciek Lulko

**The City of Mobile, Alabama Environmental Court docket** is both unusual and complex. It has evolved from a means to address littering and unsightly yards into a multipurpose docket handling a myriad of issues within the City. This includes tax and revenue violations, residential maintenance and upkeep violations, among others. These issues are addressed through the enforcement of municipal law, specifically municipal ordinances.

The public generally knows that there are two types of law: criminal and civil. In basic terms, criminal law involves a government entity's prosecution of people charged with crimes, and ends in a finding of either guilt or innocence. Civil law involves private individuals and businesses suing for a wrong committed that produced harm. But very few know that municipal law can act as a hybrid of the two realms of law. For a municipal attorney, the day can vary from prosecuting defendants for violating both state law and municipal ordinances to defending civil suits brought against the municipality, or even filing civil suits on behalf of the municipality. This article explores one unique instance of civil and criminal combining in municipal law in the City of Mobile: The Environmental Court docket. This article will also discuss the challenges that can arise as a result of combining civil and criminal law and best practices for a municipality in enforcing its own municipal ordinances.

## Ordinance Drafting

Much of municipal law centers around the enforcement of municipal ordinances. Municipalities must take care that the ordinances it enacts do not overstep the bounds prescribed by state law. In *Congo v. State*, for example, the Alabama Court of Criminal Appeals wrestled with whether a Huntsville, Alabama municipal ordinance banning public intoxication conflicted with a state statute addressing similar conduct.[1] The appellant argued that the state statute required more than just mere presence in public along with intoxication, which is what the municipal ordinance prohibited. The Court upheld the municipal ordinance, reasoning that an ordinance requiring more than what the state law requires does not in itself deem an ordinance invalid, unless the state law specifically disallows it.[2] The state law for public intoxication does not have such provisions.[3] As the court explained:

> Whether an ordinance is inconsistent with the general law of the State is to be determined by whether the municipal law prohibits anything which the State law specifically permits. An ordinance which merely enlarges upon the provision of a statute by requiring more restrictions than the statute requires creates no conflict unless the statute limits the requirement for all cases to its own terms.[4]

Municipal ordinance drafting begins with the local elected officials, usually a city or town council, being made aware of an issue within the city that needs to be addressed. Oftentimes citizens will contact their elected representative, who will create and present a draft of a proposed ordinance to the council for discussion and eventually for a vote. Many councils employ legal counsel of their own to research and draft ordinances to make sure that they do not run afoul of state law or the constitutional rights of citizens. Ordinances set out clear requirements, and prescribe a remedy for violation of the ordinance, be it a monetary fine or incarceration. Once an ordinance is passed, it is recorded and published with a date stating when it will become effective. Once effective, enforcement can take place.

Some ordinances simply adopt state law so that municipal ordinance enforcement officers, not just sworn law enforcement officers, can enforce municipal ordinance violations. In Mobile these matters usually are addressed during the Environmental Court docket that is held once a week in front of a municipal court judge. Though it is called the "environmental docket", cases on the docket range from animal cruelty to unauthorized tree mutilation to junk cars littering yards. While different, each of these ordinances address a municipality's desire to maintain a high standard for quality of life for all citizens, even those on four legs.

One instance of a municipal ordinance adopting a state law is § 7-25 of the City of Mobile Code of Ordinances (1991). This particular code section deals with animal cruelty, defining it as "[a]ny person or corporation committing the offense of cruelty to animals within the corporate limits of the city which is declared by law or laws of the state now existing."[5] It adopts Ala. Code § 13A-11-14 and § 13A-11-241 (1975), which address the same conduct on a state level.[6] By adopting the state law as a municipal ordinance, the City of Mobile can then task its Animal Control Officers (who are not sworn law enforcement officers) to investigate and charge offenders with violations of the ordinances. This accomplishes several goals. First, it can free up the police department from investigating and responding to such calls. For a municipality as large as the City of Mobile, cases of suspected animal cruelty can quickly overwhelm an already overworked force. Although best practice would be to have tickets issued by sworn law enforcement officers, the use of municipal enforcement offices is a great way to conserve resources. Tight budgets and dwindling resources for many municipalities means only the most egregious cases will likely be addressed by a sworn law enforcement officer. Second, it allows people specifically trained in the handling of all types of animals to respond quickly to the scene to document municipal violations, ensuring the best and safest outcome for both animal and human.

## Ordinance Enforcement and Prosecution

Enforcing ordinances enacted by a municipality requires municipal code officers and law enforcement officers to understand and uphold the principles of Due Process at every stage, from the investigation to the charging instrument, and throughout the prosecution thereof.

As with any law, the first step in making sure enforcement and prosecution of a municipal ordinance violation is proper is to put the citizens of the municipality and others on notice as to what the law is in that municipality. Any ordinance that is enacted must be published. Once published, the citizens of that municipality are deemed to be on notice as to what conduct is or is not allowed.

Credit: Elly Blue

Once a municipal enforcement officer or sworn law enforcement officer determines that there is probable cause to believe that a violation has taken place, they are tasked with properly notifying the citizen of such violation through a charging instrument. Three types of instruments used in Mobile Municipal Court include a Municipal Offense Ticket (MOT), a Uniform Nontraffic Citation and Complaint (UNTCC) and a Criminal Complaint and Summons. MOTs and Summons /Complaints can be used by sworn law enforcement or municipal enforcement officers, whereas UNTCCs can only be issued by sworn law enforcement officers. With each of these, the officer must detail which ordinance was violated and how. They must also notify the offender when to appear in court to address the violation or how they can pay the fine and necessary court costs in lieu of a court appearance. Ideally, the charging instrument tracks the language of the statute to include the elements of the offense needed to prove the offense and satisfy Due Process. Charging instruments must also be clear and concise; it is not necessary and sometimes detrimental to put more than what is necessary to prove the violation.

### Who to Charge

Not only can citizens be charged with violations of municipal ordinances but businesses can as well. Serving business with a notice of violation of a municipal ordinance can be tricky, but there are best practices.

If a business is found to be in violation of an ordinance, the charging instrument shall be written to the registered agent of the business. In Alabama, that information can be found on the Secretary of State's Business Entity search option on its website. Often, the registered agent does not live within the city limits of the municipality. In that case, best practice is to serve notice on the business itself, either a manager or owner if one can be located. There are plenty of instances when, after exhausting all efforts to serve notice to an offending party, the civil law realm of municipal law must step in. Property owners and business can be brought before the city or town council to be declared nuisances, which then allows for other avenues to be explored, such as placing liens on property.

## Conclusion

Municipalities of all sizes must take care to ensure ordinances enacted do not overstep the bounds prescribed by state law or the ordinance could be deemed invalid. Counsel for municipalities must be sure to inform municipal ordinance officers on the best practices for notifying citizens of a violation of a municipal ordinance through the charging instruments available to them, keeping in mind principles of Due Process. Lastly, there must be a holistic approach to prosecuting businesses in violation of municipal ordinances, to include not only criminal liability, but civil liability as well. The Environmental Docket does that by having both a prosecutor and a judge who understands the challenges of this quasi-criminal area of law. The end goal is to ensure that ordinances enacted by a municipality address the needs and concerns of that municipality's citizens, giving them a greater role in the stewardship of the place they call home.

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## Endnotes

1. 409 So.2d 475 (Ala.Ct.Crim.App 1981).
2. *Id.* at 478 ("In the case before us, Huntsville's ordinance does not contravene a State law; it does not, by its terms, prohibit something which the corresponding State statute affirmatively allows").
3. Ala. Code § 13A-11-10 (1975).
4. *Congo v. State*, 409 So.2d 475, 478 (Ala.Ct.Crim.App. 1981).
5. § 7-25 City of Mobile Code of Ordinances (1991).
6. Ala. Code § 13A-11-14(a): A person commits the crime of cruelty to animals if, except as otherwise authorized by law, he or she recklessly or with criminal negligence: (1) Subjects any animal to cruel mistreatment;or (2) Subjects any animal in his or her custody to cruel neglect; or (3) Kills or injures without good cause any animal belonging to another.

   Ala. Code § 13A-11-241: (a) A person commits the crime of cruelty to a dog or cat in the first degree if he or she intentionally tortures any dog or cat or skins a domestic dog or cat or offers for sale or exchange or offers to buy or exchange the fur, hide, or pelt of a domestic dog or cat. (b) A person commits the crime of cruelty to a dog or cat in the second degree if he or she, in a cruel manner, overloads, overdrives, deprives of necessary sustenance or shelter, unnecessarily or cruelly beats, injuries, mutilates, or causes the same to be done.

# City Laws, Nuisances, and the Fourth Amendment

Kristina Alexander

**Hoarding may be in the eye of the beholder, but nuisance** is against the law. Where one property owner's natural yard is another's weed infested mosquito factory, a court may have to decide.

Nuisance is a word with many meanings. Most people think of it as a bother, an annoyance, a little brother. In law, it has a distinct meaning: a condition that interferes with someone's use or enjoyment of their property. Municipal ordinances typically include a definition of "nuisance" to authorize the city to take action when those conditions occur.

## State Laws on Nuisance

Alabama state law authorizes municipalities to take matters in their own hands upon finding a nuisance.[1] According to that provision, once a municipality has made a determination that a nuisance exists, and the owner fails or refuses to "abate the nuisance" (i.e., fix it), "then the municipality may enter upon the property and abate the nuisance using its own forces, or it may provide by contract for the abatement" (in other words, hire someone else to fix it).

Rather than using the term nuisance to describe messes on private lands, Mississippi state law authorizes municipalities to clean private property after determining the land is a "menace."[2] The law describes a menace as being in "such a state of uncleanliness" that it poses a risk to "public health, safety and welfare of a community." The law requires a public hearing which can be brought by the governing authority of a municipality or by a petition of the majority of landowners within 400 feet of the offending property. As is consistent with due process, the owner of the menace must receive notice of the hearing describing the offenses and the opportunity to challenge the violations.

## Municipal Laws on Nuisance

Municipalities likely have their own rules regarding nuisances on private property in exercise of their general authority to protect the public health and safety of the community. Many of the rules focus on overgrown weeds and junked cars. In Starkville, Mississippi the city may declare a public nuisance when a property has an excessive accumulation of overgrown or dead plants, stagnant water, or junk/trash/debris which may form a breeding ground for animals and mosquitos or "or adversely affect and impair the economic welfare of adjacent property."[3] Additionally, it is unlawful for "junk, scrap or salvage material to be on any land" except where it is "screened from ordinary public view."[4] Center Point, Alabama may declare a nuisance when it finds an inoperable vehicle left in public view in violation of local law.[5] Upon notice of the violation and opportunity for a hearing, the city council can arrange for its removal and disposal.[6]

Underlying these rights to declare a nuisance and to force abatement is the right to identify the nuisance in the first place. Specifically, the city's right to identify nuisances on private property. Municipalities typically authorize code enforcement officials to inspect, document, and charge instances of violating city ordinances. Think of violations such as selling liquor at the wrong time, or blocking a ramp with a dumpster, rather than criminal violations. Code enforcement officers will be authorized to enter property "at reasonable times, to investigate conditions."[7]

## Problems with Enforcement

Courts in both Alabama and Mississippi have found that code enforcement officers were trespassing and violated the rights of the landowner when property inspections led to charges regarding property maintenance.[8] The claims in both cases involved the portion of the Fourth Amendment of the U.S. Constitution that protects "[t]he right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures." Typically, this provision is associated with criminal law; and, as any regular viewer of Law & Order knows, the police need a warrant for searches.

However, it's an interesting question whether the Fourth Amendment applies to *civil* searches where those searches are authorized under municipal ordinances. Those ordinances, it could be argued, provide the same general rationale as a warrant for the search – reasonable cause. In 1967 the U.S. Supreme Court described such a search as "a routine inspection of the physical condition of private property [which] is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime."[9] However, municipalities' use of warrantless administrative searches, according to the Court, "cannot be justified on the grounds that the searches make minimal demands on occupants." Those subject to the searches have more at risk than just a clean-up order or a civil violation, and they may not know the "reasonable grounds" for the search or why a city official is at at their door.

The U.S. Supreme Court in *Camara v. Municipal Court*, for example, noted that administrative inspections for public health and safety can lead to a criminal complaint and that refusing to comply may be a criminal offense.[10] In *Camara*, the authorized city employees were attempting to verify whether an occupant was illegally using commercial premises as a residence. After multiple refusals to allow access, the occupant was arrested.

The arguments made in support of municipalities' right to make warrantless inspections is that the authorized searches must be based on reasonable grounds. Also, because the factors to show a civil nuisance are quite broad – impacting health or human safety – if forced to get a warrant first, the warrants also could be broad, providing little protection to the property owner. And communities depend on civil enforcement to curb the behavior of unlawful neighbors. Nonetheless, the Supreme Court rejected the notion that routine inspection was the only effective way to enforce minimum health and public safety standards. The inspections need to be made but must be made with a warrant, according to the Court.

It might not be hard to get the warrant. According to the Court, the standards to obtain a warrant for health purposes may be lesser than to grab the fruits of a crime. Probable cause is flexible, said the Court, and is based on the nature of the search, for example "the passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of the warrant."[11] Or a citizen complaint could form the basis for the warrant. Thus, the Supreme Court did not think requiring a warrant would hamper the ability of municipalities to enforce their civil codes.

### Inspections for Nuisances in Mississippi and Alabama

Some 55 years later, Alabama and Mississippi courts found that warrantless searches by city officials for the purpose of identifying a nuisance violated the law, but the courts relied on different arguments to reach that conclusion.

In a 2022 Mississippi Court of Appeals case, *Okhuysen v. City of Starkville*, a city code inspector came onto what is known as the curtilage of a home – property surrounding the structure – and found "an abandoned truck and various other debris, junk, scrap materials, and construction materials" and took photos. The landowner was charged with violating the provisions related to excessive junk, high weeds, and abandoned vehicles.[12] After a trial, the landowner was found guilty and fined $1,000. The municipality then sought to charge him under Miss. Code § 21-19-11, for keeping property that posed a menace. At the Board of Aldermen hearing to determine whether a violation occurred, the landowner's attorney said, among other things, that the inspector had trespassed and violated the Mississippi Constitution, Art. 3, § 23. The Board gave the landowner approximately 60 days to clean up the property. The landowner appealed all the way to the Court of Appeals.

The Court of Appeals agreed with the landowner's attorney that Art. 3, § 23 of the Mississippi Constitution protected all of the landowner's property from an unreasonable search and seizure, even those parts in plain view. That constitutional provision is worded nearly identically to the Fourth Amendment of the U.S. Constitution, with one significant change. The Mississippi Constitution states "The people shall be secure in their persons, houses, and *possessions*, from unreasonable seizure or search …" whereas the U.S. Constitution refers to "persons, houses, *papers, and effects*." The Mississippi Supreme Court has held that the difference means Mississippi requires a warrant for searches for more things, notably "practically everything which may be owned, and

over which a person may exercise control."[13] Accordingly, the City of Starkville "should not have been able to use that evidence" (the photos and testimony) gathered without a warrant, and the court in *Okhuysen* ordered dismissal of the claim against the landowner.

Alabama's Civil Court of Appeals also found Fourth Amendment violations related to finding inoperable vehicles at a home. A code enforcement official spotted two vehicles from the road, entered the curtilage to verify, and issued a notice of violation and an order to comply.[14] After a few weeks, the city arranged towing, and eventually the towing company sold the two cars. The owner of the vehicles sought $100,000 in compensation for the sale of the inoperable 2002 Chevrolet Camaro and 1984 Buick Regal,[15] $300,000 in punitive damages, and unspecified damages for violations of her constitutional and civil rights.

The Alabama court described municipal inspections as being more broadly authorized than did its Mississippi counterpart, finding that there is no consensus as to whether a warrant is required for a properly-conducted administrative inspection:

> it is important to note that, in the context of the enforcement of nuisance ordinances, a prescribed administrative process may provide a constitutionally adequate substitute for a warrant. Indeed, a number of federal circuit courts have held that the *warrantless abatement of a public nuisance was nonetheless reasonable under the Fourth Amendment* when it was accompanied by an adequate administrative procedure.[16]

However, according to the court, the City of Center Point did not provide a process for challenging a notice of violation, time to abate the violation, or an opportunity for a hearing.[17] Accordingly, the court held the landowner's Fourth Amendment rights were violated.

## Conclusion

The difference between the *Okhuysen* case in Mississippi, and the *McDonald* case in Alabama, is that the municipal ordinance itself was faulted by the court in *McDonald*:

> there was no adequate procedure administrative or judicial process that might, under the facts of this case, have rendered the seizure of McDonald's vehicles reasonable under the Fourth Amendment.[18]

*Whereas* in Okhuysen, the state constitution was the basis to deny the legitimacy of the search. This gives the Alabama decision a limited application in comparison. A properly drafted municipal ordinance – providing notice and an opportunity for a hearing – may authorize a warrantless search for a nuisance violation under Alabama law, but it won't make a difference in Mississippi.

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## Endnotes

1. Ala. Code § 11-67-145.
2. Miss. Code § 21-19-11 (the fine may be $1,500 or 50% of the actual costs for cleaning the property, whichever is higher, not to exceed $20,000 for multiple cleanups occurring in a 12-month period).
3. Starkville (MS) Ord. § 8.1.01.D.
4. Starkville (MS) Ord. § 8.1.12.D.
5. Center Point (AL) Ord. § 46-68.
6. Center Point (AL) Ord. § 46-70 (as modified Sept. 16, 2019).
7. *See, e.g.* Starkville (MS) Ord. § 8.1.02.E.
8. McDonald v. Keahey, 301 So.3d 823 (Ala. Civ. App. 2019); Okhuysen v. City of Starkville, 333 So.3d 573 (Miss. Ct. App. 2022)
9. Camara v. Municipal Court, 387 U.S. 523 (1967).
10. *Camara*, at 531.
11. *Camara* at 358.
12. The ordinances which the landowner was charged with § 94-27, § 54-107, respectively, have been revised and renumbered since the charges were brought.
13. Falkner v. State, 134 Miss. 253, 257, 98 So.691, 692 (1924).
14. McDonald v. Keahey, 301 So.3d 823 (Ala. Ct. Civ. App. 2019).
15. Edmunds estimates the value of the Chevy Camaro as $865-$7,317, and J.D. Power assesses the Buick Regal as $950 - $2,925.
16. *McDonald*, 301 So.3d at 836 (emphasis added).
17. *McDonald*, 301 So.3d at 837. Based on a review of the ordinances, it appears the ordinances were amended in September 2019 and provide an opportunity for a hearing.
18. *McDonald*, 301 So.3d at 837.

# *Wheelan v. City of Gautier*: Reducing the Power of Local Authorities in Mississippi

Conner Linkowski

## Interpretation of City Ordinances in Mississippi

Until recently, the power to interpret local ordinances in Mississippi lay largely in the hands of local authorities. Whether a violation of a local ordinance occurred was determined by how a county board, city council, or board of aldermen interpreted and applied the ordinance to the facts of the alleged violation. Mississippi courts could only interfere with a local authority's enforcement of an ordinance if the local authority's decision regarding a violation was "arbitrary, capricious, discriminatory, illegal, or without [a] substantial evidentiary basis."[1] As long as the local authority's decision was "fairly debatable," the Court would give deference to said authority's interpretation of the ordinance.[2]

The Mississippi Supreme Court's decision in *Wheelan v. City of Gautier* in February 2022, however, did away with the Court's practice of giving deference to local authorities' interpretation of ordinances. Instead of analyzing whether a local authority's interpretation is "fairly debatable," the Court will now simply review whether the local authority's decision was correct given the ordinance's language and the law governing interpretation of ordinances.[3] Accordingly, *Wheelan* has created a heightened standard for local authorities' interpretation of ordinances and has rendered their interpretation meaningless in cases involving a dispute over an ordinance's interpretation.

## What is Deference?

The term "deference," as used by Mississippi courts, refers to the idea that certain matters are best understood by the entities involved—whether those be county boards, city councils, boards of aldermen, etc.—and their decisions on such matters should therefore be enforced in most cases. The Mississippi Supreme Court has stated that deference "derives from our realization that the everyday experience of the [local authority] gives it familiarity with the particularities and nuances of the problems committed to its care which no court can replicate."[4] Deference, therefore, stands for the proposition that courts should allow certain matters to be addressed by those best equipped to appropriately address them.

## *Wheelan v. City of Gautier*

Central to the dispute in *Wheelan* was the City of Gautier's (City) interpretation of an ordinance governing the maximum percentage of a lot that may be covered by buildings. The ordinance states in Section 5.4.4(F) that the maximum lot coverage allowed is "twenty-five (25) percent for the principal structure and accessory structures," and that "accessory structures shall not exceed twenty (20) percent of the rear lot area or fifty (50) percent of the main building area, whichever is less."[5]

This ordinance was relevant because the City's Building Department denied David Vindich's application to build a 1,410-square-foot workshop near his 2,843-square-foot house on his 0.76-acre lot. He had already built several accessory structures on the property which totaled 1,129 square feet. The Building Department interpreted the phrase "main building area" to mean the size of Vindich's house, which would have allowed only 293 square feet for the workshop after accounting for the other accessory structures – far less than what Vindich had planned. Vindich appealed the decision to the Planning Commission, which ultimately voted to let him build the workshop based on its interpretation of the ordinance. The Planning Commission interpreted "main building area" to mean the entire lot, which would have allowed roughly 1,600 square feet for the workshop. The City Council then accepted the Planning Commission's interpretation, approved its decision, and granted Vindich the building permit.

Credit: City of Gautier, Mississippi

Martin Wheelan, Vindich's neighbor, took issue with the workshop's construction because he believed that it violated the ordinance. Wheelan filed a lawsuit against the City alleging – among other claims – that the City's interpretation of the ordinance and its decision to grant Vindich the building permit was "arbitrary and capricious." Both the Jackson County Chancery Court and the Mississippi Court of Appeals dismissed Wheelan's claims, upholding the City's decision. The Mississippi Court of Appeals noted the deference normally given to local authorities in interpreting statutes, stating, "because the authority to interpret the wording of an ordinance is vested in the City Council and because the interpretation of the Unified Development Ordinance was debatable, the City Council's actions were not arbitrary, capricious, or manifestly unreasonable."

The Mississippi Supreme Court, however, took a different approach to the issue. Although determining whether the City's interpretation was "arbitrary, capricious, or manifestly unreasonable" such that its decision was not fairly debatable was the relevant analysis prior to this case, the Court decided to completely throw out that analysis. Instead, the Court changed the analysis to whether the local authority's interpretation was "correct" in light of the ordinance's language and the law governing interpretation of ordinances.[7]

The Court applied its new approach to the City's interpretation of Section 5.4.4(F). The Court found that the City's interpretation "of its ordinance [] renders meaningless other parts of the same ordinance," making the interpretation not "correct."[8]

There are two restrictions within the ordinance as recited earlier. The first part restricts lot coverage from buildings to 25 percent of the size of the lot for the principal structure *and* accessory structures. The second applies only to accessory structures. Accessory structures may not exceed 20 percent of the rear lot area or 50 percent of the main building area, whichever is less.

The City interpreted the "main building area" from the second part to mean the entire lot, rather than the size of the residence (the main building). The Court found that interpretation would render the 50 percent limit on accessory structures meaningless.[9] If the City's interpretation were true, the 25 percent limitation from the first part would apply in every situation that would have considered the 50 percent limit, making the 50 percent limit pointless.[10] Further, the interpretation would make the second part internally inconsistent. The Court found that under the City's interpretation, accessory structures would be allowed only on 20 percent of the rear lot area because "twenty percent of the rear lot area will always be less than fifty percent of the entire lot."[11]

Accordingly, because the City's interpretation of Section 5.4.4(F) rendered other parts of the ordinance meaningless, the Court held that the City erred in its interpretation and reversed and remanded the case back to the Jackson County Chancery Court to vacate the building permit.

The Court's decision to do away with the practice of giving deference to local authorities' interpretations of local ordinances is notable because it disregards the informed decisions made by those that may best understand how to address certain situations and places it in the Court's hands. Additionally, the Court's decision may show its opinion that the courts, not cities, are best suited to interpret ordinances, because it could have simply found the City's interpretation arbitrary and capricious instead of discarding the deference standard altogether.

## How do the Other Gulf States Treat Local Authorities' Interpretations?

With its departure from the deference standard, Mississippi has now entered the minority of states bordering the Gulf of Mexico in how their courts treat local authorities' interpretations of local ordinances. Alabama, Florida, and Texas courts use the deference standard while Mississippi and Louisiana are now the only gulf states that do not.[12]

To the east of Mississippi, Alabama courts recognize the value in deferring to the interpretations of local authorities concerning local ordinances. The Alabama legislature has granted local authorities the power to create and enforce ordinances, and courts defer to their interpretations of their ordinances "to ensure uniformity of decisions in light of the agency's specialized competence."[13] Alabama courts hold the same view discarded by Mississippi courts when *Wheelan* was decided: local authorities are the best equipped to handle local problems because they are involved in the everyday function of the locality, which gives them "specialized competence" in being able to understand their problems that courts do not have. The deference Alabama courts will give to a local authority's interpretation of a local ordinance has limits, however. Similar to Mississippi's old standard where courts could only interfere with a local authority's enforcement of an ordinance if the local authority's interpretation was "arbitrary, capricious, or manifestly unreasonable," Alabama courts will not defer to the local authorities' interpretation if "it appears that the agency's interpretation is unreasonable or unsupported by the law."[14]

## Conclusion

In summation, the *Wheelan* decision is notable because it established a new standard for Mississippi courts to use in resolving disputes over ordinance interpretation that is not used by most of the other gulf states. Further, it trims local authorities' power to enforce the meaning they give to their ordinances and places that interpretation power in court's hands. *Wheelan's* message is clear: courts – not local authorities – are in the best position to interpret local ordinances.

## Endnotes

1. Hatfield v. Bd. of Supervisors of Madison Cnty., 235 So. 3d 18, 21 (Miss. 2017) *overruled* by Wheelan v. City of Gautier, 332 So. 3d 851 (Miss. 2022) (quoting Drews v. City of Hattiesburg, 904 So. 2d 138, 140 (Miss. 2005) (brackets in original)).
2. *Id.*
3. Wheelan v. City of Gautier, 332 So. 3d 851, 860 (Miss. 2022).
4. Gill v. Mississippi Dept. of Wildlife Conservation 574 So. 2d 586, 593 (Miss. 1990) (alteration in quote).
5. Gautier, Miss., Unified Development Ordinance § 5.4.4(F) (2009).
6. Wheelan, 332 So. 3d at 855.
7. *Id.* at 859.
8. *Id.* (citing *Hemphill Constr. Co. v. City of Clarksdale*, 250 So. 3d 1258 (Miss. 2018)).
9. *Id.* at 860-61 (referring to the dissent in the *Wheelan* Court of Appeals decision).
10. *Id.*
11. *Id.*
12. *See* Ex parte Chestnut, 208 So. 3d 624, 640 (Ala. 2016) ("A reviewing court will accord an interpretation placed on a statute or an ordinance by an administrative agency charged with its enforcement great weight and deference"); Donovan v. Okaloosa Cnty., 82 So. 3d 801, 807 (Fla. 2012) ("The County's interpretation of its own ordinance is entitled to deference"); Howeth Invs., Inc. v. City of Hedwig Vill., 259 S.W.3d 877, 907 (Tex. App. 2008) ("Courts will generally defer to the interpretation of the agency . . . charged with enforcing an ordinance when that interpretation is reasonable"); Olde Nawlins Cookery, L.L.C. v. Edwards, 38 So. 3d 1012, 1016 (La. Ct. App. 2010) ("The proper interpretation of an ordinance is a question of law, reviewed under the *de novo* standard of review").
13. Ex parte Chestnut, 208 So. 3d at 640.
14. Wheelan, 332 So. 3d at 852; *Id.*

# Variances and Other Quasi-Judicial Development Decisions

Stephen Deal

**A seldom understood aspect of the planning practice is** the quasi-judicial hearing. Quasi-judicial hearings are a unique function of the planning process and require higher levels of fact finding, with public input limited to sworn, factual testimony. This type of development decision making process is most often used with regards to variances, however, there are other situations in which a city may need to act in a quasi-judicial manner. Such hearings can be difficult for local governments, as staff may not be fully cognizant of the meeting requirements and level of detail needed for such decisions. By having a sound understanding of quasi-judicial hearings and the role they play in city policymaking, city governments can better protect themselves from legal liability.

## Understanding Variances

A variance is a policy mechanism found within zoning codes that authorizes the use of an individual property in a way that would not be allowed under the existing code.[1] Variances exist as a form of regulatory relief in situations where zoning may have the effect of denying a property owner all reasonable use of their property. Variances are most frequently used in situations where lot area requirements such as building setbacks, lot width, or building height need to be modified. These types of variances are known as area variances.

There are many quasi-judicial features of the variance process. One basic feature is that a variance is subject to appeal in courts of law. However, the primary quasi-judicial feature of variances is the way in which variance hearings are structured. A quasi-judicial hearing is similar to a court hearing in that witnesses are sworn in, testimony is focused on facts relevant to the case, and participants in the hearing must have legal standing.[2] Approval of the variance must be based on the evidence at hand and the standards set forth in the ordinance. Upon approval, the board granting the variance needs to memorialize the variance in writing, which identifies the property affected and the extent of the modification that is permitted.

Some states place limits on a jurisdiction's variance authority. In the state of North Carolina, statutory standards do not permit use variances, which means that a variance cannot be used to change an existing land use put in place by the zoning ordinance.[3] In some instances, cities have worked with their state legislatures to enact special enabling legislation that changes the conditions in which variances can be granted. In Florida, special legislation was passed that prohibits use variances for new construction on unimproved property within the city of Tampa. The legislation also requires all use variances to be reviewed by the city's planning commission, which provides an added layer of oversight to the variance process.

In other instances local governments are given expansive power to grant variances. Special enabling acts by the Tennessee General Assembly granted Shelby County and the City of Memphis considerable power in issuing variances. This power was further bolstered by a 1972 Tennessee Supreme Court case in which the city's variance power was upheld in *Glankler v. City of Memphis*, where the city deemed filling land zoned for single-family above the 100-year floodplain to be an unnecessary hardship and approved its use for multifamily housing.[4] Over a period of 95 years, Memphis and Shelby County's Board of Adjustment have approved around 14,000 variances. In 2012, the City of Memphis, in response to its high volume of variances granted, prohibited any use variances on a property that had been subject to a rezoning request at any time within an 18-month period.

Credit: Paul Chandler

## Learning from Variances

A city shouldn't rest comfortably if its zoning is resulting in a high volume of variances. A large number of variances can be an indicator of some deficiency in the zoning ordinance that is in need of review.[5] Local government staff may look into revising existing setbacks or lot dimension standards, especially if a high number of variances are centered around a specific development scenario or land use context. One solution utilized in Beaufort County, South Carolina was to authorize staff to give modulation permits, which provided for minor modifications to dimensional or development standards. Cities can also attach conditions to the approval of a variance, which ensures that variances are executed in a quick and timely manner. For example, a board of adjustment could stipulate that the development be completed within a specified time frame.

Planners need to address how city variance stipulations interact with the legislative duties of the planning commission. If a city grants too many variances, it can deeply undermine the legislative authority of the planning commission and its ability to enforce zoning provisions. This is why many cities and states prohibit use variances, as changes of use are best addressed through legislative bodies through the zoning amendment process.

In Alabama, state law does not prohibit use variances, however cities and counties in the state can enact statutes barring use variances within their jurisdiction.[6] Baldwin County's Board of Adjustment, for example, cannot grant use variances, only area variances. In Mississippi, the City of Madison also prohibits use variances.[7] Such measures help ensure that variances don't become a tool for evading land use provisions.

As mentioned previously, area variances are quite common and are generally seen as a legitimate exercise of variance authority. Use variances are permissible in many states, but they should be used infrequently so as not to undermine the authority of the planning commission. Then there are variances associated with development provisions that directly impact the life and safety of local residents. For example, local jurisdictions can grant variances to authorize construction that is not in keeping with the floodplain management ordinance.[8] Since such variances may have a direct impact on the life and safety of residents by increasing collective flood risk, they should be very rare and granted only if the property hardship is "exceptional, unusual, and specific to the property involved."

### Other Circumstances that Require a Quasi-Judicial Framework

Other situations in which quasi-judicial decision making can be applied include: special exceptions, subdivision plats, and zoning code violations.[9] These situations can be fraught with uncertainty in the same way variances are, as local boards may not always be aware of when circumstances necessitate a quasi-judicial hearing.

In North Carolina special use permit requests are done through the quasi-judicial framework. Like variances, special use permits are approved only if the applicant provides "competent, material, and substantial evidence" that the ordinance's standards for approval will be met. In the case of *PHG Asheville, LLC v. City of Asheville*, the North Carolina Supreme Court ruled that Asheville lacked the authority to deny PHG, a developer, a special use permit.[10] The Court stated that PHG had produced "competent, material, and substantial evidence" indicating it met the ordinance's required conditions. By comparison, the city provided no such evidence to counter the applicant's claims, and the Court noted that the city council's concerns were not relevant to the ordinance language under consideration.

Another issue at play in quasi-judicial hearings is how to best deal with situations where legislative bodies become involved in the quasi-judicial deliberation process. One solution arrived at in many communities is the use of a hearing examiner system to conduct quasi-judicial land use hearings. In the State of Washington hearing examiners are employed frequently in local jurisdictions.[11] Hearing examiners will have extensive legal backgrounds, and because they are not elected officials, they are less subject to political pressures that might hinder their ability to render objective decisions. While this does not fully isolate the city council from quasi-judicial decision making it does provide a kind of safety valve in which quasi-judicial permits can be delegated to the hearing examiner, such as conditional use permits, variances, planned unit developments, and design review approvals.

Hillsborough County, Florida has had a hearing examiner system in place since 1978.[12] The county's land development code allows for hearing officers for a variety of special property rights cases, along with many other specialty appeals boards. Though such an approach may be too unwieldy for smaller jurisdictions, in Hillsborough County this system is highly effective. Though there have been a number of appeals to reach state courts, only one land development case reached the state appellate court related to the way a property was sited and whether it was consistent with the county's comprehensive plan.

### Conclusion

Variances and other forms of quasi-judicial decision making are an important part of the planning process. In some situations states have legislation that limits the variance granting power of a city; however, cities cannot wholly rely on state law to set boundaries on quasi-judicial decision making. Cities with a sound understanding of quasi-judicial processes will educate their elected officials and advisory boards on the meeting framework while also establishing clear boundaries between the quasi-judicial and legislative functions of local governance.

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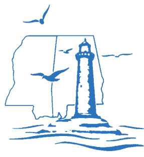
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