

# A Reference Manual for Alabama County Engineers

5th Edition, August 2024



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AN INTRODUCTION TO  
A REFERENCE MANUAL FOR  
ALABAMA COUNTY ENGINEERS

The Association of County Commissions of Alabama (ACCA) and the Association of County Engineers of Alabama (ACEA) are proud to present the fifth edition of *A Reference Manual for Alabama County Engineers*. This manual is designed as a legal resource tool for county engineers, covering many of the issues they encounter on a day-to-day basis. The manual contains a written overview of the various issues and laws impacting the work of county engineers, with references to applicable statutes, opinions from the Attorney General's Office and Ethics Commission, and court cases. This manual was first published in 2000 under the leadership of then ACCA President Roger Hayes and ACEA President Randy Tindell, with original text written by then ACCA General Counsel Mary Pons.

This manual is intended to be revised periodically to reflect changes in the law and to respond to the needs of county engineers. The five editions of the manual would not have been possible without the knowledge and expertise of people who care deeply about county government. The county engineers who contributed to the newest edition are ACEA President Eric Hill (Lauderdale County), Vice President Luke McGinty (Elmore County), Secretary and Treasurer Robert Nail (Etowah County), Scott Anders (Tuscaloosa County), Jeremy Butler (Clay County), and Greg Bodley (Morgan County). ACCA General Counsel Kelley Askew Gillikin and Assistant General Counsel Lita Waggoner led the effort to revise this edition, with assistance from Derek J. Stafford, a rising second-year law student at The University of Alabama School of Law, and Former ACCA General Counsel Mary Pons, who took time out of her retirement to revise several chapters.

Much has changed since this manual was first published 24 years ago, but one thing has remained constant: how much the contributors to this manual care about improving Alabama's counties. We are grateful for the long-time contributors who have shaped this manual over the years, as well as the new contributors who participated in this revision process for the very first time. Your collective knowledge and dedication ensure that *A Reference Manual for Alabama County Engineers* remains a valuable resource for years to come.

A handwritten signature in black ink, appearing to read "Sonny Brasfield". The signature is stylized with a large, prominent initial "S" and a cursive "Brasfield".

Sonny Brasfield  
Executive Director  
Association of County Commissions of Alabama

## AN INTRODUCTION TO LEGAL RESEARCH TOOLS

*A Reference Manual for Alabama County Engineers* is intended to provide a starting point for solving problems faced by county engineering departments. While this manual contains a general overview of relevant laws (at least as the law stands in August 2024), it is not a substitute for legal counsel. County engineers and county commissions are encouraged to consult their county attorneys before applying the law to a particular set of facts.

This manual cites a variety of statutes, court cases, and administrative guidance, including opinions from the Attorney General's Office and the Ethics Commission. Below is an overview of these materials and where they may be found online.

- I. **The Constitution of Alabama of 2022:** Alabama's current constitution was first adopted in 1901. Notably, Alabama has one of the longest constitutions in the world, with over a thousand constitutional amendments. In 2022, Alabama voters approved the adoption of the Constitution of Alabama of 2022, which is a recompilation of the Constitution of Alabama of 1901. The Constitution's text is available through the Alabama Legislative Information System Online (ALISON): <https://alison.legislature.state.al.us/constitution>
- II. **The Code of Alabama of 1975:** Alabama's current code was adopted in 1975. Each year, the Alabama Legislature makes changes to the statutes found in the Code of Alabama of 1975. Like the Constitution, the Code is publicly available through the ALISON website: <https://alison.legislature.state.al.us/code-of-alabama>
- III. **Attorney General's Opinions:** Pursuant to Ala. Code § 36-15-1, the Attorney General has a duty to issue opinions as to any question of law connected with the duties of county officers who are required to collect, disburse, handle, or account for public funds. The Attorney General's opinions are not binding on the courts; however, they are persuasive authority and, if followed, provide county officers with protection from liability. Attorney General's opinions — and information about how to request them — are available here: <https://www.alabamaag.gov/opinions/>
- IV. **The Alabama Administrative Code:** State agencies, such as the Alabama Department of Transportation or the Alabama Department of Revenue, periodically adopt rules and regulations to provide further guidance regarding the implementation of the law. These rules and regulations are published in the Alabama Administrative Code, which may be found here and is also available on the ALISON website: <https://admincode.legislature.state.al.us/>
- V. **Court Cases:** The Supreme Court of Alabama, the Court of Civil Appeals, and the Court of Criminal Appeals regularly issue appellate opinions of relevance to county government. The Alabama Appellate Courts Public Portal provides access to appellate opinions and related documents from May 19, 2023, or later: <https://publicportal.alappeals.gov/portal/home>.

Supreme Court opinions and special writings from October 2013 to May 19, 2023, are available here: <https://judicial.alabama.gov/Decision/SupremeCourtDecisions>.

Opinions of the Court of Civil Appeals from May 2014 to May 19, 2023, are available here: <https://judicial.alabama.gov/Decision/CivilDecisions>.

Additionally, many appellate opinions are available here: <https://caselaw.findlaw.com/court/alabama>.

- VI. **Ethics Commission Opinions:** Pursuant to Ala. Code § 36-25-4, the Ethics Commission has a duty to issue and publish advisory opinions on the requirements of the Ethics Act, based on a real or hypothetical set of circumstances. Opinions from the Ethics Commission may be found here: <https://www.ethics.alabama.gov/commission-opinions.aspx>
- VII. **Local Law Indexes by County:** County commissions should be aware that, to date, some counties' local laws have not yet been codified in the Code of Alabama 1975. The Legislative Services Agency annually publishes "Local Law Indexes," which list local legislative acts by county and topic. Newer acts are notated with the act number (e.g., 2024-XYZ), while older acts are notated with an act number and page number (e.g., 79-XYZ, 123, where 123 is the page number) or the act year and page number (e.g., 1966, 321, where 321 is the page number). The Local Law Indexes are available here: <https://alison.legislature.state.al.us/local-law-indexes-by-county>.
- VIII. **Legislative Acts:** After a bill is signed by the Governor or otherwise becomes law, it becomes a legislative act. Later, these legislative acts are codified into the Code of Alabama 1975. Legislative acts from mid-1999 and later are available through the Secretary of State's website: <https://www.sos.alabama.gov/government-records/legislative-acts>. Older legislative acts are available through the Alabama Department of Archives and History: <https://www.archive.org/details/alabama-acts>.
- IX. **Bills:** Bills may be tracked throughout the legislative process using the Alabama Legislature's website: <https://alison.legislature.state.al.us/bill-search>. Additionally, information about the bills that ACCA has been tracking is available here: <https://www.alabamacounties.org/legislation/bill-tracking/>.

ACCA hopes that this information is helpful to you, both as a county employee and as a citizen. If you have any questions, please contact the ACCA staff or your county attorney.

Kelley Askew Gillikin  
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# County Road Department

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# CHAPTER ONE

## THE COUNTY ROAD DEPARTMENT

### I. GENERAL ORGANIZATION OF THE COUNTY ROAD DEPARTMENT

There is no general law in Alabama specifically governing the structure of the county highway or road department. However, Ala. Code § 23-1-80 does grant counties general authority over the establishment, change, and maintenance of county roads and bridges and provides that:

The county commissions of the several counties of this state have general superintendence of the public roads, bridges, and ferries within their respective counties . . . [and] may establish, promulgate, and enforce rules and regulations, make and enter into such contracts as may be necessary or as may be deemed necessary or advisable by such commissions to build, construct, make, improve and maintain a good system of public roads, bridges, and ferries in their respective counties, and regulate the use thereof. . . .

*See also* Ala. Code § 11-3-10.

The structure of the county road department, which in many instances is determined by local law, varies considerably from county to county. However, in several counties the structure of the county and its system for supervising roads and bridges has been set by court order or resolution of the county commission.

There are three basic structures for county road supervision:

1. **The district system**, where each county commissioner receives a portion of the available county road funds and maintains his or her own road crews, equipment, etc. Under this system, each county commissioner plans, supervises, and controls the road activities for his or her individual district.
2. **The unit system**, where planning, purchasing, construction, and maintenance relative to the county road system is administered on the basis of the county as a whole, usually with the county engineer supervising and overseeing all projects and activities in the county highway department under the direction of the county commission.
3. **The modified unit system**, where a portion of the road and bridge work is performed on a unit basis and a portion maintained under the district system.

In A.G. No. 96-00276, the Attorney General's Office stated that it could not find anything that would not allow a county to adopt the unit system of road administration by resolution pursuant to its general powers for road superintendence. However, that office warned that there may be court orders impacting this authority in a particular county.

The Attorney General has also opined that in a county that operates under the unit system, the county commission may set priorities for projects to be handled by the county highway department and its county engineer. A.G. No. 2001-134. However, a local law establishing a unit or district system may restrict this.

## **II. THE COUNTY ENGINEER**

Ala. Code §§ 11-6-1 to -6 address the office of county engineer. Additionally, many counties have local laws that provide specifically for the county engineer and his or her duties. The general law is discussed in more detail below.

### **A. APPOINTMENT OF COUNTY ENGINEER**

Ala. Code § 11-6-1 provides that the county commission is authorized to appoint a county engineer who shall serve full time. Consulting engineers acting in the capacity of county engineer are not permitted. The statute provides that the county commission may enter into a contract of employment with the county engineer for a period of time not to exceed five years.

Generally, any personnel rules or policies of the county will apply to the county engineer, but local laws, contracts, or policies may provide otherwise.

Ala. Code § 11-6-5 states that the provisions of a civil service or merit system law governing employees of a county shall remain in full force and effect. County commissions should consult their local laws to determine whether the county engineer is subject to the county's civil service or merit system law. *See, e.g., Hurley v. Marshall County Commission*, 614 So. 2d 427 (Ala. 1993).

### **B. QUALIFICATIONS OF COUNTY ENGINEER**

Under Ala. Code § 11-6-2, the county engineer shall be a registered professional engineer in Alabama, with a minimum of three years' experience in the maintenance and construction of highways and bridges. This experience requirement may be met with experience gained either before or after registration. A.G. No. 2001-010. For the qualifications and licensure requirements for a registered professional engineer in the State of Alabama, *see* Ala. Code §§ 34-11-1 to -16.

### **C. COUNTY ENGINEER'S SALARY**

#### **1. Setting Salary**

The county commission fixes the salary of the county engineer. Ala. Code § 11-6-1.

#### **2. Overtime Pay**

Questions have sometimes arisen about the applicability of the overtime provisions of the Fair Labor Standards Act (FLSA) to the county engineer. A.G. No. 89-00451 concluded that, based upon the facts given, the Jackson County Engineer appeared to be exempt from the overtime provisions of the FLSA. The Attorney General's Office stated that the county commission could include overtime compensation in his or her salary, even if not required by the FLSA, if the payments were definite, paid at stated intervals for a fixed period, and in compensation for rendering services.

#### **3. State Contribution to Salary**

Under Ala. Code § 11-6-4, the Alabama Department of Transportation, upon application by the county commission, is required to contribute 70% of the county engineer's salary, up to the maximum amount described below.

- The contribution shall not exceed 70% of the top step of the state salary schedule under the Professional Civil Engineer II, Senior classification. This is not a limitation on what the engineer's salary can be, but only on the amount the state will contribute.
- Pursuant to Ala. Code § 36-27-9, this contribution includes the employer contribution to the Retirement Systems of Alabama in counties participating in that system.
- There is no requirement that the county engineer be qualified as a land surveyor to receive state participation in his or her salary. Ala. Code § 11-6-2.

#### D. COUNTY ENGINEER'S DUTIES

##### 1. In General

The general duties of the county engineer are found in Ala. Code § 11-6-3 and, subject to the approval and direction of the county commission, include the following:

- Employ, supervise, and direct assistants as are necessary to construct and properly maintain the county's roads and bridges.
- Perform engineering and surveying services as may be required to prepare and maintain necessary maps, plans, and records. Please note, however, that certain surveys can only be performed by a licensed professional surveyor under Ala. Code §§ 34-11-1 to 34-11-16. If the county engineer is not also a licensed professional land surveyor, the county engineer may not perform these surveys personally and may be responsible for assuring that these surveys are performed by a licensed professional land surveyor. A.G. No. 99-00059.
- Maintain the necessary accounting records to reflect the cost of constructing and maintaining the county highway system.
- Perform such other duties as are necessary and incident to the operation of the county highway system as directed by the county commission.

##### 2. Additional Duties

In addition to the duties set out in Ala. Code § 11-6-3, the county engineer has other statutory duties — some of which will be discussed in more detail elsewhere in this manual. Some examples are:

- Where the municipal planning commission is responsible for the regulation of subdivision development within its jurisdiction, the county engineer shall certify that the municipal planning commission has approved the plat for recording. See Ala. Code § 11-52-30(k).
- Where the county regulates subdivision development, the county engineer oversees the development for compliance, reviews all plats and plans, and makes recommendations to the county commission regarding approval. See Ala. Code §§ 11-24-1 to -7.
- To facilitate acquirement of easements by watershed associations, water conservancy associations or districts, or any other lawful entity engaged in water and soil conservation work, the probate judge must receive and record aerial photographs or maps of land areas in the county. In these circumstances, the county engineer must approve all aerial photographs or maps of land areas in the county prior to recordation in the probate office. See Ala. Code §§ 35-2-80 to -81.

Also, many counties have local laws which further provide for the duties of the county engineer.

### III. ENGINEER INTERNS

Alabama's law also provides for employment of "engineer trainees" by the county commission. See Ala. Code §§ 11-6-20 to -25. These personnel are now generally known as "engineer interns" in line with the law dealing with the licensure and regulation of professional engineers and land surveyors. See Ala. Code §§ 34-11-1 to -16.

#### A. APPOINTMENT AND QUALIFICATIONS

Under Ala. Code § 11-6-20, the county commission is authorized to appoint an engineer trainee as an assistant to the county engineer, who shall devote his or her full time to the duties of that office. The engineer trainee is considered a county employee in all respects. Ala. Code § 11-6-24.

Ala. Code § 11-6-21 provides that the trainee shall be a graduate engineer and a certified engineer intern in good standing as provided in Chapter 11 of Title 34. However, Ala. Code § 11-6-21 further provides that if no such candidate is available, the county may appoint a non-graduate certified engineer intern in good standing.

Under Ala. Code § 34-11-4(2), the Alabama Board of Licensure for Engineers and Land Surveyors shall consider any of the following to be minimum evidence that the applicant is qualified for certification as an engineer intern:

- **Graduation and examination.** A graduate of an approved engineering curriculum of four years or more from a school or college approved by the board who has successfully passed a board-approved examination in the fundamental engineering subjects shall be certified as an engineer intern, if otherwise qualified.
- **Graduation and examination plus experience.** Graduation in an unapproved engineering curriculum plus two years' experience. A graduate of an unapproved engineering curriculum of four years or more who has successfully passed a board-approved examination in the fundamental engineering subjects and who has a specific record of two years or more of progressive experience in engineering work of a grade and character satisfactory to the board shall be certified as an engineer intern, if otherwise qualified.
- **Comity.** The education, experience, and examination qualifications of the applicant are, in the judgment of the board, of a standard not lower than that specified in the applicable licensure act in effect in Alabama at the time such certificate was issued. Fundamentals of engineering examinations of comparable character taken and passed in another jurisdiction may be accepted by the board.

## **B. SALARY**

Ala. Code § 11-6-23 provides for the Alabama Department of Transportation to contribute 50% of the annual salary of an engineer trainee upon application of the county commission, up to the maximum amount described below. The amount is to be paid to the county in equal monthly installments to reimburse the county fund from which the salary of the engineer trainee is paid.

- The amount paid by the state shall not exceed 50% of the state salary schedule under the top step of the Professional Civil Engineer I classification.
- The amount paid by the Department of Transportation shall not include retirement contributions, Social Security, unemployment, or other benefits.

## **C. DUTIES OF THE ENGINEER TRAINEE**

Ala. Code § 11-6-22 provides that, subject to the approval and direction of the county commission, the engineer trainee has a duty to assist the county engineer in all duties of the county engineer as prescribed by law or as directed by the county commission. He or she shall also perform such other duties as necessary and incident to the operation of the county highway system.



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# Creation, Vacation & Annexation of County Roads

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# CHAPTER TWO

## CREATION, VACATION, AND ANNEXATION OF COUNTY ROADS

There are several methods by which a county road is created or vacated. The determination of whether a road is a county road is frequently essential when considering such issues as whether the county is liable for damages, whether the county has the authority or duty to maintain a road, and whether use of the road can be regulated by the county governing body.

This chapter deals with the procedures and requirements for the creation and vacation of county roads and outlines the distinction between public roads, private roads, and county (or county-maintained) roads. Subsequent chapters will discuss the construction and maintenance of county roads and other related issues, such as county work on private roads, regulation of public roads, and the construction of roads within subdivisions regulated by the county.

### I. CREATION OF COUNTY-MAINTAINED ROADS

The general public often has misconceptions about which roads the county commission has an obligation to maintain. Some people erroneously believe that if the public uses a road, then the county commission must be responsible for that road. However, not all public roads are county-maintained roads. Resolution of the issue of who “owns” the road is often critical, such as when a county is considering whether it can or must maintain a road.

There is little statutory law specifically addressing what constitutes a county road. However, there are some cases discussing this issue. There are also several Attorney General’s opinions that set out the general guidelines for making the factual determination of whether a road is public or private and whether it is a county road that the county commission is responsible for maintaining.

In this chapter, the terms “county road” and “county-maintained road” are largely used interchangeably to refer to roads that are within the county’s road system and subject to maintenance by the county. However, it is important to note that a road being named “County Road ##” does not necessarily mean that any or all portions of the road are maintained by the county commission.

As discussed in more detail below, a county road is established in one of three ways:

- By a regular proceeding for that purpose (as where the county has constructed or built the road for public use).
- By a dedication and acceptance of the road by the county commission.
- By prescription.

*See, e.g., Auerbach v. Parker*, 544 So.2d 943 (Ala. 1989). *See also* A.G. Nos. 2002-146, 89-00338, and 89-00299.

Whether a road is a public road and/or a county road is a factual determination to be made by the county commission. A.G. Nos. 2005-120, 2002-146, and 94-00148. However, this question frequently becomes a matter of litigation. See *Tucker v. Moorehouse*, 58 So.3d 1262 (Ala. Civ. App. 2010) for a discussion of evidence to consider in making the determination of whether a road is a public road.

The Supreme Court of Alabama has held that the county must be joined as a party where determination of whether a road is public or private might affect not only the rights of litigants but also the rights of members of the public to use the road, the duty of the county to maintain it, and the liability of the county for failure to maintain it. *Boles v. Autery*, 554 So.2d 959 (Ala. 1989). See also *Newman v. Skypark Properties, LLC*, 266 So.3d 724 (Ala. Civ. App. 2018); *Allbritton v. Dawkins*, 19 So.3d 241 (Ala. Civ. App. 2009); *Burnett v. Munoz*, 853 So.2d 963 (Ala. Civ. App. 2002). In essence, the courts have held that the county must be afforded an opportunity to assert its interests in the road or right of way. See *Newman v. Skypark Properties, LLC*, 266 So.3d 724 (Ala. Civ. App. 2018), for a discussion of this principle of law.

- In *Boles* and similar cases, the Court has held that if the county is not joined as a party in the lawsuit, neither the county nor other members of the public are bound by the court's ruling.
- The absence of an indispensable party is a jurisdictional defect rendering the proceedings void and may be raised by the appellate court even if the parties failed to present the issue to the trial court. *Newman v. Skypark Properties, LLC*, 266 So.3d 724 (Ala. Civ. App. 2018). See also *Wilson v. Berry*, 36 So.3d 559 (Ala. Civ. App. 2009).
- The county is not an indispensable party in private dispute over use of unpaved road when one party has acquired an easement by prescription, the parties do not want the road declared a public road, and the judgment does not impose any duties or responsibilities on the county or foreclose later action regarding whether roadway was a public road. *Steele v. O'Neal*, 87 So.3d 559 (Ala. Civ. App. 2011).

#### A. COUNTY ROAD ESTABLISHED BY COUNTY

As noted above, one method for establishing a county road is the construction of the road by the county for public purposes. There are many factors that impact and affect the construction of county roads. A detailed discussion of these issues and the statutory provisions addressing construction of roads is found in Chapter Three of this manual.

#### B. DEDICATION OF ROADS

Black's Law Dictionary defines "dedication" as, "The donation of land or creation of an easement for public use." Dedication does not create a county road but merely a road that may be used by the public even if it remains privately owned. See, e.g., *Blair v. Fullmer*, 583 So.2d 1307 (Ala. 1991). See also A.G. Nos. 97-00077 and 88-00173.

The most typical circumstance where this occurs today is newly constructed roads in a subdivision development. The developer will construct the roads (hopefully pursuant to county subdivision regulations) in conjunction with the construction of homes in the development. The developer generally then asks the county commission to accept the road into the county road system.

It is important to keep in mind that dedication of a road to public use does **not** by itself create a county road. There must be an acceptance of the road by the county commission, which has broad discretionary authority under Ala. Code § 23-1-80 to determine which roads it will accept and use as “county roads.” See, e.g., A.G. Nos. 2003-254 and 88-00173. As the Supreme Court of Alabama explained in *Chalkley v. Tuscaloosa County Commission*, 34 So.3d 667 (Ala. 2009), because acceptance of a dedication constitutes the assumption of responsibility for the property in question, a grantor (e.g., a developer) cannot automatically impose such responsibility on the public through his or her dedication of the property.

- The acceptance of the road by the county governing body is not necessary to establish dedication to the public if the statutory procedures are followed. *Harper v. Coats*, 988 So.2d 501 (Ala. 2008).
- Approval of a recorded subdivision plat does **not** amount to acceptance of the roads as county roads nor does it impose upon the county a duty to maintain the road. See, e.g., *Chalkley v. Tuscaloosa County Commission*, 34 So.3d 667 (Ala. 2009); *Blair v. Fullmer*, 583 So.2d 1307 (Ala. 1991).
- When the county does accept a subdivision dedication, it does have responsibility over the roads in the subdivision and has a duty to maintain safety and convenience of those roads. *Richardson v. County of Mobile*, 327 So.3d 1130 (Ala. 2020).

Legally, the county commission may decline to accept a road that has been “dedicated” to public use as a public road even if the road is built to proper standards.

- Keep in mind that, once accepted, the county has a duty to maintain that road in a reasonably safe condition for travel.
- Where the county has subdivision regulations or “road acceptance” policies, roads should only be accepted into the county road system if those regulations or policies have been followed in the construction and maintenance of the road.

There are two legally recognized methods for the establishment of public roads through dedication by landowners: statutory dedication and common law dedication. Each method is outlined below.

## 1. Statutory Dedication

Statutory dedication of roads is addressed in Ala. Code §§ 35-2-50 to -52, which provide, in general, the following:

- Anyone desiring to subdivide his or her lands into lots must have the lands surveyed and “shall cause a plat or map thereof to be made.”
- The plat must be certified by a land surveyor and a certificate must be signed by the owner or his agent.
- The plat, with the certificate and acknowledgement, shall be recorded in the probate office.

After there has been a proper dedication, that dedication is irrevocable and cannot be altered or withdrawn except by statutory vacation proceedings. *Gaston v. Ames*, 514 So.2d 877 (Ala. 1987). See also *Pritchett v. Mobile County*, 958 So.2d 349 (Ala. Civ. App. 2006). Where there are questions about whether a road has been dedicated to public use, the burden of proof lies with the party asserting dedication and the dedication must be demonstrated by affirmative evidence. *Montabano v. City of Mountain Brook*, 653 So.2d 947 (Ala. 1995).

- Substantial compliance with the statutory requirements constitutes a valid dedication. *See, e.g., Harper v. Coats*, 988 So.2d 501 (Ala. 2008); *Montabano v. City of Mountain Brook*, 653 So.2d 947 (Ala. 1995).

## 2. Recording of Plats

It is important to note that no map or plat of any subdivision shall be recorded, and no property sold, until and unless it has been submitted to and approved by the proper entity, either the municipal planning commission for subdivision development under its regulations or the county engineer for development regulated by the county. *See* Ala. Code § 11-52-30(k) and Ala. Code §§ 11-24-1 to -7. Additionally, in counties that regulate subdivisions, the owner(s) of land to be subdivided must comply with the county's regulations prior to recording the plat. (*See* Chapter Nine regarding subdivision regulations.)

- The acknowledgment and recording shall be held as a conveyance of the portions donated or granted to the public. In other words, once the plat or map is recorded in the probate office, the streets included are held to be dedicated to the public. *McClendon v. Shelby County*, 484 So.2d 459 (Ala. Civ. App. 1985). *See also Harper v. Coats*, 988 So.2d 501 (Ala. 2008).
- The mere approval of the plat is not an acceptance of the proffered dedication and imposes no burden on the governmental body. *See, e.g., Chalkley v. Tuscaloosa County Commission*, 34 So.3d 667 (Ala. 2009); *Cottage Hill Land Corp. v. City of Mobile*, 443 So.2d 1201 (Ala. 1983). *See also* A.G. No. 2014-042.
- The Alabama Court of Civil Appeals has held that where a record map is used in conjunction with a deed of conveyance and there is discrepancy between the map and the deed, it is the terms of the deed that control, even though the map may have been recorded prior to the deed. *Bradley v. City of Trussville*, 527 So.2d 1303 (Ala. Civ. App. 1988).

## 3. Common Law Dedication

The Supreme Court of Alabama has authorized the inclusion of a road into the county road system by common law dedication. *CRW, Inc. v. Twin Lakes Property Owner's Assn.*, 521 So.2d 939 (Ala. 1988); *Hall v. Polk*, 363 So.2d 300 (Ala. 1978). *See also* A.G. No. 83-00396.

Common law dedication consists of acts indicative of the owner's intent to dedicate property to public use and an acceptance by the public. For a discussion of owner's intent, *see Ritchey v. Dalgo*, 514 So.2d 808 (Ala. 1987).

- The owner must unequivocally intend to create a public right exclusive of his or her own. *CRW, Inc. v. Twin Lakes Property Owner's Assn.*, 521 So.2d 939 (Ala. 1988).
- The intent to dedicate may be shown by a deed to an individual where the owner declares part of his or her land reserved to a public use.
- It is the conduct of the owner that determines his or her intent to dedicate property to a public use, ascertained by acts and not any hidden purpose in the owner's mind. *Ritchey v. Dalgo*, 514 So.2d 808 (Ala. 1987).

### C. ACCEPTANCE OF ROADS

As discussed above, a dedicated road does not become a county road until and unless it is accepted by the county commission. *See, e.g., Chalkley v. Tuscaloosa County Commission*, 34 So.3d 667 (Ala. 2009); *Blair v. Fullmer*, 583 So.2d 1307 (Ala. 1991).

1. The county may, within its discretion, accept dedicated roads into the county road system pursuant to its statutory authority over the county's roads. *See* Ala. Code §§ 11-3-10 and 23-1-80. *See also* A.G. Nos. 89-00338 and 89-00299.
2. There must be a clear acceptance and assent, as by resolution, before a road dedicated by a private landowner (such as a subdivision developer) can be considered a county road. A.G. Nos. 96-00061 and 83-00396.
  - The mere fact of dedication does not impose a duty on the county to maintain the road and a grantor cannot automatically impose such responsibility on the public through his or her dedication. *See Blair v. Fullmer*, 583 So.2d 1307 (Ala. 1991); *Chalkley v. Tuscaloosa County Commission*, 34 So.3d 667 (Ala. 2009).
  - Dedication of a road, in and of itself, is insufficient to transfer responsibility for maintenance and liability to a governmental entity. Moreover, the approval of a subdivision plat does not amount to acceptance of a road. *Chalkley v. Tuscaloosa County Commission*, 34 So.3d 667 (Ala. 2009). *See also* A.G. No. 2014-042.
  - This same principle would apply to a "dedicated" easement included in a plat or deed. A.G. No. 97-00249.
  - When accepting a dedication, it is highly recommended that the county commission adopt a resolution that clearly defines what is being accepted. *See* A.G. No. 2021-004.
3. The county is not required to accept roads which do not meet their minimum standards. *See, e.g.,* A.G. Nos. 2003-254, 89-00338, and 88-00173.
  - This is true regardless of whether the county has adopted written subdivision regulations.
  - It is recommended that the county establish specific policy and standards for the acceptance of roads. A.G. No. 83-00396.
  - If the county has established guidelines for acceptance of a road, those guidelines must be met before the road is accepted by the county. A.G. No. 2001-231.
  - The state may take over a private road if the county chooses not to accept it and the state determines that the greater good would be served. A.G. No. 2003-254.
4. It is also important that the county not maintain any road until and unless it has been formally accepted as a county road.
  - A county may pave a road if it has been dedicated and accepted, but it is a violation of Section 94 of Alabama's Constitution to pave or make repairs on a private roadway or drive. A.G. No. 2002-130.
  - A governing body may not repair or replace a private road and bridge in a private gated community located in the governing body's jurisdiction but may accept the dedication of the roads and bridges and assume their maintenance and repair. A.G. No. 2019-034.

## D. CREATION OF PUBLIC OR COUNTY ROAD BY PRESCRIPTION

A road can also become a public road (or county road) by prescription. This can be a very difficult determination to make and must be looked at on a case-by-case basis. The Attorney General frequently states that this determination must be made by the county, but often this issue is decided by the courts.

The general principle of law governing prescription is that an open, defined roadway in continuous use by the public without let or hindrance for a period of twenty years becomes a public road by prescription. Under such circumstances, there is a presumption of dedication or other appropriation to public use. *Osborn v. Champion Int'l Corp.*, 892 So.2d 882 (Ala. 2004). See also A.G. No. 2005-120. Where there is a dispute, the burden is on the landowner challenging the claim that the road is public to show that use of the road was permissive only in recognition of his or her right to reclaim possession. *Osborn v. Champion Int'l Corp.*, 892 So.2d 882 (Ala. 2004).

See *Smyth v. Bratcher*, 962 So.2d 842 (Ala. Civ. App. 2006) for a discussion of evidence to consider in determining whether a road has become a public road by prescription. See also *Quinn v. Morgan*, 215 So.3d 1090 (Ala. Civ. App. 2016) and *Barker v. Bennett*, 227 So.3d 43 (Ala. Civ. App. 2016) for a discussion of evidence required to establish prescriptive rights or easements.

A few considerations in determining if a road has become a public or county road by prescription are:

### 1. Length of Time Road Used by the Public

As a general rule, an open, undefined roadway continuously used by the public without let or hindrance for a period of 20 years becomes a public road by prescription. *Suttle v. Tucker*, 398 So.2d 266 (Ala. 1981). See also A.G. Nos. 2005-120, 94-00185, and 89-00338.

- Where these circumstances exist, there is a presumption of dedication and permissive use. *Barker v. Bennett*, 227 So.3d 43 (Ala. Civ. App. 2016); *Osborn v. Champion Int'l Corp.*, 892 So.2d 882 (Ala. 2004).
- However, this presumption does not apply to wooded or unimproved lands. *Osborn v. Champion Int'l Corp.*, 892 So.2d 882 (Ala. 2004).

### 2. Use of the Road by the Public

In determining whether a public road has been created by prescription, it is the character of the use — rather than the frequency — that controls. A.G. No. 2005-120. Also, a road in a bad state of repair may still be a road for public use. A.G. No. 2005-120. See also *Laney v. Garmon*, 66 So.3d 766 (Ala. Civ. App. 2010). While none are solely determinative, some factors to consider as noted in A.G. No. 2005-120 include:

- Is the road used as a mail or school bus route?
- Is the road used by the general public or only adjoining landowners?
- Has a barrier erected to impede access been in place for twenty years?

### 3. Maintenance and Condition of the Road

Whether the county has provided maintenance of the road over the years will be a strong consideration, but not necessarily determinative.

- County maintenance is strong evidence that a road is a public road, but maintenance is not essential to this determination. *See, e.g., Darnall v. Hughes*, 17 So.3d 1201 (Ala. 2008); *Davis v. Linden*, 340 So.2d 775 (Ala. 1976). *See also* A.G. Nos. 2005-120, 2002-146, 94-00148, and 89-00338.

### 4. Maps and Deeds

Evidence from maps and deeds showing the road as public or private can be important. *See, e.g., Barber v. Landrum*, No. CL-2022-0848, 2023 WL 3557747 (Ala. Civ. App. May 19, 2023).

- However, one should not rely on a tax assessor's map to the extent that it overlooks other compelling evidence. *Williams v. Nearen*, 540 So.2d 1371 (Ala. 1989). *See also* A.G. Nos. 94-00185 and 91-00379.

### 5. Position of Property Owners

The use of the road must be unobstructed and adverse to the rights of the property owner claiming exclusive ownership or rights. Therefore, if a property owner attempts to limit or prohibit use of the road, or if he or she authorizes use but makes clear that it is with permission and he or she is not relinquishing ownership, the road would not likely be viewed as a public road created by prescription.

- Roads are frequently used as matter of convenience without any intention on the part of landowners to dedicate or give up their lands for public use. A.G. No. 2005-120.

### 6. Location of Road

Where the road runs over unimproved or "turned out" lands, there is a presumption that the use is permissive rather than adverse, regardless of the time of use. *Osborn v. Champion Int'l Corp.*, 892 So.2d 882 (Ala. 2004).

### E. PRIVATE ROADS

The law provides for the county commission to recognize a private road up to 15 feet in width upon a person's application. Ala. Code §§ 23-1-130 to -131. The person applying is responsible for keeping the road open and in repair. While there is no definition of "private road" in this statute, the law governing motor vehicles and traffic defines a "private road" at Ala. Code § 32-1-1.1(49) as: "Every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons." *See also Thompson v. Champion Int'l Corp.*, 500 So.2d 1048 (Ala. 1986).

- In *Thompson v. Champion Int'l Corp.*, 500 So.2d 1048 (Ala. 1986), the Supreme Court of Alabama stated that Ala. Code § 23-1-131 was passed "to allow an individual to establish a private road across the land of another by applying to the county commission" and that such road is not required to meet statutory standards of a public road or highway.

## II. ROAD CLOSINGS

There are several Code provisions addressing road closures.

### A. CLOSING BY COUNTY COMMISSION

Ala. Code § 23-1-3 authorizes counties, acting through the county commission and duly authorized employees, to close public roads and, where possible, to make detour roads when deemed necessary or advisable. The state, acting through the Alabama Department of Transportation, has the same authority.

Counties (and the state) may also, by resolution, prohibit or restrict the operation of vehicles upon any roads “whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights reduced.” Ala. Code § 32-1-3.

- All restrictions must be posted with appropriate signs, and the resolution “shall not be effective until or unless such signs are erected and maintained.”
- Because this procedure requires a resolution, it would appear that the county engineer does not have authority to impose such restrictions without action by the county commission.

### B. ARE YOU REALLY “CLOSING” THE ROAD?

It is important to distinguish between road “closings” and advising citizens of weather-related or other emergency conditions making the road temporarily “impassable”. As noted above, “closing” a county road requires affirmative action by the county commission, along with signage — and barricades — making clear that use of the road is prohibited. These actions are generally not realistic when a road becomes dangerous because of weather conditions or other emergency circumstances. In these instances, the county typically does not take action to prohibit access to the road or roads through the placement of barricades or signage but should take action to publicly discourage use of the road or roads during or after the storm.

To address these issues, a group of county engineers, emergency management directors, and attorneys developed a suggested procedure for counties to utilize when there are weather-related or other conditions resulting in the county commission making a blanket announcement to the public regarding the imminent dangers in traveling on county roads. This suggested policy (found at the end of this chapter) has been approved by the ACCA and ACEA Boards of Directors as a recommended procedure for counties to utilize during emergency conditions where travel on county roads should be discouraged.

### C. ROAD CLOSING BY THE STATE

State troopers may close roads immediately by barricading them when they become dangerous on account of weather, road damage, or other cause. Ala. Code § 32-5-16. Under this section, the state trooper shall immediately notify the Alabama Department of Transportation of the danger and the road remains closed until the hazard has been corrected and the road is ordered reopened by the Alabama Department of Transportation.

### III. VACATION AND ABANDONMENT OF ROADS

Ala. Code §§ 23-4-1 to -20 set out the procedure for the vacation of a public road by the county or by petition of abutting landowners. See also A.G. No. 89-00338. The Alabama Legislature rewrote this law in 2004 to eliminate a hearing in probate court when the vacation is initiated by the county commission and to make procedures for vacation virtually identical whether initiated by the governing body or adjoining landowners. See Act No. 2004-323. The law was further amended in 2014 to establish some special rules for a few special and non-typical circumstances. See Act No. 2014-333.

In addition to Ala. Code §§ 23-4-1 to -20, Ala. Code §§ 35-2-54 to -55 address vacation of platted streets or alleys by abutting landowners, discussed in more detail in Section III, C, below.

The courts have generally disfavored vacation of roads and have required strict compliance with the statutory procedures. *Holland v. City of Alabaster*, 624 So.2d 1376 (Ala. 2000); *Bownes v. Winston County*, 481 So.2d 362 (Ala. 1985). See also A.G. Nos. 96-00061 and 89-00338. In *Perkins v. Shelby County*, 985 So.2d 952 (Ala. Civ. App. 2007), the Supreme Court of Alabama held that an executed quitclaim deed purportedly transferring a roadway to another entity was invalid when the county had not followed the statutory vacation procedures to relinquish the road.

- A public road cannot be lawfully disposed of unless it is properly vacated or abandoned. *Perkins v. Shelby County*, 985 So.2d 952 (Ala. Civ. App. 2007).
- The interests of adjoining or nearby landowners will be carefully scrutinized by the courts to ensure that they have convenient and reasonable egress and ingress to and from their property. Ala. Code § 23-4-20. See also *Jackson v. Moody*, 431 So.2d 509 (Ala. 1983); *Booth v. Montrose Cemetery Association*, 387 So.2d 774 (Ala. 1980). However, it is not a question of comparing conveniences or desirability, but whether there is some other reasonably convenient way. *City of Mobile v. Pinto Island Land Co.*, 5 So.3d 1248 (Ala. Civ. App. 2007).
- Public necessity is a strong consideration in upholding a vacation approved by the governing body. *City of Mobile v. Pinto Island Land Co.*, 5 So.3d 1248 (Ala. Civ. App. 2007).

The Attorney General's Office has held that vacation procedures should be followed when a street is being changed to a dead-end street if private landowners have property abutting the portion of the street to be closed. A.G. No. 99-00191.

- However, citing *Holland v. City of Alabaster*, that opinion also states that, although vacation of roads is disfavored, the private rights of abutting owners is subordinate to the public right and the closing of a road may be justified on the ground of public necessity. A.G. No. 99-00191. See also *City of Mobile v. Pinto Island Land Co.*, 5 So.3d 1248 (Ala. Civ. App. 2007).

- Moreover, after rendering its opinion in A.G. No. 99-00191, the Attorney General distinguished the situation where a municipality seeks to close a street versus *per se* vacating a street, finding that it is within the municipality's inherent authority under its police power to impose reasonable regulations to control traffic and the use of streets within its corporate boundaries. A.G. No. 2008-105. In regard to municipalities, at least, the Attorney General found that the mere closing of the street in furtherance of this inherent authority did not require adherence to statutory vacation procedures. *Id.*
- ***The important takeaway from these cases and opinions appears to be that the procedures to effect the closure of an existing thoroughfare may be dictated by the facts and circumstances in each particular case. As a result, prior to taking any action in this regard, county engineers and their county commissions should consult with legal counsel.***

The Attorney General has also held that once the county has assented to the vacation of a road, it has no authority to rescind its resolution. Therefore, if after closure, the county desires to “reestablish” the road, it must do so by dedication and acceptance or by statutory procedures. A.G. No. 94-00195.

#### A. VACATION BY COUNTY

Ala. Code § 23-4-1 provides that streets, alleys or other highways (in other words, county roads) may be closed and vacated “upon the application of the county in which they are situated” where the street, alley, or highway is not located within a municipality. However, the vacation of a county road will not be deemed perfected if there is not strict compliance with all of these statutory procedures.

The procedures for notice and hearing on the issue of a vacation initiated by the county commission are found in Ala. Code § 23-4-2 and outlined below:

1. When the county commission proposes to vacate a public road, it must schedule a public hearing prior to taking final action on the issue.
  - There is no requirement that the public hearing be scheduled separately from a county commission meeting.
  - However, the decision on the proposed vacation must be made at a regularly scheduled county commission meeting.
2. The county commission must give at least 30 days prior notice of the scheduled hearing on vacation in each of the following ways:
  - a. Publication in a newspaper of general circulation “in the portion of the county where the street . . . lies” once a week for four consecutive weeks.
  - b. Posting notice on a bulletin board at the courthouse.
  - c. Mailing notice to any abutting landowners.
  - d. Mailing notice to any entity known to have facilities or equipment (such as utility lines) within the road’s public right-of-way.

3. The notice from the governing body shall describe the road it proposes to vacate and provide the date, time, and location of the meeting on the issue.
  - The Supreme Court has held that the 30-day time period to appeal vacation of a road or alley does not apply where any abutting landowner is not given proper notice. *Barry v. The D.M. Drennen and Emma Houston Drennen and Drennen Memorial Trust of Saint Mary's Church et al.*, 982 So.2d 478 (Ala. 2007).
4. Any citizen alleging to be affected by the proposed vacation may file a written objection to the vacation or request to be heard at the public hearing.
5. With one exception discussed below, where the commissioners are elected by single-member districts, the motion to vacate the road must be made by the district commissioner where the road lies.
6. If the commission votes to vacate the road, it shall adopt a resolution to be filed in probate court. The resolution shall:
  - a. Describe with accuracy the road to be vacated.
  - b. Give the names of abutting landowners affected by the vacation.
  - c. Set forth that the vacation is in the public interest.
7. Notice of the vacation shall be published once in a newspaper in the county no later than 14 days after the resolution to vacate is adopted.
8. The vacation divests all public rights and liabilities in the road (including any prescriptive rights). Under § 23-4-2(b), title vests in the abutting landowners.
  - However, this section specifically provides that entities with utility lines, equipment, and facilities in place at the time of vacation may continue to maintain, extend, and enlarge their lines, equipment, and facilities as if the vacation had not occurred.
  - Ala. Code § 23-4-2(b) provides that, upon vacation, title and all public rights "shall vest in the abutting landowners." An appellate court has held that this provision does not mean that each abutting landowner is entitled to an equal share of the vacated right-of-way. Instead, the court held, the common law allowing for a different division of property is still in place. *Keeton v. Kelly Co.*, 47 So.3d 1262 (Ala. Civ. App. 2010).

The vacation of a public road shall not deprive other property owners of any right they have to convenient and reasonable means of ingress and egress to and from their property. If necessary to avoid this, the county must dedicate another road affording that right. Ala. Code § 23-4-2(b).

- Reasonable means of ingress and egress does not necessarily mean the preferred route of certain persons when there are other roads available. See *Elmore County Commission v. Smith*, 786 So.2d 449 (Ala. 2000) and *City of Mobile v. Pinto Island Land Co.*, 5 So.3d 1248 (Ala. Civ. App. 2007).
- The Supreme Court of Alabama has held that a vacation of a road initiated by a public authority to better serve the public interest is a situation where the rule of public necessity overrides private convenience. *City of Mobile v. Pinto Island Land Co.*, 5 So.3d 1248 (Ala. Civ. App. 2007).

## B. VACATION BY ABUTTING LANDOWNERS UNDER ALA. CODE § 23-4-20

As noted above, Ala. Code § 23-4-20 provides that the notice and hearing procedures for vacating a road at the request of abutting landowners are now the same as procedures used when vacation is initiated by the governing body, with one exception discussed in paragraph 3 below. To initiate action, the abutting owner or owners file a written petition with the county commission requesting vacation of the road.

- The Supreme Court of Alabama has held that a lot separated from a road by a walkway does abut that road and property owner of that lot is an abutting owner. *Town of Dauphin Island v. Point Properties, Inc.*, 620 So.2d 602 (Ala. 1993). See also *Scott & Scott v. City of Mountain Brook*, 682 So.2d 42 (Ala. 1996).

### 1. Public Hearing Requirement

There is no legal requirement for the county commission to take action on a petition for vacation submitted by abutting landowners. However, Ala. Code § 23-4-20(a) requires that the county commission set a public hearing on the request for vacation within 100 days from the date the petition is received.

- Notice of the hearing shall be provided in the manner required for notice of meetings under the Open Meetings Act.
- The notice must describe the road or portion of the road the petitioners are requesting be vacated.
- A copy of the notice shall be mailed to any abutting landowner at least 30 days prior to the scheduled hearing.
- A copy of the notice shall also be mailed at least 30 days prior to the hearing to any entity known to have facilities or equipment (such as utility lines) within the public right-of-way of the road or portion of the road where vacation is requested.

### 2. Procedures and Effect of Vacation

As noted above, the county commission is *not* required to take action on the petition following the public hearing. However, if the commission elects to take action, it shall follow the procedures it would follow in the event the vacation was initiated by the commission.

- If the county commission approves the vacation, it shall adopt the resolution as required in Ala. Code § 23-4-2, file it in probate court, and publish notice of the vacation in the newspaper.
- The vacation divests all public rights and liabilities in the road, vesting title in the abutting landowners.
- Utilities have continued access to maintain, extend, and enlarge their lines, equipment, and facilities as if the vacation had not occurred.

As with vacation initiated by the county commission, a vacation granted in response to a petition by abutting landowners shall not deprive other property owners of their right to convenient and reasonable means of ingress and egress to and from their property.

### 3. Special Procedures when Petition Filed by Family Members

As mentioned above, Ala. Code § 23-4-2(b) requires that, in counties where the commissioners are elected by single member districts, any motion to vacate a road or a portion of a road pursuant to a petition filed by abutting landowners must be made by the district commissioner in the district where the road lies.

However, Ala. Code § 23-4-20(c) provides a special procedure for such motions if the petitioners are all members of the same immediate family.

- For the purposes of this section, "immediate family" means spouse, parent, child, sibling, or grandparent.

Under these special procedures, if the county commissioner from the district in which the road or portion of the road is located does not move to vacate within 100 days following the public hearing, the issue may be placed on a regular county commission meeting agenda if, within 30 days:

- a. A written request to place the issue on the agenda is submitted to the county commission chair by a majority of other members of the county commission; *and*
- b. A copy of the written request is delivered to the commissioner in whose district the road or portion of the road is located at the same time that the written request is submitted to the chair.

This procedure may only be used to place the issue on the agenda of a *regular county commission meeting*. However, when the issue is placed on the agenda under this procedure, a motion to approve the vacation may be made at the meeting at which the issue is debated by one of the members of the commission who requested the matter be placed on the agenda.

### C. VACATION BY ABUTTING LANDOWNERS UNDER ALA. CODE § 35-2-54

The owner or owners of lands abutting any street or alley shown by any map, plat or survey, executed and recorded or not, may vacate the street or alley or a portion thereof by joining in a written instrument recorded in the same manner as conveyances of land. Recording of the declaration operates to destroy the force and effect of the dedication by the map, plat, or survey and to divest all public rights in the street or alley, including any rights acquired by prescription. If the street or alley is within the limits of any municipality, the assent of the mayor or governing body of the municipality must be procured, evidenced by a resolution adopted by such governing body, with a certified copy filed and recorded by the clerk or ministerial officer in charge of the records of the municipality.

If such street or alley is outside of the municipality and has been or is being used as a public road, the assent of the county commission of the county in which the property is situated must be procured, evidenced by resolution adopted by such county commission, with a copy certified by the presiding officer filed and recorded with the declaration of vacation.

- Convenient means of ingress and egress to and from their property shall be afforded to all other property owners owning property in the tract of land embraced in the map, plat, or survey, either by the remaining streets and alleys dedicated by such map, plat, or survey or by any other street or alley being dedicated.

- Assent of county commission is only required if the road has been or is being used as a public road, but where required, the vacation cannot be valid without such consent. *Booth v. Montrose Cemetery Association*, 387 So.2d 774 (Ala. 1980).

#### D. GENERAL PROCEDURE FOR APPEAL OF VACATION

Ala. Code § 23-4-5 authorizes any party affected by the vacation of a public road to appeal the county commission's decision to Circuit Court.

1. The appeal must be filed within 30 days of the governing body's decision to vacate the road.
  - The 30-day time period to appeal vacation of a road or alley does not apply where any abutting landowner is not given proper notice of the governing body's consideration of vacation. *Barry v. The D.M. Drennen and Emma Houston Drennen and Drennen Memorial Trust of Saint Mary's Church et al.*, 982 So.2d 478 (Ala. 2007).
  - Ownership of abutting property is not a requirement for standing to appeal a vacation under Ala. Code § 23-4-5. *Crossfield v. Limestone County Commission*, 164 So.3d 547 (Ala. 2014).
2. The appeal will not suspend the effect of the vacation unless the appealing party posts bond in an amount determined by the circuit judge.
3. Either party may appeal the circuit court's decision to the appellate courts.

#### E. SPECIAL APPEAL RULES FOR VACATING CERTAIN UNPAVED ROADS

There is no general right of appeal where the county commission takes no action or fails to act on a petition to vacate a road submitted by abutting landowners. However, Ala. Code § 23-4-20(d) sets out a special right to appeal to the circuit court if the county commission denies or fails to act within 100 days on a petition to vacate an unpaved road or alley filed by **all** owners of property abutting **all** sides of an unpaved road or alley from its beginning to the place where the road or alley ends.

- The petition must be filed by **all** property owners abutting **all** sides of the unpaved road or alley from its beginning to the place where the unpaved road or alley ends.
- This special right of appeal does not apply when the unpaved road or alley ends along a body of water.

Where an appeal has been filed under these circumstances, the county commission shall be granted an opportunity to present evidence establishing why the unpaved road should not be vacated prior to any order for vacation being issued by the court.

The court may only issue an order for vacation upon an affirmative finding that:

1. **All** owners of the property abutting **all** sides of the unpaved road from its beginning to its end have joined as plaintiffs; **and**
2. Vacation of the unpaved road or alley will not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to their property.

In the event the court grants the petition for vacation, the order shall include a specific finding that the county is divested of all public rights and liabilities in the unpaved road or alley.

- The plaintiffs shall be required to post signs along the unpaved road or alley providing notice that the unpaved road or alley is privately owned and *not* maintained by the county.
- Vacation of the unpaved road or alley shall not take effect until and unless the signs are posted.

#### F. VACATION BY CIRCUIT COURT

Ala. Code §§ 35-2-58 to -61 authorize the circuit court to vacate a road and set out the procedures for such an action. Any person owning lands abutting the street or alley to be vacated may file the civil action, but all owners of land abutting the street or alley shall be made a party. In fact, the Supreme Court of Alabama has held that this method still requires consent of all abutting landowners. *Turner v. Hoehn*, 494 So.2d 28 (Ala. 1986). See also A.G. Nos. 92-00253 and 91-00341.

- The municipality (or the county if the street is not within municipal limits) shall be made a party defendant.

The proceedings are handled like all civil actions, and appeals may be filed under the rules of civil procedure. If the final judgment grants the petition, the petition and final order shall be recorded in the office where the map, plat, or survey showing the roads, streets or alleys are recorded, and the order shall not be final until this is done. The party filing the petition is responsible for the recording fees.

#### G. VACATION OF ROADS WITHIN MUNICIPALITY

Municipalities are governed by the same statutory procedures as counties for vacating streets within their jurisdiction. Ala. Code § 23-4-1 to -6.

- These procedures may not be used to vacate a county road which lies partially within the corporate limits of a municipality. A.G. No. 94-00160.
- If the road is partially a city street and partially a county road, vacation can only be accomplished by procedures involving both governing bodies. A.G. No. 94-00236.

#### H. VACATION OR ABANDONMENT OF ROADS BY PRESCRIPTION

In addition to statutory vacation of roads, it is possible for a road to be vacated or abandoned by prescription. Generally, a road may be abandoned by nonuse for a continuous period of 20 years. *Bownes v. Winston County*, 481 So.2d 362 (Ala. 1985). However, the Supreme Court of Alabama has also held that there can be abandonment by nonuse for a shorter period of time, such as when there has been construction of a new highway replacing the road. *Floyd v. Industrial Development Board of Dothan*, 442 So.2d 927 (Ala. 1983).

This is frequently a difficult case to prove and will be carefully scrutinized by the courts. Unfortunately, there are no hard-and-fast rules regarding how a road is abandoned by prescription and the appellate courts are frequently split on the issue. For a review of the cases and issues involved in determining whether a road has been abandoned by prescription, see A.G. No. 2002-146.

The Supreme Court of Alabama, in *Walker v. Winston County Commission*, 474 So.2d 1116 (Ala. 1985), and other cases, has noted that a public road may be abandoned in one of several ways:

1. Through statutory vacation procedures.
2. Through nonuse for a period of twenty years.
  - Party alleging the public road had been abandoned by virtue of nonuse has burden of showing abandonment by clear and convincing evidence. *See, e.g., Barber v. Landrum*, No. CL-2022-0848, 2023 WL 3557747 (Ala. Civ. App. May 19, 2023); *Floyd v. Industrial Development Board of Dothan*, 442 So.2d 927 (Ala. 1983).
3. Where one road replaces another.
  - The construction of a new highway replacing an old road may, under the right circumstances and after an appropriate length of time, result in an abandonment of the old road in a period of less than 20 years. *See, e.g., Floyd v. Industrial Development Board of Dothan*, 442 So.2d 927 (Ala. 1983).
  - Decrease in use due to a new road is probably not sufficient alone to show abandonment. *See, e.g., Barber v. Landrum*, No. CL-2022-0848, 2023 WL 3557747 (Ala. Civ. App. May 19, 2023); *Fox Trail Hunting Club v. McDaniel*, 785 So.2d 1151 (Ala. Civ. App. 2000).

The county should be very careful in attempting to assert that a county road has been abandoned by prescription. In fact, it is recommended that, where the county desires to be relieved of responsibility for a public road, the county satisfy the statutory procedures for vacation of the road to eliminate any doubt regarding the county's position with regard to the road. *See* A.G. No. 96-00246.

As noted above, the courts look at vacation with disfavor, and will strictly construe efforts to vacate. In the case of vacation by prescription or abandonment, the burden of showing abandonment is on the party who asserts that the public has lost or surrendered their rights to use of the road. *Floyd v. Industrial Development Board of Dothan*, 442 So.2d 927 (Ala. 1983).

There are many different factual circumstances that may be considered by courts reviewing this issue — many of which are similar to the determination that a road has become a public road by prescription. (*See Section I, D above.*) Some examples are:

- Whether or not the county has maintained the road. The failure of county authorities to keep a road in repair or the fact that it is unsafe for travel are not, taken alone, sufficient to show the road has been abandoned. *Barber v. Landrum*, No. CL-2022-0848, 2023 WL 3557747 (Ala. Civ. App. May 19, 2023); *Auerbach v. Parker*, 544 So.2d 943 (Ala. 1989). *See also* A.G. Nos. 2002-146 and 94-00148. *See also Fox Trail Hunting Club v. McDaniel*, 785 So.2d 1151 (Ala. Civ. App. 2000).
- The fact that the disputed roadway was infrequently used and generally only by those with a special need by virtue of owning nearby land or desiring to hunt or cut timber on nearby land is insufficient to prove disputed roadway is a private road. *Laney v. Garmon*, 66 So.3d 766 (Ala. Civ. App. 2010). *See also Fox Trail Hunting Club v. McDaniel*, 785 So.2d 1151 (Ala. Civ. App. 2000).

- Evidence of a deed, conveyance, plat, or map indicating that the road has been abandoned (even if not properly recorded). *See, e.g., Barber v. Landrum*, No. CL-2022-0848, 2023 WL 3557747 (Ala. Civ. App. May 19, 2023); *Bownes v. Winston County*, 481 So.2d 362 (Ala. 1985).
- Regularity with which a road is used by the general public or by owners of land in the area. However, decrease in travel does not work as an abandonment so long as it is open for public use generally and is being used by those who desire or have occasion to use it. *Fox Trail Hunting Club v. McDaniel*, 785 So.2d 1151 (Ala. Civ. App. 2000).
- Construction of a new highway replacing the road. *See, e.g., Fox Trail Hunting Club v. McDaniel*, 785 So.2d 1151 (Ala. Civ. App. 2000); *Floyd v. Industrial Development Board of Dothan*, 442 So.2d 927 (Ala. 1983); *Bownes v. Winston County*, 481 So.2d 362 (Ala. 1985).
- Whether or not a gate or blockade has been erected across the road. In *Auerbach v. Parker*, 544 So.2d 943 (Ala. 1989), the Supreme Court of Alabama rejected this fact as controlling where there was evidence that there was no interruption of its use by those travelling the road. *See also Walker v. Winston County Commission*, 474 So.2d 1116 (Ala. 1985).
- The fact that the county does not consider the road a county road and has not maintained it is insufficient to prove abandonment of the road. *Laney v. Garmon*, 66 So.3d 766 (Ala. Civ. App. 2010).
- The acts of private landowners are generally not sufficient, alone, to establish abandonment, given the principle that a private landowner has no right to treat a public highway as a private roadway so as to force abandonment of the public highway. *Barber v. Landrum*, No. CL-2022-0848, 2023 WL 3557747 (Ala. Civ. App. May 19, 2023).
- County's alleged failure to use a right-of-way that was dedicated for public use as a roadway did not cause the right-of-way to be vacated. *Pritchett v. Mobile County*, 958 So.2d 349 (Ala. Civ. App. 2006).

#### IV. COUNTY ROADS ANNEXED INTO MUNICIPALITY

The question of who controls a county road once it is annexed into a municipality is complicated and has been the issue of much controversy and litigation. There have been several statutory changes aimed at clearing up some of the problems and relieving the county of some responsibility for roads annexed into a municipality. However, many issues remain unanswered, and it is important to understand and follow the statutory requirements and procedures regarding annexed roads, which are different for roads annexed into a municipality before and after July 7, 1995. Ala. Code §§ 11-49-80 and -81, outlined below, set forth these requirements and procedures.

##### A. ANNEXATIONS AFTER JULY 7, 1995

Ala. Code §§ 11-49-80 and -81 set out specific procedures for the municipality to assume control and responsibility of an annexed road. Section 11-49-80(c) provides that, for annexations occurring after July 7, 1995, a municipality shall assume control and responsibility of a "county-maintained street" annexed into its corporate limits, provided either of the following apply:

- The county controlled and maintained the road for a period of one year prior to the annexation.

- The municipal planning commission approved the construction of the road regardless of whether the road has been maintained by the county for less than a year.

For the purposes of this statute, a “county-maintained street” is defined as “[a] public street, road, or bridge that the county commission has the authority or responsibility to control, manage, supervise, regulate, repair, maintain, or improve.” For ease of reference, for purposes of the discussion in this section, references to “county roads” or “county-maintained roads” encompass the full scope of this definition.

In addition to roads within the annexed property, Ala. Code § 11-49-80(d) provides that, after July 7, 1995, if an annexation results in a county road being outside the corporate limits of the municipality but bounded on both sides by the corporate limits, the county commission shall consent to the annexation of that road by the municipality. Once consent is given, the municipality shall annex that road and assume responsibility for the road.

- This section does not apply when the road is not bounded on both sides by the corporate limits of the annexing municipality. A.G. No. 2022-008.

Absent specific action or agreement as discussed in Section C below, a municipality does not assume responsibility for any roads which were not the responsibility of the county prior to the annexation. Also, nothing shall require the county to assume responsibility for any public road in the annexed area that was not a county-maintained road prior to the effective date of the annexation. See Ala. Code § 11-49-80(c). See also A.G. No. 2020-029.

## B. ANNEXATIONS PRIOR TO JULY 7, 1995

For roads annexed *prior to July 7, 1995*, the entity responsible for the road prior to annexation retains full responsibility for the road until and unless the statutory procedures for assuming responsibility and control have been satisfied. Ala. Code § 11-49-80(e). See A.G. Nos. 2023-033 and 2000-007. This means that counties likely remain responsible for some roads within a municipality.

## C. AGREEMENT BETWEEN THE COUNTY AND ANNEXING MUNICIPALITY

Ala. Code § 11-49-80(b) provides that a municipality may assume responsibility for county roads lying within a municipality upon designation in a resolution adopted by the municipal governing body. See A.G. No. 2001-254. Additionally, Ala. Code § 11-49-80(f) specifically authorizes the county and municipality to enter into mutual agreements regarding road responsibility within the corporate limits of a municipality following an annexation.

- To be effective, an agreement under Section 11-49-80(f) must be approved by the governing body of the municipality. See A.G. No. 2023-033 (municipal mayor cannot enter into an agreement with the county regarding road responsibility without approval of the municipal governing body and compliance with the provisions of Ala. Code §§ 11-102-1 to -8).

Ala. Code § 11-49-81 provides that a resolution adopted by the municipality “shall designate the sum or sums ascertained to be the reasonable charge to be paid by such county for being relieved of the burden” of responsibility for the road or roads, and that no such resolution shall become effective until and unless the county pays or contracts to pay the amount designated in such resolution. It appears this section would only apply in circumstances where the municipality is agreeing to assume responsibility for county-maintained roads within the municipal corporate limits, because the law requires the municipality to assume responsibility for any roads included in an annexation occurring after July 7, 1995.

In *McCool v. Morgan County Commission*, 716 So.2d 1201 (Ala. Civ. App. 1997), the Alabama Court of Civil Appeals carved out what is, in effect, a narrow exception to the requirement for strict compliance with the statutory procedures set out in Ala. Code § 11-49-80. In *McCool*, the statutory procedures for a mutual agreement between the county and the municipality regarding road responsibility had not been satisfied, but it was undisputed that the municipality had exercised sole authority for the road since annexation, and both the municipality and the county acknowledged that the road had been the municipality’s responsibility since annexation. In this instance, the Court found that the entities had exercised consecutive — rather than concurrent — control over the road and ruled that the county was not responsible for maintenance of the road.

***Please note, the holding in McCool appears to be an outlier and likely limited to the precise set of facts presented in the case. As such, as a general rule, counties should look to the procedural framework set forth in Section 11-49-80 to assess their responsibility for a county road located within the corporate limits of a municipality.***

- To this point, as of the date of this publication, the holding in *McCool* has not been relied upon in a reported case or Attorney General opinion to assign responsibility to a municipality for the maintenance of county roads located within its boundaries. *See, e.g.*, A.G. No. 2023-033 (observing that the holding in *McCool* would allow a municipality to assume responsibility for a county road within its boundaries exercising sole authority over the road, but that this would be a question of law and fact that the Attorney General could not resolve).

#### D. RESPONSIBILITY FOR COUNTY ROADS FOLLOWING INCORPORATION

Ala. Code § 11-49-80 deals only with annexation, not incorporation. For municipalities incorporated after July 7, 1995, the Attorney General’s office determined that the newly incorporated municipality was not required to assume responsibility for county-maintained roads lying within its corporate boundaries. *See, e.g.*, A.G. Nos. 2000-07 and 97-00002.

However, in 2004, the Alabama Legislature spoke directly to this issue by amending Ala. Code § 11-41-1, which sets out the procedures for the incorporation of new municipalities. As amended in 2004, this section now provides that any newly incorporated municipality shall assume responsibility for all roads within its corporate limits within 24 months of the incorporation being final.

- The 2004 amendment, which was effective August 1, 2004, has prospective application only, meaning there is still no statutory responsibility for a municipality incorporated prior to August 1, 2004, to assume responsibility for county roads that were included in the boundaries of the municipality at the time of incorporation.

For municipalities incorporated after August 1, 2004, if prior to the expiration of the 24-month period set forth in Section 11-41-1 the municipality annexes additional areas, the Attorney General's Office has opined that the municipality's assumption of responsibility for county-maintained roads in the newly annexed areas, if required under Section 11-49-80(c), should occur at the same time within the 24-month period that the municipality begins to assume responsibility for the streets in the newly incorporated town. See A.G. No. 2019-049.

## V. ANNEXATION EFFECT ON POLICE JURISDICTIONS

While the alteration of a police jurisdiction does not directly affect the county's responsibility for county-maintained roads, it can impact the county commission's responsibilities in the area of the police jurisdictions, including what roads in the area remain county roads. The law is confusing and has been amended several times in recent years, with the most recent rewrite passed in 2021. See Act No. 2021-297 (enacting, in part, amendments to Ala. Code § 11-40-10). A brief overview of the law as it affects police jurisdiction boundaries is set out below. Further information regarding the effect of these changes in the law on municipal planning commissions, building codes, and subdivision development regulation is provided in Chapter Nine.

Act 2021-297 retained the general rule in Ala. Code § 11-40-10(a)(1) that the police jurisdiction in municipalities having a population of 6,000 or more shall cover all adjoining territory within three miles of the corporate limits, and in municipalities having a population of less than 6,000, the police jurisdiction shall cover all adjoining territory within a mile and a half of its corporate limits. However, this general rule is expressly subject to the exceptions set forth in Ala. Code § 11-40-10(a)(2) and (3) discussed below.

Ala. Code § 11-40-10(a)(2)a. generally freezes the police jurisdictions of municipalities as they existed on January 1, 2021. Annexations after this date cannot extend the police jurisdiction of a municipality except to include that property annexed into the corporate limits.

- This general rule, however, was subject to the exception in Ala. Code § 11-40-10(a)(2)b., which authorized municipalities having a population less than 6,000 according to the 2010 federal census but 6,000 or more according to the 2020 federal census were authorized to extend their police jurisdictions to include all territory within three miles of their corporate limits by adoption of an ordinance not later than 180 days following the release of the final 2020 federal census.

Section 11-40-10(a)(2)a. does not prohibit a municipality from eliminating or reducing its police jurisdiction after January 1, 2021. See Ala. Code § 11-40-10(a)(3)a. (authorizing a municipality to adopt an ordinance to eliminate or reduce its police jurisdiction in one half mile increments). An ordinance reducing or eliminating a municipality's police jurisdiction is effective on the first day of January following its adoption on or before the preceding first day of October.

- The municipality eliminating or reducing its police jurisdiction must send written notice to the county commission no later than 30 days following the adoption of the ordinance.
- The municipality must cease to levy any taxes, licenses, or fees in the area removed from the police jurisdiction except for those relating to the regulation of subdivisions.

- A municipality may reduce its police jurisdiction pursuant to this paragraph no more than once during any 24-month period. An ordinance adopted under this paragraph cannot otherwise be amended, altered, or repealed, except by local law.

Ala. Code § 11-40-10(a)(3)b. allows a municipality, by ordinance, to cease to provide any service in its police jurisdiction outside its corporate limits by adopting an ordinance to take effect on the first day of January following its adoption on or before the preceding first day of October.

- A municipality may terminate some or all of the services it provides to its police jurisdiction, provided the municipality does not collect license taxes in the police jurisdiction or have a contract or mutual aid agreement to provide those services. A.G. No. 2022-027. *See also* Ala. Code § 11-40-10(f).
- The municipality shall send written notice to the county commission no later than 30 days following the adoption of the ordinance.
- The municipality may adopt an ordinance pursuant to this paragraph no more than once during any 24-month period.
- The ordinance cannot be amended, altered, or repealed, except by act of the Legislature.

## VI. NOTICE AND EFFECTIVE DATE OF ANNEXATION

Ala. Code § 11-42-7 requires a municipality to notify the Legislative Reapportionment Office within seven days of any annexation or deannexation. This law was intended to provide counties with a good resource for identifying what property actually lies within a municipality and what roads have been “taken over” by the municipality pursuant to Ala. Code § 11-49-80. However, it is unclear whether municipalities have routinely complied with this statutory requirement.

## MODEL ROAD CONDITIONS POLICY

Following the winter storms of 2014, the Association asked its attorneys, county engineers and emergency management directors to take a look at the common practice of making public announcements that county roads are “closed” during ice and/or snow storms. The focus of the review was whether the terminology of “closing” county roads presents both a misunderstanding by the public as well as possible liability exposure for the county.

The major concern is vested in the provisions of Alabama law that establish a formal procedure to be followed when the county wishes to actually “close” a county-maintained road. This process involves the holding of a public hearing and the posting of notice at the road. Obviously, during times of inclement weather the county commission is not following this procedure because it is impractical. It could be argued, however, that the county’s use of the term “closed” somehow attaches an obligation to follow the legal procedures established in the law.

For this reason, the groups developed a suggested procedure for counties to utilize when there are weather or other conditions resulting in the county commission making a blanket announcement regarding the use of county roads. The policy focuses on announcing that the county-maintained roads are “impassable” rather than using the confusing legal term of “closed.”

This policy has been vetted through the Association of County Engineers of Alabama and the Alabama Association of Emergency Managers, and approved by the Board of Directors of the Association of County Commissions of Alabama. It is recommended that counties review the policy with your county attorney and strongly consider adopting and utilizing this procedure when weather conditions dictate that motorists should stay off the county roads.

The policy also provides an announcement that should be made when the weather conditions have improved. This announcement also contains a specific warning that the county cannot guarantee that all the conditions on all county roads are safe.

# Policy on Public Notice Regarding Blanket Conditions of County Roads and Bridges

## PURPOSE:

This policy shall be utilized by the \_\_\_\_\_ County Commission in order to effectively communicate the blanket conditions of county roads and bridges resulting from extreme weather conditions or other disaster events. The policy does not apply to other circumstances.

## PROCESS:

Should conditions warrant blanket communication regarding the conditions of roads and bridges, the \_\_\_\_\_ County Commission shall distribute such information through its County \_\_\_\_\_ (Engineer or Chairman).

## ROAD and BRIDGE CONDITIONS:

When conditions warrant, the public shall be notified of the following information:

***IMPASSABLE TRAVEL ADVISORY: Effective \_\_\_\_\_ all roads and bridges in \_\_\_\_\_ County should be considered IMPASSABLE until further notice. Members of the general public are advised that when roads and bridges become IMPASSABLE all travel should be suspended or delayed. Only emergency vehicles should travel on county roads and bridges until further notice.***

When conditions improve, the public shall be notified of the following information:

***RESUMPTION OF TRAVEL: Effective \_\_\_\_\_ conditions have improved and the previous IMPASSABLE TRAVEL ADVISORY for \_\_\_\_\_ County roads and bridges has been lifted. Because county officials cannot guarantee the conditions everywhere, drivers are reminded to use caution while traveling.***

An aerial photograph of a bridge with a teal overlay. The bridge has several piers and spans across a body of water. The text is centered on the page, flanked by two horizontal dashed lines.

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# Construction, Maintenance & Regulation of County Roads & Bridges

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# CHAPTER THREE

## CONSTRUCTION, MAINTENANCE, AND REGULATION OF COUNTY ROADS AND BRIDGES

Ala. Code § 23-1-80 grants counties general superintendence of the public roads, bridges, and ferries so as to render travel on them as safe and convenient as practicable. *See, e.g., Holt v. Lauderdale County*, 26 So.3d 401 (Ala. 2008). Ala. Code § 11-3-10 also provides counties with the general authority “in relation to the establishment, change, or discontinuance of roads, bridges, causeways, and ferries within the county, except where otherwise provided by law . . . .”

- *See Barber v. Covington County Commission*, 466 So.2d 945 (Ala. 1985), for a discussion of the county commission’s legislative powers and discretionary authority over the county’s road system.

There are several statutory provisions addressing more specifically certain areas relating to county roads and bridges, and there are cases and Attorney General’s opinions that help interpret the laws and identify the county’s proper roles and responsibilities regarding the roads and bridges in the county.

### I. ROAD AND BRIDGE CONSTRUCTION GENERALLY

#### A. GENERAL POWERS AND DUTIES

Ala. Code §§ 23-1-80 to -95 deal specifically with the county’s authority in regard to the construction, location, and maintenance of roads and bridges. An overview of pertinent Code sections is set out below.

- Ala. Code § 23-1-81 grants counties the authority to purchase or establish bridges, causeways, and ferries within their jurisdiction and to levy a special tax to purchase or build them when, in the county commission’s opinion, the public good requires it. (See Chapter Six for a more detailed discussion of funding issues.)
- Ala. Code § 23-1-81 also authorizes counties to license others to establish or operate toll roads and bridges.
  - This section was amended in 2000 to grant the Alabama Department of Transportation the same right and to provide that once a license is issued by either the county or the state, no further license shall be required to construct, own, or operate the toll road or bridge and no further license, tax, or fee may be imposed by any governmental body or agency.
- Ala. Code § 23-1-82 grants counties the right of eminent domain for the purpose of establishing and changing public roads, bridges, and ferries in their respective counties, except where the Alabama Department of Transportation has jurisdiction. (See Section II below for discussion of eminent domain.)

- Ala. Code § 23-1-86 authorizes counties to build or maintain roads or bridges within the corporate limits of a municipality with consent from that municipality. See A.G. No. 98-00014. See *also* Ala. Code § 23-1-90 and Section IV below.
- A municipality does not have the authority to build or maintain county roads and bridges; however, a county and municipality may enter into an agreement on road maintenance pursuant to the Joint Powers Act found at Ala. Code §§ 11-102-1 to-8. A.G. No. 2004-182.
- Ala. Code §§ 23-1-87 to -90 address construction, maintenance, and funding of roads and bridges between adjoining counties.
- Ala. Code § 23-1-83 authorizes the county to transfer any surplus from the county's general fund to the county's road fund when, in the judgment of the county commission, it will promote the interest of the county. Any transferred funds shall only be used for public roads or bridges. (See Chapter Six for discussion of funding issues.)
- Ala. Code § 23-1-84 authorizes counties to expend funds derived from fees, excise, or license taxes relating to the registration, operation, or use of motor vehicles and motor fuels for constructing, reconstructing, maintaining, and repairing public roads and bridges. (See Chapter Six for discussion of funding issues.)
  - These funds cannot be used to supplement the county general fund. A.G. No. 2000-216.

## B. SPECIAL PROVISIONS RELATING TO BRIDGES

In addition to the general powers set out above, there are several Code sections relating specifically to bridges.

- Ala. Code §§ 11-3-15 to -17 address counties' authority with regard to bridges over navigable or other streams.
- Ala. Code §§ 23-1-87 to -91 deal with the expense and authority to build, maintain, and operate bridges, ferries, and public highways between adjoining counties and municipalities.
- Ala. Code § 23-1-93 provides an exception to bid advertising requirements in the event of destruction or damage to a bridge rendering it impassable or other emergency if the public good requires it. See *also* Ala. Code § 31-9-10.
  - This does not apply where the Alabama Department of Transportation has jurisdiction over such bridges.

## C. OTHER GRANTS OF AUTHORITY

There are other provisions of law which also address the county's authority regarding roads and bridges.

- Ala. Code §§ 23-2-140 to -163 provide for toll roads, bridges, and ferries.
- Ala. Code §§ 11-102-1 to -8 (the Joint Powers Act) authorizes any county or incorporated municipality to enter into a written contract with any one or more counties or municipalities for the joint exercise of any power or service that state or local law authorizes each of the contracting entities to exercise individually.
  - Counties and municipalities can use the Joint Powers Act to enter into agreements related to maintenance of county and municipal roads and bridges. A.G. No. 2004-182.

## II. ACQUISITION OF LANDS FOR ROAD AND BRIDGE CONSTRUCTION OR MAINTENANCE

### A. CONDEMNATION/EMINENT DOMAIN

As noted above, Ala. Code § 23-1-82 grants counties the right of eminent domain for the purpose of establishing and changing public roads, bridges, and ferries in the county. Alabama's Constitution also addresses the governmental power of eminent domain and provides that no property shall be taken without just compensation. Constitution of Alabama of 2022, Sections 23 and 235. The general procedures for condemnation, found in Alabama's eminent domain law at Ala. Code §§ 18-1A-1 to -311, also apply.

- A county commission may condemn and take over a private road as a county road to provide residents with access to their homes as long as the owner is justly compensated and the condemnation is for a public use. A.G. No. 2001-230.

Other sections addressing the authority to condemn properties are set out below:

- Ala. Code § 11-80-1 authorizes counties to condemn lands for public roads or streets or for material for the construction of public roads or streets.
  - The Supreme Court of Alabama, in one case, has interpreted this authority to include the condemnation of property for a connector road and bridge to be constructed and operated by a private company if it is for a public use. *Gober v. Stubbs*, 682 So.2d 430 (Ala. 1996).
  - However, this case was decided before Ala. Code § 11-80-1 was amended in 2005 to prohibit counties from condemning "property for the purposes of private retail, office, commercial, industrial, or residential development . . . ." While it is not certain that this prohibition would have altered the Court's holding in *Gober*, this prohibition should be considered before taking condemnation actions.
- Ala. Code § 11-80-2 allows counties to provide relocation assistance to persons displaced by such acquisition. See also Ala. Code §§ 23-1-210 to -212 regarding relocation assistance.

- Ala. Code § 11-14-23 authorizes counties to acquire by purchase or condemnation, at reasonable market value, land necessary for drainage ditches and borrow pits, lime and stone quarries, clay and clay pits, sand and sand pits, chert and chert pits, gravel and gravel pits, and any and all other materials that may be necessary, essential, or desired in the construction and maintenance of highways and bridges.
  - Ala. Code § 11-14-24 provides that the condemnation proceedings for such land and materials “shall be as is now provided by law for condemnation of land for public use” (i.e., the condemnation procedures set out in the Code sections cited above should be used).
  - The Board of Education has no statutory duty to contribute to the cost of acquiring property for a road by a school, but it may do so if it finds it necessary to contribute. A.G. No. 2005-122.

For a discussion of the procedures for a condemnation action under the powers of eminent domain, see A.G. No. 97-00120.

The Alabama Relocation Assistance and Real Property Acquisition Policies Act of 1999 requires the payment of relocation expenses to “displaced persons” under certain circumstances. Ala. Code §§ 18-4-1 to -19. This law only applies to state projects involving federal or state funds, and it specifically excludes local governments. Ala. Code § 18-4-2. However, it may have application in some county projects with the state. The law also does not apply to the Alabama Department of Transportation where the Department is required to provide relocation assistance under other sections of the law. Ala. Code § 18-4-4.

## **B. RIGHTS-OF-WAY**

There are special statutory provisions regarding acquisition of rights-of-way for road and bridge construction and maintenance. It is also possible to obtain a right of way by prescription.

### **1. Statutory County Rights-of-Way**

Under Ala. Code § 23-1-45, the Director of Transportation has authority to acquire rights-of-way deemed necessary for construction of a state road, either by purchase or by right of eminent domain.

- The county shall acquire such rights-of-way when requested to do so by the Director.

Ala. Code §§ 11-14-23 and -24 authorize counties to acquire through condemnation such road right-of-way as may be necessary for ingress or egress to land necessary for drainage ditches, borrow pits, and all materials necessary, essential, or desired in the construction and maintenance of highways and bridges.

### **2. Rights-of-Way Established by Prescription**

A prescriptive right-of-way may be established by general use of the public for 20 years. *Auerbach v. Parker*, 544 So.2d 943 (Ala. 1989). In determining whether a right-of-way has been acquired by prescription, the same principles apply as those discussed in Chapter Two regarding creation of a public road by prescription.

- In a case in which the landowner is challenging a claim that a right-of-way has been established by prescription, the burden is on the landowner to show that he has only granted permission to use the road without relinquishing his title and possession to the land. *Suttle v. Tucker*, 398 So.2d 266 (Ala. 1981).
- There is no specified width of a right-of-way established by prescription. The right-of-way established is governed, measured, and limited by actual use, and is not necessarily limited to “the beaten path.” *Williams v. Nearen*, 540 So.2d 1371 (Ala. 1989); *Grubb v. Teale*, 90 So.2d 727 (1956). See also A.G. No. 91-00361.

The width of a right-of-way established by prescription is governed by the extent of the actual usage for road purposes, taking into account factors such as:

- The actual width of the public road.
- The width reasonably necessary for the safety and convenience of the traveling public.
- The need for repairs or improvements.

### 3. Special Rights-of-Way or Use Rights Granted to Others

Some entities are granted certain special rights-of-way or special rights to use public rights-of-way under Alabama law.

- Ala. Code § 11-88-14 authorizes water, sewer, and fire protection authorities to use rights-of-way of public roads with consent of the county governing body subject to regulations established by the county and applied uniformly to all such authorities.
  - The authority has the duty to restore ***to pre-use condition at its expense*** all roads, highways, and public rights-of-way in which it has made excavations or done other work in laying pipes, etc.
  - The authority must post bond in the amount required to restore to said condition as determined by the county engineer.
  - However, there is no statutory requirement that the authority pay for relocation or other damage.
  - The authority must comply with the state permit provisions and regulations when working on state-controlled roads. Ala. Code § 23-1-4.
  - Please keep in mind that water, sewer, and fire protection *authorities* governed by Ala. Code §§ 11-88-1 to -21 vary in several significant ways from water, sewer, solid waste disposal, and fire protection *districts* governed by Ala. Code §§ 11-89-1 to -19, described in more detail below.
- Ala. Code § 11-89-14 authorizes water, sewer, solid waste disposal, and fire protection districts to use the rights-of-way of all public roads in the state without securing the prior approval of the governing body of any county.
  - However, the district has the duty to restore ***at its expense*** all roads, highways, and public rights-of-way in which it may have made excavations or done other work in laying pipes or performing any of its other corporate functions.

- The district must comply with the state permit provisions and regulations when working on state-controlled roads. Ala. Code § 23-1-4.
- Ala. Code §§ 18-3-1 to -3 provide private landowners the right to acquire a right-of-way not exceeding 30 feet in width over lands intervening and lying between the owner's land and the nearest or most convenient public road. This is called a "private condemnation" action.
  - This process is only available to a landowner who is landlocked with no existing, reasonably adequate means of access to a public road. *Key v. Ellis*, 973 So.2d 359 (Ala. Civ. App. 2007); *Loveless v. Joelex Corporation*, 590 So.2d 228 (Ala. 1991).
  - A cause of action is available under this article if the landowner does not have either private or public access to a public road that is "unobstructed and unquestioned." *Key v. Ellis*, 973 So.2d 359 (Ala. Civ. App. 2007); *Crabtrey v. Tew*, 485 So.2d 726 (Ala. Civ. App. 1985).
  - Although this article does not expressly speak to lands outside of a municipality, the appellate courts have held that the article applies to landlocked property owners in the county, as well. *Hawkins v. Griffin*, 512 So.2d 109 (Ala. Civ. App. 1987).
- Ala. Code § 23-1-85 provides that the right-of-way is granted to entities having the right to construct electrical transmission, telegraph, or telephone lines, subject to removal or change by the county commission except where the Alabama Department of Transportation has jurisdiction over the highway.
  - The statute does not address who is responsible for the cost of removal or change.
  - This section provides that the right of way granted is that "along the margin of the right-of-way of public highways."
  - The Supreme Court of Alabama has held that this means "the space between the traveled part of the roadway and the edge of the right-of-way." *Studdard v. South Central Bell*, 356 So.2d 139 (Ala. 1978).
  - The Supreme Court of Alabama has also held that because Ala. Code § 23-1-85 specifically addresses use of the county's right of way, the county's regulatory authority under Ala. Code § 23-1-80 extends only so far as to allow it to regulate the use of the rights-of-way so that there will not be unreasonable or unnecessary interference with the use of the road. *Lightwave Technologies, L.L.C. v. Escambia County*, 804 So.2d 176 (Ala. 2001).
  - Telecommunication service provider that obtained a statewide franchise under the predecessor of Ala. Code § 23-1-85 may use, modify, or install new facilities within a municipality's rights-of-way without municipal approval. A.G. No. 2008-021.

#### 4. Right-of-Way Maintenance

Ala. Code § 23-1-80 grants the county commission specific authority to establish, promulgate, and enforce rules and regulations to maintain a good road system.

Historically, the Attorney General's Office has opined that this statutory power is broad enough to allow the county commission to prohibit placement of political advertisements along the county right-of-way.

A.G. Nos. 2002-134 and 88-00415. Since these opinions were issued, there have been developments in federal First Amendment jurisprudence regarding the ways in which local governments may restrict the public's ability to place signage along roadways. See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015); *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022). County commissions are encouraged to seek legal counsel before adopting any policies regarding signage along roadways.

Ala. Code § 23-1-80 includes the power to decide whether private entities may install sewer lines in the county right-of-way provided the decision is not arbitrary and capricious. *ECO Preservation Services v. Jefferson County Commission*, 933 So.2d 1067 (Ala. 2006).

The Attorney General's Office has opined that the responsibility for the care of trees on a right-of-way belongs to the entity holding the right-of-way upon which the trees are located. A.G. No. 82-00067.

### III. COUNTY RESPONSIBILITY FOR ROAD MAINTENANCE

#### A. DUTY TO MAINTAIN

The county is exclusively and affirmatively responsible for the maintenance and control of its roadways. Ala. Code § 23-1-80. In fact, the appellate courts have stated that the county has a duty to maintain its streets in a reasonably safe condition for travel and to remedy defects in the roadway upon receipt of notice of such defect. *Jefferson County v. Sulzby*, 468 So.2d 112 (Ala. 1985).

- The Attorney General has opined that, although Ala. Code § 23-1-80 grants the county general superintendence of its roads and bridges, giving maintenance or repair priority to roads abutting property whose owners are willing to make payments for the improvements would likely constitute discrimination under the Fourteenth Amendment of the U.S. Constitution. A.G. No. 93-00023.
- However, A.G. No. 93-00023 also states that the Office is unaware of any prohibition against a private property owner contributing funds for road maintenance.
- The Board of Education may contribute to the cost of a traffic study to address traffic congestion around schools if it determines that the expenditure is beneficial to its interests or serves a public purpose related to education. A.G. No. 2005-122.

#### B. COUNTY'S LIABILITY FOR FAILURE TO MAINTAIN

While counties do not enjoy absolute immunity from liability, there is a statutory cap on recovery of judgments. Ala. Code § 11-93-2. This cap also applies to a county commissioner and to the county engineer acting in their official capacities. *Smitherman v. Marshall County Commission*, 746 So.2d 1001 (Ala. 1999).

- There is also a statutory prohibition against awarding punitive damages in a suit against a county. Ala. Code § 6-11-26.

Counties can be sued for negligent maintenance and repair of roads and bridges and have been held liable for damages when the legal standard of care has not been met. *See, e.g., Cook v. County of St. Clair*, 384 So.2d 1 (Ala. 1980). Therefore, it is incumbent upon counties to make all diligent efforts to maintain their roads in a reasonably safe condition and remedy defects upon notice (for example, by promptly replacing stop signs when down or stolen). County commissioners and county engineers can be and are sued in their official capacity. However, they cannot generally be sued individually for actions taken in the line and scope of their employment or office. *Smitherman v. Marshall County Commission*, 746 So.2d 1001 (Ala. 1999).

Frequently, in cases involving county roads, the factual determination of whether the county has control and responsibility for the road is a crucial and determinative issue in the case.

- There are several cases discussing the county's control and responsibility for roads within its jurisdictional boundaries or within a municipality. *See, e.g., Garner v. Covington County*, 624 So.2d 1346 (Ala. 1993); *Yates v. Town of Vincent*, 611 So.2d 1040 (Ala. 1992); *Harris v. Macon County*, 579 So.2d 1295 (Ala. 1991); *Perry v. Mobile County*, 533 So.2d 602 (Ala. 1988); *Jefferson County v. Sulzby*, 468 So.2d 112 (Ala. 1985); *Cook v. County of St. Clair*, 384 So.2d 1 (Ala. 1980).
- There are also several Attorney General's opinions on this subject, although that Office generally declines to specifically decide a question of fact. *See, e.g.,* A.G. Nos. 96-00206 and 93-00298.

### C. ROAD CONTRACTOR'S RESPONSIBILITIES

County commissions often utilize contractors to construct, repair, or maintain roads and bridges. These contractors — as well as their subcontractors, directors, officers, and employees — have some protection from civil liability pursuant to Ala. Code §§ 6-5-700 to -709, which were significantly amended by Act 2023-316. Notably, the act's amendatory provisions only apply to causes of action that accrue after August 1, 2023.

Ala. Code §§ 6-5-700 to -709 help to clarify the respective duties of the county commission and the contractor. In essence, the county commission is generally responsible for the plans and specifications of the road or bridge project, and the "contractor is justified ordinarily in relying upon the plans and specifications that are contained in the contract[.]" Ala. Code § 6-5-701. Pursuant to Act 2023-313, contractors no longer must notify the Alabama Department of Transportation if they discover that the plans and specifications could result in a potentially dangerous condition.

Additionally, the county commission (and not the contractor) is generally responsible for maintenance following the conclusion of the project. *See* Ala. Code § 6-5-706. For the purposes of this article, Ala. Code § 6-5-700(2) defines "conclusion of the project" as the earlier of the following:

- The date that the awarding authority notifies the contractor, in writing, that the awarding authority has assumed maintenance responsibilities for the project.
- The date following the expiration of 45 days after the contractor provides, by certified mail return receipt requested, notice of presumptive conclusion of the project to the awarding authority and the awarding authority fails to respond.

- The date following the expiration of 90 days after the contractor has completed the advertising requirements of the Public Works Law and the awarding authority has made the final payment to the contractor.

Ala. Code § 6-5-701 now provides that a contractor shall not be held civilly liable for work performed on a county project unless it is shown by a preponderance of the evidence that physical injury, property damage, or death is proximately caused by either of the following:

- A failure by the contractor to follow the plans and specifications resulting in a dangerous condition;  
OR
- A latent defect which creates a dangerous condition that is the result of the work of the contractor.

For the purposes of this article, a "latent defect" is defined as: "A defect or omission resulting from the work conducted or materials provided by the contractor under the contract which was not discoverable, visible, or apparent." Ala. Code § 6-5-700(5).

#### D. ROAD SIGNAGE

Proper placement and maintenance of road signage is an important part of road and bridge maintenance. Many lawsuits against counties are based upon negligent maintenance of road signs or other traffic-control devices. *See, e.g., McCool v. Morgan County Commission*, 716 So.2d 1201 (Ala. Civ. App. 1997). Occasionally, counties have been found liable in this regard.

##### 1. General Authority/Duty to Erect and Maintain Road Signs

Ala. Code § 32-5A-113 authorizes counties to erect and maintain stop signs, yield signs, or other traffic-control devices in reference to highways under their jurisdiction.

Moreover, Ala. Code § 32-5-31 requires that local authorities place and maintain necessary traffic-control devices in their respective jurisdictions.

- However, Ala. Code § 32-5A-30 prohibits counties from placing or maintaining any traffic-control devices upon any highway under the jurisdiction of Alabama Department of Transportation.

##### 2. Specific Code Provisions Relating to Road Signage

In addition to the general provisions cited above, there are Code provisions addressing specific areas of road signage and traffic-control devices. Many are related to the unauthorized placement of signs and traffic-control devices and the enforcement thereof. Some examples are:

- Ala. Code § 23-1-8.1 prohibits using state funds for the erection and maintenance of signs designating roads, bridges, or buildings in honor or in memory of individuals. The Alabama Department of Transportation may prepare and erect such signs as long as the actual cost of preparation and maintenance is paid by private funds or municipal or county government funds.
- Ala. Code § 23-1-10 provides for blue reflective markers for fire and water hydrants.

- Ala. Code § 23-5-2 prohibits driving around or destruction of detour or warning signs, barricades, or fences.
- Ala. Code § 32-5A-36 declares the display of unauthorized signs, signals, or markings a public nuisance.
- Ala. Code § 37-8-200 prohibits the erection or maintenance of advertising signs resembling railroad crossing signs.
- Ala. Code § 13A-8-71 prohibits the unlawful possession of any traffic signs erected by the state, a county, or a municipality or makes it unlawful to intentionally destroy, knock down, remove, deface, or alter any traffic sign or traffic control device. Penalties are set out in Ala. Code § 13A-8-72.
- Ala. Code § 11-98-6(d), relating to emergency telephone service and 911 boards, states that the governing body and the 911 board are jointly responsible for purchasing and installing the necessary signs to properly identify all roads and streets in the 911 district. The 911 board is not responsible for maintaining street signs, but the governing body and the 911 board are jointly responsible for replacing street signs. A.G. No. 2006-051.
- Ala. Code § 11-80-14 authorizes, but does not require, a county or municipality, upon request, to install deaf or blind child area signs to warn drivers that a deaf or blind child lives on a residential road. The cost of the sign may be paid by the requesting party, a private individual, or a neighborhood association. The county or municipality shall annually review placement of the sign to ensure it is still applicable.
  - Before installing a deaf or blind child area sign, the county commission is encouraged to confer with its county attorney for a full evaluation of the proposed action.

#### E. CITIZEN'S LIABILITY FOR DAMAGE TO COUNTY ROADS

Alabama law makes some provision for misuse of and damage to county roads and bridges.

- Pursuant to Ala. Code § 32-5-4, it is a misdemeanor to unload lumber, logs, or any other article upon a highway or within the limits of a right-of-way of any public highway.
  - Penalties may include \$25.00 to \$100.00 in fines and 10 to 30 days in jail.
- It is also illegal to park any vehicle upon a public highway and use any ramp, platform or other loading device to load or unload. Ala. Code § 32-5-3.
- Ala. Code § 23-1-59(b) authorizes the Alabama Department of Transportation to promulgate rules and regulations to prevent unnecessary trespass or injury to any public roads, bridges, or rights-of-way upon which state money may be expended or appropriated.
- Ala. Code § 32-5-9 provides that any person driving any vehicle shall be liable for all damage to the highway resulting from any illegal or careless operation of the vehicle or as a result of driving in excess of the maximum weight permitted by law.
  - See also *Tuscaloosa County v. Jim Thomas Forestry Consultants, Inc.*, 613 So.2d 322 (Ala. 1992); *Hall v. North Montgomery Materials, LLC*, 39 So.3d 159 (Ala. Civ. App. 2008).
  - If the driver is not the owner but is operating the vehicle with the express or implied consent of the owner, the driver and owner are jointly and severally liable.

- The Supreme Court of Alabama has held that damages in this area are to be determined based upon repair or replacement cost. *Tuscaloosa County v. Jim Thomas Forestry Consultants, Inc.*, 613 So.2d 322 (Ala. 1992).
- The Attorney General has opined that the county may enter into an agreement with the party responsible for the damage to hire contractors to make repairs so long as the contractors comply with state road specifications. A.G. No. 91-00024.
- Ala. Code § 13A-8-71 prohibits the unlawful possession of any traffic signs erected by the state, a county, or a municipality or makes it unlawful to intentionally destroy, knock down, remove, deface, or alter any traffic sign or traffic control device. Penalties are set out in Ala. Code § 13A-8-72.
  - Possession of a traffic sign is punishable by fine of not more than \$50.00
  - Other violations range from a Class B misdemeanor to a Class C felony, with fines up to \$15,000, depending on the severity of the offense. *See also* Ala. Code §§ 13A-5-11 and -12.
  - In addition to the fines, the parents of a minor shall be liable for actual damages and court costs for the destruction or defacement of any public road sign by the intentional acts of the minor.
  - All fines collected shall be deposited into the county general fund, and one-half of the fines shall be designated to the county road and bridge fund. Ala. Code § 13A-8-73.
- Section 13A-8-71 also provides that it is unlawful to intentionally deface any public building or public property.
  - While this Code section is intended to apply to vandalism of public buildings, if the definition of “public property” is broad enough to include a public road or bridge, penalties could be assessed under this section for the willful or reckless damage to a road, such as by carelessly loading logs or intentionally carrying overweight loads.

As discussed previously, Ala. Code § 11-88-14 authorizes water, sewer, and fire protection authorities to use the rights-of-way of all public roads in the state. However, they are responsible to restore roads damaged by work done at their expense, and to post bond. Additionally, if the work is to be done on a state-controlled road, the authority must obtain a permit and must perform the work in accordance with regulations prescribed by the Alabama Department of Transportation. County commissions should be aware that water, sewer, and fire protection *authorities* are incorporated under different statutory authority from water, sewer, solid waste disposal, and fire protection *districts*, and consequently, each has different legal powers and responsibilities. Ala. Code § 11-89-14 provides that water, sewer, solid waste disposal, and fire protection districts are authorized to use the rights-of-way of all public roads in the state without securing prior approval from the county commission. The district has the duty to restore at its expense all roads, highways, and public rights-of-way in which it may have made excavations or done other work in laying pipes or performing any of its other corporate functions. If the work is to be done on a state-controlled road, the district must obtain a permit and must perform the work in accordance with regulations prescribed by the Alabama Department of Transportation.

## F. LITTERING AND HIGHWAY BEAUTIFICATION

There are several Code provisions addressing highway beautification and assessing crimes and penalties for littering Alabama's roads.

## 1. Littering Provisions

The following sections deal specifically with littering:

- Ala. Code § 13A-7-29. Criminal littering statute.
  - This section creates a rebuttable presumption that trash bearing a person's name was knowingly deposited by that person and allows for a county license inspector to enforce the law under procedures set out in the statute.
- Ala. Code §§ 23-5-6 to -9. Trash and litter on public thoroughfare.
- Ala. Code § 32-5-76. Spilling loads or litter.
- Ala. Code § 32-5A-60. Throwing destructive or injurious materials glass or litter on roadway.
  - This section provides that no person shall throw or deposit any substance upon or alongside any highway, road, street, or public right-of-way that is likely to injure any person or vehicle.
  - This would prohibit a sign so large that it is likely to injure a person or vehicle that might strike it. A.G. No. 2002-134.

## 2. Highway Beautification

Code sections addressing highway beautification include:

- Ala. Code §§ 23-1-220 to -223. Highway Beautification.
- Ala. Code §§ 23-1-240 to -251. Junkyard Control.
- Ala. Code §§ 23-1-270 to -288. Outdoor Advertising.

In addition to the above, Ala. Code § 11-80-10 authorizes counties to license junkyards located outside the police jurisdiction of any municipality in the county and to establish criteria to issue or revoke such licenses.

## IV. COUNTY/MUNICIPALITY ROAD ISSUES

There is frequently interplay between counties and municipalities with regard to county and municipal roads and bridges. An outline of some of the more important issues is set out below.

### A. MAINTENANCE OF COUNTY ROADS WITHIN MUNICIPALITIES

The Attorney General's Office has opined that a municipality may not make improvements (such as installing streetlights) on county roads within its police jurisdiction but outside its corporate limits. A.G. No. 2000-023.

- However, the county and a municipality may enter into an agreement under the Joint Powers Act (Ala. Code §§ 11-102-1 to -8) whereby each entity will maintain roads in the jurisdiction of the other. A.G. No. 2004-182.

This subject is more fully discussed in Chapter Two of this manual.

## B. REGULATION OF TRAVEL WITHIN MUNICIPALITIES

Ala. Code § 11-49-4, as amended by Act 2023-130, now provides that a municipality may not fix the speed at which motor vehicles may be operated on a county-maintained street, as defined in Section 11-49-80, located within the corporate limits of the municipality unless the municipality conducts an engineering and traffic investigation and receives written approval from the county engineer to fix the speed based on the results of that investigation. Act 2023-130 also added similar language to Ala. Code §§ 32-5A-173 and -176. Act 2023-130 is effective beginning August 1, 2023.

Ala. Code § 32-5A-171 prohibits a municipality from enforcing speed limits set under that Code section outside its corporate limits. *See, e.g.,* A.G. No. 96-00247.

- However, the Attorney General has opined that municipalities may enforce speed limits set pursuant to Ala. Code §§ 32-5A-172 and -173 within their police jurisdictions. A.G. No. 98-00072.

See Section V below for further discussion of speed limits.

## C. COUNTY ASSISTANCE IN THE CONSTRUCTION OR MAINTENANCE OF MUNICIPAL ROADS

### 1. Construction and Maintenance of Municipal Roads

Ala. Code § 23-1-86 authorizes the county commission to establish, construct, and maintain any road or bridge within the corporate limits of a municipality with the consent of that municipality. *See also* A.G. Nos. 98-00014 and 87-00307. The Attorney General's Office has stated that such roads remain under the control of the municipality. A.G. Nos. 91-00133 and 86-00087.

Other Code sections dealing with agreements between counties and municipalities with regard to roads and bridges are as follows:

- Ala. Code §§ 11-14-6 to -7. County payments to cities or towns for improvements to sidewalks and streets around or abutting county buildings.
- Ala. Code §§ 11-49-100 to -106. Vacation of municipal roads for the construction of county buildings.
- Ala. Code § 23-1-91. Aid for development of access roads or bridges to certain facilities by contiguous counties or municipalities.
- Ala. Code §§ 11-102-1 to -8. The Joint Powers Act.

### 2. Funding Sources for County Work in a Municipality

The county may use 7¢ gasoline tax proceeds and may use money derived from fees, excises and license taxes as authorized in Ala. Code § 23-1-84(a) for projects within the municipality. A.G. Nos. 98-00014 and 91-00133.

However, the county cannot use the 6¢ gasoline tax proceeds for municipal roads because Ala. Code § 40-17-362 provides that these funds shall be for resurfacing, restoration, and rehabilitation of paved county roads and bridges or bridge replacement on the county road system. See A.G. No. 91-00133 (interpreting a prior statute that is analogous to today's 6¢ gasoline tax statute but was only 4¢ at that time).

See Chapter Six for a more detailed discussion of funding issues.

### **3. Construction or Maintenance of Roads in County and Municipality**

Whenever the county constructs or improves a public road which is partly within a city or town, the city or town may contract with the county as to its proportionate share of the improvement. Ala. Code §§ 11-49-60 to -63.

Additionally, Ala. Code § 23-1-90 provides that a municipality may extend aid to the establishment, construction, or maintenance of any bridges, causeways, highways, or ferries in a county or counties if the municipality would benefit from the purchase, establishment, construction, or maintenance.

### **4. County Funding for Municipal Road Projects**

Ala. Code § 11-83-2 requires counties to pay each municipality in the county one-half of any money collected from a road tax levied on property located in the municipality. This section applies wherever the levy is "for or devoted to the purpose of constructing, repairing, or maintaining roads and highways of any description in the county, except the special tax authorized by Section 215 of the Constitution."

Under Ala. Code § 11-83-3, the sums paid to the municipality shall be used exclusively for maintaining the streets in the corporate limits of the municipality. If the tax levied is for a particular class of roads, the funds shall be used for roads of a similar character.

## **V. COUNTY REGULATION OF TRAVEL ON AND USE OF COUNTY ROADS**

Counties are granted certain specific statutory authority to regulate travel on county roads. These range from establishing rules of the road, restricting travel of certain vehicles, to closing roads where necessary.

### **A. SPEED LIMITATIONS AND TRAFFIC REGULATIONS**

#### **1. Setting Speed Limits on County Roads**

Ala. Code § 32-5A-171 establishes maximum speed limits for particular types of roads within the state, including unposted county roads. These speed limit laws were established in part as a protection for counties against liability in the event speed limit signs are down or have not been placed by the county.

### **a. Unpaved Roads**

The maximum speed limit on any unposted unpaved road is 35 miles per hour. The definition of an unpaved road under this section is "any highway under the jurisdiction of any county, the surface of which consists of natural earth, mixed soil, stabilized soil, aggregate, crushed sea shells, or similar materials without the use of asphalt, cement, or similar binders."

### **b. Paved Roads**

The maximum speed on any unposted county-maintained paved road in an unincorporated area is 45 miles per hour.

- The county commission may establish a different speed.
- The speed limit cannot exceed 55 miles per hour unless the Governor alters the speed as required by federal law in order for Alabama to receive federal funds for highway maintenance and construction.

### **c. Maximum Speed Limits on Other Roads**

Other speed limits set under Ala. Code § 32-5A-171 are as follows:

- 30 miles per hour in an urban district.
- 70 miles per hour on an interstate highway.
- 65 miles per hour on four-lane roads or highways.
- 55 miles per hour for other roads or highways.

The Governor may alter some maximum limits under proper circumstances set out in the statute.

- Pursuant to Ala. Code § 32-5A-172, the Director of Transportation and Director of the Alabama Law Enforcement Agency also have authority to alter speed limits when determined appropriate based upon engineering and traffic investigations under procedures set out for the same.

## **2. Minimum Speed Limits**

Ala. Code § 32-5A-174 authorizes state and local authorities to establish minimum speed limits. They can also set special speed limits for bridges under Ala. Code § 32-5A-176.

## **3. Altering Speed Limits on County Roads**

Ala. Code § 32-5A-173 authorizes the county commission to alter speed limits on county roads on the basis of an engineering and traffic investigation that the statutory maximum speed is unreasonable under the conditions existing on the road.

- Any altered speed limits are only effective when appropriate signs are erected.
- There can be no more than six alterations per mile, except for reduced limits at intersections.
- The difference between adjacent limits cannot be more than 10 miles per hour.

The Attorney General has historically opined that a municipality, not the county, sets speed limits within its corporate limits pursuant to Ala. Code § 11-49-4, even if the county is responsible for maintenance of the road and traffic devices. See A.G. Nos. 2012-050 and 97-00002. However, this principle was modified statutorily by Act 2023-130, which provides that a municipality may not fix the speed on a county-maintained street within its corporate limits unless the municipality conducts an engineering and traffic investigation and receives written approval from the county engineer to fix the speed based on the results of that investigation.

#### **4. Speed Limits in Construction Zones**

Ala. Code § 32-5A-176.1 authorizes the Alabama Department of Transportation and the county commission to set speed limits in urban and rural construction zones along roads and highways.

- The speed limits shall be posted at least 100 feet in advance of the entrance of the construction zone and may be enforced by law enforcement authorities.
- Fines for speeding are the greater of \$250 or double the amount outside a construction zone if in a construction zone designated by the Department of Transportation or a local government, construction or maintenance workers are present and performing work, and there are work zone traffic control devices, traffic controls, or warning signs present to notify motorists of workers in the area.

#### **5. Traffic Control**

In addition to speed limit provisions, state law also grants counties the authority to regulate traffic on their roads. For example:

- Ala. Code § 32-5A-86 grants the authority to determine no-passing zones.
- Ala. Code § 32-5A-87 grants the authority to designate one-way roadways and rotary traffic islands.

#### **6. County and Municipal Reduced Speed School Zone Act**

Ala. Code §§ 32-5A-180 to -186, the County and Municipal Reduced Speed School Zone Act, establishes a reduced speed school zone for every public or private school in the state, including schools along state-maintained roads. Ala. Code § 32-5A-182.

- Appropriate signs shall be erected warning of the approaching reduced speed and designating where regular speed may resume.
- All signs and placement shall be in accordance with the current Manual of Uniform Traffic Control Devices.
- Pursuant to Ala. Code § 32-5A-183, the county commission shall place and maintain signs on county-maintained roads and the Alabama Department of Transportation shall place and maintain signs on state-maintained roads.

Fines for violation within a school zone shall be double the amount for speeding outside a school zone. Ala. Code § 32-5A-185. Proceeds from the fines payable to the county shall be paid into the county's public road and bridge fund. Ala. Code § 32-5A-186.

## B. PROHIBITING OR RESTRICTING TRAVEL

In addition to regulating speed, county commissions have the authority to, by resolution, prohibit or impose restrictions as to vehicles traveling upon county-maintained highways whenever, by reason of deterioration or weather conditions, such highways will be seriously damaged or destroyed unless the use of vehicles is prohibited or the permissible weights are reduced. Ala. Code § 32-1-3. *See also* Ala. Code § 23-1-80. The Attorney General's Office has opined that bridges are included in the definition of "highways" as used in Ala. Code § 32-1-3. A.G. No. 2021-048. Ala. Code § 32-1-3 requires the county to erect and maintain signs designating the restrictions at each end of the portion of any highway affected, and the resolution shall not be effective until and unless such signs are erected and maintained. (A more detailed discussion of road closings is found in Chapter Two.)

Ala. Code § 32-5A-92 authorizes local authorities to regulate or prohibit the use of any controlled-access roadway within their jurisdiction by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic. Again, this Code section requires that any restrictions be posted.

- The Attorney General has opined that under Ala. Code § 23-1-80, along with Ala. Code § 11-3-11(a)(1) and §11-3-10, counties may regulate road use by appropriate means such as permit and may impose a fee and bond requirement for that permit. A.G. No. 2004-021.
- While the principles discussed in this opinion would still generally apply to regulation of county roads and bridges, counties may no longer require permits and bonds from logging operations. *See* Ala. Code § 23-1-80.1. Instead, counties may adopt a logging notice ordinance under Ala. Code § 23-1-80.1 (See Section V, F below for a detailed discussion of the logging notice ordinance statute.)

Some county commissions have had success reaching out to navigation software companies such as Google Maps, Apple Maps, and Waze to notify them of closed roads or limitations on county-maintained roads.

## C. WEIGHT RESTRICTIONS

As noted above, Ala. Code § 32-1-3 authorizes the county commission, by resolution, to prohibit or impose weight limitations upon the operation of trucks or other commercial vehicles on county roads if, by reason of deterioration, rain, snow, or other climactic conditions, the county roads would be seriously damaged or destroyed. These restrictions must also be "designated by appropriate signs." *See also Hall v. North Montgomery Materials, LLC*, 39 So.3d 159 (Ala. Civ. App. 2008).

There is another important provision authorizing counties to set maximum weights for trucks, trailers, and semi-trailers at a limit lower than authorized by state law. Ala. Code §§ 32-9-20 to -32 are the general law provisions relating to size and weight of trucks, trailers, and semi-trailers. Axle weight and spacing requirements and authorized exemptions and tolerances are also addressed. *See* Ala. Code § 32-9-20.

Additionally, Ala. Code § 23-1-59(c) grants the Alabama Department of Transportation rulemaking authority for the weight or tonnage of vehicles using any public roads where state money may be expended or appropriated.

For discussion on weighing trucks, statutory tolerances, and imposing fines, see *Curry v. State*, 506 So.2d 346 (Ala. Crim. App. 1986). See also *State Department of Public Safety v. Scotch Lumber Co.*, 302 So.2d 844 (Ala. 1974), on exemptions.

- Size and weight limitations set out in the law cannot exceed federal provisions and regulations governing limitations on federal highways. Ala. Code § 32-9-20. See also *Perry v. State*, 441 So.2d 127 (Ala. Crim. App. 1983).
- A shipping company is not vicariously liable for violations of weight restrictions by an independent contractor trucking company. *Fike v. Peace*, 964 So.2d 651 (Ala. 2007).
- Ala. Code § 32-9-20 exempts dump trucks, concrete mixing trucks, fuel trucks, and trucks designated and constructed for special type work or use from axle spacing requirements. Logging trucks do not qualify for this exemption. A.G. No. 2003-152.
- Under Ala. Code § 32-9-22, federal, state, county, and municipal trucks, semitrailer trucks, or trailers are exempt from these size and weight restrictions. A.G. No. 95-00241 states that the weight exemptions for government vehicles do apply on the federal interstate highway system.
- Ala. Code § 32-9-22 also exempts “implements of husbandry” (i.e., farm equipment) but only when “temporarily propelled or moved upon the highways,” not when travelling a highway for an extended period. *Pugh v. Taylor*, 507 So.2d 428 (Ala. 1987).
- See Ala. Code §§ 32-9-23 to -26 for other exemptions.

The Code provisions setting state weight and size limits also apply to vehicles traveling on county roads. However, Ala. Code § 32-9-20 provides that the governing body of a county may, by appropriate resolution, authorize limitations less than those prescribed in state law for vehicles operated upon the county’s highways. See also A.G. Nos. 2004-021 and 84-00095.

- As noted in Section V, E below, Ala. Code § 32-9-20 grants the Alabama Department of Transportation the authority to lower weight limitations on bridges.

Ala. Code §§ 32-9-5 and -6 prescribe penalties and distribution of fines and forfeitures for violations of weight and size restrictions.

- Counties do not receive a portion of the fines.
- Ala. Code § 32-5-9 addresses liability for damage to a road created by vehicles driving on Alabama’s roads in excess of legal weight limitations. (See also Section III, E above.)

Ala. Code § 23-1-59(c) provides that the Alabama Department of Transportation “may prescribe rules and regulations as to the weight or tonnage of vehicles to be used upon any of the public roads, bridges, or highways of the state upon which state money may be expended or appropriated, except as may be otherwise provided by law.”

#### D. HEIGHT RESTRICTIONS

Ala. Code § 32-9-20 provides that no vehicle, semitrailer, or trailer shall exceed in height 13 ½ feet, including load.

## E. SPECIAL PROVISIONS RELATING TO BRIDGES

Ala. Code § 32-5-92 authorizes the Alabama Department of Transportation to conduct an investigation of any public bridge, causeway, or viaduct on its own initiative or upon request from local authorities (e.g. the county commission), and if it finds that the structure cannot safely withstand vehicles traveling at speeds set by law, it shall determine and declare the maximum speed for the structure and cause or permit suitable signs setting out the maximum speed to be erected and maintained.

- There is also authority for posting weight limitations on bridges found in Ala. Code § 32-9-20.

Ala. Code § 32-5A-176 authorizes the Alabama Department of Transportation and local authorities to conduct similar investigations of their bridges relating to speed and, if warranted as described above, establish special speed limitations over such bridges or elevated structures. The entity establishing the limitations shall post and maintain signs stating the maximum speed.

Ala. Code § 32-9-20 exempts certain trucks from axle spacing requirements under some circumstances. However, this section provides that it shall be a violation if the vehicles entitled to axle spacing exemptions travel on bridges posted as incapable of carrying such loads.

## F. LOGGING NOTICE ORDINANCE

Ala. Code § 23-1-80.1 authorizes the county commission to adopt an ordinance requiring all persons or firms that own timber in any unincorporated area of the county to provide notice of intent to utilize county roads for delivery of any type timber to any wood yard or processing plant.

Under the statute, the term "timber owner" means "any person or firm that has entered into a contract with a landowner for the purposes of severing that timber and delivering pulpwood, logs, poles, posts, or wood chips to any wood yard or processing plant." Ala. Code § 23-1-80.1(a).

- Where the landowner harvests his or her own timber and delivers it to any wood yard or processing plant, the landowner is the timber owner.
- The term timber owner is intended to mean the person or firm who has legal title to the timber when it enters the county road.

Adoption of an ordinance under this statutory provision is the county's only option for regulating logging activities on county roads and rights-of-way. Ala. Code § 23-1-80.1(o) specifically provides that except as provided in this section, a county may not require any timber owner that plans to utilize county roads to provide any other notice of the activity, acquire any other specific permit or license for such purpose, or except as provided in this law, post any security as a condition of using the county roads.

- Any existing county rules, ordinances, or resolutions in conflict with this section were repealed in this law to the extent of such conflict.
- However, nothing in this law repeals or amends any laws related to the county's general superintendence of the roads and bridges within its jurisdiction, including its driveway or access management policy, or its authority to regulate and supervise the use of its rights- of-way or roads and bridges.

- Additionally, the county's acceptance of the notice from the timber owner shall in no way limit or affect the county's authority to regulate and enforce any laws governing the use of or damage to a county-maintained road or bridge or a county right-of-way.

In an effort to provide assistance to counties interested in implementing a logging notice ordinance as authorized in the law, the Association of County Engineers of Alabama formed a Logging Policy Advisory Committee working with Association staff and county attorneys to develop a model ordinance and suggested forms for use by counties implementing the new law. The model ordinance and forms were carefully developed to ensure proper procedures are followed and to avoid actions not permitted by the law.

A copy of the ordinance, with suggested forms and guidance on procedures for adopting and implementing the ordinance, is available through ACCA.

### **1. When Notice Required**

Pursuant to Ala. Code § 23-1-80.1(b), any ordinance or resolution adopted shall require the timber owner to provide prior written notice for each separate tract utilizing the county roads as follows:

- If a new access point is required for the tract, the timber owner is required to provide the county four business days' notice.
- If an existing access point is to be utilized for the tract, the timber owner is required to provide the county two business days' notice.

Ala. Code § 23-1-80.1(c) defines an existing access point as either:

- A location which has previously been approved, permitted, or grandfathered through the county's driveway or access management policy and has been previously used to access the tract; or
- If the county does not have a driveway or access management policy, the location that has been previously used to access the tract.

In the event the county has a driveway or access management policy and an access point has not been previously approved or permitted, but has been previously used to access the tract, there is a presumption that the access point shall be considered an existing access point for the purposes of this subsection.

A county is not required to adopt a driveway or access management policy if it does not already have one.

The notice shall be effective for a period of 12 months and may be extended by the county commission for an additional six-month period upon request from the timber owner. Ala. Code § 23-1-80.1(f).

The requirement to provide notice applies to any use of county roads by a timber owner, his or her representatives or employees, or a contractor responsible for harvesting the timber in furtherance of its operations on or after the effective date of the county's ordinance or resolution. Ala. Code § 23-1-80.1(h).

## 2. Notice Requirements

Ala. Code § 23-1-80.1(d) provides that the notice shall be as prescribed by the county commission and shall consist of *only* the following:

- A map or legal description of the area which identifies the location of the tract and the access point or points to the tract from a county road.
- Whether the access point or points are new or existing, including details outlining how access will be accomplished while maintaining the normal drainage features on the public road.
- The expected routes upon county roads related to the operations.
- The estimated acreage of the tract.
- The estimated date that access to the county roads will commence.
- The name, address, and phone number of the timber owner and the contractor responsible for harvesting the timber, if not the same.
  - If the contractor is not known at the time of notice submission, the person giving notice shall provide this information prior to accessing the county roads.
- The name and address of the liability insurance carrier of the person providing the notice and the contractor responsible for harvesting the timber.
- If the contractor is not known at the time of notice submission, the person giving notice shall provide the information prior to accessing the county roads.

Ala. Code § 23-1-80.1(e) requires that the notice be submitted to the county commission office in person, by fax or email, by regular mail, or by other means as approved by the county commission.

## 3. Review of Submitted Notice

While Ala. Code § 23-1-80.1 does not specifically address review of the notice by the county engineer or county commission, Ala. Code § 23-1-80.1(o) specifically provides that acceptance of the notice “shall in no way limit or affect the county’s authority to regulate and enforce any laws governing the use of or damage to a county-maintained road or bridge or a county right-of-way.”

To ensure that the timber owner’s proposed use of the road will not violate the county’s regulations regarding proper use of roads and rights-of-way (including its access management policy) or cause damage to its roads or rights-of-way, the county engineer should carefully review each submitted notice before timber activities are initiated, and provide the timber owner with a written response to the submitted notice that either:

- Confirms that the content of the notice complies with county policy and Alabama law and that the logging operation is responsible for compliance with the content of the notice during the harvest of timber; or
- Sets out deficiencies with the submitted notice and provides an opportunity to correct problems with the notice.

The model ordinance that was created by the Logging Policy Advisory Committee sets out a suggested procedure for conducting this review and response.

#### **4. Issuance of Warnings for Noncompliance**

The county shall provide a warning and opportunity to comply to any timber owner who fails to provide notice or fails to comply with the terms of the notice. Ala. Code § 23-1-80.1(i).

- Upon receipt of the warning and the failure to comply with this section, the person owning the timber may be fined \$500.00 for each day a violation continues to take place.
- All fines collected shall be payable to the county and deposited into its road and bridge fund.
- Additionally, the county may bring a civil action to enjoin the timber owner, his or her representatives or employees, or a contractor responsible for harvesting the timber from utilizing county roads.

#### **5. Enforcement of Ordinance**

Section 23-1-80.1 may be enforced by the county license inspector appointed pursuant to Ala. Code § 40-12-10, including the issuance of citations for failure to comply with the notice requirements or with the terms of the notice. Ala. Code § 23-1-80.1(j).

As noted above, under Ala. Code § 23-1-80.1(i), the timber owner may be fined \$500.00 a day for each violation which continues following receipt of a warning and opportunity to comply.

Ala. Code § 23-1-80.1(k) provides that once a citation has been issued, no subsequent notice application shall be effective until all fines and penalties have been collected.

Additionally, if any timber owner, his or her representatives or employees, or a contractor has been cited on three separate occasions within a 24-month period, the county may require that security be posted as a condition of using the county roads.

#### **6. County Protection from Liability**

Pursuant to Ala. Code § 23-1-80.1(g), the county's receipt of the notice shall not constitute an act on behalf of the county which shall result in the county commission, the county engineer, or any employees of the county commission being held liable in any matter arising from the actions or inactions of the timber owner or his or her representatives, employees, or contractors.

Additionally, compliance with notice provisions shall not operate to relieve such persons or firms from liability for damages which may arise from their use of public roads, bridges, or rights-of-way in the county. Ala. Code § 23-1-80.1(l).

#### **7. Emergencies Declared by Governor**

Ala. Code § 23-1-80.1(m) provides that when the Governor declares a state of emergency as a result of an event that causes damage to timber within a county, the notification requirements set forth in this law are suspended for that county for the period of time consistent with the Governor's proclamation.

## **8. Utilities**

Pursuant to Ala. Code § 23-1-80.1(n), this law shall not apply to any utility maintaining or establishing clearances from timber or vegetation for its facilities and equipment nor shall it apply to the employees, contractors, agents, or representatives of such a utility where the employees, contractors, agents, or representatives are acting within the course and scope of their employment, contract, or agency.



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# County Work on Private Property

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# CHAPTER FOUR

## COUNTY WORK ON PRIVATE PROPERTY

### I. GENERAL RULE PROHIBITING WORK ON PRIVATE PROPERTY

#### A. ETHICS ACT

Public work on private property may violate the Ethics Act under certain circumstances. Ala. Code § 36-25-5 prohibits the use of public office or public employment for personal gain. Ala. Code § 36-25-5(c) prohibits a public official or public employee from using public equipment, facilities, time, materials, human labor, or property under his or her discretion or control for the private benefit or business benefit of himself or herself or any other person. Additionally, Ala. Code § 36-25-5(d) provides that no person shall solicit such an activity “which would materially affect his or her financial interest, except as otherwise provided by law.”

- For an advisory opinion from the Ethics Commission specifically addressing the use of public equipment or personnel for work on private property, see Ethics Opinion No. 95-111.

#### B. CONSTITUTIONAL PROHIBITION

Section 94 of Alabama’s Constitution includes a strict prohibition against the county performing work on private property, expending public monies for non-public purposes, or otherwise granting any “public money or thing of value in aid of” any private interest. This prohibition also applies to cities, towns, and other subdivisions of the state.

This constitutional prohibition is the basis for the long-held view that counties are prohibited from performing work on private property, from providing labor or materials to individuals, from contributing to private enterprises, or expending any monies for “non-public” purposes. This prohibition even applies in some instances where Alabama’s Ethics Act may not actually be in play. Additionally, the Attorney General’s Office has opined that Section 94 applies even when a county is expending federal funds. A.G. No. 2022-002 (holding that Section 94 applies to federal Recovery Funds under the American Rescue Plan Act of 2021).

Section 94 of the Constitution of Alabama of 2022 provides in relevant part:

The Legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company by issuing bonds or otherwise. The Legislature may enact general, special, or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration, public parks and playgrounds, or other public recreational facilities and public housing projects, conditional upon the approval of a majority of the duly qualified electors of the county, city, town, or other subdivision affected thereby, voting at an election held for [that purpose].

### C. ATTORNEY GENERAL INTERPRETATIONS OF LAW

There are numerous Attorney General's opinions addressing specific questions regarding the constitutional prohibition set out in Section 94. Some of the holdings are as follows:

- A town is prohibited under Section 94 from appropriating and expending public funds to be paid to private entities for the repair and maintenance of private streets and related infrastructure. A.G. No. 2024-029.
- A city may not expend municipal funds or lend its credit for the repair or replacement of private roads and bridges in a private gated community located in the city; however, the city may accept the dedication of the roads and bridges and assume their maintenance and repair under such terms and conditions as determined by the city. A.G. No. 2019-034.
- A town has no authority to pave a private roadway or private drive but may pave a street if it has been dedicated and accepted by the town. A.G. No. 2002-130.
- A county cannot remove a culvert/drainage ditch located on private property where the county has no liability for its installation, and its removal would be of no benefit to the county, even though the ditch floods and backs water onto property of residents (and even though the county had installed the original drainage ditch in violation of the constitutional prohibition). A.G. No. 99-00290.
  - *See also* A.G. No. 2005-077 (holding that the obligation and liability of a county commission for drainage easements must be decided on a case-by-case basis, but that generally, a county is not responsible for a drainage structure on private property).
- A county or a city cannot dump surplus dirt onto private property unless the dirt is without value and it is shown that dumping the dirt on nearby private property will cost less than hauling it some distance for disposal. A.G. Nos. 93-00299 and 83-00261.
- *See also* Ethics Opinion No. 95-111.
- A county cannot sell pipe to individuals at cost. A.G. No. 84-00031.
- A town cannot perform work on water and sewer lines located on private property beyond main water and sewer lines. A.G. Nos. 2001-188 and 95-00029.
- A county cannot construct or maintain school bus parking pads or turnarounds on private property. A.G. Nos. 2005-176, 96-00214, 94-00245, 92-00172, and 87-00133.
- A town cannot pave around a county building leased to a town, which is currently being used as a private funeral home. A.G. No. 93-00311.
- A county has no authority to perform private work at no cost to a church. A.G. No. 93-00245.
  - *See also* A.G. Nos. 2010-081 (prohibiting county maintenance of a church cemetery) and 96-00037 (prohibiting a municipality from paving church parking lots).
- A county cannot perform excavating work for a private college at no charge. A.G. No. 81-00126.
- A county road department may not clear debris from private property. A.G. No. 83-00299.
  - *But see* A.G. No. 2005-029 (holding that debris removal can be performed following a hurricane if there is a public purpose or the debris constitutes a health hazard, the property owner is assessed, and no private source can be located for removal).
- A county employees cannot load chert onto private vehicles. A.G. No. 97-00001.
- A town may not use its equipment and employees to open and close graves even where there is full reimbursement. A.G. No. 98-00130.

Please note that several of the opinions cited above were issued to municipalities, rather than to counties.

Although municipalities and counties have much in common, there are also significant statutory differences between the two. Before relying on an opinion issued to a municipality, a county should review its own statutory authority to determine whether the opinion's reasoning would also apply to the county.

## II. EXCEPTIONS TO GENERAL RULE

### A. PUBLIC PURPOSE DOCTRINE

The Supreme Court of Alabama has held that public entities may donate public money or other things of value where there is a "public purpose," which has as its objective "the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community." The test is whether the expenditure confers "a direct public benefit of a reasonably general character" (i.e., to a "significant part" of the public, as distinguished from "a remote and theoretical benefit" to the public). *Slawson v. Alabama Forestry Commission*, 631 So.2d 953 (Ala. 1994). See also A.G. No. 2005-073.

The Supreme Court of Alabama and the Attorney General's Office have generally stated that this is largely a decision to be made by the governing body. However, counties should be very careful in applying this doctrine and ensure that there will be a direct public benefit of a general character.

In addition to identifying a public purpose, counties should be prepared to point to statutory language authorizing the use or expenditure of the public funds. In a recent analysis of Section 94, the Attorney General's Office explained, "The governing body of the county or municipality must be able to articulate a rationale for the expenditure which benefits the public-at-large . . . and is supported by the governing body's statutory authority." A.G. No. 2022-002. This opinion provided a few examples of the county's statutory authority, including its authority to care for "the poor and needy" and the "aged."

Here are some other opinions underscoring the importance of underlying statutory authority:

- The county may perform maintenance and repairs to private property used as a polling place if the county determines that the continued use of the private property as a polling place is needed and that a public purpose would be served by the maintenance and repairs. A.G. No. 2022-030. This opinion relies on Ala. Code § 17-6-4, which requires the county commission to designate, provide, and equip polling places in the county.
- Absent statutory authority to promote the general welfare and development of citizens who are mentally and developmentally disabled, the county cannot use public funds to pay for fire and hazard insurance premiums on a building owned by a non-profit organization and used by mentally and developmentally disabled individuals within the county. A.G. No. 2012-044.
- The county may perform free grading, filling, graveling, and pavement work at rural volunteer fire department locations. A.G. No. 87-00028. This opinion relies on Ala. Code § 9-3-18, which authorizes the county to provide for volunteer fire departments and rescue squads.

In many of the "public purpose doctrine" opinions, the Attorney General's Office recommends the governmental entity execute a contract with the entity to which it is providing an appropriation or benefit, setting out the mutual benefits of each party and the consideration on both sides. See, e.g., A.G. Nos. 2017-024, 2012-041, 2001-111, and 96-065. In essence, such an agreement makes clear there is a "public purpose" involved that will confer a direct public benefit to residents of the county.

As part of its maintenance of the county road system, a county may clean drainage areas located on private property if the county has an easement and the county will receive some benefit from the work performed. A.G. Nos. 90-00317 and 87-00307.

## B. SECTION 94.01

Section 94.01 provides another exception to Section 94's general prohibition. Section 94.01 was added to Alabama's Constitution following the ratification of Amendment 772 in 2004 and was later amended in 2022 by Amendment 987. Colloquially, many people still refer to Section 94.01 as "Amendment 772."

Section 94.01 grants counties fairly broad powers to use county resources for the acquisition and establishment of economic and industrial development projects, which may include transportation infrastructure, maintenance, and improvement. See A.G. No. 2009-068.

Under Section 94.01, the county may do any of the following for the purpose of promoting economic and industrial development without violating Section 94:

- Purchase, lease, or otherwise acquire real property and equipment using public funds.
- Lend its credit or grant public funds or things of value.
- Become indebted and issue bonds.

Prior to taking any action under Section 94.01, the county commission must:

- Provide seven days' notice of the public meeting at which the expenditure of public funds will be considered.
  - The notice must be published in a newspaper in circulation in the county and describe in reasonable detail the action proposed to be taken, a description of the public benefits sought to be achieved by the action, and identifying each individual or entity that stands to benefit.
- Adopt a resolution making the determination that the expenditure of specified use public funds will serve a valid and sufficient public purpose, "notwithstanding any incidental benefit accruing to any private entity or entities."

As mentioned above, Section 94.01 gives counties broad powers to provide for economic and industrial development, which may include participation in the infrastructure needs of any given project. Counties should consider all prospects very carefully to determine whether they fit within the definition of the public purpose doctrine as discussed above. See A.G. No. 2023-030 (stating that "[n]ot only must an expenditure in compliance with Amendment 772 serve a public purpose, but any benefit to a private entity must be 'incidental' to the public purpose").

For more information about the county commission's authority pertaining to industrial and economic development, see Ala. Code § 11-3-11(a)(19) and subsequent discussion in *Chapter Ten, Section II*.

## C. TRANSACTIONS BETWEEN PUBLIC ENTITIES

Section 94 only prohibits the county from providing things of value to a *private* individual or entity. The Attorney General's Office has stated that Section 94 is not violated when a transaction is between political subdivisions or public entities. A.G. No. 2010-010. See also *Rogers v. City of Mobile*, 277 Ala. 261 (1964). In A.G. No. 2010-010, the Attorney General's Office stated that while the county commission "should not make appropriations that are inconsistent with its statutory or constitutional authority and overall purpose, transfers among governmental agencies are not subject to the limitations" of Section 94.

Some examples are:

- The county may use county equipment and labor in the construction of a football field on property owned by the county school system. A.G. No. 82-00374. This opinion relies on Ala. Code § 11-3-11(a)(21), which authorizes counties to use county equipment and expend funds for the improvement, beautification, or decoration of any county school or schools under the control of the county board of education.
- Ala. Code § 23-1-86 authorizes counties to construct and maintain roads and bridges within a municipality with the consent of the municipality. A.G. No. 87-00307.
- Section 94's constitutional prohibition is not applicable to work done by a county on a roadway belonging to a public water authority because it is a public corporation and a road belonging to that corporation would be a public road. A.G. No. 82-00072.
  - However, the county may not perform maintenance and repairs on a private road leading to a water authority. A.G. No. 2001-231.

#### D. LOCAL LEGISLATION

Although the Attorney General's Office has not issued an opinion to this effect recently, it has historically opined that the county may perform work on private property where there is local legislation authorizing such work to be done if both of the following are true:

1. The legislation provides that the county will be fully reimbursed for the labor, materials, and equipment used in the work.
2. There is a provision of certainty in the legislation that the county will be paid.

*See, e.g.,* A.G. Nos. 2001-188, 96-00061, 94-00245, 90-00257, 89-00089, and 84-00393. This is a very narrow exception to the general rule prohibiting public work on private property. Although the Attorney General's Office has approved this practice on several occasions under the limited circumstances set out above, there is no indication that Alabama's appellate courts have done the same thus far. The county commission should consult with its county attorney prior to relying on an existing local law or pursuing local legislation of the type described in the above opinions.

The requirement for reimbursement has been strictly construed by the Attorney General's Office. A.G. Nos. 93-00139, 84-00031, and 81-00004. In other words, even with a local law authorizing work on private property, the owner of the property must pay for any work performed or materials used.

The language of Section 94 expressly authorizes local legislation to provide assistance for certain public purpose projects such as parks and housing projects, if approved by the electorate. However, this provision has very limited application.

#### E. MISCELLANEOUS

If the county causes (or contributes to) damage to private property, the Attorney General's Office has indicated that a county may correct that damage without violating Section 94. However, the Attorney General has cautioned that the county should enter into a written contract or agreement with the property owner before attempting to remedy the damage. A.G. Nos. 95-00018 and 2014-062.

An aerial photograph of a highway interchange with a prominent green median. The image is overlaid with a semi-transparent teal filter. The text 'Alabama Department of Transportation' is centered in white, flanked by two horizontal dashed white lines.

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# Alabama Department of Transportation

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# CHAPTER FIVE

## THE ALABAMA DEPARTMENT OF TRANSPORTATION

### I. GENERAL ORGANIZATION OF THE ALABAMA DEPARTMENT OF TRANSPORTATION

The Alabama Department of Transportation (sometimes referred to herein as “ALDOT”) is established pursuant to Ala. Code § 23-1-20. This agency was originally called the Highway Department, but the name was changed by legislation in 1993. All references in the Code to the “Highway Department” are now deemed to refer to the Alabama Department of Transportation.

#### A. POWERS AND RESPONSIBILITIES

Ala. Code §§ 23-1-20 to -63 set out the general statutory authority of ALDOT.

- The general duties and powers of ALDOT are enumerated in Ala. Code § 23-1-40.
- ALDOT’s rule-making authority is set out in Ala. Code § 23-1-59.

There are noteworthy Code sections addressing the role and powers of ALDOT. For example:

#### 1. Highway Beautification (Scenic Enhancement, Junkyard Control, Outdoor Advertising)

- a. Ala. Code §§ 23-1-220 to -223 deal with “scenic enhancement” and provide that the Director of ALDOT is authorized to acquire land necessary for the restoration, preservation, and enhancement of scenic beauty and establishment of rest areas within and adjacent to state and federal-aid highways.
- b. Ala. Code §§ 23-1-240 to -251 address “junkyard control” and empower ALDOT, through its Director, to issue licenses and regulate junkyards adjacent to state or interstate highways.
- c. Ala. Code §§ 23-1-270 to -288 address “outdoor advertising” and again grant ALDOT authority for permitting and regulation.

#### 2. Controlled Access Facilities

Ala. Code §§ 23-3-1 to -8 address controlled access facilities. Ala. Code § 23-3-2 declares that it is the policy of the state “to facilitate the flow of traffic and promote public safety by controlling access to highways included in the national system of interstate highways as selected by joint action of [ALDOT] and the United States Bureau of Public Roads.” The Director of ALDOT has broad powers in this area “acting alone or in cooperation with counties, cities, towns or any federal, state or local agency or any other state”.

Ala. Code § 23-3-3.

## B. DIRECTOR OF ALDOT

The Director of ALDOT ("Director") is appointed by the Governor and holds office at his or her pleasure. Ala. Code § 23-1-21. The specific duties and authority of this office are found throughout the above-referenced Code sections, as well as in other sections of Alabama's law, such as the following:

- a. Ala. Code §§ 23-1-21.2 and -21.3 set out the Director's authority with regard to public transportation.
- b. Ala. Code § 23-1-45 grants the Director authority to acquire rights-of-way deemed necessary for construction of a state highway, either by purchase or by right of eminent domain and to request that the county acquire such rights-of-way, which the county must do if requested.
- c. Ala. Code § 23-1-56 addresses the Director's role in the contracting and bidding process.
- d. Ala. Code §§ 11-6-4 and -23 authorizes the Director to approve partial payment by the state of the salaries of the county engineer and county engineer interns. *(See Chapter One, Sections II, C and III, B for further discussion of this issue.)*
- e. Ala. Code § 23-1-60, sets out the Director's authority with regard to alteration of plans or character of highway projects.
- f. Ala. Code § 40-12-270 requires the Director's (or his or her designee's) approval of plans for use of certain road funds distributed to counties. *(See, Section II below and Chapter Six, Section II, E, 2 for further discussion of this issue.)*
- g. Ala. Code § 23-1-212 authorizes the Director to issue regulations and procedures necessary to carry out relocation assistance following the acquisition of property which results in displacing persons from their homes.
- h. Ala. Code § 23-1-332 requires the Director to approve projects under the Rural Access Program and grants him or her sole authority to promulgate rules and regulations for the operation of that program. *(See Section III below for further discussion of this issue.)*

## C. CHIEF ENGINEER

Ala. Code § 23-1-22 provides for the position of chief engineer and states that this position "shall be filled by appointment by the Director, with the approval of the Governor."

- The duties of the chief engineer, subject to and under the control and supervision of the Director, include the administration of technical phases of ALDOT, and direction and coordination of its engineering activities. Ala. Code § 23-1-24.
- Additionally, the chief engineer "shall sign the title sheets of all plans let to contract by the [ALDOT]." Ala. Code § 23-1-24.

#### D. PUBLIC TRANSPORTATION

Ala. Code § 23-1-21.2 and -21.3 delegate to the Director, acting alone or in cooperation with local entities, the authority to:

1. Enter into agreements to provide public transportation and to administer any programs relative to public transportation resulting from federal legislation.
2. Enter into agreements with the United States for federal assistance for public transportation.
3. Enter into agreements with local entities to perform and/or cooperate in the performance of transportation planning for public transportation improvements, provided the local entities affected enter into an agreement with the Director to carry out a planning process.
4. Provide technical assistance to local entities for formulating a program of public transportation projects.
5. Administer any state funds authorized by the Legislature for public transportation.
6. Promulgate rules and regulations to ensure compliance with federal laws and regulations relating to public transportation.

In addition to the above, the Alabama Legislature transferred the Alabama Department of Aeronautics to the ALDOT during the 2000 Regular Session. See Ala. Code §§ 23-1-350 to -391.

#### E. GENERAL SUPERVISION OVER ROAD PROJECTS

There are several Code sections — in particular, Ala. Code § 23-1-40 — that specifically address ALDOT's general supervision over road projects across the state, including county or municipal projects.

1. Ala. Code § 23-1-40(d) provides that ALDOT shall collect information and prepare statistics relative to the mileage, character, and condition of the roads and bridges in the state.
2. Ala. Code § 23-1-40(e) requires ALDOT to investigate and determine the methods of road construction best adapted to the various sections of the state and to establish standards for the maintenance of roads and bridges that have been constructed with state aid.
3. Ala. Code § 23-1-40(f) states that ALDOT may be consulted by county officials relative to any matter relating to the construction of roads, bridges, and culverts. Additionally, ALDOT may call on all county officials for information or assistance and the county has a duty to supply the same.
4. Ala. Code § 23-1-40(g) provides that ALDOT shall have general supervision over the construction and maintenance of all public roads, bridges, and culverts (including county roads, bridges, and culverts) where state funds are used.
5. Ala. Code § 23-1-49 requires ALDOT to furnish a competent engineer, when needed, to supervise county projects and to oversee compliance with the plans and specifications.
6. Ala. Code § 23-1-5 authorizes ALDOT to require relocation of any utility facility necessitated by interstate highway construction, including extensions within urban areas. The cost of relocation for utilities with a gross income of \$250,000,000 or less must be paid by the state as part of the construction costs.

## F. RULEMAKING AUTHORITY

Several sections outline ALDOT's broad powers to promulgate rules and regulations relating to its different areas of responsibility. ALDOT's rules are codified in Chapter 450 of the Alabama Administrative Code.

1. Ala. Code § 23-1-59 grants ALDOT the right and power to adopt all reasonable and necessary rules and regulations for the better construction, repair, and maintenance of public roads and bridges in Alabama. This authority extends to rules regarding the construction or maintenance of utility poles, wires, etc. to ensure the safety of the travelling public.
  - a. The Supreme Court of Alabama has held that standard specifications established for highway construction need not be adopted through the Administrative Procedures Act but are instead specifications for details and materials that may be incorporated by reference into requests for bids. *Alabama Department of Transportation v. Blue Ridge Sand & Gravel*, 718 So.2d 27, 29 (Ala. 1998).
  - b. Counties must comply with ALDOT standards when utilizing state or federal funds. A.G. No. 96-00172.
2. Ala. Code § 23-1-59 also grants ALDOT authority to prescribe rules and regulations regarding the weight or tonnage of vehicles using public roads. It also grants ALDOT the authority to prescribe rules and regulations to prevent unnecessary trespass or injury to any roads or rights-of-way upon which state money may be expended or appropriated.
3. In addition to the specifically enumerated rulemaking authority, Ala. Code § 23-1-59(d) authorizes ALDOT to make all reasonable rules and regulations necessary to carry out the provisions of the laws regarding Alabama highways.
4. Ala. Code § 23-1-1 grants ALDOT rulemaking authority for the effective implementation and cooperation with the provisions of acts of Congress relating to road and bridge projects.
5. Ala. Code § 23-1-56(e) authorizes ALDOT to promulgate rules and regulations relating to qualification of bidders.
6. Ala. Code § 23-1-64(b) authorizes ALDOT to promulgate administrative rules and regulations relating to the disposal of surplus property. Ala. Code § 23-1-332(j) provides that the Director of ALDOT shall have sole authority to promulgate rules and regulations for the operation of the Rural Access Program. (See Section III below for further discussion of this issue.)

## G. CONTRACTING AND BIDDING POWERS AND RESPONSIBILITIES

ALDOT also has very broad contracting powers and responsibilities. Some of those statutory powers are listed below.

1. Ala. Code § 23-1-1 provides that ALDOT is authorized to enter into all necessary contracts and agreements with the U.S. government or any federal agency in accordance to acts of Congress relating to the construction, maintenance, and beautification of highways, bridges, tunnels, or ferries and to do all other things necessary to secure that the state and its counties and municipalities receive the full benefits provided by such acts.

2. Ala. Code § 23-1-40(b) authorizes ALDOT to cooperate or contract with any municipality or county in the paving or improving of any streets, highways, or walkways upon which a state educational or eleemosynary institution or property may front or abut.
3. Ala. Code § 23-1-53 authorizes ALDOT to contract with counties (or municipalities) to do any work in the construction, repair, and maintenance of roads, bridges, or highways in the state.
4. Ala. Code § 23-1-57 authorizes ALDOT to enter into contracts and agreements with adjoining states and the federal government relative to the acquisition, construction, maintenance, and repair of bridges across any river or stream forming the boundary between Alabama and an adjoining state, subject to terms and conditions set out in the section.
5. Ala. Code § 23-1-54 states that every contract for road or bridge construction, repair, or maintenance under Code of Alabama 1975, Title 23, Chapter 1 shall be made in the name of the State of Alabama and approved by ALDOT and the Governor.
  - Under Ala. Code § 23-1-55, no contract for construction, repair, or renewal of highways, bridges or culverts shall be let without approval of the Governor.
6. Ala. Code § 23-1-55 provides that no contract shall be let until after all necessary right-of-way and right for material for construction and right-of-way for ingress and egress to said material have been legally procured with documents covering such procurement on file with ALDOT.
7. Ala. Code § 23-1-56 addresses the ALDOT's special rules for prequalification of bidders seeking to contract with the state for road and bridge projects.
  - See *Alabama Department of Transportation v. Blue Ridge Sand & Gravel*, 718 So.2d 27 (Ala. 1998) , in which ALDOT successfully argued that its standard specifications are specifications to be incorporated by reference in its proposals for bid and contracts.

In addition to these specific contracting powers and responsibilities, ALDOT has special provisions for many aspects of bidding and contracting pursuant to Title 23 and Alabama's public works law, found in Code of Alabama 1975, Title 39. (See *Chapter 8 on Alabama's public works law for further discussion of these special provisions.*)

- Additionally, Ala. Code § 23-1-40 allows ALDOT to utilize the design-build process for contracting certain public works projects of not less than \$100,000,000.

#### H. SURPLUS PERSONAL PROPERTY

Ala. Code §§ 23-1-64 to -66 deal with ALDOT's authority to dispose of surplus personal property. Sections of particular interest to counties are:

1. Ala. Code § 23-1-64(c) which authorizes ALDOT to sell surplus personal property at fair market value and to set out its published rules to counties and other agencies on how to purchase such property from ALDOT.
  - All purchases must be paid for within 30 days, or the purchase shall be declared void.

2. Ala. Code § 23-1-64(d) and (e) provide that the governing body of any municipality or county shall be given preference on the disposal of all surplus motor vehicles owned by ALDOT except those sold to other state agencies.
  - The county shall notify ALDOT, in writing, of the type of motor vehicle needed, and ALDOT shall maintain a list of needs on a first-come, first-served basis.
  - Once notified that needed vehicles have become available, the county will have seven working days to respond.

## **II. THE ROLE OF ALDOT IN COUNTY ROAD AND BRIDGE PROJECTS**

ALDOT plays a major role in many county road and bridge projects, particularly when such projects are funded, in whole or in part, with state and/or federal funds. In fact, as set out above, many of the Code sections addressing ALDOT's duties and responsibility deal with its regulatory authority over county projects.

In A.G. No. 96-00172, the Attorney General's Office opined that the design standards that a county must follow in its road and bridge projects depend on the source of funding for each project, and that if funding is provided by the state or federal government, the county must adhere to standards that must be approved by ALDOT.

## **III. WORK ON STATE ROADS WITHIN THE COUNTY**

Ala. Code § 23-1-48 provides that when a county commission desires that a state road or bridge in the county be constructed or maintained with state aid, it shall make written application to ALDOT under rules and regulations that ALDOT may prescribe.

1. If the application is approved, the county commission shall direct an engineer to prepare surveys, plans, specifications, and cost estimates and ALDOT may then appropriate out of state funds such part of the cost "as it may deem proper."
2. ALDOT shall proceed to do such work by contract or with its own forces.
3. ALDOT may accept appropriations from the county which shall be paid into the state's fund before the work begins.
4. Whenever a county fails to make application or ALDOT deems it best for such work to be done, it may proceed to construct or maintain any part of the state road or bridge and pay part or all of the cost out of the State Highway Fund.

## **A. DISTRIBUTION OF ROAD AND BRIDGE FUNDS TO COUNTIES**

There are several different sources of funding for county roads and bridges, many of which are derived from state-levied taxes and fees and from federal funding. In some instances, the use of funds requires approval from ALDOT. Chapter Six of this manual deals specifically with funding sources for county roads and bridges. However, the role of ALDOT in the distribution and use of certain funds is addressed here.

## 1. General Supervision over Projects Using State Funds

As noted above, Ala. Code § 23-1-40(g) provides that ALDOT shall have general supervision of any state funds apportioned to any county of the state for the construction and maintenance of all public roads, bridges, and culverts in each county.

- Ala. Code § 23-1-40(e) provides that ALDOT shall establish standards for the maintenance of roads and bridges that have been constructed with state aid. *See also* A.G. No. 96-00172.

## 2. Motor Vehicle License Taxes and Registration Fees

Ala. Code § 40-12-240 to -275 impose license tax and registration fees for motor vehicles. Generally, these funds are distributed pursuant to Ala. Code § 40-12-270, which includes a distribution to counties. Ala. Code § 40-12-270 prescribes the appropriate uses for funds distributed to counties and requires that all plans be submitted to and approved by the Director of ALDOT or his or her designee. The review and approval of all plans shall be based on the criteria and standards developed by the Secondary Road Committee, discussed below.

Also, Ala. Code § 40-12-242 provides for an additional license tax and registration fee for battery electric vehicles and plug-in hybrid electric vehicles. These additional taxes and fees are distributed pursuant to Ala. Code § 40-12-242(f); counties receive a portion of that revenue, as well.

## 3. Secondary Road Committee

Pursuant to Ala. Code 40-12-270(e)(2), there is a “secondary road committee” comprised of the following members who serve at the pleasure of the appointing authority:

- The chief of the bureau of secondary roads of ALDOT;
- Two county engineers appointed by the Director of ALDOT; and
- Two county commission members appointed by the Governor.

The purpose of this committee is to develop and publish criteria for the designation of high-density roads and bridges and eligible recreational access roads and to develop and publish minimum design standards, including allowable cost items, for the construction, reconstruction, surfacing, resurfacing, restoration, and rehabilitation of high-density roads and bridges and recreational access roads.

- The committee may amend the criteria and standards as necessary upon 60 days’ notice to the chairman of each county commission.

#### IV. RURAL ACCESS PROGRAM

In addition to the above-referenced programs administered by ALDOT, in 1995 the Alabama Legislature created a program known as the "Rural Access Program (RAP)" and allocated specific revenues to this program. Ala. Code §§ 23-1-330 to -333.

The program was designed to provide funds for counties to use to improve existing paved roads, to pave dirt roads, and for bridge replacement. See Ala. Code § 23-1-332(d), which also provides that funds from the program cannot be used for routine maintenance. Ala. Code § 23-1-332 sets out the general rules and procedures for projects funded under the Rural Access Program. However, to date, the threshold for monies to be paid into this program has never been met, and no funds from this program have ever been appropriated or distributed to counties.

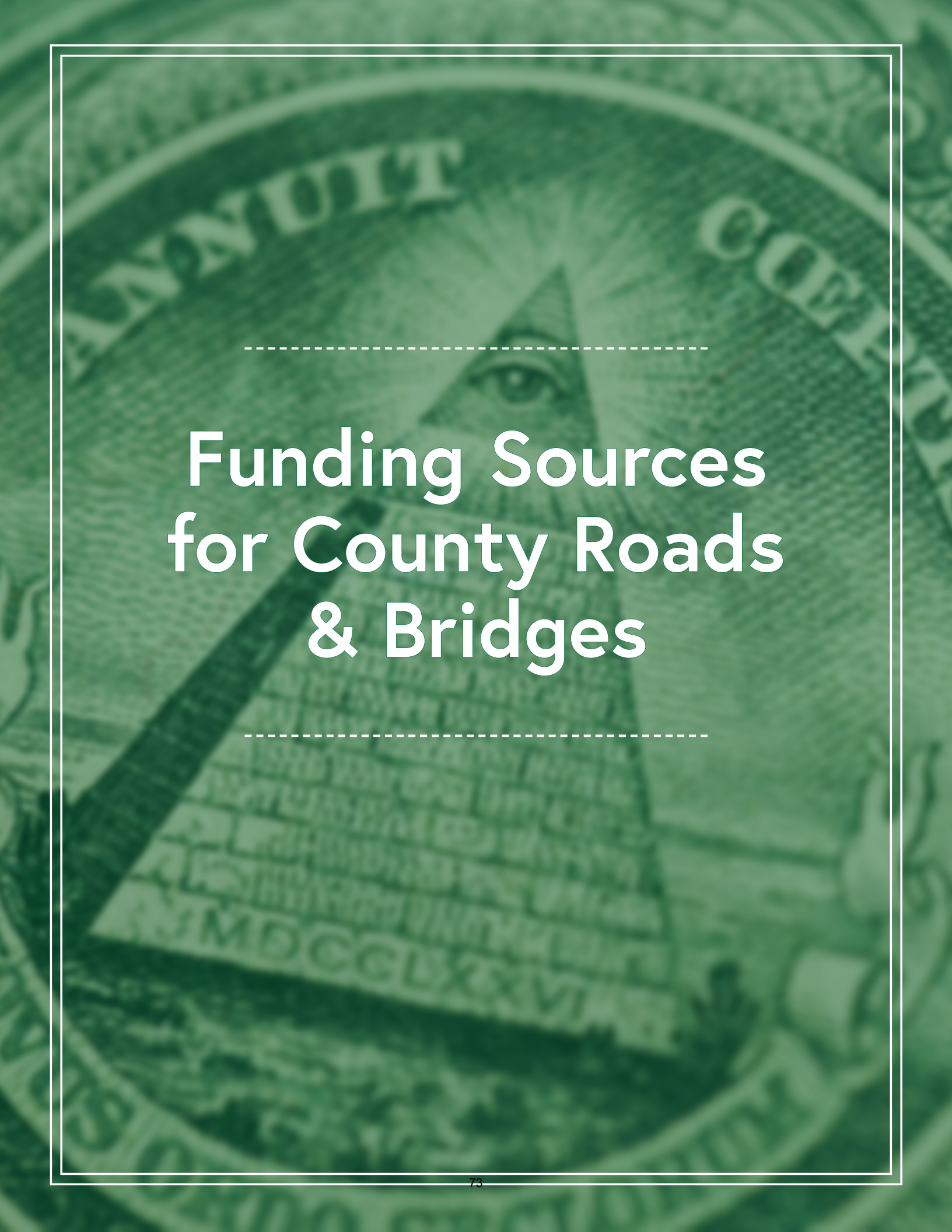
#### V. CAPTIVE COUNTIES

Prior to 1979, ten counties, known as "captive counties", did not maintain a county road or highway department. The road and bridge work in each of these counties was performed by the State and its employees. Those counties were: Cherokee, DeKalb, Jackson, Colbert, Cullman, Lauderdale, Lawrence, Winston, Franklin, and Baldwin.

In 1979, the Alabama Legislature passed Act 79-688, codified at Ala. Code §§ 23-1-100 to -107, which in effect, transferred the responsibility for the construction, repair, and maintenance of the county roads and bridges in the respective counties to the county commission of each county. The law required ALDOT to transfer any unexpended monies maintained for road and bridge projects in these counties to each of the counties. It also required ALDOT to transfer adequate facilities and equipment for the counties to carry out its duties and functions in relation to roads and bridges.

Counties were authorized to employ up to 75% of state employees working in the respective counties, and the state was responsible for accumulated leave and other benefits. Ala. Code § 23-1-105 provided that all contracts entered into by ALDOT prior to the adoption of this law would remain in effect. However, Ala. Code § 23-1-106 provided that all outstanding financial obligations became the obligations of the respective captive counties.

This law went into effect on October 1, 1979, or October 1, 1980, "at the discretion of the individual county commissions." Ala. Code § 23-1-107.



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# Funding Sources for County Roads & Bridges

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# CHAPTER SIX

## FUNDING SOURCES FOR COUNTY ROADS AND BRIDGES

An effective county engineer must have an understanding of what funding sources are available for county transportation projects, how funds may be spent, and what paperwork is involved. Various funding sources such as ad valorem (property) taxes, gasoline and diesel fuel taxes, petroleum inspection fees, motor vehicle license taxes and registration fees, and driver's license fees are used — at least in part — for county transportation-related purposes. However, each of these funding sources comes with its own permissible uses. This chapter discusses these funding sources, how they may be used, and restrictions on their uses.

Generally, each funding source will be associated with a particular fund number, and possibly an account number or object code. The Alabama Department of Examiners of Public Accounts has provided general standards for the assignment of these types of accounting codes to the various funding sources. However, specific accounting codes may vary from county to county. As a result, when budgeting for or carrying out a county transportation project, the county engineer should consult with the county administrator regarding applicable accounting codes, as well as any other necessary procedures used to ensure proper accounting of project costs and budget items. For more information about the recommended standards provided by the Alabama Department of Examiners of Public Accounts, see Section 4 of [Alabama County Finance Manual \(2021 Revision\)](#). Again, the county administrator should always be consulted regarding the county's accounting codes.

### I. CONSTITUTIONAL PROVISIONS FOR ROAD AND BRIDGE FUNDING

Alabama counties have no inherent power to tax. They derive any taxing authority from the Legislature through general or local laws. The Constitution of Alabama of 2022 addresses possible funding of county roads and bridges through the levy of local ad valorem taxes. However, it also places strict limitations on the procedures for levying such taxes and on total county tax levies and rates. In many counties, these restrictions have been altered by a local constitutional amendment increasing the county's total tax limit. Nonetheless, the availability of ad valorem tax revenues for roads and bridges must be determined in conjunction with tax levies for other purposes, such as education and public health.

The procedures and limitations applicable to levying local taxes for roads and bridges or for other purposes are complicated and beyond the scope of this reference manual. However, the relevant constitutional and statutory sections specific to road and bridge funding are set out below.

#### A. SPECIAL AD VALOREM TAX FOR COUNTY ROADS AND BRIDGES

##### 1. Section 215 of the Constitution of Alabama of 2022

Section 215 of the Constitution of Alabama of 2022 provides generally that no county shall be authorized to levy an ad valorem tax of more than 5 mills in any one year. However, it does authorize an additional special tax of no more than 2½ mills to pay any debt or liability incurred for the erection, construction, or

maintenance of public roads, bridges, or buildings. The imposition of such tax must be approved by referendum of the voters in the county, and as mentioned above, can only be levied if within the constitutional limit of county taxation.

Section 215 originally limited the use of the special 2½ mill tax to the purposes for which they were levied and collected, but as amended by Amendment 208, which was ratified on November 11, 1962, the proceeds of such taxes in excess of amounts payable on bonds, warrants, or other securities issued by the county may now be spent for general county purposes in such manner as determined by the county commission.

The Supreme Court of Alabama has held that Section 215 is *not* a grant of power to the counties to levy taxes but is a limitation upon the power of the Legislature to authorize counties to levy taxes. *Jefferson County v. City of Birmingham*, 27 So.2d 584 (Ala. 1946). Furthermore, the Legislature must authorize the special 2½ mill levy. *Rollings v. Marshall County*, 82 So.2d 428 (Ala. 1955); *Jefferson County v. City of Birmingham*, *supra*.

## 2. Statutory Provisions for Ad Valorem Tax

The Alabama Legislature has provided for the levy of this ad valorem tax. See Ala. Code § 11-14-11. *See also* Ala. Code § 11-3-11(a)(2), which authorizes the county commission “to levy a general tax, for general county purposes and a special tax, for special purposes.”

### B. RESTRICTION ON USE OF FEES, EXCISES, AND LICENSE TAXES

#### 1. Section 111.06 of the Constitution of Alabama of 2022

Section 111.06 (Amendments 93 and 354) of the Constitution of Alabama of 2022 generally provides that monies derived from fees, excises, or license taxes levied by the state relating to vehicles or fuels cannot be expended for any purpose other than administering such laws; the construction, reconstruction, maintenance and repair of public highways and bridges; and traffic regulation.

Section 111.06 provides some exceptions to this prohibition, such as for vehicle-use taxes imposed in lieu of a sales tax; pump taxes; and fees, excises, and license taxes levied by the state for school purposes.

The Supreme Court of Alabama has opined that this section applies only to fees and taxes that are levied directly by the Legislature and not to those levied by counties and municipalities pursuant to authority granted by the state. *In re Opinion of Justices*, 96 So.2d 634 (Ala. 1957).

#### 2. Statutory Implementation of Section 111.06

Ala. Code § 23-1-84 authorizes counties to spend funds derived from state-levied fees, excises, or license taxes on vehicles or fuels for road and bridge projects, and states that the legislative intent of this section is to implement Section 111.06 (cited in Section 23-1-84 as Amendment 93 to the Constitution of Alabama).

- This Code section, however, does not authorize counties to use these funds for traffic regulation as provided for in Section 111.06.

- The Attorney General's Office has opined that, because the Legislature has restricted the use of these funds, counties cannot use public highway and traffic fund monies for the purpose of enforcing state traffic and motor vehicle laws absent local legislation authorizing such use of funds. A.G. Nos. 93-00256 and 93-00304. In these opinions, the counties had asked whether public highway and traffic fund monies could be used for hiring deputy sheriffs or for the maintenance of deputy sheriffs' vehicles.
- The Attorney General has opined that these funds cannot be used to supplement the county general fund. A.G. No. 2000-216.

### 3. Additional Statutory Restrictions on Uses of County-Levied Motor Vehicle Fuel Taxes

Ala. Code § 40-17-362.1 provides that all taxes on motor fuels, as defined in Section 40-17-322, whether called an excise tax, license tax, or otherwise, levied by a municipality or county after August 1, 2023, may be used only for the cost of administering the tax; cost of construction, reconstruction, maintenance, mass transit, and repair of roads, bridges, and rights-of-ways; cost of traffic regulation; and the cost of enforcing traffic and motor vehicle laws. However, this prohibition does not apply to taxes on motor fuels that are levied or that may be levied by a county or municipality pursuant to a local law or general law of local application that is in effect on August 1, 2023.

## II. STATE REVENUE SOURCES

Alabama general law levies several state gasoline and diesel fuel taxes. Counties receive a portion of most of the gas tax levies, and 4.69% of the 6¢ per gallon excise tax of the diesel tax proceeds. There are limitations on the use of monies distributed to counties, depending in part on the levy from which the monies are paid to counties.

The gasoline and diesel fuel tax laws were rewritten in 2011 to provide a new system of collecting the taxes "at the rack." See Act 2011-565. This resulted in changes in Code sections related to the tax levies and distribution. Although the Code sections were rearranged and renumbered, the substance of the law related to distribution and use of monies was not generally altered in any substantive ways.

The law was again amended in 2015 to make changes in the levy, collection, and distribution of inspection fees and the additional 4¢ excise tax effective October 1, 2016. See Act 2015-54. This outline details the law as it reads effective October 1, 2016.

Prior to 2019, the state gasoline tax was levied exclusively under Ala. Code § 40-17-325(a)(1). The tax on gasoline levied under this section is 18¢ per gallon, which includes a 7¢ excise tax, a supplemental 5¢ excise tax, and an additional 6¢ excise tax. While all of the gas tax proceeds are earmarked for state, county, or municipal road and bridge use, each tax has special restrictions for how the monies can be spent. See Ala. Code §§ 40-17-359 and -362. These authorized uses are discussed in more detail below.

In 2019, the Rebuild Alabama Act was signed into law. The act created an *additional* state tax levy on gasoline and diesel fuels. The initial levy was in the amount of 6¢ per gallon, with increases scheduled during the following two years to increase the levy to 10¢ per gallon. Section II, E includes further discussion of the Rebuild Alabama Act and authorized uses of the proceeds of the additional tax levied therein.

## A. NET TAX PROCEEDS (7¢ EXCISE TAX PROCEEDS)

Ala. Code § 40-17-359(a)(9) defines “net tax proceeds” of the gasoline taxes levied pursuant to Ala. Code § 40-17-325(a)(1) as:

The entire proceeds from the highway gasoline tax, except the proceeds from the supplemental excise tax of five cents (\$.05) per gallon and additional six cents (\$.06) imposed by [Section 40-17-325(a)(1)], less the cost of collection and less any refunds pursuant to the [law].

In essence, this defines the 7¢ state-levied excise tax on gasoline.

### 1. Local Subdivisions’ Portion

The “local subdivisions’ shares of the net tax proceeds” is 55% of the net tax proceeds, with 25% distributed equally to all 67 counties and 30% distributed by population based upon each county’s pro rata portion of the state’s population. See Ala. Code § 40-17-359(a)(7) and (d).

Ala. Code § 40-17-359(e)(1) requires that 10% of net tax proceeds (7¢ monies) paid to a county to be distributed to the municipalities of the county on a pro rata basis of the total population of all municipalities in the county.

- Some counties have local legislation requiring that a larger portion of the proceeds be distributed to municipalities in the county.
- The Attorney General has opined that in the absence of an agreement, a county cannot insist that a municipality’s share of the gas tax proceeds be used for upkeep of county roads within the municipality. A.G. No. 2000-007.

Ala. Code § 40-17-359(b)(2) sets out the permissible uses of the 7¢ excise tax, providing that proceeds shall not be used for any purpose other than construction, improvement, maintenance, and supervision of highways, bridges, and streets, including the retirement of bonds for the payment of which such revenues have been or may be pledged.

Ala. Code § 40-17-359(g) provides that counties may pay a portion of the county commissioners’ salaries out of county gasoline tax revenues that is proportionate to their time spent supervising, inspecting, accepting, building, or repairing county roads or bridges.

Ala. Code § 40-17-359(h) authorizes counties to pay up to 75% of the clerk’s compensation out of the road and bridge fund or gasoline tax funds of the county.

Ala. Code § 40-17-359(j)(2), similar to Ala. Code § 40-17-359(b)(2), also provides that county monies “shall be for transportation planning, the construction, reconstruction, maintenance, widening, alteration, and improvement of public roads and bridges . . . including payment of the principal of and interest on any securities at any time issued by the county pursuant to law for payment of which all or any of the net tax proceeds were or may be lawfully pledged.”

Ala. Code § 40-17-359(k) authorizes counties to use gasoline tax proceeds for the construction and maintenance of streets within a municipality located in the county.

Ala. Code § 40-17-359(l) provides that counties may use proceeds for construction, reconstruction, maintenance, and repair of public highways and traffic control areas located on public school property or state school property within the county.

## 2. Attorney General's Opinions Regarding Use of Funds

The Attorney General's Office has issued a number of opinions addressing appropriate uses of the 7¢ gasoline tax. Although many of these opinions were issued to municipalities and not counties, there is significant overlap between the appropriate uses by counties found in Ala. Code § 40-17-359(j)(2) and by municipalities included in Ala. Code § 40-17-359(j)(3). Thus, the appropriate uses by municipalities are generally analogous to the appropriate uses by counties.

Most of the opinions addressing appropriate uses of the 7¢ gasoline tax were written before passage of Act 2011-565 meaning that Code section references in the opinions are to the "old law" repealed in Act 2011-565. However, because the substance of the law did not change in the new act and the appropriate uses remain the same, these opinions still apply as a controlling interpretation of the law.

The following are some examples:

- There is no requirement that the proceeds be distributed within the county on the basis of road mileage within each commission district. The county commission may determine by majority vote how the proceeds from the tax should be distributed within the districts in the county. A.G. No. 84-0023
- Counties may use 7¢ gas tax monies to maintain flood structures on county roads including bushhogging. A.G. No. 86-00387.
- 7¢ gas tax monies may be used for salaries of members of the county governing bodies and for county clerks. A.G. No. 87-00259.
  - *But see* A.G. No. 99-00100 set out below.
- The portion of county gasoline tax revenues used to pay commissioners' salaries cannot be used for insurance premiums, dues, and attending seminars related to their road and highway responsibilities. A.G. No. 99-00100.
- Counties may use 7¢ gas tax monies for the construction and maintenance of streets in a municipality. A.G. Nos. 98-0014, 91-00133, and 87-00307.
- Counties may use 7¢ gas tax monies for equipment and labor associated with drainage improvements and cleaning or digging out drains if such improvements are directly connected with and necessary for the maintenance of a road. A.G. No. 87-00307.
- Counties may *not* use 7¢ gas tax monies to pay the costs of litigation. A.G. No. 87-00279.
- Counties may *not* use 7¢ gas tax monies to purchase scales and hire personnel to enforce weight limits on county roads. A.G. No. 89-00442.
- Labor costs for employees working directly on roads and bridges may be paid from 7¢ gas tax monies. A.G. No. 91-00267.
- 7¢ gas tax monies may *not* be used for restoration and repair of an airport runway. A.G. No. 98-00179.
- 7¢ gas tax monies may be used to repair, maintain, and construct ditches and culverts along the right-of-way. A.G. No. 98-00189.

- 7¢ gas tax monies may be used for a one-time cleaning of a street and adjoining state right-of-way, because this is considered maintenance and improvement. A.G. No. 2001-078.
- 7¢ gas tax monies may be used to purchase a leaf vacuum truck to be used for maintenance of streets, alleys, and rights-of-way. A.G. No. 2006-083.
- 7¢ gas tax monies may be used for the purchase of reflective street signs. A.G. No. 2016-002.
- 7¢ gas tax monies may be used to pay the outstanding balance on a backhoe used exclusively in the building, maintaining, and rehabilitation of roadways and bridges. They may also be used to construct a building to house equipment used in the building, maintaining, and rehabilitating of roadways and bridges. A.G. No. 2018-047.
- 7¢ gas tax monies may be used to directly repay the Alabama Department of Transportation for repairs and maintenance to traffic signals. A.G. No. 2018-028.

## B. SUPPLEMENTAL NET TAX PROCEEDS (5¢ EXCISE TAX PROCEEDS)

Ala. Code § 40-17-359(a)(13) defines supplemental net tax proceeds as:

That portion of the highway gasoline tax remaining after the deduction of the net tax proceeds and one-third of all revenues received or collected by the department remaining after the payment of refunds from the additional six cents (\$.06) tax levied on gasoline under Section 40-17-325(a)(1) and two-thirds revenues received or collected by the department after the payment of refunds and the expense of administration and enforcement of this article from the additional six cents (\$.06) tax levied on gasoline under Section 40-17-325(a)(1), less the cost of collection and less any refunds of the highway gasoline tax applicable to the supplemental gasoline excise tax imposed in subdivision (1) of subsection (a) of Section 40-17-325.

This is a long-winded definition for the supplemental 5¢ excise tax levied under Ala. Code, § 40-17-325(a)(1).

### 1. Distribution of Proceeds

The county portion of this tax is equal to 55% of two-fifths of the proceeds from this supplemental tax. These monies are distributed in the same manner as the tax proceeds of the 7¢ tax. Ala. Code § 40-17-359(f).

### 2. Use of Proceeds

These monies are used for resurfacing, restoration, and rehabilitation and may be used for vegetation management in the same way as monies from the 6¢ excise tax. See Ala. Code §§ 40-17-359(f) and 40-17-362(b)(2). Pursuant to Ala. Code § 40-17-359(f), these monies can also be used to match federal aid on any projects that meet the requirements for federal funding.

Additionally, pursuant to Ala. Code § 40-17-359(f), these funds can be used “for new construction *without regard* to the provision that 90 percent of the county’s paved road system has achieved a grade of 85 percent based on the [Department of Transportation’s] annual maintenance report of county roads and bridges” (emphasis added).

### 3. Attorney General's Opinions Regarding Use of Funds

The following is a sampling of Attorney General's opinions on the proper use of 5¢ tax monies:

- These funds may not be used for landscaping, because that is not restoration or rehabilitation, but they may be used for one-time street cleaning if work is part of resurfacing, restoration, and rehabilitation. A.G. No. 2001-078.
- Where at least 60% of the use of a backhoe is for projects authorized as expenditures from the \$.05 and \$.04 gasoline tax funds, these funds may be used for a proportionate share of monthly cost and maintenance, although a better option would be to pay for the backhoe and maintenance with unrestricted funds followed by reimbursement from the restricted gasoline tax funds based on invoices and project costs. A.G. No. 2014-084.
- 5¢ tax monies may not be used to fund the purchase or installation of emergency street signs. A.G. No. 2016-002.

#### C. ADDITIONAL 6¢ EXCISE TAX

Counties also receive a portion of the additional 6¢ excise tax on gasoline levied in Ala. Code § 40-17-325(a)(1). This tax, amended by Act 2015-54, replaced the 4¢ excise tax effective October 1, 2016. The distribution of monies is altered in the amended law, but as is detailed below, the use of funds by the counties is unchanged.

Effective October 1, 2016, Ala. Code § 40-17-359(p) provides that two-thirds of the revenues collected from this tax are distributed for highway purposes. Ala. Code § 40-17-359(o) provides that the remaining one-third is distributed in the same manner as inspection fees are distributed under Ala. Code § 8-17-91 (discussed in more detail later in this chapter).

##### 1. Local Subdivisions' Portion

As with the 7¢ monies, the Alabama Department of Transportation receives 45% of the 6¢ monies and counties and municipalities receive 55% of the proceeds. Ala. Code § 40-17-359(p)(2). The "local subdivisions' share" of the two-third distribution of proceeds is paid to counties as follows:

- 25% is distributed equally to the 67 counties;
- 30% is distributed based upon each county's pro rata portion of the state's population; and
- As with the 7¢ monies, 10% of these proceeds are distributed to municipalities in the county.

Pursuant to Ala. Code § 40-17-362, the proceeds from this tax levy are to be utilized by the county for resurfacing, restoration, and rehabilitation — the "RRR" monies.

Ala. Code § 40-17-362 defines “resurfacing, restoration, and rehabilitation” as:

Work undertaken primarily to preserve an existing facility. Restoration and rehabilitation is work required to return the existing pavement or bridge deck, including shoulders, to a condition of adequate structural support or to a condition adequate for placement of an additional state of construction. Resurfacing consists of the placement of additional surface material over the existing, restored, or rehabilitated roadway or bridge deck to improve serviceability or to provide additional strength. Resurfacing, restoration, and rehabilitation work may include changes to geometric features, such as minor widening, flattening curves, or improving sight distances.

Ala. Code § 40-17-362 also allows these monies to be used for vegetation management on the right-of-way using herbicides, heavy equipment, and other means. However, these funds cannot be used for purchasing herbicides or equipment. Ala. Code § 40-17-362(b)(2).

These funds cannot be used for new construction unless 90% of the county’s paved road system has achieved a grade of 85% based on the Department of Transportation’s annual county roads and bridges maintenance report. Ala. Code § 40-17-362(b)(2).

The 6¢ monies cannot be commingled with other funds of the county, including any other gasoline tax revenues. Pursuant to Ala. Code § 40-17-362(b)(2), these monies shall be disbursed from a special fund kept only for its purposes. *See also* A.G. No. 86-00314.

## 2. Attorney General’s Opinions Regarding Use of Funds

There are several Attorney General’s opinions addressing use of funds from the 4¢ excise tax in effect prior to October 1, 2016. These opinions will likely also apply to the use of 6¢ monies now addressed in Ala. Code § 40-17-362:

- Pursuant to authority granted under Ala. Code § 23-1-80, the county may sell and issue warrants in anticipation of and payable solely out of its share of the 4¢ gas tax receipts. However, the expenditure of the proceeds from the sale of warrants is restricted to the same purposes for which the tax funds themselves could be expended. A.G. No. 80-00433.
  - See Section III, B, 3 for further discussion of warrants in anticipation of gasoline taxes.
- Counties may spend 4¢ tax monies for renting equipment to be used on RRR projects. A.G. No. 81-00254. (*But see* A.G. No. 85-00241 below regarding purchase of equipment.)
- 4¢ tax monies may be used to repair and restore culverts as well as bridges and highways. A.G. No. 82-00030. *See also* A.G. No. 98-00189.
- 4¢ tax monies **cannot** be used to pay for shaping and placing base and pavement on an existing graded (but unpaved) road. A.G. No. 84-00012.
- 4¢ tax monies may be used for restripping and resigning of county roads incident to a RRR project but **cannot** be used to purchase equipment for this project. A.G. No. 85-00241.
- 4¢ tax monies may be used to widen the shoulder of a Federal Aid Secondary Route in advance of a resurfacing project. A.G. No. 85-00409.

- 4¢ tax monies may be used for repairing storm drains, but not for constructing new drains. A.G. No. 86-00020.
- 4¢ tax monies **cannot** be used for paying the salaries of county commissioners and county clerks. A.G. No. 87-00259.
- Counties may use 4¢ tax monies for drainage improvements and cleaning or digging out drains if such improvements are directly connected with and necessary for the maintenance of a road. A.G. No. 87-00307.
- 4¢ tax monies **cannot** be used to purchase scales and hire personnel to enforce weight limits on county roads. A.G. No. 89-00442.
- County **cannot** use 4¢ tax monies to do work on streets within a municipality but may use such proceeds for work on county roads within a municipality. A.G. No. 91-00133.
- 4¢ tax monies may be used to remove debris from county roads resulting from a winter storm. A.G. No. 93-00172.
  - This opinion, which involved “extraordinary damage” resulting from a major winter storm that “swept the nation,” is likely limited to the narrow set of facts presented. Additionally, A.G. No. 93-00172 relies in part on a provision in the Emergency Management Act, Ala. Code § 31-9-10(b)(5), which has been amended significantly by the Legislature since the opinion was issued. Before relying on this opinion, the county commission should consider the factual circumstances at issue and consult legal counsel.
  - *Compare* A.G. No. 99-00270 (4¢ tax monies **cannot** be used for “the daily or routine removal of debris” because that is not considered part of the rehabilitation or restoration of the road).
- 4¢ tax monies **cannot** be used for restoration and repair of an airport runway. A.G. No. 98-00179.
- 4¢ tax monies may be used for lighting public streets when such lighting is part of the construction of a road. This fits in with the definition of resurfacing, restoration, and rehabilitation in that it would improve sight distances (which is specifically included in the definition). A.G. No. 99-00252. However, while these funds can be used for installation of a streetlight, they **cannot** be used for streetlight operation and maintenance. A.G. No. 99-00270.
- 4¢ tax monies **cannot** be used to pay a claim against the county. A.G. No. 2000-018.
- 4¢ tax monies **cannot** be used for landscaping, because that is not restoration or rehabilitation, but they may be used for one-time street cleaning if the work is part of resurfacing, restoration, and rehabilitation. A.G. No. 2001-078.
- A matching fund using RRR gas tax monies may be created for road paving, but the fund must be kept in a separate account from grant funds because commingling of gas tax monies with other funds is prohibited. A.G. No. 2010-090.
- Where at least 60% of the use of a backhoe is for projects authorized as expenditures from the 5¢ and 4¢ gasoline tax funds, these funds may be used for a proportionate share of monthly cost and maintenance, although a better option would be to pay for the backhoe and maintenance with unrestricted funds followed by reimbursement from the restricted gasoline tax funds based on invoices and project costs. A.G. No. 2014-084.
- 6¢ excise tax monies **cannot** be used to fund the purchase or installation of emergency street signs. A.G. No. 2016-002. *See also* A.G. No. 2014-016.

## D. PETROLEUM INSPECTION FEES

Act 2015-54 substantially revised the law on inspection fees, with most changes taking effect on October 1, 2016. Under the revised law, Ala. Code § 8-17-87 imposes a 2¢ inspection fee on the ultimate consumer of gasoline or undyed diesel fuel, if the excise tax imposed on the supplier is refunded by the Alabama Department of Revenue — unless the ultimate consumer is specifically exempted from the inspection fee. The inspection fee is also imposed on other petroleum purchases such as dyed diesel, dyed kerosene, and lubricating oil under certain circumstances. The inspection fee is 2¢ per gallon on dyed diesel fuel, 1¢ per gallon on dyed kerosene, and 15¢ per gallon on lubricating oil. There is also a reduced rate of \$.00025 per gallon on dyed diesel and dyed kerosene for boats, tractors, railroads, and preservation of wood products.

### 1. Distribution of Proceeds

The distribution of the proceeds of inspection fees, along with one-third of the 6¢ excise tax discussed above, is addressed in Ala. Code § 8-17-91. The first \$175,000 or 5%, whichever is greater, of the proceeds received each month is paid to the Agriculture and Industries Fund. 13.87% of the balance of the proceeds is distributed equally among each of the 67 counties.

\$408,981 monthly is allocated to the Alabama Department of Transportation. 2.76% of the balance of the proceeds is allocated to incorporated municipalities, using population ratios as set out in the Code section. The Department of Agriculture and Industries receives an additional 5% of the balance of the proceeds after the distribution to the counties and municipalities. The Department of Revenue receives 2½% of the balance of the proceeds after the distributions to the Department of Agriculture and Industries, the Department of Transportation, the counties and the municipalities. The balance of the proceeds is distributed to the Department of Transportation.

### 2. Use of Funds

Ala. Code § 8-17-91 provides that funds paid to the county shall be deposited into its RRR fund and used for any purpose authorized for RRR funds.

- Act 2015-54 repealed many of the restrictions on use of funds for counties and eliminated participation by the Secondary Road Committee, previously charged with developing criteria for projects utilizing these funds.

### 3. Attorney General's Opinions Regarding Use of Funds

The Attorney General's opinions issued prior to the 2016 changes in the law should still be relevant as relates to proper use of RRR funds. A sampling of those opinions is set out below:

- These funds cannot be used for paying salaries of county commissioners and county clerks. A.G. No. 87-00259.
- These funds cannot be used for purchasing scales and hiring personnel to enforce weight limits on county roads. A.G. No. 89-00442.
- These funds can be used to match federal secondary road funds for a road project that otherwise qualifies for funds under Ala. Code § 8-17-91. A.G. No. 88-00187.

- These funds may be used for a one-time cleaning of a street and adjoining state right- of-way, because this is considered maintenance and improvement. A.G. No. 2001-078.
- These funds cannot be expended for the construction and repair of sidewalks. A.G. No. 2003-068.
- These funds may not be used for restoration and repair of an airport runway. A.G. No. 98-00179.
- These funds can be used for the purchase of reflective street signs. A.G. No. 2016-002.

2¢ inspection fees may be used to directly repay the Alabama Department of Transportation for repairs and maintenance to traffic signals. A.G. No. 2018-028.

#### E. THE REBUILD ALABAMA ACT

The Rebuild Alabama Act (Act 2019-2) was signed into law on March 12, 2019, to improve Alabama's transportation infrastructure. A variety of Rebuild Alabama implementation guides and materials are available through ACCA's website, including the most recently approved bidding procedures, a county reporting guide, and a sample memorandum of understanding with municipalities. The letter from the Department of Examiners of Public Accounts approving the Rebuild Alabama bidding procedures may also be found on the website. Additionally, ACCA's website is a centralized location where members of the public may find information about County Transportation Plans and County Certificates of Compliance. For more information, please see [www.alabamacounties.org/rebuildal/](http://www.alabamacounties.org/rebuildal/).

The Rebuild Alabama Act imposed an additional 10¢ excise tax on each net gallon of gasoline and diesel fuel. Ala. Code § 40-17-370. The 10¢ increase was phased in over the course of three years, with the full amount going into effect on October 1, 2021. Ala. Code § 40-17-370(d) also allows for future upward adjustments to the excise tax, based upon an index designed to estimate rising construction costs.

The Alabama Department of Revenue retains 0.25% of the tax proceeds for its collection costs. Additionally, up to \$750,000 of the tax proceeds from the gasoline tax and up to \$230,000 of the tax proceeds from the diesel fuel tax may be distributed to the Alabama Highway Finance Corporation for bond payments.

Pursuant to Ala. Code § 40-17-371, the net tax proceeds remaining after any refunds, the cost of collection, and the distribution to the Alabama Highway Finance Corporation are allocated as follows:

- 66.67% to the Alabama Department of Transportation (ALDOT), to be deposited into the Rebuild Alabama Fund.
- 25% to counties.
- 8.33% to municipalities.

Each of these distributions is discussed in turn below, followed by a summary of the county's reporting requirements.

## 1. ALDOT's Allocation of Rebuild Alabama Taxes

As mentioned above, 66.67% of the net tax proceeds under the Rebuild Alabama Act are allocated to ALDOT and deposited into the Rebuild Alabama Fund. Ala. Code § 40-17-371(c)(1). The Rebuild Alabama Fund is held within the State Treasury. Ala. Code § 23-8-4.

The net tax proceeds allocated to ALDOT *cannot* be used for salaries, benefits, or any other form of compensation for state or contract employees except as included as direct project costs; the purchase, lease, or maintenance of equipment, other than equipment purchased and permanently installed as part of a road or bridge project; or the maintenance or construction of public buildings or other structures that are not integral to the system of roads and bridges. Ala. Code § 40-17-371(c)(1)a.

The net tax proceeds allocated to ALDOT must be used "for transportation infrastructure improvement, preservation and maintenance projects pursuant to the Rebuild Alabama Act." Ala. Code § 40-17-371(c)(1). Some specific programs set out by statute are described in more detail below:

- **Federal Aid Exchange Fund (FAEF)**

Ala. Code § 40-17-371(c)(1) provides that each October 1, ALDOT shall allocate \$400,000 to each county in exchange for the annual federal allocation of \$533,000 that was being distributed to each county on March 12, 2019.

- **Economic Development Roads Program**

The purpose of this program is to develop and improve transportation infrastructure to enhance economic development efforts in the State of Alabama. ALDOT shall develop an assessment and prioritization plan to allocate funds for economic development road projects with priority given to projects in economically underserved areas of the state. Ala. Code § 23-8-5(a).

- **Rebuild Alabama Annual Grant Program**

Ala. Code § 23-8-5(b) requires ALDOT to establish an annual grant program of at least \$10 million for use on any classified system of roads and bridges. Any county or municipality may apply for a grant. The projects are to be bid and let by the respective county or municipality following procedures approved by ALDOT.

More information about applying for the Rebuild Alabama Act Annual Grant Program may be found on the Alabama Department of Transportation's website here:

[www.dot.state.al.us/programs/RAAGrantProgram.html](http://www.dot.state.al.us/programs/RAAGrantProgram.html).

- **ATRIP-II**

Ala. Code § 23-8-5(b) establishes the Alabama Transportation Rehabilitation and Improvement Program-II (ATRIP-II) to fund projects of local interest on the state-maintained highway system, which may also include local roads and bridges essential to such projects. All ATRIP-II projects shall be developed and let to contract by ALDOT.

Ala. Code § 23-8-7 establishes the ATRIP-II Committee, which consists of eight members, at least one of whom must be a representative of local governments. A report on the contracting information submitted by counties and municipalities must be distributed by the ATRIP-II Committee annually to the Governor, the President Pro Tempore of the Senate, the Speaker of the Alabama House of Representatives, the Chair of the Joint Transportation Committee, the Alabama Senate Minority Leader, and the Alabama House of Representatives Minority Leader no later than October 1 of each year.

More information about applying for ATRIP-II may be found on the Alabama Department of Transportation's website here: [www.dot.state.al.us/programs/ATRIPII.html](http://www.dot.state.al.us/programs/ATRIPII.html). As with any grant program, the county commission should consider the terms and conditions of the ATRIP-II program before pursuing state funding.

## 2. Counties' Allocation of Rebuild Alabama Taxes

As mentioned above, 25% of the net tax proceeds under the Rebuild Alabama Act are allocated to counties to be used for transportation infrastructure improvement, preservation, and maintenance. Of that amount, 45% is allocated equally among the 67 counties, while 55% is allocated among the 67 counties based on population. Ala. Code § 40-17-371(c)(2).

The net tax proceeds may be used to match any available federal, state, and local transportation funding.

The governing body of a county may also pledge its share of the net tax proceeds not to exceed 50% of the proceeds as security for the issuance or refinancing of any loan or debt obligation used for transportation infrastructure improvement, preservation, and maintenance. This pledge shall be irrevocable for the duration of the loan or debt obligations for which the net tax proceeds are pledged.

Counties must ensure that at least 50% of the funds are allocated for projects utilizing established bidding procedures submitted by the Association of County Engineers of Alabama and approved by the Department of Examiners of Public Accounts. The approved procedures are available on ACCA's website: [www.alabamacounties.org/rebuildal/](http://www.alabamacounties.org/rebuildal/). Counties should verify that they are using the most current, approved Rebuild Alabama bidding procedures prior to bidding out a contract.

The county may utilize such funds to meet any other project matching requirements associated with other federally or state funded transportation projects, upon approval of the county commission. A county may utilize over 50% of its annual allocation of these funds for project match if the project follows the approved bidding procedures or is let to contract through ALDOT.

## 3. Municipalities' Allocation of Rebuild Alabama Taxes

As mentioned above, 8.33% of the net tax proceeds under the Rebuild Alabama Act are allocated to municipalities to be used for transportation infrastructure improvement, preservation, and maintenance. Ala. Code § 40-17-371(c)(3). Utilizing a memorandum of understanding, municipalities frequently allocate these funds to the county commission to be expended pursuant to the Rebuild Alabama Act. A sample memorandum of understanding is available on ACCA's website: [www.alabamacounties.org/rebuildal/](http://www.alabamacounties.org/rebuildal/).

#### 4. Rebuild Alabama Bidding Procedures

Again, Ala. Code § 40-17-371(c)(2)d. states that counties must ensure that at least 50% of their Rebuild Alabama taxes are allocated for projects utilizing established bidding procedures submitted by the Association of County Engineers of Alabama and approved by the Department of Examiners of Public Accounts. The most recently approved procedures, as well as the Department's approval letter of those procedures, are available on ACCA's website: [www.alabamacounties.org/rebuildal/](http://www.alabamacounties.org/rebuildal/).

Additionally, Ala. Code § 23-8-6 provides that the bidding procedures approved by the Department of Examiners of Public Accounts, as authorized in the code section mentioned above, may be used for any county road and bridge project otherwise subject to the public works law.

It is important that counties ensure that they are using the most up-to-date version of the approved Rebuild Alabama bidding procedures. For example, when the Department of Revenue amended a regulation pertaining to certificates of exemption under Ala. Code § 40-9-14.1, the bidding procedures had to be revised and resubmitted to the Department of Examiners of Public Accounts. These amended bidding procedures were approved by the Department of Examiners of Public Accounts on January 24, 2023. (For further information about certificates of exemption under Ala. Code § 40-9-14.1, see Chapter 8.) ACCA will inform the ACEA membership whenever the Department of Examiners of Public Accounts approves a new set of Rebuild Alabama bidding procedures.

#### 5. Rebuild Alabama Reporting by Counties

The following reporting requirements should be applied to the County Rebuild Alabama Fund (CRAF) and the Federal Aid Exchange Fund (FAEF). Both the CRAF and FAEF will be audited by the Department of Examiners of Public Accounts.

Further, these reporting requirements should be implemented in such a manner to allow the ACCA to submit comprehensive reports to the appropriate legislative officials to satisfy the reporting requirements listed below.

More information is listed on ACCA's website at [www.alabamacounties.org/rebuildal/](http://www.alabamacounties.org/rebuildal/).

- **County Transportation Plan (Ala. Code § 23-8-8(d))**

Counties shall adopt an annual County Transportation Plan (CTP) no later than August 31st for the next fiscal year. The plan shall be approved by an affirmative vote of the majority of the members of the County Commission.

The CTP shall provide a detailed list of projects for which expenditures are intended to be made in the next fiscal year. The detailed list of projects shall be based on an estimate of the revenues anticipated to be received in the fund during the fiscal year. ACCA has developed a sample plan format for use by counties. Each year, ACCA collects and compiles the CTPs for all counties. Timely submitting the CTP to ACCA is crucially important to keep the Legislature, the Executive Branch, and the public informed of how CRAF and FAEF funds are being expended by Alabama's counties for the public's benefit.

The CTP, once adopted, shall be displayed in conspicuous places at the county courthouse, county commission office, county highway department and other places deemed appropriate by the County Commission. In addition, the CTP should be posted on the official website of the County Commission and submitted to ACCA. Past and present CTPs may be found here: [www.alabamacounties.org/rebuildal/county-transportation-plans/](http://www.alabamacounties.org/rebuildal/county-transportation-plans/).

- **County Rebuild Alabama Contractor Report (Ala. Code § 23-8-6(a))**

County projects let to contract shall utilize suppliers listed on the Alabama Department of Transportation (ALDOT) list of approved contractors and suppliers, including ALDOT's Certified Disadvantaged Business Enterprise (CDBE) list.

Beginning October 1, 2020, and every October 1st thereafter, counties shall provide a list of all contractors awarded projects funded with County Rebuild Alabama Funds to the Senate President Pro Tempore, Speaker of the House and the Chair of Joint Transportation Committee. This listing shall be called the County Rebuild Alabama Contractor Report (CRACR).

The County Contractor Reports are to be sent to ACCA at [rebuild@alabamacounties.org](mailto:rebuild@alabamacounties.org) by July 31st annually, to allow ACCA staff to assemble all county specific reports into the 67 Counties Rebuild Alabama Contractor Report.

No bidding is required by the county for asphalt or other road construction or repair materials if the county has an annual contract for providing such materials. Competitive bid requirements remain in place and do apply in this scenario. ACCA has developed model bid documents for both competitive bids and public works bids.

- **County Rebuild Alabama Annual Report (Ala. Code § 23-8-8(e))**

Beginning in 2021 at the first meeting in January of each year, the County Engineer shall present the County Rebuild Alabama Annual Report (CRAAR). This annual written report shall detail expenditures made in the previous fiscal year from the CRAF and FAEF and include the status of each project included in the previous fiscal year's CTP. The CRAAR shall be entered into the minutes of the County Commission and shall be made available for public inspection including posting on the county's website, if available.

- **County Rebuild Alabama Certificate of Compliance (Ala. Code § 23-8-8(f))**

By January 15th of each year, the County Engineer shall submit the County Rebuild Alabama Certificate of Compliance (CRACC) verifying 50% of CRAFs for the previous fiscal year were let to contract. The CRACC shall also be filed with the Senate President Pro Tempore, Speaker of the House and the Chair of Joint Transportation Committee. ACCA submits the CRACC to these legislators on the behalf of Alabama's counties. Thus, it is crucial that the CRACCs be submitted to ACCA in a timely fashion. The CRACCs may be found here: [www.alabamacounties.org/rebuildal/county-certificates-of-compliance/](http://www.alabamacounties.org/rebuildal/county-certificates-of-compliance/).

## F. MOTOR VEHICLE LICENSE TAXES AND REGISTRATION FEES

### 1. Distribution of Proceeds

Ala. Code §§ 40-12-240 to -275 provide for license taxes and registration fees for motor vehicles. Counties receive a portion of the proceeds from motor vehicle and truck and tractor taxes and fees, but the distribution of monies — and proper uses — which are set out in Ala. Code §§ 40-12-248 and -270, is complicated. The assessment of fees and distribution of proceeds from trucks and tractors has been altered several times, which may have affected the revenue generated from license taxes and registration fees on those vehicles. However, the authorized uses of the proceeds from these fees have not been changed.

### 2. Use of Proceeds

As in the case of other tax revenues, Alabama law specifies how these tax proceeds may be used by counties. See Ala. Code § 40-12-270. However, the uses vary somewhat depending on the particular source of the tax revenues.

There are two schedules of license taxes and registration fees paid for trucks and tractors under Ala. Code § 40-12-248(b) and the different “schedules” impact the use of monies by counties. The two schedules are the “Schedule of Base Amounts” and the “Schedule of Additional Amounts.”

#### a. “Schedule of Additional Amounts”

Ala. Code § 40-12-270 provides that funds collected under the “Schedule of Additional Amounts” shall be used for the following purposes:

- Construction of certain high density unpaved roads, including draining, grading, basing, paving, signing, and erosion items.
- Reconstruction, resurfacing, restoration, and rehabilitation of county paved roads and bridges or bridge replacement on the county road system.
- Construction, including draining, grading, basing, and paving of certain unpaved roads.
- Reconstruction of certain paved roads accessing certain public and private recreational facilities and areas.

Ala. Code § 40-12-270 provides that the county must comply with certain requirements set out in the law when using these funds:

- Plans must be submitted to the Director of Transportation or his or her designee for approval.
- Funds cannot be commingled with other funds except the county's portion of the inspection fee distributed under Ala. Code § 8-17-91.
- Funds shall be kept and disbursed from a special fund only for proper purposes.
- County may deposit proceeds into its RRR fund.

Ala. Code § 40-12-270 creates a Secondary Road Committee to develop and publish criteria for the designation of high density roads, bridges, and eligible recreational access roads and to perform other duties as set out in that Code section. The Committee previously performed similar duties with regard to use of proceeds from the inspection fee outlined in Section II, D above, but that language was repealed for inspection fees in Act 2015-54.

b. "Schedule of Base Amounts" and other License and Registration Taxes and Fees

Ala. Code § 40-12-270(e)(1) provides that all license and registration taxes and fees for motor vehicles and trucks and tractors except those proceeds paid under the "Schedule of Additional Amounts" shall be used exclusively for construction, improvement, and maintenance of public highways or public streets, including administrative expenses in connection with the same and the retirement of securities evidencing obligations incurred for payment of the same.

- These funds can be used for the purchase of reflective street signs. A.G. No. 2016-002.

c. Additional Annual License Tax and Registration Fee on Battery Electric and Plug-In Hybrid Electric Vehicles

The Rebuild Alabama Act (Act 2019-2), discussed in more detail above, imposed an additional annual license tax and registration fee on battery electric and plug-in hybrid electric vehicles. See Ala. Code § 40-12-242. At the time of this manual's publication, the additional license tax and registration fee is \$203 for each battery electric vehicle and \$103 for each plug-in hybrid electric vehicle. However, the law provides for adjustments to those amounts in future years if certain conditions are met. Please refer to the Alabama Department of Revenue for the amounts in effect at the time of inquiry.

All proceeds, following any deductions made to the probate judge pursuant to Ala. Code § 40-12-269(a)(1), are distributed in the following way:

- The first \$150 collected from a battery electric vehicle and the first \$75 collected from a plug-in hybrid electric vehicle are distributed 66.67% to the state, 25% to counties, and 8.33% to municipalities. Ala. Code § 40-12-242(f)(1).
- If the total annual registrations of hybrid and electric vehicles make up 4% or less of the total annual registrations of all motor vehicles in Alabama, then the remainder of the proceeds will be used to fund ALDOT's Electric Transportation Infrastructure Grant Program. Ala. Code § 40-12-242(f)(2).
  - Once the total annual registrations of hybrid and electric vehicles exceed 4% of the total annual registrations of all motor vehicles, then the annual license tax and registration fee will be reduced to \$150 and \$75, respectively, with the proceeds distributed to the state, counties, and municipalities as previously described. Ala. Code § 40-12-242(f)(2).

All proceeds distributed to counties from annual license taxes and registration fees on hybrid and electric vehicles must be allocated in the same manner and used for the same purposes as Rebuild Alabama funds. Ala. Code § 40-12-242.1. See also Ala. Code § 40-17-371(c)(2).

There is a separate annual license tax and registration fee on electric low-speed vehicles, the proceeds of which are distributed in the same manner and used for the same purposes as Rebuild Alabama funds. Ala. Code § 40-12-242.2.

## G. MISCELLANEOUS STATE REVENUE SOURCES

### 1. Driver's License Fees

Ala. Code § 32-6-5 provides that the probate judge shall retain \$1.50 of all fees collected for driver's licenses. If the probate judge is compensated by fees, he or she shall keep two-fifths of the \$1.50 and the balance shall be paid over to the county. Otherwise, the county retains the entire \$1.50.

- All fees paid to the county from driver's licenses shall be paid into the "public highway and traffic fund of the county."
- The statute does not mandate specific uses for these funds.

### 2. National Forest Receipts

Ala. Code § 9-13-2 provides that any monies the state receives from the federal government from receipts from national forests within the state shall be distributed among the several counties proportional to the area of national forests located therein. The county shall pay 50% of the proceeds to the county board of education and shall expend the other 50% "for the benefit of the public roads of the county."

- The county commission and county school board cannot enter an agreement for all proceeds to go to the county commission. A.G. No. 2001-061.

### 3. County Government Capital Improvement

Ala. Code §§ 11-29-1 to -7 provides for counties to receive 10% of the trust income from the Alabama Trust Fund once that fund exceeds \$60,000,000. Counties first received revenue from this fund in 1997. In 2002, the Heritage Trust Fund merged into the Alabama Trust Fund, significantly increasing the trust income, and therefore, the county proceeds. Ala. Code § 11-29-4 establishes the County Government Capital Improvement Fund for the receipt of all monies distributed from the Alabama Trust Fund.

In 2000, Alabama voters approved "Amendment One" at the ballot box, which added reference to the County Government Capital Improvement Fund into Alabama's Constitution, providing counties with funding for bridge repair and replacement. See Constitution of Alabama of 2022, Section 219.04 (Amendment 666). The same protection was also placed in a separate amendment. See Constitution of Alabama of 2022, Section 219.05 (Amendment 668).

Ala. Code § 11-29-6 specifies the proper use of these funds. Authorized uses of particular interest to the county highway department are:

- Up to 50% for the construction, maintenance, reconstruction, restoration, or resurfacing of county roads and bridges.
- Construction, furnishing, equipping, and renovation of public buildings including the purchase of land for public buildings.
- Solid waste programs.
- Public water and wastewater treatment facilities and drainage facilities, including the purchase of land and rights-of-way and equipment and supplies necessary for the installation and maintenance of such public facilities.

There are very few Attorney General's opinions addressing proper use of these funds, but those discussing use of funds for public works project purposes are set out below:

- The county may use capital improvement funds to pave parking lots at the courthouse annex building. A.G. No. 2020-048.
- Ala. Code § 11-29-6 does not authorize the expenditure of funds for the rehabilitation and upgrade of a fuel management system located at the county road department. A.G. No. 2015-063.
- The county may not use capital improvement funds to satisfy payments on bonds incurred to construct hangars owned by a regional airport authority because such hangars are not county or public buildings or structures. A.G. No. 2015-052.
- Ala. Code § 11-29-6 authorizes the use of capital improvement funds to reimburse other county accounts for the use of equipment and materials in the general maintenance of county roads. Once the funds are transferred, the county may utilize those funds for the broader purposes applicable to the reimbursed account. A.G. No. 2014-045.
- Ala. Code § 11-29-6 authorizes using capital improvement fund monies for the installation of water and sanitary sewer lines on county property. A.G. No. 2004-066.

### III. LOCAL REVENUE SOURCES

As mentioned above, the county can levy a special ad valorem tax for roads and bridges, but only up to 2½ mills, and only provided the tax levy is within the constitutional limits for the county. Some counties have local constitutional amendments increasing the constitutional limit for ad valorem taxation. Additionally, many counties have local legislation authorizing sales and use taxes, gasoline taxes, license and registration fees, etc.

Keep in mind that, as discussed in Chapter Three, Section IV, C, 4, Ala. Code § 11-83-2 requires counties to pay each municipality in the county one-half of any money collected from a road ad valorem tax levy on the property located in the municipality when the levy is for constructing, repairing, or maintaining roads and highways in the county.

Additionally, as discussed previously, Ala. Code § 40-17-362.1 provides that all taxes on motor fuels, as defined in Section 40-17-322, whether called an excise tax, license tax, or otherwise, levied by a municipality or county after August 1, 2023, may be used only for the cost of administering the tax; cost of construction, reconstruction, maintenance, mass transit, and repair of roads, bridges, and rights-of-ways; cost of traffic regulation; and the cost of enforcing traffic and motor vehicle laws. However, this prohibition does not apply to taxes on motor fuels that are levied or that may be levied by a county or municipality pursuant to a local law or general law of local application that is in effect on August 1, 2023.

#### A. LOCAL TAX LEVIES

There is no general county tax for roads and bridges. However, there is statutory authority for levying certain ad valorem taxes.

- Ala. Code § 11-3-11(a)(2) authorizes the county commission to levy a general tax for general county purposes and a special tax for special purposes.

- As mentioned above, Ala. Code § 11-14-11 authorizes a special 2½ mill tax for the erection, construction, or maintenance of necessary roads and bridges. The Supreme Court of Alabama has made clear that this section only authorizes the levy of an ad valorem tax, not a sales or other tax. *Ex parte Coffee County Commission*, 583 So.2d 985 (Ala. 1991).
- Ala. Code § 23-1-81(a) authorizes the county commission to levy a special tax to purchase or establish toll bridges, free bridges, causeways and ferries or free ferries when, in the opinion of the county commission, the public good requires it.

## B. OTHER COUNTY FUNDS FOR ROADS AND BRIDGES

### 1. Surplus of General Funds (Ala. Code § 23-1-83)

The county commission may transfer any surplus of the general funds of the county to the county road fund when, in the judgment of the commission, it will promote the interest of the county to make such transfer. When funds are transferred to the road and bridge fund, they may only be used for road and bridge purposes.

### 2. Fees, Excises, or License Taxes (Ala. Code § 23-1-84)

Counties may expend funds derived from fees, excises, or license taxes levied by the state relating to the registration, operation, or use of motor vehicles or relating to fuels used for propelling such vehicles for the cost of constructing, reconstructing, maintaining, and repairing public roads and bridges.

### 3. Warrants in Anticipation of Taxes (Ala. Code §§ 11-11-1 to -8)

Ala. Code § 11-11-3 provides for issuing warrants in anticipation of and payable solely out of gasoline taxes to be distributed to the county under certain circumstances. The procedures for issuing such warrants are set out in Ala. Code § 11-11-3 and the other sections in Chapter 11 of Title 11.

- Ala. Code § 11-11-2 states that issuing such warrants is only available to the county in a fiscal year following a year in which it collected at least \$40,000 from the special ad valorem tax levied by the county under Section 215 of Alabama's Constitution.
- The proceeds from the sale of warrants shall be used for the construction, surfacing, resurfacing, grading, and draining of roads, streets, bridges and causeways in the county and for expenses incurred in issuing the warrants. Ala. Code § 11-11-5.
  - The Attorney General has opined that the expenditure of the proceeds from the sale of warrants is restricted to the same purposes for which the tax funds themselves could be expended. A.G. No. 80-00433. In other words, if the tax funds are RRR money, warrants may only be issued for RRR projects.
  - The Supreme Court of Alabama has held that gasoline tax anticipation warrants are not a charge on the general revenue of the county or on the proceeds of any county levy, and thus do not constitute debt within the meaning of the constitutional debt limitation found in Section 224 of the Constitution of Alabama of 2022. See *Taxpayers and Citizens of Lawrence County v. Lawrence County*, 143 So.2d 813 (Ala. 1962); *Isbell v. Shelby County*, 180 So. 567 (Ala. 1938).

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# Alabama's Competitive Bid Law

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# CHAPTER SEVEN

## ALABAMA'S COMPETITIVE BID LAW

The competitive bid law applicable to county government and most other local governing bodies is found at Ala. Code §§ 41-16-50 to -63. This law addresses the lease or purchase of goods and services, setting out monetary threshold amounts requiring competitive bidding, procedures for bidding and award of contracts, and exceptions to and exemptions from the law. While there are some similarities to the competitive bid requirements required for state agencies and most state and local educational institutions, Ala. Code §§ 41-16-50 to -63 only apply to county and municipal entities, including waterworks, sewer, gas, and other like utility boards and commissions, the Alabama Fire College, and district boards of education or independent school districts.

In 2021, the Alabama Legislature repealed the prior competitive bid law applicable to state agencies and educational institutions and enacted new procedures governed by the Division of Procurement within the Department of Finance as overseen by the Chief Procurement Officer. See Act 2021-296. The new law governing the lease or purchase of goods and services by most state agencies is found in Article 5 of Chapter 4 of Title 41 of the Code of Alabama 1975 (Ala. Code §§ 41-4-120 to -179). This law does not apply to county entities.

The lease or purchase of goods and services by county and municipal boards of education is governed by Ala. Code §§ 16-13B-1 to -11. This law is similar to the law applicable to counties and municipalities, but there are differences.

The principles governing competitive bidding and the purchasing of goods and services for state agencies and educational institutions are generally the same as those applicable to local governments, and the statutes are similar in many respects. However, there are important differences in some instances, so it is always important to know which laws apply to counties and make sure the proper statutory provisions are followed for purchases and contracts for goods and services when the awarding authority is an agency or division of county government.

The Supreme Court of Alabama has repeatedly held that the most important requirement of the competitive bid law is the good faith of the officials charged in executing the law. See, e.g., *White v. McDonald Ford Tractor Co.*, 248 So.2d 121 (1971). The Attorney General's Office frequently echoes this principle of law. See, e.g., A.G. No. 85-00035.

## I. APPLICABILITY

### A. APPLICABLE PURCHASES

#### 1. Materials, Equipment, Labor, and Services

Pursuant to Ala. Code § 41-16-50(a), the competitive bid law applicable to counties and most other local governmental entities (including municipalities and utility boards and commissions) applies to expenditures of public funds for any of the following goods or services where the expenditure of public funds will be \$30,000 or more:

- Labor, services, or work;
- Purchase of materials, equipment, supplies, or other personal property;
- Lease of materials, equipment, supplies, or other personal property where the lessee is or becomes legally and contractually bound to pay a total of \$30,000 or more.

While the law and its procedures are mandatory where applicable, there are many exceptions and exemptions to this requirement which are specifically set out in the law and discussed below.

#### 2. Real Property

While the competitive bid law applies to the purchase or lease of personal property, it does not apply to the purchase or lease of real property. Ala. Code § 41-16-50(a).

#### 3. Sale, Lease, or Disposal of Surplus County Property

The competitive bid law applies to the county commission purchasing or leasing personal property. It does not apply to the county commission selling, leasing out, or otherwise disposing of surplus real or personal property. See Ala. Code § 41-16-50(a). In other words, a county commission is not required to dispose of surplus property through a sealed bid process. A.G. Nos. 2009-031 and 88-00323. However, there is nothing prohibiting the county commission from taking sealed bids to sell surplus property, if it chooses to do so.

Additionally, local entities are usually exempt from the Land Sales Act applicable to the sale or lease of state property. Ala. Code § 9-15-82(b). However, if state property is transferred to a county entity and then resold, leased, or otherwise transferred to a private person, firm, or corporation within three years of the date of acquisition, then the Land Sales Act must be followed. Ala. Code § 9-15-82(b). See A.G. No. 2016-022.

The county commission may direct, control, and maintain the property of the county as it may deem expedient according to law. Ala. Code § 11-3-11(a)(1). See *also* Ala. Code § 11-14-2. Although counties are generally without authority to sell property, a county commission may sell property if there is a need to dispose of it as surplus. A.G. No. 2011-007. See *also* A.G. Nos. 93-00145 (pipe); 86-00349 (dirt); 85-00072 (chert); and 81-00383 (pipe). As a best practice, the county commission is encouraged to determine that the property is, in fact, surplus and document that determination prior to disposition.

There are constitutional considerations when disposing of surplus property. Section 94 of the Constitution of Alabama of 2022 prohibits a county from giving a thing of value in aid of a private person, association, or corporation. However, there are some exceptions to this general rule. For further discussion of Section 94, see Chapter 4.

The Supreme Court of Alabama has held that Section 94's prohibition is not applicable to a contract of a public body where there are benefits flowing to both parties and a consideration on both sides. *Rogers v. City of Mobile*, 277 Ala. 261 (1964). These contracts must also serve a public purpose. A.G. Nos. 99-00093, 98-00111, and 95-00204. In exchange for the property, the public body must receive "adequate consideration." See, e.g., A.G. Nos. 2012-041 and 84-00189. See also *Dothan Area Chamber of Commerce v. Shealy*, 561 So.2d 515 (Ala. 1990).

Sometimes the term "fair market value" is used in the law instead of "adequate consideration," including in Section 94.01(e) of the Constitution of Alabama of 2022, which provides the following:

"For purposes of the foregoing, any sale, lease, or other disposition of property **for a price equal to its fair market value** thereof shall not constitute the lending of credit or a grant of public funds or thing of value in aid of a private entity" (emphasis added).

Some possible methods of determining "fair market value" or "adequate consideration" include appraisal, auction, or taking sealed bids. If the surplus property has no determinable value, the county commission should "seek the most economical way" of disposing of the surplus property. See A.G. No. 93-00299.

The general law is largely silent on the county commission's process for disposing of surplus property, although there are some local laws on this subject. The county commission is encouraged to adopt reasonable procedures, applying good business practices and establishing strong internal controls over the process. When adopting policies and procedures regarding the disposition of surplus property, the county commission should consult its county attorney and consider the following:

- Because the county commission is generally without authority to sell property unless it is surplus property, it is recommended that the county commission determine that the property is surplus and document that determination prior to disposition.
- If the county commission disposes of *real* property, Ala. Code § 11-14-2 requires it to record the order in its meeting minutes.
- The Attorney General's Office has indicated that an agreement to dispose of surplus real or personal property should be memorialized with a written contract. See, e.g., A.G. Nos. 2013-035 and 2012-041.
- Although the competitive bid law does not require the county commission to take sealed bids when selling or leasing out surplus property, the county commission may nevertheless use this method to ensure that adequate consideration/fair market value is provided to the county for the surplus property. Other potential methods include auctions (such as eBay or GovDeals), appraisal prior to sale, or working with a vendor who regularly does business in the goods being sold.

- In developing policies and procedures regarding the disposition of surplus property, the county commission should also consider the Ethics Act, particularly Ala. Code § 36-25-5, which prohibits use of office or position for personal gain, and Ala. Code § 36-25-8, which prohibits use of confidential information for financial gain. See Ethics Opinion No. 2003-042. These issues arise most acutely when county officials, county employees, or their family members are potential recipients of the surplus property.
- Before disposing of property that was obtained through a federal grant, even if it is believed to be surplus property, the county commission is encouraged to review the terms and conditions of the federal grant program at issue.

#### 4. Public Works Contracts

Ala. Code § 41-16-50(a) makes clear that the competitive bid law does not apply to public works contracts (i.e., contracts for the construction, renovation, or repair of roads, bridges, buildings, or other public structures). See, e.g., A.G. No. 2018-004. Those projects are governed by the public works law found in Code of Alabama 1975, Title 39 and discussed in detail in Chapter Eight of this manual. See Ala. Code § 39-2-1(6) for the statutory definition of “public works”.

It is important to determine whether the lease or purchase being considered falls under the competitive bid law or the public works law because the rules and procedures for compliance are very different — including the threshold amount requiring bidding. Unfortunately, it is not always easy to determine which law applies. For example:

- Where a proposed project is less about the acquisition of certain materials and equipment and more about the installation of such materials and equipment, the project falls under the public works law and not the competitive bid law. A.G. No. 2018-004.
- Cutting grass in a public cemetery is a service which falls under the competitive bid law, but maintenance, repair, and upkeep of markers, headstones, etc. are public works projects. A.G. No. 2007-030.

#### 5. Public Funds

Where there is no expenditure of public funds, the competitive bid law does not apply. A.G. Nos. 2004-223; 2000-003; and 93-00038.

- However, where funds are transferred to a governmental entity from a private source, they become public funds. A.G. No. 2004-223.
- The granting of an exclusive right constitutes an exchange of consideration by the parties involved and must be let by competitive bid even where there is no apparent expenditure of public funds. See, e.g., *Kennedy v. City of Prichard*, 484 So.2d 432 (Ala. 1986). See also A.G. Nos. 2013-012 and 2000-219 (exclusive right to provide inmate telephone service) and 99-00158 (exclusive right to sell concessions).

## 6. Threshold Amount Requiring Competitive Bids

The threshold amount requiring competitive bidding is currently set at \$30,000 in Ala. Code § 41-16-50(a). *See also* Ala. Code § 41-16-54(a).

- Ala. Code § 41-16-54(c) specifically provides that if the purchase or contract amount will be less than \$30,000, the purchase or contract may be on the basis of sealed bids, a joint purchasing agreement, a reverse auction procedure, or in the open market.

## 7. Periodic Adjustments to the Threshold Amount

Over the years, the Legislature has periodically increased the threshold amount requiring application of the competitive bid law for the purchase of goods and services. However, included in recent amendments to the competitive bid law found in Act 2023-135, the law now includes a provision to allow for subsequent cost adjustments for all dollar amounts found in the competitive bid law without requiring specific legislative action. *See* Ala. Code § 41-16-50(g).

Under Ala. Code § 41-16-50(g), beginning October 1, 2027, and every three years thereafter, the Chief Examiner of the Department of Examiners of Public Accounts (the Examiners Office) may submit a recommendation to the Chair of the Legislative Council for the amount to be increased based upon the percentage increase in the Consumer Price Index for the preceding three-year period, rounded to the next dollar.

- The recommendation is subject to the approval of the Legislative Council.
- If the recommendation is not disapproved by the Legislative Council by the end of April following the recommendation, the recommendation shall be approved.
- Upon approval, the Examiners Office shall notify the public of the adjusted dollar amounts by July 1 before the fiscal year in which the changes will take effect.

## 8. Like-Item Purchases

It is a long-standing legal principle that known or contemplated “like-item” purchases must be considered in the aggregate, and if such purchases in a year will exceed the threshold amount for bidding, all such purchases must be bid. *See, e.g.,* A.G. No. 2003-098.

While this principle still applies, the law now provides that if an awarding authority documents its reasonable belief based upon expenditures in previous years that an expenditure will not meet the threshold amount required for bidding and, based upon that reasonable belief, makes an expenditure without bidding, it will not be a violation of the law if circumstances necessitate making a subsequent expenditure for like items or services in an amount that would increase the total to or above the dollar threshold amount, provided: (a) the awarding authority has documented its reasonable belief based upon expenditures in previous years and (b) the subsequent expenditure was bid. Ala. Code § 41-16-50(f)(2).

## 9. Exclusive Franchise Contracts

Article I, Section 22 of the Constitution of Alabama of 2022 prohibits any governmental entity from granting an exclusive franchise to a business or entity. The Supreme Court of Alabama has held that where an exclusive contract is contemplated, an awarding authority must substantially comply with the competitive bid laws. *See Kennedy v. City of Prichard*, 484 So.2d 432 (Ala. 1986). *See also* A.G. No. 2020-015.

Therefore, competitive bidding is sometimes required even if not required under Alabama's competitive bid law. See, e.g., A.G. Nos. 2013-012 and 2000-219.

## B. EXEMPTIONS

### 1. Exemptions from Competitive Bidding Provisions of the Law

Ala. Code § 41-16-51(a) provides a list of specific exemptions to the competitive bidding requirements of the law. Exemptions that are the most relevant to the county engineering or transportation department are as follows:

- a. Utility services where the rates are fixed by law, regulation, or ordinance. Ala. Code § 41-16-51(a). See also *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas et al.*, 694 So.2d 1344 (Ala. 1997).
- b. The purchase of insurance. Ala. Code § 41-16-51(a)(1).
- c. Contracts for securing services of individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part. Ala. Code § 41-16-51(a)(3).

In addition to Ala. Code § 41-16-51(a)(1), Ala. Code § 41-15-54(f) further provides that professional services are not subject to the requirements of the competitive bid law. See also *Anderson v. Fayette County Bd. of Educ.*, 738 So. 854 (Ala. 1999).

- This exemption includes attorneys, architects, construction superintendents, engineers, consultants, and accountants.
- The Attorney General's Office has opined that administrative services are not exempt from bidding. See A.G. No. 2002-078.
- The Attorney General's Office has also opined that, where the professional services provided by a vendor with regard to the purchase of equipment or a system (such as a voting system) are inextricably intertwined with the particular equipment or system, the purchase does not have to be competitively bid. See, e.g., A.G. Nos. 2017-044 and 2005-197.
  - If non-professional services or the purchase of equipment are incidental to and integrated with professional services, those services or equipment are exempt. A.G. Nos. 2005-192 and 96-00046.
  - However, if the professional services are incidental to the purchase of equipment, the purchase of equipment is subject to the bid law. See A.G. Nos. 95-00303 and 84-00263.
- Where a properly qualified consultant has the education and extensive experience to provide expertise in the field in which he or she consults, securing those services would be exempt from the requirement that his or her services be purchased through a competitive bid process. A.G. No. 92-00084.
- Security services are not professional services under the bid law. See *Layman's Sec. Co. v. Water Works and Sewer Bd. of City of Prichard*, 547 So.2d 533 (Ala. 1989) (overruled on other grounds).
- Consultants in the field of emergency telephone services, mapping, and other fields related to or involved in the provision of emergency telephone services are professional services. A.G. No. 92-00084.

- The acquisition of the services of systems engineers and other specialists for providing maintenance services for complex, highly sophisticated computers, including hardware and software, falls within the professional services exception of the competitive bid law, although routine maintenance services for ordinary equipment generally would not fall under this exception. A.G. No. 90-00121. *See also* A.G. No. 2022-004.
- d. Contracts for fiscal or financial advice or services. Ala. Code § 41-16-51(a)(5). *See* A.G. No. 94-00076.
- e. Purchases of computer programs, software applications, manuscripts, books, maps, pamphlets, periodicals, and library or research electronic databases of manuscripts, books, maps, pamphlets, or periodicals. Ala. Code § 41-16-51(a)(8).
  - This section was amended in 2023 such that there is now an exemption for all computer programs and software applications. *See* Act 2023-544. Prior law only allowed an exemption for computer hardware and custom software.
- f. Existing contracts up for renewal for sanitation or solid waste collection, recycling, and disposal between those providing services and municipalities or counties, or both. Ala. Code § 41-16-51(a)(10).
  - Contracts may be renewed without bidding provided the terms are not changed and the original contract provides for renewal. A.G. Nos. 96-00142 and 91-00371.
  - County may not a renew waste disposal contract that increases the price without competitive bidding. A.G. No. 2003-197 and 96-00142.
  - Language contained within a renewal clause of a contract for solid waste collection which includes an upward adjustment to the monthly collection fee does not constitute a material change to the contract in violation of the Competitive Bid Law so long as the formula used for calculating an adjustment to the monthly collection fee upon renewal was contemplated under the original contract. A.G. No. 2022-006.
  - In considering whether a renewal is authorized without letting the contract for bid, the county should be aware that contracts for the collection and disposal of residential solid waste may not be let for periods greater than five years. Ala. Code § 41-16-57(f).
- g. Purchases of computer and word processing hardware when the hardware is the only type that is compatible with hardware already owned by the entity taking bids and custom software. Ala. Code § 41-16-51(a)(11).
  - *See* A.G. No. 99-00245 and 99-00139.
  - *See also* Ala. Code § 41-16-51(a)(8), expanding the exemptions to include all computer hardware and software. *See* Act 2023-544.
- h. Contractual services and purchases of commodities for which there is only one vendor or supplier. Ala. Code § 41-16-51(a)(13).
  - *See* *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 657 So.2d 857 (Ala. 1995); *General Electric Co. v. City of Mobile*, 585 So.2d 1311 (Ala. 1991); and A.G. Nos. 2017-044 and 91-00282.
  - *See* Section II, A, 3 below for further discussion of “sole source.”

- i. Contractual services and purchases of personal property, which by their very nature are impossible to award by competitive bidding. Ala. Code § 41-16-51(a)(13).
  - To have a competitive bid, the owner must be able to prepare plans and specifications that are sufficiently definite to allow potential bidders to prepare bids intelligently and on a comparison basis. When that is not possible, competitive bids are not possible. A.G. No. 2009-052. *See also* A.G. No. 2016-015.
  
- j. Purchases of dirt, sand, or gravel by a county governing body from in-county property owners in order to supply a county project in which the materials will be used. Ala. Code § 41-16-51(a)(14).
  - The material must be delivered to the project site by county employees and equipment used only on project components conducted exclusively by county employees.
  
- k. Contractual services and purchases related to, or having an impact on, security plans, procedures, assessments, measures, or systems, or the security or safety of individuals, structures, facilities, or infrastructures. Ala. Code § 41-16-51(a)(15).
  - Although the routine purchase of office supplies by a public safety entity would not be related to or have an impact upon the safety of persons, the purchase of software that locates emergency callers with pinpoint accuracy may have an impact upon public safety, but this is a factual determination that the awarding authority must make taking into consideration definitions and the fact that such a determination is reviewable by the courts and may not be arbitrary, unreasonable, or capricious. A.G. No. 2014-047.
  - Contractual services related to security plans and procedures and the security of individuals are exempt from competitive bidding, and the purchase of other services that are inextricably intertwined with the security services is also exempt. However, if not inextricably intertwined, those services are subject to bid. A.G. No. 2009-081.
  
- l. Purchases, leases, or lease/purchases of goods or services, other than voice or data wireless communication services, made as part of the purchasing cooperative sponsored by the National Association of Counties, its successor organization, or any other national or regional governmental cooperative purchasing program. Ala. Code § 41-16-51(a)(16). This exemption only applies if all of the following occur:
  - The goods or services are available as a result of a competitive bid process conducted by a governmental entity and approved by the Department of Examiners of Public Accounts (the Examiners Office).
  - The goods or services are either not available to counties on the state purchasing program or are available at a price equal to or less than that on the state purchasing program.
  - The purchase, lease, or lease/purchase is made through a participating licensed Alabama vendor if one exists.
  - The purchasing/leasing entity has been notified by the Examiners Office that the competitive bid process utilized by the cooperative program offering the goods or services complies with the law.
    - A list of approved cooperative programs is available from the website of the Department of Examiners of Public Accounts.
    - *See* A.G. No. 2014-050 for a discussion of this exemption.

Ala. Code § 41-16-51(a)(16) also provides that, upon request, a vendor shall provide the entity purchasing, leasing, or lease/purchasing goods or services equaling or exceeding \$30,000 during the previous 12 months a report of sales, leases, and lease/purchases with a general description of the goods or services and the number and price of units sold, leased, or lease/purchased.

- m. Purchases of goods or services, other than voice or data wireless communication services, from vendors that have been awarded a current and valid Government Services Administration (GSA) contract. Ala. Code § 41-16-51(a)(17).
  - Purchases shall be under the same terms and conditions as provided in the GSA contract.
  - Prices paid may not exceed the amount provided in the GSA contract.
    - Purchases of goods or services from vendors that have been awarded a current and valid statewide contract listed on the Alabama Buys e-procurement system. Ala. Code § 41-16-51(a)(18).
  - Purchases shall be under the same terms and conditions as provided in the statewide contract.
  - Prices paid may not exceed the amount provided in the statewide contract.
  - While this provision codifies the ability for counties to purchase from other governmental entities in the state, the Attorney General's Office has long opined that counties and other local governmental entities may purchase off the "state bid list" without competitively bidding if the purchase is made from the vendor to whom the state awarded the contract and the state bid included political subdivisions and instrumentalities of political subdivisions on the state bid. *See, e.g.,* A.G. No. 2011-011.
- n. Purchases of goods or services between governmental entities of the state as authorized by Ala. Code § 11-1-10. Ala. Code § 41-16-51(a)(19).
  - The Attorney General's Office has opined that while the competitive bid law is not applicable to a contract for the purchase of goods and services between a state agency and another governmental entity, if a governmental agency chooses to solicit bids, a governmental entity submitting a bid in response to that invitation must comply with the bid specifications. A.G. No. 2005-119.
- o. Purchases of goods or services between a municipality and a governmental entity, defined in Ala. Code § 8-38-2 as "the state, a county, or a municipality or any instrumentality of the state, a county, or a municipality". Ala. Code § 41-16-51(a)(20).

## 2. Exemptions from the Competitive Bid Law

Ala. Code § 41-16-51(b) exempts certain purchases from all provisions of the competitive bid law. Some of these that may be applicable to counties are:

- a. Any purchases of products where the price of the product is already regulated and established by state law.
- b. Contracts for the purchase, lease, sale, construction, installation, acquisition, improvement, enlargement, or extension of plants or other facilities or any machinery, equipment, or furnishings designed or intended for lease or sale for industrial development. *See* A.G. No. 85-00380.

- c. Contracts for the construction and equipment of buildings for municipal public building authorities under Ala. Code §§ 11-56-1 to -22 or county building authorities under Ala. Code §§ 11-15-1 to -19. See Act 2024-280.
  - Under Ala. Code § 39-2-1(1), these contracts would also be exempt from the public works law. See A.G. Nos. 99-00218 and 99-00224. (See *also* Chapter Eight.)
- d. Purchase of equipment or supplies needed, used, and consumed in the normal and routine operation of any waterworks, sewer, gas, or electric system owned by counties or other governmental instrumentalities where no part of the operating expenses have, during the then current fiscal year, been paid from tax revenues.
  - For a discussion of how this exemption is applied, see A.G. No. 2016-009. See *also* A.G. No. 95-00096.
  - A backhoe is not a piece of equipment that is needed, used, and consumed in the normal and routine operation of a utility system and its purchase must be bid. A.G. No. 2016-009.
  - See A.G. No. 2002-097, which notes that this is not a general exemption, but only an exemption from purchases in the normal and routine operation of the authority. See *also* A.G. No. 2001-139.
- e. Some public corporations and entities have statutory exemptions from the requirements of the competitive bid law found in the statute authorizing the creation and operation of such corporations and entities.
  - For example, Ala. Code § 11-20-49 exempts county industrial development boards from the competitive bid law. See A.G. No. 82-00394.
  - However, the competitive bid law applies to public corporations where public funds are expended unless there is a specific exemption. A.G. No. 2005-045.
  - An “exempt” entity must comply with the bid law when it is submitting a bid in response to an invitation for bid solicited from a governmental entity subject to the competitive bid law. A.G. No. 2005-119.

### 3. Emergencies and Other Harmful Circumstances

Ala. Code § 41-16-53 provides that where circumstances arise for which a delay in remedying or addressing the situation would likely cause harm to an individual or public property, a contract may be let to the extent necessary to mitigate the harm without competitive bidding, provided the awarding authority does both of the following:

- Documents two or more price quotations or estimates before letting the contract.
- Adopts a resolution declaring the nature of the circumstances, the action taken, and the reasons for taking the action.

Whether the proper circumstances exist to invoke the emergency procedures authorized in Ala. Code § 41-16-53 requires a finding of fact that only the awarding authority can make. See, *e.g.*, A.G. No. 2000-75. See *also Union Springs Telephone Co. v. Rowell*, 623 So.2d 732 (Ala. 1993). While there have been statutory revisions to this provision, previously issued cases and Attorney General Opinions can offer counties some guidance in making a determination about whether the proper circumstances exist to implement these emergency procedures. A brief sampling is set out below:

- The Supreme Court of Alabama rejected a claim that a contract fell under the emergency conditions exception due to: (i) the length of time of the negotiations; (ii) the fact that there was no compliance with the requirement to declare the emergency in writing and make the agency's actions public; and (iii) the fact that, under the law at that time, the provision for emergencies under the bid law dispenses with the requirement of public advertising, not competitive bidding. *General Electric Co. v. City of Mobile*, 585 So.2d 1311 (Ala. 1991).
- Where the awarding authority has terminated a construction contract for default, the surety has failed to honor its obligations under the performance bond, and the wall cavities on the projects (where roofs are not completed) are exposed and contain water, the awarding authority can make a good faith judgment to exercise the emergency provisions found in the bid law. A.G. No. 85-00035. See also A.G. No. 96-00113.
- A previous purchase cannot be treated as an emergency purchase at the present time in order to save a contract which would be void because of noncompliance with the competitive bid law. A.G. No. 83-00426.
- Contracts to repair damage to state property caused by a hurricane may be let on an emergency basis where immediate action is required to prevent deterioration to property (i.e., roofs, broken windows, damaged exterior walls, out of order utilities). A.G. No. 80-00122.
- Oil and hazardous material discharges or spills would constitute an emergency affecting the public health, safety, or convenience. A.G. No. 79-00427.

In addition to Ala. Code § 41-16-53, Ala. Code § 31-9-2(a) authorizes state and local governments to implement certain emergency powers when necessary due to the occurrence of disasters or emergencies of unprecedented size and destructiveness where emergency actions are necessary to deal with such disasters or emergencies in order to: (1) provide for the common defense; (2) protect the public peace, health, and safety; and (3) preserve the lives and property of the people of the state.

To this end, Ala. Code § 31-9-10 requires each political subdivision of the state to establish a local emergency management organization and, where warranted due to emergency conditions described in Ala. Code § 31-9-2(a), enter into necessary contracts without following the procedures in the competitive bid law by following the procedures set out in Ala. Code § 31-9-10(a)(5).

Ala. Code § 31-9-10(a)(5) provides that when the governing body determines that any of the conditions described in Ala. Code § 31-9-2(a) has occurred or is imminently likely to occur, the governing body may let contracts to the extent necessary to address the conditions provided the governing body does the following:

- Documents at least two price quotes or estimates before letting the contract.
- Adopts a resolution declaring the conditions, the action taken, and the reasons for taking the action.

#### 4. Reverse Auctions

A reverse auction takes place as a real-time bidding process where anonymous suppliers submit bids at a specified Internet location, with the bidding process lasting either less than an hour at a previously scheduled time or less than two weeks during a previously scheduled period. Ala. Code § 41-16-54(d)(1) and (2).

Ala. Code § 41-16-54(d) authorizes an awarding authority to make purchases through this reverse auction process under procedures established by the Department of Examiners of Public Accounts (Examiners Office), but only where the item to be purchased is either: (a) not available on the state purchasing program or (b) the lowest price offered in the reverse auction is equal to or less than the price available on the state purchasing program under the same terms and conditions.

- All purchases made through reverse auction shall be subject to audit by the Examiners Officers.

## **5. Construction Equipment Repair and Leases**

Ala. Code § 41-16-52 provides a limited exception to the provisions of the competitive bid law for the repair and/or lease of certain heavy-duty off-highway construction equipment with a gross vehicle rating of 25,000 pounds or greater, as outlined below:

- a. The exemption applies to machinery used for grading, drainage, road construction, and compaction for the exclusive use of county and municipal highway, street, and sanitation departments.
- b. The exemption applies to all expenditures of funds involving not more than \$40,000 for repair and repair parts.
  - The exemption applies to each repair incident. A.G. No. 2003-098.
  - The \$40,000 amount currently set in the law is subject to future CPI adjustments as provided in Ala. Code § 41-16-50(g) and discussed in Section I, A, 7 above.
- c. Pursuant to Ala. Code § 41-16-52(b), this option may only be exercised by the governing body and not by an employee unless the employee has received official prior approval of the governing body or exercises the option pursuant to a formal policy adopted by the governing body.
- d. This exemption also applies to the leasing of heavy equipment involving a rental of not more than \$10,000 a month per vehicle or piece of equipment but not to exceed \$30,000 a month for all such vehicles or equipment leased by the governing body.
  - The current monetary amount set in the law is subject to future CPI adjustments as provided in Ala. Code § 41-16-50(g) and discussed in Section I, A, 7 above.

## II. BIDDING REQUIREMENTS

### A. PREPARING FOR BIDS

#### 1. Bid Specifications

There is no Code provision specifically addressing preparation of bid specifications. However, there are cases and Attorney General's opinions on the subject.

- The awarding authority may properly designate a special product covered by patent or only manufactured by one bidder, but where the specifications are so worded that they are in reality a particular bidder's specifications, the bidding is invalid and unlawful. *White v. McDonald Ford Tractor Co.*, 248 So.2d 121 (1971). See also *Mobile Dodge, Inc. v. Mobile County and Treadwell Ford, Inc.*, 442 So.2d 56 (Ala. 1983).
- If specifications are so framed as to preclude free and full competition, the contract is void whether or not there was a bad motive or intent. *White v. McDonald Ford Tractor Co.*, 248 So.2d 121 (1971).
- A bad motive, fraud, or gross abuse of discretion will impair an award whether made with specifications that are quite general or very precise. *Mobile Dodge, Inc. v. Mobile County and Treadwell Ford, Inc.*, 442 So.2d 56 (Ala. 1983).
- While an awarding authority may not draw bid specifications narrowly just to ensure that only one bidder will meet those specs, it may impose any specifications that are reasonably related to the job, program, or function to be performed by the bid items. A.G. No. 91-00282.
- The awarding authority may use a particular brand name in specifications to indicate a level of quality provided a bidder may submit a bid equal to or better than the brand name used in the specifications. A.G. Nos. 2006-098 and 91-124.
  - See also A.G. Nos. 86-070 and 86-359 stating that the brand name may be used when followed by the words "or equal".
- It is permissible to request alternative bids based on different specifications and determine which alternative is in the awarding authority's best interest regardless of which alternative produces the lowest bid. *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 657 So.2d 857 (Ala. 1995).

#### 2. Request for Proposals

Because the competitive bid law requires that award be made to the lowest responsible bidder, a "request for proposal" allowing for negotiation with bidders on specific details of a bid cannot be utilized in place of bid specifications. See A.G. No. 2013-012.

### 3. Sole Source

Ala. Code § 41-16-57(b) prohibits specifying use of materials or systems by a sole source unless all of the following apply:

- The awarding authority can document that the sole source goods or services are of an indispensable nature, that all other viable alternatives have been explored, and that only these goods or services will fulfill the function for which the product is needed.
  - Frivolous features will not be considered.
- No other vendor offers substantially equivalent goods or services that can accomplish the purpose for which the goods or services are required.
- All information substantiating the use of the sole source specification is documented and in the project file.

For a discussion of “sole source,” see *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 657 So.2d 857 (Ala. 1995), and *General Electric Co. v. City of Mobile*, 585 So.2d 1311 (Ala. 1991). See also A.G. No. 2017-044.

### 4. Life Cycle Costs

Pursuant to Ala. Code § 41-16-57(c), the awarding authority may consider “life cycle costs” in making its determination of who is the lowest responsible bidder – in other words, the expected life of the items that can be ascertained from industry recognized and accepted resources. To utilize this option in determining the lowest responsible bidder, the awarding authority shall include notice in its invitation to bid that life cycle costs may be utilized in determining the lowest responsible bidder.

- The awarding authority must follow procedures established by the Department of Examiners of Public Accounts.

### 5. Advertising

Ala. Code § 41-16-54(a) requires that all proposed purchases in excess of \$30,000 shall be advertised by:

- Posting notice on a bulletin board maintained outside the purchasing office.
- Sending notice by mail or other electronic means to all persons, firms, or corporations who have filed a request in writing that they be listed for solicitations on bids for the particular items that are set forth in the request.
  - Any person, firm, or corporation that fails to respond to any solicitation for bids after receipt of three solicitations may be cancelled from the list.
- In any other manner determined appropriate.

If a governing body mandates that advertisement for bids be published in a newspaper, the contract for purchase shall be awarded if the newspaper to which the advertisement was submitted did not publish the advertisement if the governing body can provide proof that it in good faith submitted the advertisement to the newspaper with instructions to publish the notice in accordance with this law. Ala. Code § 41-16-54(a)(2).

The awarding authority cannot limit the number of vendors to whom it will send a notice of bid offering. A.G. No. 2005-008.

If a bidder participates in collusion as defined in Ala. Code § 41-16-55, he or she will be disqualified from submitting bids on future purchases. (See Section IV, A below for further discussion on this issue.)

Bids may be requested — **but not received** — by telephone. A.G. No. 83-00199.

The awarding authority cannot mail invitations to bid on a crawler dozer only to Caterpillar dealers. A.G. No. 86-00359.

All bids must be in writing. A.G. No. 2000-239.

## 6. Time Frames

Ala. Code § 41-16-54(a) provides that the awarding authority can establish reasonable time frames for submitting bids in response to an invitation to bid.

### B. BIDDERS REQUIREMENTS

#### 1. Sealed Bids

Ala. Code § 41-16-54(b) requires that, except as provided for reverse auctions, all bids shall be sealed when received and opened in public at the hour stated in the bid offering.

- Bids cannot be received or accepted by telephone. A.G. No. 83-00199.
- A faxed bid does not meet the requirements of the statute because it is not sealed. A.G. No. 91-00016.
- A written proposal on the outside of a sealed bid made prior to the opening can be considered part of the bid proposal. A.G. No. 2005-160.
- The bidding process for reverse auctions is discussed in Section I, B, 4 above.

#### 2. Bid Bond

A bid bond is designed to secure a particular bid until it is either rejected or accepted and a contract has been executed. A.G. No. 82-00220. While the competitive bid law does not mandate requiring a bid bond, Ala. Code § 41-16-50(d) authorizes the awarding authority to require a bid bond provided the bonding requirement: (a) applies to all bidders, (b) is included in the bid specifications, and (c) bonding is available for the services, equipment, or materials.

The following opinions from the Attorney General's Office apply where a bid bond is requested in the bid specifications:

- Failure to submit proper bond is a ground for disqualifying the bid where it is required in specifications. *Steeley v. Nolen*, 578 So.2d 1278 (Ala. 1991). See also AG. No. 2003-196.

- Since the purpose for requiring a bond is to guarantee that successful bidders honor terms of bids, that purpose can be accomplished only if the bidder is principal on bond, as the surety's liability is measured by that of principal. *Steeley v. Nolen*, 578 So.2d 1278 (Ala. 1991). See also A.G. No. 2014-011.
- The bid bond remains in effect until the low bidder executes the contract. A.G. No. 82-00220.
- The bid bond should be for an amount which would protect the county against a change of status involving substantial damages, loss, or detriment. A.G. No. 82-00220. See also *Steeley v. Nolen*, 578 So.2d 1278 (Ala. 1991).
- An irrevocable letter of credit may be accepted as the bid bond. A.G. No. 92-00053.
- The awarding authority may not require a certified check in lieu of a bid bond but it may accept one if it chooses and the bidder wishes to use a certified check. A.G. No. 85-00032.
- If the bid specifications state the bond must be included with the bid, a bid without a bid bond is nonresponsive and cannot be considered. A.G. No. 2003-196.
- If the bid specifications do not specify when the bid bond is to be furnished, failure to include it at bid opening can be waived as a minor informality. A.G. No. 2003-196.
- The awarding authority may permit the lowest responsible bidder to correct a technical deficiency in a bid bond if it determines that it is in the best interest of the entity to do so and such determination is not arbitrary or capricious. A.G. No. 2014-011.

### 3. Compliance with Bid Requirements

There is no statutory provision specifically addressing compliance with bid requirements. There are a few Attorney General's opinions.

- Whether failure to comply with the terms and conditions of an invitation to bid is only a minor irregularity (such as the omission of license information on the outside envelope of a bid) is a factual determination to be made by the awarding authority. A.G. No. 97-00281.
- Awarding authorities may waive technical deficiencies and minor irregularities in bids under the public works law and the competitive bid law. A.G. Nos. 2016-006 and 2014-011.
- A company that is the low bidder may be given an opportunity to comply with specifications in the awarding of the contract. However, there should not be any material alterations in the bid after it is opened to comply with bid specifications. A.G. No. 92-00397.
- A bidder who previously withdrew his or her bid may rebid on the same contract if all bids on the original contract are subsequently rejected and the contract is rebid, provided that there is no fraud or collusion. A.G. No. 2002-246.
- If the bid specifications do not state when the bid bond must be presented, failure to include the bond with the bid can be waived as a minor informality (assuming it is presented later). A.G. No. 2003-196.

### C. OPENING BIDS

Pursuant to Ala. Code § 41-16-54(b), all bids shall be opened in public at the hour stated in the notice. There is no requirement that bids be opened at a county commission meeting. Because all bids will need to be carefully reviewed before an award is made, the award typically should not occur at the same time as bid opening.

## D. RETENTION OF DOCUMENTS

All original bids and all documents pertaining to the award of the contract shall be retained in accordance with a retention period of at least seven years established by the Local Government Records Commission. All bid documents shall be open to public inspection. Ala. Code § 41-16-54(e). See A.G. No. 95-00010.

## III. AWARD OF CONTRACT

### A. LOWEST RESPONSIBLE BIDDER

#### 1. Statutory Requirement

Pursuant to Ala. Code § 41-16-57(a), the contract award shall be made to the lowest responsible bidder, determined by taking into consideration the following:

- The qualities of the commodities proposed to be supplied,
- Their conformity with specifications,
- The purposes for which required,
- The terms of delivery,
- Transportation charges, and
- Dates of delivery.

#### 2. Cases and Opinions

For a discussion of "lowest responsible bidder", see *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 657 So.2d 857 (Ala. 1995); *Crest Construction Corp. v. Shelby County Bd. of Educ.*, 612 So.2d 425 (Ala.1992).

See also the following cases and Attorney General's opinions:

- The county may take into consideration the bidder's integrity. See A.G. Nos. 2007-063 and 82-00305.
- Quality is a consideration when determining responsibility of the bidder, and it is appropriate to look at size, experience, lack of equipment, and other resources. *Crest Construction Corp. v. Shelby County Bd. of Educ.*, 612 So.2d 425 (Ala.1992).
- In determining who the lowest responsible bidder is, the awarding authority may take into consideration the quality of the materials as well as their adaptability to the particular use required. *White v. McDonald Ford Tractor Co.*, 248 So.2d 121 (1971).
- The use of insider information, as well as the possibility or perception of use of insider information may be considered in determining the responsibility of a vendor. A.G. No. 2002-030.
- The Supreme Court of Alabama has opined that courts should not interfere with the discretion of the awarding authority in determining who was the lowest responsible bidder unless the decision was based upon a misconception of the law, was the result of improper influence, was made in violation of the law, or was based upon ignorance through lack of inquiry. *White v. McDonald Ford Tractor Co.*, 248 So. 2d 121 (1971).

- A bid accepted in error as the lowest responsible bid is null and void and the awarding authority, upon discovery of the error, may accept the lowest bid and award the contract to that bidder. A.G. No. 2002-071.
- A conviction and bar by a federal agency are factors which may be considered in determining if a bidder is responsible. A.G. No. 2007-063.
- The law does not require award to the lowest bidder, but the lowest responsible bidder. *See, e.g., Crest Constr. Corp. v. Shelby County Bd. of Educ.*, 612 So.2d 425 (Ala.1992), *Mobile Dodge, Inc. v. Mobile County and Treadwell Ford, Inc.*, 442 So.2d 56 (Ala. 1983); *White v. McDonald Ford Tractor Co.*, 248 So.2d 121 (1971).

## B. PREFERENCES

### 1. Alabama Preference

The county shall give preference to commodities produced in Alabama or sold by Alabama companies provided there is no sacrifice or loss in price or quality. *See* Ala. Code § 41-15-57(b). The statute does not define the term “preference” in this instance.

### 2. Local Preference

Ala. Code § 41-16-50(b) authorizes an awarding authority to award a bid for an item of personal property or services to a person, firm, or corporation deemed to be a responsible bidder and having a place of business within a local preference zone (a resident bidder), provided the bid is no more than 5% greater than the bid of the lowest responsible bidder.

Ala. Code § 41-16-50(b)(1) provides that the local preference zone shall consist of any of the following:

- a. The legal boundaries or jurisdiction of the awarding authority.
- b. The boundaries of the county in which the awarding authority is located.
- c. The boundaries of the Core Based Statistical Area (CBSA) in which the awarding authority is located.

Under Ala. Code § 41-16-50(b)(1), the local preference zone should be established prior to advertising for bids. However, if no such action is taken, the boundaries of the local preference zone shall be deemed to be the same as the legal boundaries or jurisdiction of the awarding authority.

- Awarding the local preference is permissive, not mandatory. A.G. No. 92-00076.
- In determining whether a bidder is entitled to the preference, the awarding authority may determine if a place of business was opened solely for the purpose of obtaining the preference, but may not, in making such a determination, use criteria which unfairly favors any category of business (i.e., large versus small company). A.G. No. 92-00076.
- The preference applies to bidders who maintain one or more stores in the county even if the “home office” is not in the county. A.G. No. 2002-070.

### 3. Preferences when Lowest Bidder is “Foreign Entity”

There are also several “in-state” preferences when the lowest responsible bidder is a “foreign entity”, meaning that the company with the lowest bid does not have a place of business within the state. See Ala. Code § 41-16-50(e). Under this preference, the awarding authority may award the contract to a responsible bidder whose bid is no more than 10% greater than the lowest bid if:

- The bidder has a place of business within the local preference zone or
- The bidder is a responsible bidder from one of the following businesses within the state:
  - A woman-owned enterprise
  - A small business enterprise as defined in Ala. Code § 10-5-3 (“A business which is independently owned and operated. In addition, such business must have either fewer than 50 employees or less than \$1,000,000.00 in gross receipts per year”)
  - A minority-owned business enterprise
  - A veteran-owned business enterprise
  - A disadvantaged-owned business enterprise

As with the other local preferences, this preference applies to purchases of personal property and services and is granted at the option of the county commission or other awarding authority.

## C. REJECTION/NEGOTIATION

### 1. Price or Quality

The awarding authority may reject any bid if the price is deemed excessive or the quality of the product inferior. Ala. Code § 41-16-57(d).

- Once a bid is rejected, it ceases to exist, and the awarding authority cannot accept the rejected bid and award the contract. A.G. No. 96-00317.

### 2. One Bidder or No Bids Received

Ala. Code § 41-16-50(b)(4) provides that if no bids or only one bid is received in response to an invitation to bid, the awarding authority may do one of the following:

- Advertise for and seek other competitive bids.
- Negotiate through the receipt of informal bids not subject to the requirements of the competitive bid law.

Where only one responsible and responsive bid has been received, any negotiation shall be for a price lower than the bid.

### 3. Negotiation

Ala. Code § 41-16-50(b)(5) provides that in the event all bids exceed the awarding authority's anticipated budget, the awarding authority may negotiate with the lowest responsible and responsive bidder provided the negotiated price is lower than the bid price.

- The Attorney General's Office has long opined that an awarding authority may negotiate a lower price with a successful bidder provided there is no change in bid specifications. *See, e.g.*, A.G. No. 95-00002. *See also* A.G. No. 96-00240.

### 4. Substituting Second Lowest Bidder after Default

Ala. Code § 41-16-57(a) authorizes an awarding authority to award the bid to the second lowest bidder for the remainder of the original contract term when the successful bidder defaults during the term of the contract, provided the second lowest bidder agrees to all terms and conditions set out in his or her original bid. This option is only available to the awarding authority if either the bidder under contract notifies the awarding authority in writing that he or she will no longer comply with the contract terms or the awarding authority documents the default and the second lowest bidder agrees to all terms and conditions in his or her original bid.

## D. PUBLIC INSPECTION

Ala. Code § 41-16-57(e) requires that, after the award of an order or contract, each record regarding the award shall be open to public inspection. The record shall, at a minimum, indicate who is the successful bidder and, if the bid was not awarded to the lowest bidder, state the reasons for the award.

## E. CONTRACT REQUIREMENTS

### 1. Contract Term Limitations

Ala. Code § 41-16-57(f) provides that, except for residential solid waste collection and disposal contracts, contracts for the purchase of personal property or contractual services shall not be for periods greater than three years. Except for contracts in Class 1 municipalities, contracts for residential solid waste collection and disposal shall be let for not greater than five years.

Ala. Code § 41-16-57(f) also provides that lease purchase contracts, including lease purchase contracts for capital improvements and repairs to real property, cannot be for periods longer than ten years.

Contracts for leasing motor vehicles by local governing bodies shall be let for periods not greater than five years.

- The Supreme Court of Alabama has held that this statutory provision only applies to contracts that are competitively bid. *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas and City of Huntsville*, 694 So.2d 1344 (Ala. 1997). *See also* A.G. Nos. 2005-192; 2001-049; and 89-173.

### 2. Contract Bond

Ala. Code § 41-16-58 provides that a bond for faithful performance of the contract may be required in an amount specified in the advertisement for bids. This is a separate bond from the bid bond under Ala. Code § 41-16-50(c) discussed in Section II, B, 2 above.

### **3. Assignment of Contract**

Ala. Code § 41-16-59 prohibits assignment of the contract by the successful bidder without the written consent of the awarding authority. This section also provides that a contract cannot be assigned to an unsuccessful bidder whose bid was rejected because he or she was not a responsible bidder.

### **4. Change Orders**

The competitive bid law does not specifically provide for change orders, but they have consistently been allowed by the Attorney General's Office pursuant to guidelines it has articulated in interpreting the intent of the bid law. A.G. Nos. 2000-098 and 93-00105. Change orders should only be used in the most extreme situations. Change orders generally apply to public works contracts and are more fully discussed in Chapter 8, the chapter addressing that law.

### **5. Contract Statement on Unauthorized Aliens**

Under Alabama's immigration law, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, all business entities must enroll in and utilize the E-Verify Program as a condition of an award of a contract that has been competitively bid. Ala. Code § 31-13-9(b). Additionally, Ala. Code § 31-13-9(k) includes a requirement that all contracts governed by the immigration law include the following provision:

By signing this contract, the contracting parties affirm, for the duration of the agreement, that they will not violate federal immigration law or knowingly employ, hire for employment, or continue to employ an unauthorized alien within the state of Alabama. Furthermore, a contracting party found to be in violation of this provision shall be deemed in breach of the agreement and shall be responsible for all damages resulting therefrom.

For a discussion of the responsibilities of contractors and governmental entities in complying with this law, see A.G. No. 2021-007.

- Governmental entities have an affirmative duty to ensure that the language set out in Ala. Code § 31-13-9(k) is included in each contract and that contractors provide appropriate verification that they have enrolled in E-Verify and have complied with its requirements. A.G. No. 2021-007.
- The same verification requirements apply whether the contracting entity is an out-of-state business, vendor, or corporation or an in-state entity, so long as the entity employs at least one employee in Alabama. A.G. No. 2021-007.

### **6. Contract Statement on Boycotts**

Alabama law prohibits a governmental entity from entering into a contract governed by Title 39 (the Public Works Law) or Chapter 16, Title 41 (the Competitive Bid Law) with a business entity unless the contract includes a representation that the business entity is not currently engaged in, and an agreement that the business entity will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with which this state can enjoy open trade. Ala. Code § 41-16-5(b). The definition of "boycott" may be found at Ala. Code § 41-16-5(a)(1).

This prohibition does not apply if the business offers to provide the goods or services for at least 20 percent less than the lowest certifying business entity. Ala. Code § 41-16-5(c)(1).

Nothing in this law requires a business entity or individual to do business with any other particular business entity or individual in order to enter into a contract with a governmental entity. Ala. Code § 41-16-5(d).

## **7. Contract Statement on Economic Boycotts**

Alabama law prohibits a governmental entity from entering into certain contracts for goods or services unless the contract contains a written verification from the company that the company, without violating controlling law or regulation, does not and will not, during the term of the contract, engage in economic boycotts. Ala. Code § 41-16-161(b). The law shall apply separately to all companies in a multiple-party contract. "Economic boycott" is defined in Ala. Code § 41-16-160(2).

The law applies under the following circumstances:

- The contract is between a governmental entity and a company with 10 or more full-time employees; and
- The governmental entity will pay or may pay a company at least \$15,000 over the term of the contract wholly or partly from public funds of the governmental entity.

There are exceptions to the law for certain finance-related contracts or contracts that would "prevent the governmental entity from obtaining the supplies or services to be provided in an economically practicable manner." Ala. Code § 41-16-161(c).

There are also procedures set out in Ala. Code § 41-16-161(d) for a governmental entity to waive the requirements of the law upon a finding, posted on its publicly available website, that:

- (1) The governmental entity has made reasonable and good faith efforts to obtain services meeting the law's requirements and has included them in the minimum selection criteria.
- (2) Based on objective information available to the governmental entity, the cost appears significantly higher than the services available to similarly oriented governmental entities not subject to similar requirements, or the quality of services or options appears significantly lower than the quality of services available to similarly oriented governmental entities not subject to similar requirements, or both.
- (3) The governmental entity determines that a waiver is clearly in the best interest of the public.

## IV. PROHIBITIONS/VIOLATIONS

### A. COLLUSION

Ala. Code § 41-16-55 prohibits any agreement or collusion among bidders or prospective bidders to bid at a fixed price or to refrain from bidding in restraint of freedom of competition. Any such activity shall:

1. Render the bids void.
2. Cause the bidders to be disqualified from submitting further bids on future purchases.

Collusion is a Class A misdemeanor punishable by imprisonment of up to one year (Ala. Code § 13A-5-7(a)(1)) and/or a \$6,000 fine (Ala. Code § 13A-5-12(a)(1)).

### B. ADVANCE DISCLOSURE

Ala. Code § 41-16-56 provides that any disclosure in advance of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and require re-advertisement and award. See A.G. No. 94-00112.

### C. SPLITTING CONTRACTS

Ala. Code § 41-16-50(f)(1) prohibits dividing a purchase or contract into parts involving \$30,000 or less for the purpose of avoiding the competitive bid law.

- All such partial contracts shall be void.
- For a discussion on the proper application of this provision, see A.G. Nos. 2003-098 and 82-00343.

### D. CONFLICTS

While the competitive bid law no longer prohibits county commissioners from entering into contracts with the county, Ala. Code § 11-3-5 addresses county commission contracting conflict of interests, allowing such contracts only under limited and specific circumstances outlined below.

Pursuant to Ala. Code § 11-3-5(a), for a commissioner or a business with which he or she is associated to be allowed to enter into a contract with the county, the contract must be the result of competitive bid regardless of whether bidding is required under Alabama's competitive bid law.

- This requirement also applies where the county commission is considering a contract with a family member of a commissioner.
- Under no circumstances shall the commissioner participate in bid preparation or review of the bid.
- The commissioner shall not deliberate or vote on acceptance of the submitted bid.

For the purposes of this section, the definition of "family member" is the same as the Ethics Law definition found in Ala. Code § 36-25-1(15) for the family member of a public official:

"The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official."

Violation of Ala. Code § 11-3-5 is a Class A misdemeanor, which carries penalties of up to \$6,000 in fines and/or up to one year in the county jail. See Ala. Code §§ 13A-5-7(a)(1) and 13A-5-12(a)(1).

Ala. Code § 11-3-5(d) specifically provides that a commissioner entering into a contract with the county must be in compliance with Ala. Code § 36-25-11, the Ethics Law section requiring that any contract executed with a public official or business with which he or she is associated be filed with the Ethics Commission within 10 days after the contract is executed. Additionally, any contract executed in violation of Ala. Code § 11-3-5 shall be void by operation of law.

## E. AUCTIONS

The Attorney General's Office has opined that a county cannot purchase items subject to the competitive bid requirements from an auction. A.G. No. 91-00037. A county may sell items by auction.

## F. CONTRACTS VIOLATING COMPETITIVE BID LAW

### 1. Contract Void

Any contract entered into in violation of the competitive bid law is void. Ala. Code § 41-16-51(d). See also *Ex parte Ballew*, 771 So.2d 1040 (Ala. 2000); *Layman's Sec. Co. v. Water Works and Sewer Bd. of City of Prichard*, 547 So.2d 533 (Ala. 1989) (overruled on other grounds).

### 2. Violation is a Felony

Ala. Code § 41-16-51(d) also provides that anyone who violates the competitive bid law shall be guilty of a Class C felony, which is punishable by a sentence of one to ten years (Ala. Code § 13A-5-6(3)) and/or up to a \$15,000 fine (Ala. Code § 13A-5-11(a)(3)).

### 3. Substantial Compliance

Both the appellate courts and the Attorney General's Office have stated that in reviewing whether the competitive bid law has been followed, the contract will not be illegal and void if the awarding authority has "substantially complied" with the law. See, e.g., *Kennedy v. City of Prichard*, 484 So.2d 432 (Ala. 1986).

## G. INJUNCTION

Ala. Code § 41-16-61 provides that a civil action to enjoin the execution of a contract entered into in violation of the competitive bid law may be brought by:

- Any taxpayer within the jurisdiction of the awarding authority, or
- Any bona fide unsuccessful bidder.

The appellate courts have consistently held that an unsuccessful bidder cannot bring an action to enjoin the awarding authority from rejecting all bids and rebidding the contract or to compel the awarding authority to award the contract to him or her. *Vinson Guard Service, Inc. v. Retirement Systems of Alabama*, 836 So.2d 807 (Ala. 2002).

## H. COMPENSATORY DAMAGES

The Supreme Court of Alabama and the Attorney General's Office have consistently stated that legal action cannot be brought for compensatory damages (such as loss of profits) under the competitive bid law. *See, e.g., Jenkins, Weber & Associates v. Hewitt*, 565 So.2d 616 (Ala. 1990); *Crest Construction Corp. v. Shelby County Bd. of Educ.*, 612 So.2d 425 (Ala.1992); A.G. No. 93-00297.

In *Crest Construction Corp.*, the Court held that the legislature provided a remedy to prevent an agency from violating the competitive bid law by allowing a taxpayer or "bona fide unsuccessful bidder" to sue to enjoin execution of a contract entered into in violation of the law – and that the language in the statute is unambiguous. The Court recognized that a disappointed bidder's remedies are limited, but noted that the competitive bid law benefits the public and creates no enforceable rights in the bidders.

- The Attorney General's Office has opined that because the competitive bid law does not provide for compensatory damages, an awarding authority cannot enter into a settlement with an unsuccessful bidder. A.G. No. 93-00297.

In *Spring Hill Lighting & Supply Co., Inc. v. Square D Co., Inc.*, 662 So.2d 1141 (Ala. 1995), the Supreme Court of Alabama refused to state affirmatively that damages for intentional wrongful conduct in the bidding process could not be recovered and overruled the summary judgment of a trial court holding that no such action was available under the competitive bid law.

- It should be noted that this case has not routinely been followed by the appellate courts. *See, e.g., Alabama Municipal and Environmental Engineers, Inc. v. Slaughter Construction Company, Inc.*, 961 So.2d 889 (Ala. Civ. App. 2007), where the Court distinguished the facts in the *Spring Hill* case by noting that the plaintiff in that case was not a disappointed bidder and its cause of action did not arise from an alleged circumvention of the competitive bidding process.

## V. SPECIAL PURCHASING/CONTRACTING PROVISIONS

### A. JOINT BIDDING OR PURCHASING

#### 1. Authority for Joint Bidding or Purchasing

Ala. Code § 41-16-50(c) allows two or more local governing bodies to "provide by joint agreement for the purchase of labor, services, or work or for the purchase or lease of materials, equipment, supplies, or other personal property for use by the respective agencies." *See, e.g.,* A.G. No. 2014-053.

- This Code section is the authority for the Association's County Joint Bid Program.

#### 2. Procedures for Joint Bidding or Purchasing

Under Ala. Code § 41-16-50(c), each entity shall enter into similar resolutions setting forth:

- The categories of purchases or leases to be included;
- The manner of advertisement for bids and awarding of contracts;
- The method of payment by each participating contracting agency; and

- Any other matters deemed necessary to carry out the purposes of the agreement.

Each county's share of the expenditures shall be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the county.

The counties entering into a joint agreement may designate a joint purchasing agent and provide that the agent shall have the responsibility to comply with the competitive bid law.

Purchases, contracts, or agreements made pursuant to a joint purchasing agreement shall be subject to all terms and conditions of the competitive bid law.

## B. GOVERNMENTAL LEASING

Ala. Code § 41-16A-2 states a declaration by the Alabama Legislature that it is in the public interest to have flexibility to finance the acquisition, installation, equipping, and/or improvement of eligible property through the use of lease, lease-purchase, or installment-purchase financing. To this end, Code of Alabama 1975, Title 41, Chapter 16A provides for "alternative financing" for purchases of eligible property by governmental entities in the state.

- Counties are included in the definition of "governmental entity". Ala. Code § 41-16A-3(b).
- "Eligible property" is defined as, "Any tangible personal property, or any interest therein, including without limitation any goods, supplies, materials, appliances, equipment, furnishings, and/or machinery, whether or not such items constitute fixtures." Ala. Code § 41-16A-3(d).
- The definition of eligible property does not include real property, and as such, an eligible entity cannot enter into a lease-purchase for a building under the provisions of this law. See A.G. No. 99-00224.
- "Alternative financing contract" is defined as "A lease, lease-purchase, lease with option to purchase, installment-sale agreement or arrangement, or other similar agreement or arrangement." Ala. Code § 41-16A-3(a).

Ala. Code § 41-16A-4 authorizes the governmental entity to execute, perform, and authorize payments under an alternative financing contract.

This statute has very broad contracting powers, and specifically states that it is to be liberally construed to achieve its goal of allowing governmental entities to enter into lease or lease purchase agreements of personal property. Ala. Code § 41-16A-5.

- See also A.G. No. 99-00224.
- However, the governmental leasing law does not create an exception to the competitive bid law.

## C. SURPLUS PERSONAL PROPERTY

Ala. Code §§ 41-16-120 to -125 provides for the sale and disposal of surplus personal property owned by the state through the Alabama Department of Economic and Community Affairs (ADECA). Counties are permitted to participate in these purchases as an “eligible entity” under Ala. Code § 41-16-120(b)(3). This is in addition to the ability to purchase surplus property from the Alabama Department of Transportation as discussed in Chapter Five.

Some of the provisions in this law that are important to counties are outlined below.

### 1. Procedures for Sale of Surplus Property

Ala. Code § 41-16-120(e) grants ADECA the authority to sell surplus property at fair market value to eligible entities under its established and published rules.

- Under Ala. Code § 41-16-123(2), proposals for sale shall be advertised for at least two weeks in advance of the date fixed for receiving bids according to the procedures set out in that section.
- Bids shall be publicly taken or opened. Ala. Code § 41-16-123(3).
- The award of the contract shall be made to the successful bidder within 72 hours after taking of bids. Ala. Code § 41-16-123(4).

### 2. Procedures for Purchase of Surplus Property

Payment for purchases shall be made within 30 days after purchase. Ala. Code § 41-16-120(e).

- Payment plans may be established within guidelines approved by the director of ADECA.
- If payment is not made within 60 days after a purchase, the purchase shall be declared void and in default, and the property shall be immediately returned to ADECA by the defaulting purchaser.

If a successful bidder fails to accept the award of a contract, he or she shall be prohibited from bidding at a future sale unless reinstated by the director of ADECA. Ala. Code § 41-16-123(6).

ADECA shall be authorized to collect shipping and handling charges from the purchaser. Ala. Code § 41-16-122(a).



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# Alabama's Public Works Law

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# CHAPTER EIGHT

## ALABAMA'S PUBLIC WORKS LAW

Alabama's Public Works Law is found in Title 39 of the Code of Alabama 1975. This law requires that prior to entering into a contract for a public works project in excess of \$100,000, the awarding authority must advertise for sealed bids under the procedures set out in the law. Ala. Code § 39-2-2(a).

"Awarding authority" is defined in Ala. Code § 39-2-1(1) as:

Any governmental board, commission, agency, body, authority, instrumentality, department, or subdivision of the state, its counties and municipalities. This term includes, but shall not be limited to, the Department of Transportation, the Division of Real Property Management of the Department of Finance, the State Board of Education, and any other entity contracting for public works. This term shall exclude the State Docks Department and any entity exempted from the competitive bid laws of the state by statute.

Many of the provisions in the public works law are similar or identical to those found in the competitive bid law. Therefore, many of the cases and Attorney General's opinions cited in Chapter Seven will apply to public works projects, as well. However, the rules for public works projects, outlined below, are in many respects more restrictive than those for purchases made under the competitive bid law.

Because of the different rules and procedures — including the threshold amount requiring bidding — it is important to determine whether the purchase being considered falls under the competitive bid law or the public works law. Unfortunately, it is not always easy to determine which law applies.

### I. APPLICABILITY OF STATUTE

#### A. PUBLIC WORKS PROJECT

The public works law applies to any public works project in excess of \$100,000 involving an expenditure of public funds. Ala. Code § 39-2-2(a)(1).

- Public funds include federal funds, as well as state, county, and municipal funds. A.G. No. 98-00031.
- Where funds for a public works project are transferred to a governmental entity from a private source, they become public funds. A.G. No. 2004-223.

Ala. Code § 41-16-50(a) (in the competitive bid law) specifically provides that "contracts for public works whose competitive bidding requirements are governed exclusively by Title 39" are not subject to the competitive bid law in Title 41. See A.G. No. 2007-089. In other words, the competitive bid law does not apply to a public works project even if the project is under the threshold amount for bidding under the public works law.

- However, the competitive bid law would apply to the purchase of materials or services in excess of the threshold amount requiring competitive bidding. See A.G. Nos. 98-00039 and 98-00052.

Ala. Code § 39-5-6 makes clear that the provisions of the public works law are mandatory, such as to require strict competitive bidding on contracts for public works, and that courts must not apply legal or equitable principles of law that would allow recovery for work and labor done or materials furnished under any contract let in violation of the competitive bidding requirements of the law.

- However, see A.G. No. 2004-018 for a discussion of the “substantial compliance” principle.

The Attorney General's office has consistently stated that there is a two-prong test to determine whether the public works law applies. If the work is to be constructed or maintained on public property and is to be paid for, in whole or in part, with public funds, the work is a public work under the law. See, e.g., A.G. Nos. 2014-031; 2010-079; 2007-007; and 2004-026.

## 1. Public Works and Public Property Defined

“Public Works” is defined in Ala. Code § 39-2-1(6) of the public works law as:

The construction, installation, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, curbs, gutters, side walls, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, installed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.

- Citing *Black's Law Dictionary*, the Attorney General's office has opined that “Improvement” as used in the definition of public works is “[a]n addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance.” A.G. Nos. 2017-026 and 2014-031.
- Public works includes the “maintenance” of structures and other improvements maintained on public property. Citing *Black's Law Dictionary*, the Attorney General's office has opined that “Maintenance” under the public works law is “[t]he care and work put into property to keep it operating and productive; general repair and upkeep.” A.G. Nos. 2010-048; 2009-033; and 2007-089.

“Public Property” is defined in Ala. Code § 39-2-1(5) of the law as:

Real property that the state, county, municipality, or awarding authority thereof owns or has a contractual right to own or purchase, including easements, rights-of-way, or otherwise.

- The definition of “public property” includes easements. Therefore, an agreement granting public water service easements necessary to install water mains is subject to the public works law. *Bessemer Water Service v. Lake Cyrus Development Co.*, 959 So.2d 643 (Ala. 2006).

- Because the definition of “public property” includes property the awarding authority “has a contractual right to own or purchase” following the completion of construction, the construction thereof is a public works project subject to bidding pursuant to the public works law. A.G. No. 2015-019.

There are several appellate cases and Attorney General's opinions that provide guidance on the types of projects that fall under the requirements of the public works law. Some examples are set out below:

- Cutting grass in a public cemetery is a service which falls under the competitive bid law, but construction, repair, and maintenance of markers, headstones, and walls are public works projects. A.G. No. 2007-030.
- Routine interior and exterior painting for the purpose of keeping public facilities in a good and safe working condition are public works projects. A.G. No. 2007-089.
- Where the county will acquire easements for the project but will not expend public funds on private property of any entity and will not use county materials, equipment, supplies, or personnel, the improvement or construction of a water transportation facility is not subject to the public works law. A.G. No. 2002-052.
- Construction of a fire station would be a public works project and would have to be bid under the public works law even if a private company initially pays for and performs construction when the municipality later pays for construction and has an option to purchase the station through annual lease payments. A.G. No. 2002-223.
- Where work is performed on public property, or property that will become public, but is paid for entirely with private funds, the competitive bid requirements of the public works law do not apply. A.G. Nos. 2004-223 and 2004-026.
- The purchase and placement of sod by a contractor for the construction of a softball complex is a public works project. A.G. Nos. 2010-048.
- The purchase of cameras, lighting, and security fencing for installation at the courthouse is an improvement under the public works law which must be bid if the cost paid with public funds meets the threshold amount requiring bids under the law. The purchase of personal panic alarms for judges is not a public work. A.G. No. 2014-031.
- The installation of computer monitoring tools and data collection equipment on waterworks is an improvement under the public works law. A.G. No. 2017-026.
- A private entity is not subject to the public works law. A.G. No. 2012-089.
- The purchase of a public address system to be installed in a public building is a public works project. A.G. No. 2010-079.
- If the purchase of equipment, supplies, or materials is included in a contract for construction, repair, renovation, or maintenance, it is subject to the public works law. A.G. No. 2001-139.

## 2. Monetary Threshold \$100,000

Ala. Code § 39-2-2(a)(1) requires the awarding authority to advertise for sealed bids before entering into any contract for a public works involving an amount in excess of \$100,000.

- Ala. Code § 39-2-2(b)(1) specifically provides that contracts involving \$100,000 or less may be let with or without advertising or sealed bids. *See, e.g.,* A.G. Nos. 2014-031 and 2010-079.
- It is a violation to enter into multiple contracts with a single entity to avoid reaching the threshold amount. Ala. Code § 39-2-2(a)(5).
- The cost of work performed by employees of the awarding authority is not included in determining whether the monetary threshold requiring bidding is met. A.G. No. 2004-083.
- Painting contracts for less than the threshold amount may be entered with or without bids, but the awarding authority should be mindful that no public works contract in excess of the threshold amount may be divided into smaller parts for the purpose of evading the requirements of the public works law. A.G. No. 2007-089. For further discussion of aggregation in the context of the public works law, *see* A.G. Nos. 2004-083 and 2002-126.

## 3. Purchases Using Government Purchasing Cooperative Programs

Ala. Code § 39-2-2(l)(1) authorizes an awarding authority, by resolution or board action, to purchase materials or equipment utilizing a governmental purchasing cooperative program, a statewide contract listed on Alabama Buys e-procurement system, or a Government Services Administration contract as such purchases are otherwise allowed and provided for in Ala. Code § 41-16-51(a)(16), (17), and (18). These purchases are authorized even when those materials or equipment are otherwise part of a public works contract subject to the requirements of the public works law.

- The remaining portion of the project shall be subject to the requirements of the public works law, even if it involves an amount less than \$100,000 as a result of the exclusion of those purchases made pursuant to Ala. Code § 39-2-2(l)(1). Ala. Code § 39-2-2(l)(2).

## 4. Dirt, Sand, and Gravel Purchases by Counties

Ala. Code § 39-2-2(l)(1) authorizes counties, by resolution or board action, to make purchases of dirt, sand, or gravel from in-county owners for county projects as provided in Ala. Code § 41-16-51(a)(14) even when those materials are otherwise part of a public works contract subject to the requirements of the public works law.

- The remaining portion of the project shall be subject to the requirements of the public works law, even if it involves an amount less than \$100,000 as a result of the exclusion of those purchases made pursuant to Ala. Code § 39-2-2(l)(1). Ala. Code § 39-2-2(l)(2).

## 5. Purchases Between Governmental Entities

Ala. Code § 39-2-2(l)(1) authorizes the purchase of goods or services between governmental entities of the state as provided in Ala. Code § 41-16-51(a)(19) upon resolution or board action of an awarding authority even when those materials are otherwise part of a public works contract subject to the requirements of the public works law.

- The remaining portion of the project shall be subject to the requirements of the public works law, even if it involves an amount less than \$100,000 as a result of the exclusion of those purchases made pursuant to Ala. Code § 39-2-2(l)(1). Ala. Code § 39-2-2(l)(2).

## B. EXEMPTIONS/EXCLUSIONS

### 1. Professional Services

Ala. Code § 39-2-2(d)(1) provides a limited exemption from the public works law for architectural, engineering, construction management, program management, or project management services to be performed in support of a public works project.

- The exemption only applies for persons who will perform these services and will not engage in the actual construction, repair, renovation, or maintenance of the public works with their own forces, by contract, subcontract, purchase order, lease, or otherwise.

This exemption is much more limited than the professional services exemptions authorized under the competitive bid law. *Compare* Ala. Code § 41-16-51(a)(3) to Ala. Code § 39-2-2(d)(1).

- The exemption in Ala. Code § 39-2-2(d) is limited to architectural design, engineering, or project management services, and as such, where a proposed contract includes other personnel such as computer programmers not covered by the exemption, the project is not exempt from the public works law. A.G. No. 2017-026.
- A contract between a municipal housing authority and a developer for project management and planning of a housing development not including construction services is exempt from the public works law under Ala. Code § 39-2-2(d). A.G. No. 2012-089.

### 2. Exempt Public Authorities

Ala. Code § 39-2-1(1) exempts from the definition of an awarding authority the State Docks Department and any entity exempt from the competitive bid law by statute.

- County building authorities created pursuant to Ala. Code §§ 11-15-1 to -19 and municipal public building authorities created pursuant to Ala. Code §§ 11-56-1 to -22 are exempt from the competitive bid law, and as such, from the public works law. A.G. Nos. 99-00218 and 99-00224. *See also* Ala. Code § 41-16-51(b)(6).
- Certain industrial development boards are exempt from the competitive bid law, and as such, from the public works law. A.G. Nos. 98-00051 and 82-00394. *See also* Ala. Code §§ 11-54-98, 11-20-49, and 41-16-51(b)(6).

- A municipal public park and recreation board organized pursuant to Ala. Code § 11-60-1 is exempt from the competitive bid law, and as such, from the public works law. A.G. No. 99-00056. *See also* Ala. Code § 11-60-19.
- Public corporations that do not have a specific exemption are subject to the public works law where public funds are expended. A.G. No. 2005-045.

### 3. Convict Labor

Ala. Code § 39-2-6(f) states that nothing in the public works law shall preclude the use of convict labor by the awarding authority.

- A contract between the county commission and Alabama Correctional Industries does not violate the public works law and the competitive bid law. A.G. No. 97-00202.

### 4. Employee Projects

Ala. Code § 39-2-6(f) also provides that the public works law does not apply to routine maintenance and repair jobs or road or bridge construction work performed by county employees with equipment of the awarding authority.

- The cost of work performed by employees is excluded in determining the cost of the project and whether the public works law applies. A.G. No. 2004-083.

### 5. Emergencies

Ala. Code § 39-2-2(e) provides for limited exceptions to the bidding requirements in the public works law in case of emergencies.

#### a. Immediate Harm to Persons or Property

Ala. Code § 39-2-2(e)(1) states that where there is an emergency where a delay in remedying would cause immediate harm to a person or public property, contracts may be let without public advertisement *or bidding* to the extent necessary to meet the emergency.

- "Person" is defined in Ala. Code § 39-2-1(4) as, "Natural persons, partnerships, limited liability companies, corporations, and other legal entities."

#### b. Immediate Harm to Public Health, Safety, or Convenience

Ala. Code § 39-2-2(e)(2) states that where there is an emergency affecting public health, safety, or convenience, as declared in writing by the awarding authority, contracts may be let without public advertisement to the extent necessary to meet the emergency.

- The written declaration must set forth the nature of the danger to public health, safety, or convenience.

Ala. Code § 39-2-2(e)(3) requires that any emergency action taken must immediately be made public by the awarding authority and published in writing.

The emergency provisions of the public works law were substantially revised in 2023 (see Act 2023-497). However, prior cases and opinions related to emergency contracting, such as those set out below, will likely still apply.

- It is suggested that the awarding authority seek proposals for these projects from several contractors to ensure that the work will be performed at the lowest possible price to the taxpayer. A.G. No. 85-00035.
- Whether there is an “emergency” authorizing application of the exception to the bid law requires a finding of fact that only the awarding authority can make. A.G. No. 2000-075. *See also Anderson v. Fayette County Board of Education et al.*, 738 So. 854 (Ala. 1999); *Union Springs Telephone Co. v. Rowell*, 623 So.2d 732 (Ala. 1993).

As discussed in Chapter 7, in addition to these emergency provisions, Alabama law grants state and local governments emergency powers where warranted and necessary to address disasters or emergencies of unprecedented size and destructiveness. *See* Ala. Code § 31-9-2(a). Local governments procedures for emergency contracting under such circumstances are set out Ala. Code § 31-9-10 and discussed more fully in Chapter 7.

## 6. Homeland Security Exemption

Pursuant to Ala. Code § 39-2-2(g), where the Alabama Department of Homeland Security has acknowledged in writing that a proposed public works project would have a direct impact on the security or safety of persons or facilities and requires confidential handling for the protection of such persons or facilities, the awarding authority may let the contract without public advertisement provided that, while maintaining confidentiality, it takes informal bids otherwise consistent with the requirements of the public works law. Records of bidding and award shall not be disclosed to the public and shall remain confidential.

## 7. Heating or Air Conditioning Systems

Ala. Code § 39-2-2(d)(2) excludes contracts for the purchase of heating or air conditioning units or systems by certain awarding authorities (including county entities) provided the contract is entered into with an Alabama vendor who has been granted approved vendor status for the sale of heating or air conditioning units or systems as a part of a purchasing cooperative, and each of the following occur:

- The unit or system being purchased is available as a result of a competitive bid process conducted by a governmental entity which has been approved by the Department of Examiners of Public Accounts (Examiners Office).
- The purchase is not available on the state purchasing program or the purchase under the purchasing cooperative is available at a price equal to or less than that available through the state purchasing program.
- The entity entering into the contract has been notified by the Examiners Office that the bid process utilized by the cooperative program complies with the law.
- Upon request, the vendor provides the purchasing entity with a report of sales made under Ala. Code § 39-2-2(d)(2) during the previous 12-month period, including a general description of the units and systems sold, the number sold per entity, and the purchase price of the units.

Ala. Code § 39-2-2(d)(2)e. provides that this exemption shall not serve to exempt any public works project from the remaining provisions of the law.

## II. BIDDING OPTIONS

### A. PREQUALIFICATION

#### 1. Procedures and Criteria

Ala. Code § 39-2-4(b) authorizes, but does not require, prequalification of bidders if proper procedures are applied. The procedures in this section do not apply to the Alabama Department of Transportation, which has its own prequalification procedures pursuant to Ala. Code § 23-1-56.

- A bidder who has prequalified is deemed a responsible bidder. A.G. No. 2007-063.

To prequalify bidders, the awarding authority must establish written prequalification procedures and criteria under the following statutory rules:

- Procedures are published in the same manner as bid advertisements sufficiently in advance of the contract to allow bona fide bidders to obtain prequalification prior to preparing a bid.
  - Prequalification publication may run concurrently with bid advertisement publication provided it produces the required advance notice.
- The procedures are related to the purpose of the contract or contracts affected.
- The procedures are related to contract requirements or the quality of the product or service in question.
- The procedures are related to the responsibility of the bidder, including his or her competency, experience, and financial ability.
- The procedures permit reasonable competition at a level that serves the public interest.

#### 2. Prequalification Determination and Revocation

Under Ala. Code § 39-2-4(d), any bidder who has prequalified shall be deemed “responsible” for purposes of award unless prequalification is revoked by the awarding authority under the following procedures:

- Written notice of intent to revoke with grounds for revocation is issued within five working days or the next regular meeting after opening of bids.
- The bidder is provided an opportunity to be heard before the awarding authority on the intended revocation.
- The awarding authority makes a good faith showing of:
  - A material inaccuracy in the prequalification application or
  - A material change in the responsibility of the bidder since submitting his or her prequalification application.
- Revocation must be determined no later than 10 days after written notice of intent to revoke unless the bidder agrees in writing to an extension of time.

Under Ala. Code § 39-2-4(c), the awarding authority has the right to determine whether prequalification procedures and criteria are met, but the determination must be “within the bounds of good faith”. Prequalification may be revoked only for “a material inaccuracy” in the prequalification application or a “material change” in the responsibility of the bidder since submission of the application. A.G. No. 2007-063.

## B. SOLE SOURCE

Ala. Code § 39-2-2(f) provides that no awarding authority may specify the use of materials, products, systems, or services by a sole source unless all of the following requirements are met:

1. Except in contracts involving construction, reconstruction, renovation, or replacement of public roads, bridges, and water and sewer facilities, the awarding authority can document to the satisfaction of the Department of Finance's Division of Real Property Management that:
  - The sole source product, material, system, or service is of an indispensable nature for the improvement, *and*
  - There are no other viable alternatives, *and*
  - Only this particular product fulfills the function for which needed.
2. The sole source specification has been recommended by the architect or engineer of record as an "indispensable item" for which there is no viable alternative.
3. All information substantiating use of a sole source specification, including the architect or engineer recommendation, is documented and made available for examination at the time of advertisement for sealed bids.

For a discussion of "sole source", see *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 657 So.2d 857 (Ala. 1995), and *General Electric Co. v. City of Mobile et al.*, 585 So.2d 1311 (Ala. 1991).

## III. BIDDING REQUIREMENTS

### A. ADVERTISING FOR SEALED BIDS

#### 1. Newspaper Advertisement

Ala. Code § 39-2-2(a) provides that before an awarding authority such as the county or an instrumentality thereof enters into a public works contract involving an amount in excess of \$100,000, it must advertise for sealed bids once each week for three consecutive weeks in a paper of general circulation in the county in which the project or some part of it will take place.

- A newspaper of general circulation for advertising public works projects is a paper meeting the requirements of Ala. Code § 6-8-60, which requires, among other things, that the paper have its principal editorial office in the county. A.G. No. 2015-046.

Ala. Code § 39-2-2(b)(2) provides that an awarding authority may enter into a public works contract if the bid advertisement was submitted by the awarding authority to a newspaper and the newspaper only published the advertisement for two weeks provided the authority can provide proof that it in good faith submitted the advertisement to the newspaper with instructions to publish the notice in accordance with the provisions of the public works law.

## 2. Advertisement of County Road or Bridge Projects

Ala. Code § 23-8-6(c) provides that the Rebuild Alabama bidding procedures approved by the Department of Examiners of Public Accounts may be used for any county road and bridge project otherwise subject to the public works law. The bidding procedures approved at the time of this publication include the following provision: "The placement of the advertisement for bids and notice of completion on a central website, hosted by the Association of County Commissions of Alabama (ACCA), will satisfy all advertisement requirements for county road and bridge projects utilizing public funds." Please keep in mind that the option to advertise on ACCA's website is only available for "county road and bridge" projects and not for all public works projects. Any questions about this provision may be directed to ACCA.

## 3. Electronic Advertisement

Ala. Code § 39-2-2(k) authorizes the solicitation of sealed bids through electronic means including, but not limited to, electrical, digital, magnetic, optical, electromagnetic, or any other similar technology, provided that the awarding authority adopts rules and policies to ensure that all electronic submissions are transmitted securely and bids remained sealed until bid opening.

- This option is in addition to, and not in place of, the advertising requirements found in Ala. Code § 39-2-2(a).

## 4. Required Information for Bid Advertisement

The invitation to bid advertisement must meet the following conditions:

- Briefly describe the project;
- State the procedure for obtaining plans and specifications (discussed in more detail in Section IV, B, 2 below);
- State the time and place for bids to be received and opened; and
- State whether prequalification is required and where prequalification information is available. (See Section II, A above for discussion of prequalification.)

If the project requires a general contractor, Ala. Code § 34-8-8 requires "owners" to include in their bid advertisements certain information about the general contractor licensure law found in Title 34, Chapter 8 of the Code of Alabama 1975. The purpose of this requirement is to convey to invited bidders the information that will be necessary to show evidence of licensure before the bid is considered. This is discussed in more detail in Section III, B, 1 below.

## 5. Attorney General's Opinions

The Attorney General's Office has issued several opinions discussing the advertisement requirement. A sampling is set out below:

- The advertising requirements in the public works law contemplate that an interested party will have the time to acquire the plans and specifications, prepare estimates, acquire the necessary sureties for bonds, and so on. Therefore, a reasonable time for carrying out these activities must be allowed. A.G. No. 97-00247.
- In A.G. No. 2004-018, the Attorney General's Office found that the awarding authority had "substantially complied" with the advertising requirements where, after the contract had been awarded, it was determined that one of the newspapers used for advertising was not a paper of

general circulation in the state. In this instance, there was broad advertising of the project through the Internet and trade papers and the awarding authority was at risk of losing federal funding if the contract was declared void. *See also* A.G. Nos. 2011-100 and 2011-058.

- A similar opinion was issued in A.G. No. 2005-136, where after the bid had been awarded and contracts signed, the awarding authority learned that one of the newspapers used for advertising the bid offering failed, through newspaper error, to run the ad.
- Where a project was only advertised in the newspaper twice but was also advertised in other places like trade websites, a court may find that the awarding authority substantially complied with the advertisement of bids based upon the substantial number of bids received and the number of states involved in the bidding process. A.G. No. 2011-100. This opinion includes a list of opinions addressing substantial compliance in meeting the advertising requirement in the public works law.

## B. BID DOCUMENTS

### 1. Bid Specifications

There is not a specific section in the public works law addressing what should be included in the bid specifications for a public works project. However, the section requiring advertisement prescribes that bid advertisements must describe the project plans and specifications and provide information regarding prequalification, when and how to submit bids, and when bids will be received and opened. Logically, all of this information, including project details, should be included in the bid specifications.

Ala. Code § 39-3-5, which addresses the preference for resident contractors, does require that a summary of the resident contractor preference law be included as a part of the advertised specifications of all projects affected by it. (This preference is discussed in more detail later in this chapter.)

As with the competitive bid law, Alabama's public works law contemplates that the awarding authority will utilize bid specifications rather than "request for proposals" in soliciting bids for a public works projects, and that bids will be awarded based upon the lowest responsible and responsive bidder and not the most attractive proposal negotiated based upon proposals received. *See, e.g.,* A.G. No. 2013-012.

Effective October 1, 2024, the general contractor licensure law defines "general contractor" as the following:

". . . one who, for a fixed price, commission, fee, or wage, undertakes to construct or superintend or engage in the construction, alteration, maintenance, repair, rehabilitation, remediation, reclamation, or demolition of any building, highway, sewer, structure, site work, grading, paving, or project or any improvement in the State of Alabama where the cost of the undertaking is one hundred thousand dollars (\$100,000) or more. A person who does any of the activities described in this subsection shall be deemed to have engaged in the business of general contracting in the State of Alabama."

Ala. Code § 34-8-1. Therefore, contracts that are subject to the public works law's bidding requirements will generally require a licensed general contractor.

If the project requires a general contractor, Ala. Code § 34-8-8(a) requires “owners” to include in their invitations to bidders and in their bid specifications the portions of the general contractor licensure law (Title 34, Chapter 8, Code of Alabama 1975) “as are deemed necessary to convey to the invited bidder . . . the information that it will be necessary for him or her to show evidence of license before his or her bid is considered.” This chapter does not expressly define the term “owner.” However, the term likely applies to the county commission in the context of most public works contracts.

All owners must require the person, firm, or corporation submitting bids to include his or her current license number on the bid. Ala. Code § 34-8-8(b). Bids that do not contain the current license number of the general contractor submitting the bid must be rejected. Ala. Code § 34-8-8(b).

The submission of the contractor's current license number before considering the bid shall be sufficient evidence to relieve the owner or awarding authority of any liability under this chapter. Ala. Code § 34-8-6(d).

## **2. Obtaining Bid Documents for Review and Inspection**

The public works law includes detailed procedures regarding obtaining bid proposals and making bid documents available for review and inspection. Ala. Code § 39-2-3(b) and (c). Those procedures are set out below:

- An adequate number of sets of bid documents may be obtained by prime contractor bidders upon payment of a deposit for each set.
  - The deposit shall not exceed twice the cost of printing, reproduction, handling, and distribution of each set.
  - The deposit shall be refunded in full to each prime contractor upon the return of documents in reusable condition within 10 days after the bid opening. All refunds are due from awarding authority within 20 days after the bid opening.
- Additional sets of bid documents for prime contractor bidders, subcontractors, vendors, or dealers may be obtained upon payment of the same deposit.
  - This deposit shall be refunded upon return of documents in reusable condition within 10 days after the bid opening, but less the cost of printing, reproduction, handling, and distribution.
  - All refunds are due from the awarding authority within 20 days after bid opening.
- Building exchanges and similar agencies are furnished plans and specifications without charge.

There are separate procedures for the Alabama Department of Transportation contracts, which are set out in Ala. Code 39-2-3(a).

## **C. SPECIAL REQUIREMENTS FOR GRANT-FUNDED PROJECTS**

Where a project is to be funded by a grant, the awarding authority cannot begin the bidding process unless it has received confirmation of funding and any required matching funds have been secured or are available. Ala. Code § 39-2-2(i).

Additionally, Ala. Code § 39-2-12(l) provides that when the source of funds for the payment of a project is a grant, award, or direct reimbursement from the state, federal government, or other source which will not become available until after the execution of the contract, that fact shall be disclosed in the bid specifications and in the contract.

- Under these circumstances, the prompt payment procedures of the public works law shall not apply until the awarding authority is in receipt of the funds as provided in the contract.
- Upon receipt of funds, the contracting agency shall process payment within 10 days.

ACCA has developed sample bid and contract language to comply with this provision, which can be found at the end of this chapter. Please note that additional terms and conditions applicable to other funding sources (e.g., federal grant funds) may need to be incorporated into contracts, as well. Counties should review all required terms and conditions associated with such awards and consult with their county attorneys regarding which terms and conditions must be included in related contracts.

## **IV. BIDDERS REQUIREMENTS**

### **A. SEALED BIDS**

Ala. Code § 39-2-2(a) requires that the awarding authority advertise for “sealed bids” and further that all bids be opened publicly at the advertised time and place.

Ala. Code § 39-2-6(i) provides that any advance disclosure of the terms of a bid shall render the proceedings void and require readvertisement and award.

### **B. BID GUARANTY**

Ala. Code § 39-2-4(a) requires that all bidders file with his or her bid either:

- A cashier’s check drawn on an Alabama bank or
- A bid bond executed by a surety authorized to make such bonds in Alabama.

#### **1. Bid Guaranty Amount**

The check or bond for public works projects let by counties and most other awarding authorities shall be in an amount not less than 5% of the estimated cost but not to exceed \$10,000. Ala. Code § 39-2-4(a). The bid guarantee shall not be more than \$50,000 where the Department of Transportation is the awarding authority.

#### **2. Bond or Check Serves as Qualification/Guarantee**

Ala. Code § 39-2-4(a) provides that the bid bond or check shall constitute all of the qualification or guarantee required as a prerequisite to bidding except as required by the State Licensing Board for General Contractors and in any prequalification requirements of the awarding authority. (Prequalification is discussed in Section II, A above.)

### 3. Return of Bid Guaranty

Pursuant to Ala. Code § 39-2-5, except for the bid guaranties from the three lowest bona fide bidders, all bid guaranties shall be returned immediately after bids have been checked, tabulated, and the relation of the bids established.

Guaranties of the three lowest bidders shall be returned as soon as the contract bonds and the contract of the successful bidder are properly executed and approved by the awarding authority. (See Section V for discussion of executing contracts and contract bonds.)

- When an award is deferred for more than 15 days after the opening of bids, all guaranties except those of potentially successful bidders shall be returned.
- If no award is made within 30 days after the opening of bids, or other time specified in bid documents, all guaranties shall be returned except for any potentially successful bidder who agrees in writing to a stipulated extension in time for consideration of the bid. In this instance, the awarding authority may permit a potentially successful bidder to substitute a satisfactory bidder's bond for a cashier's check submitted with the bid.

#### C. MISTAKE OF BIDDER

Ala. Code § 39-2-11 provides that a low bidder who discovers a mistake in his or her bid, rendering the price substantially out of proportion to other bidders, may seek withdrawal of the bid without forfeiture.

The bidder must:

- Provide written notice to the awarding authority within three working days after the opening of bids *and*
- Offer clear and convincing documentary evidence that the mistake is due to a calculation or clerical error, an inadvertent omission, or a typographical error.

If withdrawal is allowed, the low bidder is prohibited from doing any work on the contract or from bidding on the same project if it is re-advertised.

#### D. SALES AND USE TAX EXEMPTION FOR PUBLIC WORKS PROJECTS

Ala. Code § 40-9-14.1 exempts from state and local sales and use taxes certain tangible personal property for use on construction projects for government entities, including counties. The intent of this section "is to lower the administrative cost for the governmental entity, contractor, and subcontractor for public works projects." Ala. Code § 40-9-14.1(h). A certificate of exemption must be held by the contractor to be eligible for the exemption.

Specifically, this section requires the Department of Revenue to "grant a certificate of exemption from state and local sales and use taxes to any contractor licensed by the State Licensing Board for General Contractors, or any subcontractor working under the same contract, for the purchase of building materials, construction materials and supplies, and other tangible personal property that becomes part of the structure

that is the subject of a written contract for the construction of a building or other project for and on behalf of a governmental entity which is exempt from the payment of sales and use taxes.” Ala. Code § 40-9-14.1(a)(2).

The certificate of exemption applies only to tangible personal property that becomes part of the structure that is the subject of the construction contract. Ala. Code § 40-9-14.1(c). Any contractor or subcontractor purchasing any tangible personal property pursuant to a certificate of exemption must maintain an accurate cost accounting of the purchase and use of the property in the construction of the project. Ala. Code § 40-9-14.1(c).

This exemption is operative for any contracts for a highway, road, or bridge entered into on or after January 1, 2022, but it does not apply to any contract change order or extension when the original contract was entered into prior to January 1, 2022.

Ala. Code § 40-9-14.1(g) states, “In bidding the work on a tax exempt project, the bid form shall provide for an accounting for the tax savings.”

The contractor must file reports of all exempt purchases in a manner prescribed by the Department of Revenue, which is a prerequisite for renewing the certificate of exemption. Ala. Code § 40-9-14.1(d).

The Department of Revenue “may assess any contractor or subcontractor with state and local sales or use taxes on any item purchased with a certificate of exemption not properly accounted for and reported as required.” Ala. Code § 40-9-14.1(e)(1).

For more information, see guidance from the Alabama Department of Revenue, including Ala. Admin. Code 810-6-3-.77.

## **V. AWARD OF CONTRACT**

### **A. AWARDED AUTHORITY OPTIONS**

#### **1. Lowest Responsible and Responsive Bidder**

Under Ala. Code § 39-2-6, the contract shall be awarded to the lowest responsible and responsive bidder unless the awarding authority finds that all bids are unreasonable or that it is not in the awarding authority’s interest to accept any of the bids.

- Under the public works law, a contract mistakenly entered into with a bidder other than the lowest responsible and responsive bidder is a nullity and is as if the contract does not exist. A.G. No. 2002-071.
- If the project requires a general contractor, certain information about licensure requirements must be included in the invitations to bidders, and the bidders must include their current general contractor license numbers on their bid submissions. Ala. Code § 34-8-8. If the bid submission does not contain the current general contractor license number, it must be rejected. Ala. Code § 34-8-8. The submission of the contractor’s current license number before considering the bid shall be sufficient evidence to relieve the owner or awarding authority of any liability under Title 34, Chapter 8, Code of Alabama 1975. Ala. Code § 34-8-6(d).

#### **a. Responsible Bidder**

As defined in Ala. Code § 39-2-6(a), a “responsible bidder” is “one who, among other qualities determined necessary for performance, is competent, experienced, and financially able to perform the contract”.

- A conviction and debarment by a federal agency are factors that may be considered in determining if a bidder is responsible. A.G. No. 2007-063.

#### **b. Responsive Bidder**

A “responsive bidder” is “one who submits a bid that complies with the terms and conditions of the invitation for bids.” Ala. Code § 39-2-6(a).

#### **c. Minor Irregularities**

Minor irregularities in the bid shall not defeat responsiveness. Ala. Code § 39-2-6(a).

- Whether a failure to comply with the terms and conditions of the invitation to bid is only a minor irregularity is a factual determination to be made by the awarding authority. A.G. Nos. 2016-006 and 97-00281.

#### **d. Life Cycle Costs**

Ala. Code § 39-2-6(j) provides that the lowest responsible and responsive bidder may be determined to be the bidder offering the lowest life cycle costs, provided he or she meets all of the conditions and specifications contained in the invitation to bid.

- For this option to apply, notice that life cycle costs may be considered and the criteria under which such cost will be evaluated must be included in the invitation to bid.
- A bidder may still be considered responsive if his or her bid uses different construction materials than those specified in the invitation to bid if those materials would result in lower life cycle costs for the project.

“Life cycle costs” is defined in Ala. Code § 39-2-1(3) as:

The total cost of ownership over the extended life of a public works project, taking into consideration the costs of construction, operation, and maintenance, less any value obtained from salvage and quantifiable environmental benefits, or the sum of all recurring and one-time (non-recurring) costs over the full life span or a specified period of a good, service, structure, or system, including purchase price, installation costs, operating costs, maintenance and upgrade costs, and remaining (residual or salvage) value at the end of ownership or its useful life.

## **2. Assignment of Contract**

No contract awarded to the lowest responsible and responsive bidder shall be assignable by the successful bidder without written consent of the awarding authority. Ala. Code § 39-2-6(g). In no event shall the contract be assigned to an unsuccessful bidder whose bid was rejected because he was not responsible or responsive.

### 3. When Bidder Fails to Complete Contract

Ala. Code § 39-2-6(a) provides that if the successful bidder fails or refuses to sign the contract, make bond, or provide the required evidence of insurance, the contract may be awarded to the second lowest responsible and responsive bidder.

- If the second lowest bidder fails or refuses to comply with the above requirements, the contract may be awarded to the third lowest responsible and responsive bidder.

### 4. Rejection/Negotiation of Bids

Ala. Code § 39-2-6(b), (c), and (d) address the rejection of bids received in response to an invitation to bid under the public works law.

#### a. No Bids or Only One Bid

If no bids or only one bid is received, the awarding authority may do any of the following:

- Award the contract to the sole bidder.
- Advertise for and seek other competitive bids,
- Direct that work be done by force account under the direction and control of the awarding authority (discussed in Section V, A, 5 below), **or**
- Negotiate work through informal bids not subject to bid requirements, provided that, where only one responsible and responsive bid is received, any negotiation must be for a price lower than that bid. (This provision does not apply to the Department of Transportation.)

See Ala. Code § 39-2-6(b) for more information about the above options.

Ala. Code § 39-2-6(e) requires that, where the awarding authority has determined to do work by force account or through negotiation, the awarding authority shall make the plans and specifications, an itemized estimate of costs of the project, and any informal bids available for review by the Department of Examiners of Public Accounts (the Examiners Office) and the public upon request.

Upon completion of the project, the final cost, together with an itemized list of the cost of any and all changes made to the original plans and specifications, shall be made available to the Examiners Office and to the public upon request.

Except where all bids exceed the available funding for the project, the public works law only permits a negotiated contract when the awarding authority receives no bids or only one responsible and responsive bid. See A.G. Nos. 2021-033 and 2002-006. It should be noted that these opinions were released before Ala. Code 39-2-6(c) was amended to allow for negotiation when all bids exceed the awarding authority's available funding for the project. There would be a different outcome in those situations with the change in law since the opinion's release. However, the rationale in these opinions would still apply when the bids do not exceed the available funding.

## b. Unreasonable Bids

If the awarding authority finds that all bids are unreasonable or that it is not in its best interest to accept any of the bids, it may direct work done by force account as discussed below. Ala. Code § 39-2-6(d). See A.G. Nos. 2021-033 and 2000-218.

## c. Bids in Excess of Available Funding

Ala. Code § 39-2-6(c) provides that when two or more bids are received **and** all bids exceed the awarding authority's budget for the project, the awarding authority may negotiate with the lowest responsible and responsive bidder provided:

- The awarding authority can document the shortage of funds,
- Time is of the essence, and
- The negotiated changes are in the public interest and do not materially alter the scope and nature of the project.

This option is not available to the Department of Transportation.

## 5. Force Account

Under Ala. Code § 39-2-6(d), if the awarding authority rejects all bids as unreasonable or not in its interest, it may provide that work be done by force account under its direction and control. Ala. Code § 39-2-6(e) provides that the awarding authority may let any subdivision of the project by contract or informal bids.

"Force account work" is defined in Ala. Code § 39-2-1(2) as:

Work paid for by reimbursing the actual costs for labor, materials, and equipment usage incurred in the performance of the work, as directed, including a percentage for overhead and profit, where appropriate.

As noted above, Ala. Code § 39-2-6(e) provides that if a project is carried out by force account, the plans, specifications, changes, estimated and actual costs of the project, and any informal bids shall be made available for review by the Examiners Office and be made public upon request. See *also* A.G. No. 98-00039.

There are several Attorney General's opinions addressing force account. A few examples are set out below:

- The Attorney General has opined that "force account" and "in-kind services" have the same meaning. A.G. No. 98-00039.
- Under the force account method, the awarding authority may let any unit of work by contract, if for example, it does not have qualified personnel who can perform certain tasks and wants a subcontractor to provide for these services. When an agency chooses this option, it must competitively bid the portion of the work requiring the outside labor or services, which may be done on an informal basis and need not comply with all formal bidding requirements. A.G. No. 2000-218.

- The Attorney General has held that under the public works law, an agency may decide to carry out a project by force account when it has the resources, facilities, and personnel available, and finds that it would be the most efficient use of them. A.G. Nos. 98-00039 and 98-00052.
- Since no contract would be signed where a project is carried out by force account, the public works law has no effect. However, the competitive bid law would still apply for the purchase of materials, supplies, and equipment in excess of the bidding threshold amount. A.G. Nos. 99-00065; 98-00039; and 98-00052.
- In-kind services that will serve as a match for ADECA grant funds are not required to be competitively bid. A.G. No. 98-00052.
- Where work is done by force account, engineering drawings, specifications, and estimates must be prepared by a professional engineer and the construction must be executed under the direct supervision of a professional engineer as required by Ala. Code § 34-11-10, part of the law regulating engineers and land surveyors. A.G. No. 99-00065.
- Laborers under force account must be employees of the awarding authority and not contract employees or employees of a contractor. A.G. No. 2000-218.

## **B. PROCEDURES FOR AWARDING CONTRACT**

### **1. Award Time Frame**

Ala. Code § 39-2-5 provides that if no award is made within 30 days of the opening of bids:

- All bids shall be rejected, and
- All guaranties shall be returned except for any potentially successful bidder who agrees in writing to a stipulated extension in time for consideration of the bid.

### **2. Notification to Successful Bidder**

Under Ala. Code § 39-2-6(a), the awarding authority shall notify the successful bidder of the award by confirmed fax, electronic mail, or letter at the earliest possible date.

### **3. Awarding Authority's Responsibility in Completing Contract**

#### **a. Execution of Contract**

Ala. Code § 39-2-9 provides that within 20 days after the contractor presents bonds and evidence of insurance to the awarding authority, the awarding authority must approve them and complete execution of the contract unless the contractor agrees in writing to a longer period.

#### **b. Proceed Order**

Ala. Code § 39-2-10 provides that within 15 days after final execution of the contract (and execution by Governor, if required), the awarding authority shall issue a proceed order unless both parties agree in writing to a stipulated extension.

#### **c. Awarding Authority's Failure to Complete**

Ala. Code § 39-2-11(c) provides that the awarding authority's failure to complete execution of the contract and issue a proceed order as required in Ala. Code §§ 39-2-9 and 39-2-10 is just cause for withdrawal of

the contractor's bid without forfeiture of check or bond unless the contractor agrees in writing to a longer period.

#### **d. Certificate of Compliance**

Ala. Code § 39-5-1(b) provides that prior to execution of final contracts and bonds, the awarding authority must certify that the contract was awarded in compliance with the law. The certificate of compliance constitutes a rebuttable presumption that the contract was let in accordance with the law.

- In an action brought by a contractor for payment under an illegal contract, the certificate is rebutted only by clear and convincing evidence that the certification was false or fraudulent and that the contractor knew the certification was false or fraudulent before execution of the contract.
- Under Ala. Code § 39-5-2, an awarding authority or its agent who willfully issues a false or fraudulent certificate shall be guilty of a felony punishable upon conviction by a fine of not less than \$5,000 nor more than \$50,000 or imprisonment for one to three years.

### **4. Required Contract Provisions**

#### **a. Statement Regarding Availability of Contract Funds**

Ala. Code § 39-2-12(k) requires that a public works contract include provisions outlining the source of sufficient funds to be utilized to fulfill the awarding authority's obligations under the contract.

- In particular, this provision requires including a statement regarding whether the funds are held by the awarding authority at the time of the execution of the contract or whether the funds will become available at a date following the execution of the contract.

#### **b. Special Requirements for Grant Funding**

In addition to the above, Ala. Code § 39-2-12(l) provides that, if the source of funds for payment will be a grant, award or other direct reimbursement from the state, federal government, or other source which will not be available until after the execution of the contract, that fact shall be disclosed in the bid documents and contract.

As discussed in more detail in below, in this instance prompt payment provisions in the law shall not apply until the awarding authority is in receipt of such funds.

ACCA has developed sample bid and contract language to comply with this provision. These samples are found at the end of this chapter. Please note that additional terms and conditions applicable to other funding sources (e.g., federal grant funds) may need to be incorporated into contracts, as well. Counties should review all required terms and conditions associated with such awards and consult with their county attorneys regarding which terms and conditions must be included in related contracts.

#### **c. Contract Statement on Unauthorized Aliens**

Under Alabama's immigration law, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, all business entities must enroll in and utilize the E-Verify Program as a condition of an award of a contract that has been competitively bid. Ala. Code § 31-13-9(b). Additionally, Ala. Code § 31-13-9(k) includes a requirement that all contracts governed by the immigration law include the following provision:

By signing this contract, the contracting parties affirm, for the duration of the agreement, that they will not violate federal immigration law or knowingly employ, hire for employment, or continue to

employ an unauthorized alien within the state of Alabama. Furthermore, a contracting party found to be in violation of this provision shall be deemed in breach of the agreement and shall be responsible for all damages resulting therefrom.

For a discussion of the responsibilities of contractors and governmental entities in complying with this law, see A.G. No. 2021-007.

- Governmental entities have an affirmative duty to ensure that the language set out in Ala. Code § 31-13-9(k) is included in each contract and that contractors provide appropriate verification that they have enrolled in E-Verify and have complied with its requirements. A.G. No. 2021-007.
- The same verification requirements apply whether the contracting entity is an out-of-state business, vendor, or corporation or an in-state entity, so long as the entity employs at least one employee in Alabama. A.G. No. 2021-007.

#### **d. Contract Statement on Illegal Boycotts**

Alabama law prohibits a governmental entity from entering into a contract governed by Title 39 (the Public Works Law) or Chapter 16, Title 41 (the Competitive Bid Law) with a business entity unless the contract includes a representation that the business entity is not currently engaged in, and an agreement that the business entity will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with which this state can enjoy open trade. Ala. Code § 41-16-5(b). The definition of “boycott” may be found at Ala. Code § 41-16-5(a)(1).

This prohibition does not apply if the business offers to provide the goods or services for at least 20 percent less than the lowest certifying business entity. Ala. Code § 41-16-5(c)(1).

Nothing in this law requires a business entity or individual to do business with any other particular business entity or individual in order to enter into a contract with a governmental entity. Ala. Code § 41-16-5(d).

#### **e. Contract Statement on Illegal Economic Boycotts**

Alabama law prohibits a governmental entity from entering into certain contracts for goods or services unless the contract contains a written verification from the company that the company, without violating controlling law or regulation, does not and will not, during the term of the contract, engage in economic boycotts. Ala. Code § 41-16-161(b). The law shall apply separately to all companies in a multiple-party contract. “Economic boycott” is defined in Ala. Code § 41-16-160(2).

The law applies under the following circumstances:

- The contract is between a governmental entity and a company with 10 or more full-time employees; and
- The governmental entity will pay or may pay a company at least \$15,000 over the term of the contract wholly or partly from public funds of the governmental entity.

There are exceptions to the law for certain finance-related contracts or contracts that would “prevent the governmental entity from obtaining the supplies or services to be provided in an economically practicable manner.” Ala. Code § 41-16-161(c).

There are also procedures set out in Ala. Code § 41-16-161(d) for a governmental entity to waive the requirements of the law upon a finding, posted on its publicly available website, that:

1. The governmental entity has made reasonable and good faith efforts to obtain services meeting the law's requirements and has included them in the minimum selection criteria.
2. Based on objective information available to the governmental entity, the cost appears significantly higher than the services available to similarly oriented governmental entities not subject to similar requirements, or the quality of services or options appears significantly lower than the quality of services available to similarly oriented governmental entities not subject to similar requirements, or both.
3. The governmental entity determines that a waiver is clearly in the best interest of the public.

## **5. Responsibilities of Successful Bidder**

Pursuant to Ala. Code § 39-2-8, within 15 days of being presented the contract and forms for signature by the awarding authority, the successful bidder must:

- Enter into a written contract,
- Furnish a performance bond equal to 100% of the contract price as provided in Ala. Code § 39-1-1(a),
- Furnish a payment bond of not less than 50% of the contract price as provided in Ala. Code § 39-1-1(a) for payments of all labor and materials, and
- Provide evidence of insurance as required by the bid documents.

The awarding authority may set a different time period for execution of the contract and other documents and may grant a five-day extension for any of these requirements if there are extenuating circumstances.

Ala. Code § 39-2-11 provides that if the successful bidder fails to comply with these requirements, the awarding authority shall retain or recover from the bid guaranty the difference between the contract amount as awarded and the amount of the next lowest proposal. If there are no other bids, the full amount of the guaranty shall be retained as liquidated damages.

## **6. Performance Bond Requirement**

Ala. Code § 39-1-1(a) requires that, before commencing work on a public works project, the contractor shall execute a performance bond, with penalty equal to 100% of the contract price. As set out in Ala. Code § 39-2-8, the performance bond shall be presented within 15 days of presentment of the contract unless the awarding authority allows for a different time period.

- Ala. Code § 39-1-1(e) provides that a performance bond is not required for contracts in an amount less than \$100,000.
- Under Ala. Code § 39-2-11, if the contractor fails to execute the performance bond and enter into the contract, the awarding authority shall retain or recover from the bid guaranty the difference between the contract award amount and that of the next lowest bidder, or if there are no other bids, the full amount of the guaranty.
- The statute is clear that the performance bond is to be 100% of the contract price. If the base bid and contract price differ, for whatever reason, the bond is to be measured by the contract price. A.G. No. 97-00247.

Ala. Code § 39-1-4 prohibits the awarding authority and its employees or agents from requiring the bidder to obtain a bond or insurance from a particular company. This provision also prohibits the awarding authority or its employees or agents from negotiating or procuring any bond or insurance for a bidder, contractor, or subcontractor, except insurance for builder's risk or owner's liability.

- There are some exceptions set out in this Code section that are unlikely to apply to most counties.

## **7. Payment Bond Requirements**

Ala. Code § 39-1-1(a) also requires that the contractor execute a payment bond in an amount not less than 50% of the contract price, with the obligation that the contractor(s) promptly make payments to all persons supplying labor, materials, or supplies for the work provided in the contract and for the payment of reasonable attorney fees incurred by successful claimants in civil actions on the bond.

Ala. Code § 39-1-1(b) authorizes any person who has not been paid for furnished labor, materials, or supplies for a public works contract to bring a civil action upon the payment bond.

- Suit may be brought 45 days after written notice is given to the surety of the amount claimed to be due and the nature of the claim.
- The civil action shall be commenced within one year from the date of final settlement of the contract.
- Pursuant to Ala. Code § 39-1-1(c), the awarding authority shall furnish a certified copy of the payment bond to any person having a right of action under this section.

## **8. Nonresident Contractors**

Ala. Code § 39-2-14(a) provides that every nonresident contractor shall register with the Alabama Department of Revenue prior to engaging in the performance of a contract and shall deposit with that Department 5% of the contract amount which shall be held in a "contractors use tax fund" pending the completion of the contract, the determination of the taxes due this state and other governmental bodies, and the payment of same.

- The nonresident contractor may file a surety bond in lieu of the deposit subject to approval by the Revenue Commissioner in the manner necessary to provide a guarantee of payment of the Alabama taxes due.

Ala. Code § 39-2-14(b) requires that, within 30 days of registration, the nonresident contractor shall file a statement itemizing the machinery, materials, supplies, and equipment on hand for fulfillment of the contract where such tangible personal property has been brought, shipped, or transported from outside of Alabama. Additionally, where applicable, the nonresident contractor shall pay taxes due at the time of filing and thereafter report and pay the tax as required by the Revenue Commissioner.

- In addition to the above, Ala. Code § 39-2-12(d) requires a nonresident contractor to satisfy the awarding authority that he or she has paid all state or local taxes due and payable in the state.

A nonresident contractor is defined in Ala. Code § 39-2-12(a)(2) as:

A contractor which is neither a. organized and existing under the laws of the State of Alabama, nor b. maintains its principal place of business in the State of Alabama. A nonresident contractor which has maintained a permanent branch office within the State of Alabama for at least five continuous years shall not thereafter be deemed to be a nonresident contractor so long as the contractor continues to maintain a branch office within Alabama.

## 9. Preferences

### a. Domestic Products

Ala. Code § 39-3-1 provides that when contracting for public works projects financed entirely by the State of Alabama or any of its political subdivisions (which would include counties), the awarding authority must agree to use materials manufactured in the United States or its territories if available at a reasonable and competitive price and not contrary to any sole source specifications.

- The awarding authority must stipulate to this agreement in the contract.
- If the contractor breaches the agreement, and domestic products are not used, there shall be a downward adjustment in the contract equal to any realized savings or benefits to the contractor.

### b. Domestic Iron or Steel

Ala. Code § 39-3-4 provides that any contractor for a public works project must use iron or steel produced in the United States when specifications require the use of iron or steel and do not limit its supply to a sole source.

- If the awarding authority decides that the procurement of domestic iron or steel products becomes impractical as a result of a national emergency, strike, or other cause, it shall waive the restriction.
- If the contractor violates this requirement, and domestic iron or steel is not used, there shall be a downward adjustment in the contract equal to any realized savings or benefits to the contractor.

### c. Resident Contractors

Ala. Code § 39-3-5 provides that, except in contracts funded in whole or in part with funds from a federal agency, preference shall be given to "resident contractors". There is no definition of "resident contractor", but it appears that this applies to residency in the state and not in a particular county.

Ala. Code § 39-3-5 further provides that a nonresident bidder from a state which has laws granting preferences to local contractors shall be awarded Alabama contracts "only on the same basis as the nonresident bidder's state awards contracts to Alabama contractors". A "nonresident contractor" is defined in Ala. Code § 39-2-12(a)(2) as set out in Section V, B, 8 above.

Ala. Code § 39-3-5 requires that a summary of the nonresident contractors law be included in the advertised specifications of all projects where this provision is applicable.

- The preference to resident contractors applies if: (1) the contract is under the public works law; (2) the contract utilizes any state, county, or municipal funds, except if funded in whole or in part with

federal funds; and (3) the law of the state of the out-of-state contractor gives preference to its resident contractors. A.G. No. 2010-040.

## 10. Splitting Contracts

As is the case with a contract subject to the competitive bid law, no public works contract in excess of \$100,000 shall be split into parts involving \$100,000 or less for the purpose of evading the public works law. Ala. Code § 39-2-2(a)(5).

- Where work is added to a project originally under the threshold amount for bidding and additional work is performed without bidding or approval of the awarding authority, the additional amount cannot be paid. A.G. No. 2002-126.
- A public works contract cannot be split by contract term length (i.e., cost for three years) to avoid reaching the threshold amount requiring bids. A.G. No. 2002-072.
- Where an entire project exceeds the threshold amount requiring bidding but the awarding authority utilizes both an annual asphalt contract and county forces for most of the project, the project portion attributable to county forces would not be subject to the public works law. However, if the outsourced portions of the project, including the asphalt contract, exceed the bid threshold amount, the remaining outsourced portions must be bid. A.G. No. 2004-083.
- The awarding authority cannot award multiple contracts under the threshold amount to a single entity without bidding. A.G. No. 2007-089.
- A maintenance contract for multiple water tanks cannot be divided into parts to avoid the threshold amount requiring competitive bidding. A.G. No. 2015-008.
- The time period between purchases is a circumstance, but not the only circumstance, that may be considered in an effort to determine if purchases were split to avoid taking bids. A.G. Nos. 2017-010 and 2003-098.
- Factors to consider in determining whether an awarding authority can demonstrate it is not evading the public works law by spreading out purchases over several years as funds become available are: (1) time period between purchases, (2) knowledge of the total cost of the project and ability to pay that total cost, and (3) the interchangeability or likeness of the purchased items or units. A.G. No. 2017-010.

## 11. Term of Public Works Contract

Unlike the competitive bid law, the public works law does not have any provision setting a limitation on the term of a public works contract. See A.G. No. 2015-008.

- However, a public works contract cannot be renewed without rebidding. A.G. Nos. 2017-026 and 2015-008.

## C. CHANGE ORDERS

The public works law does not specifically provide for change orders, but they have consistently been allowed by the Attorney General's Office pursuant to guidelines it has articulated in interpreting the intent of competitive bid laws. An early opinion on "change orders" set out a detailed list of criteria for allowing change orders or negotiation of contracts when the low bid exceeds the anticipated budget. See A.G. No. 79-00313 for a lengthy discussion of these issues and the philosophy for allowing minimal changes in a public works project.

The standards and authorized use and availability of change orders has expanded considerably since release of the above-referenced opinion issued in 1979. The Attorney General's Office has consistently held that change orders were appropriate under certain circumstances and has condoned changes in excess of 10% where "extraordinary circumstances" exist. See, e.g., A.G. Nos. 2000-098; 93-00105; 92-00388; 91-00279; 87-00197; and 87-00153.

In each of the above-referenced opinions addressing change orders, the Attorney General's Office points out that the most important requirement of competitive bid laws is the good faith of the officials charged in executing the law. Additionally, each of these opinions state that a signed statement from the project engineer or architect should be in the project file setting out each of the following:

- A statement of what the change order covers, who instituted it, and why.
- A statement of the reasons for using the change order method rather than bids.
- A statement that all prices have been reviewed and found reasonable, fair, and equitable and recommending the approval.

Additionally, these opinions state that all proposed changes in the contracts should be carefully reviewed and considered by the members of the awarding authority to ensure that the governmental entity's interests are protected and well preserved.

Counties should be extremely careful in agreeing to and authorizing change orders. This process — which is not found in the law — has been abused over the years to alter projects in ways not contemplated in the original bid specifications, and where such dramatic changes are allowed, counties are not only vulnerable to audit findings and litigation, but generally end up adding significantly to the cost of the project.

## VI. RETAINAGE AND PARTIAL PAYMENT PROCEDURES

### A. PARTIAL PAYMENT PROCEDURES

#### 1. Time Periods for Partial Payments

Ala. Code § 39-2-12(b)(1) provides that unless otherwise provided in the bid specifications, partial payments shall be made to the contractor as the work progresses at the end of each calendar month, but in no case later than 35 days after the acceptance by the awarding authority that the estimate and terms of the contract providing for partial payments have been fulfilled.

Ala. Code § 39-2-12(b)(2) provides that in preparing estimates for partial payments, the material delivered on the site, materials suitably stored and insured off-site, and preparatory work done may be taken into consideration.

Any agreement to increase the 35-day period for payment after the execution of the contract is not enforceable. Ala. Code § 39-2-12(b)(2).

## **2. Review and Processing of Partial Payments**

Ala. Code § 39-2-12(b)(1) requires that the contract designate a person to review the progress of completed work and documents submitted by the contractor. The designated person shall, within 10 days after receipt of a payment submission, review the submission and respond in writing to accept or, where applicable, forward the request for payment to the paying agency.

Where there is an error in the partial payment submission or dispute regarding compliance with the contract, such notice shall be disclosed in writing to the contractor within 10 days and, after corrective actions are taken, the invoice may be resubmitted and processed as provided in Ala. Code § 39-2-12(b)(1).

In the absence of any error or dispute, the awarding authority shall within 10 days proceed as follows for payment of the invoice:

- For contracts funded by a grant, award, or direct reimbursement from the state, federal government, or other source, the awarding authority shall forward the request for payment to the entity or agency that is the source of funding to be used by the contractor.
- For other contracts, payment shall be made by the contracting agency in accordance with the payment requirements and deadlines established in Ala. Code § 39-2-12(b)(1).

## **3. Penalties for Late Partial Payments**

Pursuant to Ala. Code § 39-2-12(b)(2), if the amount due by the awarding authority is not in dispute and the amount payable is not paid within the 35-day period, the contractor shall be entitled to interest on the unpaid balance at the rate assessed for underpayment of taxes under Ala. Code § 40-1-44(a).

Interest payments shall not be due on payments made after the 35-day period because of administrative or processing delays at the close of the fiscal year or delays resulting from official and announced closures by the awarding authority.

## **4. Contractor Responsibility for Care of Materials and Work**

Under Ala. Code § 39-2-12(h), all material and work covered by partial payments becomes the sole property of the awarding authority. However, the contractor is not relieved of the sole responsibility for the care and protection of materials and work upon which payments have been made and for the restoration of any damaged work.

## 5. Special Rules for Grant Projects

Pursuant to Ala. Code § 39-2-2(i), an awarding authority may not offer a contract for bidding a public works project unless confirmation of any applicable grant has been received and any required matching funds have been secured by or are available to the awarding authority. Additionally, Ala. Code § 39-2-12(l) provides that, if the source of funds for the payment be a grant, award, or direct reimbursement from the state, federal government, or other source will not become available until after the execution of the contract, that fact shall be disclosed in the bid document and contract and the payment provisions in the public works law shall not apply until the awarding authority is in receipt of the funds as provided in the contract.

- Upon receipt of funds, the contracting agency shall process payment within 10 days under the procedures in the law.

ACCA has developed sample bid and contract language to comply with this provision. These samples are found at the end of this chapter. Please note that additional terms and conditions applicable to other funding sources (e.g., federal grant funds) may need to be incorporated into contracts, as well. Counties should review all required terms and conditions associated with such awards and consult with their county attorneys regarding which terms and conditions must be included in related contracts.

## 6. Overpayments

Pursuant to Ala. Code § 39-2-12(j), if the Alabama Department of Transportation or a county awarding authority determine there has been overpayment to a contractor, they shall provide written notice of the overpayment to the contractor, who shall remit the overpayment within 60 days of receipt of the demand.

If the contractor fails to remit payment in full within 60 days, he or she shall be disqualified from bidding as a prime contractor or performing work as a subcontractor on any future Department of Transportation or county public works contracts until the overpayment is made.

The Department of Transportation or county awarding authority shall also be entitled to interest from the contractor at the rate assessed for underpayment of taxes under Ala. Code § 40-1-44(a) beginning on the 61st day after the contractor's receipt of the payment demand.

### B. RETAINAGE

Retainage is defined in the public works law at Ala. Code § 39-2-12(a)(3) as, "That money belonging to the contractor which has been retained by the awarding authority conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor."

Ala. Code § 39-2-12(c) provides that in making partial payments to the contractor, the awarding authority shall retain not more than 5% of the estimated work done and the value of project materials stored on or off-site. After 50% of a project has been completed, no further retainage shall be withheld.

- Retainage shall be held until final completion and acceptance of all work covered under the contract unless an escrow or deposit arrangement as prescribed in Ala. Code § 39-2-12(f) and (g) is utilized. See Ala. Code § 39-2-12(e) discussed below.

- There shall be no retainage held on Alabama Department of Transportation contracts for construction or maintenance of public highways, bridges, or roads.

Ala. Code § 39-2-12(e) provides that, in lieu of retainage, the awarding authority may provide in the bid specifications or contracts for an alternative procedure by either the maintenance of an escrow account as provided in Ala. Code § 39-2-12(f) or depositing security as provided in Ala. Code § 39-2-12(g).

The Attorney General has concluded that the awarding authority cannot, in bid specifications, provide for withholding more than the 5% retainage or provide that retainages shall continue to be withheld after the project is 50% complete. A.G. No. 97-00256.

## VI. COMPLETION AND FINAL PAYMENT PROVISIONS

### A. ADVERTISEMENT UPON PROJECT COMPLETION

#### 1. Contracts of \$100,000 or More

Ala. Code § 39-1-1(f)(1) provides that, immediately after the completion of a public works contract, the contractor shall give notice of same for a minimum of three weeks using one or more of the following methods:

- Advertising in a newspaper of general circulation in the county or counties in which the work, or some portion thereof, has been done.
- Posting on a website maintained by a newspaper of general circulation in the county or counties in which the work, or some portion thereof, has been done.
- Posting on a website used by the awarding authority for publishing notices.
  - County commissions should consider adopting a resolution specifying which website or websites will be utilized for publishing these notices.
  - Ala. Code § 23-8-6(c) provides that the Rebuild Alabama bidding procedures approved by the Department of Examiners of Public Accounts may be used for any county road and bridge project otherwise subject to the public works law. The bidding procedures approved at the time of this publication include the following provision: "The placement of the advertisement for bids and notice of completion on a central website, hosted by the Association of County Commissions of Alabama (ACCA), will satisfy all advertisement requirements for county road and bridge projects utilizing public funds."

If there is no newspaper published in the county in which the work was done and the awarding authority does not utilize a website for publishing notices, notice may be made by posting at the courthouse for 30 days, with proof of the posting given by the awarding authority and the contractor. Ala. Code § 39-1-1(f)(2).

A final settlement of the contract shall not take place until 30 days after completion of the notice.

Proof of publication shall be made by the contractor to the awarding authority by affidavit of the publisher or website owner and a printed copy of the notice published.

## 2. Unit Price Resurfacing Contracts

Ala. Code § 39-1-1(f)(4) provides that contracts for road resurfacing materials awarded on an annual basis bid with unit price options for materials, delivery of materials, or materials to be laid in place by the bidder, notice of contract completion may be given on an annual basis upon completion **of the project as a whole, rather than at the completion of each proceed order.**

## 3. Contracts Less than \$100,000

The public works law no longer includes any contract completion notice requirements for contractors performing contracts for less than \$100,000. Ala. Code § 39-1-1(g).

## B. PAYMENT UPON PROJECT COMPLETION

### 1. Contracts of \$100,000 or More

Ala. Code § 39-2-12(i)(1) provides that, upon completion and acceptance of all work required, the awarding authority shall pay the amount due the contractor upon presentation of the following items:

- A properly executed and duly certified voucher for payment.
- A release, if required, of all claims and claims of liens against the awarding authority arising by virtue of the contract.
- Proof of advertisement of project completion as required in Ala. Code § 39-2-1(f).

Pursuant to Ala. Code § 39-2-12(i)(2), payment is due 35 days after all of the above requirements are met. Any agreement to increase the 35-day period for payment after execution of the contract is unenforceable.

If the awarding authority fails to make payment, interest at the amount charged by the state shall accrue for underpayment of taxes under Ala. Code § 40-1-44(a).

### 2. Contracts Less than \$100,000

The public works law no longer includes any provisions for final settlement of public works contracts for less than \$100,000. Ala. Code § 39-1-1(g).

## VII. LEGAL ACTIONS AND PENALTIES

### A. AUTHORITY TO BRING DAMAGE SUIT

#### 1. Suit by Bidder

A bidder who was awarded a public works contract cannot bring a civil action to force the awarding authority to pay out public funds for work and labor, materials supplied, or performance of the contract if the contract was let or executed in violation of the law. Ala. Code § 39-5-1(a). *See also* A.G. No. 2002-126.

- The certificate of compliance signed by the awarding authority prior to execution of the contract creates a rebuttable presumption that the contract was let in compliance with the law. (See Ala. Code § 39-5-1(b) and Section V, B for further discussion of certificate of compliance.)

Additionally, Ala. Code § 39-5-6 provides that the courts shall not invoke or apply any legal or equitable principle which would allow recovery for work and labor done or materials furnished under any contract let in violation of competitive bidding requirements as prescribed by law. See *also* A.G. No. 2002-126.

## 2. Suit by Attorney General or Interested Citizen

Pursuant to Ala. Code § 39-5-3, the public works law authorizes the Attorney General or an interested citizen, in the name of and for the benefit of the awarding authority, to bring action to recover public funds from a contractor, surety, or other person receiving funds paid under a public works contract let in violation of law.

- The action must be brought within three years of final settlement of the contract.
- There must be clear and convincing evidence that the contractor, its surety, or other person who was paid funds knew of the violation before execution of the contract. See, e.g., *Lake Cyrus Development Co., Inc. v. Attorney General of the State of Alabama ex rel. Bessemer Water Service*, 143 So.3d 771 (Ala. 2014).
- No monetary recovery is allowed unless the suit is brought by the Attorney General or an interested citizen. *Lake Cyrus Development Co., Inc. v. Attorney General of the State of Alabama ex rel. Bessemer Water Service*, 143 So.3d 771 (Ala. 2014).

### B. AUTHORITY TO BRING INJUNCTIVE ACTION

An action to prevent letting or executing a public works contract in violation of the law may be brought within 45 days of an award of the contract under Ala. Code § 39-5-4 by:

- a. The Attorney General,
  - b. A bona fide unsuccessful or disqualified bidder, or
  - c. Any interested citizen.
- In an action brought by the unsuccessful bidder, he or she may recover reasonable bid preparation costs.
  - Injunction is the sole remedy available under the public works law. An unsuccessful bidder cannot pursue a claim for money damages other than bid preparation costs if he or she succeeds in the injunction. *Ala. Municipal & Environmental Engineers v. Slaughter Construction Co.*, 961 So.2d 889 (Ala. Civ. App. 2007).

## C. EFFECT OF ILLEGAL CONTRACT

### 1. Contract Void

Under Ala. Code § 39-2-2(c), any contract entered into in violation of the public works law shall be null, void, and violative of public policy. See A.G. No. 2002-126.

- The entire contract is void and no portions of the contract, including any provisions that might not have required advertisement and bidding under the public works law, can be enforced. *Lake Cyrus Development Co., Inc. v. Attorney General of the State of Alabama ex rel. Bessemer Water Service*, 143 So.3d 771 (Ala. 2014).

### 2. Willful Violations

A willful violation of the public works law is a Class C felony under Ala. Code § 39-2-2(c).

Additionally, Ala. Code § 39-5-3 provides that suit may be brought to recover paid public funds from the contractor, its surety, or any person receiving funds under any public works contract let in violation of the law, "if there is clear and convincing evidence that the contractor, its surety, or such person knew of the violation before execution of the contract."

- The action shall be commenced within three years of final settlement of the contract.
- See *Lake Cyrus Development Co., Inc. v. Attorney General of the State of Alabama ex rel. Bessemer Water Service*, 143 So.3d 771 (Ala. 2014) (regarding "clear and convincing evidence").

### 3. Collusion/Restraint of Free Competition

Ala. Code § 39-2-6(h) prohibits any agreement or collusion among bidders or prospective bidders to bid at a fixed price or refrain from bidding in restraint of freedom of competition.

- Such actions render the bids void.
- Such action also disqualifies the bidders or prospective bidders from submitting further bids to the awarding authority on future lettings.
- Any bidder or prospective bidder who willfully participates in any agreement or collusion in restraint of freedom of competition shall be guilty of a felony and, on conviction fined not less than \$5,000 nor more than \$50,000 or imprisonment for not less than one nor more than three years.

### 4. Advance Disclosure

Ala. Code § 39-2-6(i) provides that any disclosure in advance of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and require readvertisement and award.

### 5. Fraudulent Certification

Ala. Code § 39-5-2 provides that an awarding authority or its agent who willfully issues a false or fraudulent certificate of compliance shall be guilty of a felony punishable upon conviction by a fine of not less than \$5,000 nor more than \$50,000 or imprisonment for one to three years.

- The certificate of compliance requirement is found in Ala. Code § 39-5-1 and discussed in Section V, B above.

## 6. No Right to Payment

Ala. Code § 39-5-6 provides that the requirements of the public works law are mandatory, and shall be construed to require strict competitive bidding on public works contracts, and as such, courts shall not invoke or apply any legal or equitable principle which would allow a contractor to recover for work and labor done or materials furnished under a contract let in violation of the competitive bidding requirements of the law.

- An awarding authority is prohibited by the public works law from paying an invoice for unapproved work performed which is in addition to the original project price. A.G. No. 2002-126.
- *See also Lake Cyrus Development Co., Inc. v. Attorney General of the State of Alabama ex rel. Bessemer Water Service*, 143 So.3d 771.

## SAMPLE BID AND CONTRACT LANGUAGE FOR PUBLIC WORKS PROJECTS WITH GRANT OR OTHER OUTSIDE FUNDING

[NOTE: Before using the sample bid and contract language shown below, please be aware that the terms and conditions of a particular federal award may require the inclusion of certain terms and conditions in bid solicitations and related contracts. As a result, it is important to review the award letter or other award documentation to ensure compliance with any additional requirements.]

### For Bid Document

The public works project which is the subject of this invitation to bid shall be funded (*in whole or in part*) from a (*grant or other funding source*) awarded to the county by \_\_\_\_\_ (*insert entity providing the project funding*). A copy of the (*grant or other funding source*) award letter (*or other award documentation*) is (*attached or shall be provided upon request*). Pursuant to the terms of the (*grant or other funding source agreement*), the county will be responsible for payment of \_\_\_\_\_ (*insert percentage or dollar amount county required to pay*), which funds have been secured by or are available to the county. (*Delete this sentence if there is no county match.*) Additionally, under the terms of the (*grant or other funding source agreement*), the funds to be paid by the grantor will not be made available to the county until completion of the project (*or other contingency, if applicable*). Therefore, pursuant to Ala. Code § 39-2-12(l), as amended by Act 2014-404, payment for work invoiced by the successful bidder and approved by the county shall be processed by the county within 10 days of receipt of the funds from the (*grantor or other payor*).

### For Contract

The parties to this contract understand and acknowledge that this project is funded (*in whole or in part*) from a grant (*or other funding source, if applicable*) in the amount of \_\_\_\_\_ (*insert project cost percentage or dollar amount of grant*), and that under the terms of the grant (*or other funding agreement*), the funds to be paid by the (*grantor or other payor*) will not be made available to the county until completion of the project (*or other contingency, if applicable*). The parties further understand and agree that, due to these circumstances, payment for work invoiced by \_\_\_\_\_ (*contractor*) and approved by the county shall be processed by the county within 10 days of receipt of the funds from the (*grantor or other payor*) as provided in Ala. Code § 39-2-12(l), as amended by Act 2014-404.



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# Land Use Regulation in the County

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# CHAPTER NINE

## LAND USE REGULATION IN THE COUNTY

Counties in Alabama do not have any land use regulation authority under general Alabama law. Several counties have created some form of planning and zoning authority by local law. See, e.g., Baldwin (Ala. Code §§ 45-2-260 to -262), Russell (Act 95-573), and Shelby (Acts 1965, 1523). Jefferson County has established planning and zoning authority through general act. See Ala. Code § 11-52-30.

There is some statutory authority for regional planning and development through regional commissions established for this purpose. See Ala. Code §§ 11-85-1 to -73. (This is discussed in more detail in Chapter Ten.) However, these commissions, which are not governmental entities, are advisory only.

Despite the resistance to granting counties full authority to control land uses within the unincorporated areas of the state, the Legislature has granted limited authority to the governing bodies of the counties to address certain special circumstances, as discussed in this chapter.

### I. SUBDIVISION REGULATION

#### A. AUTHORITY TO REGULATE

While there is no requirement in Alabama that the county commission adopt subdivision regulations, Ala. Code §§ 11-24-1 to -7 provides strong statutory authority for each county to regulate subdivision development within its territorial jurisdiction.

The adoption and enforcement of subdivision regulations serves as an effective tool to ensure that new development in the unincorporated areas of the county will have properly constructed infrastructure, which provides a significant benefit to citizens purchasing property in the area. Subdivision regulations also provide the county commission with some assurance that any roads in the development accepted into the county road system will have been constructed to the standards established by the county commission upon advice and recommendation of the county engineer.

In *Swann v. Hunter*, 630 So.2d 374 (Ala. 1993), the Supreme Court of Alabama noted that state and local regulations regarding subdivisions “were promulgated for the protection and benefit of the public, especially those members of the public purchasing real property for residential purposes.”

If the county does elect to adopt such regulations, those regulations must comply with the statutory procedures and requirements for implementation and enforcement. Moreover, once the county has adopted subdivision regulations, it is imperative that the governing body strictly and uniformly enforce those regulations.

Following statutory changes passed in 2006, a committee of county engineers formed through the Association of County Engineers of Alabama (ACEA) developed “model subdivision regulations” to serve as a guide for counties to use in implementing subdivision regulations or revising existing regulations to comply with the changes in the law. The model regulations were amended in 2014

following a change in law allowing for “pre-sale agreements” under limited circumstances. A copy of these model regulations is available through the ACEA website ([www.alabamacountyengineers.org](http://www.alabamacountyengineers.org)).

Counties should be careful to ensure that any regulations developed and adopted by the county commission, including any based in whole or in part on the model regulations, include and follow the statutory requirements found in Ala. Code §§ 11-24-1 to -7, as well as any subsequent developments in the law since 2014.

Ala. Code § 11-24-1(b) generally provides that counties may regulate the subdivision of lands “outside the corporate limits of any municipality in the county.” However, this regulatory reach may be limited in some instances by the planning jurisdiction of a municipal planning commission extending beyond the municipality’s corporate limits. The interplay between the county’s territorial jurisdiction and the planning jurisdiction of the municipal planning commission is discussed in more detail in Section I, A, 4 below.

### 1. Scope of Authority

Ala. Code § 11-24-1(a)(4) defines a “subdivision” as the “development and division of a lot, tract, or parcel of land into two or more lots, plats, sites, or otherwise for the purpose of establishing or creating a subdivision through the sale, lease, or building development.”

- This definition does not include the construction or development of roads or buildings on agricultural property.
- Note that the definition of “subdivision” includes the development of land for the purpose of leasing lots, such as in a mobile home park. *Compare* A.G. No. 86-00299 (interpreting a similar statute applicable to municipal planning commissions that only used the word “sale” and not “lease” in its statutory definition of “subdivision,” leading the Attorney General to conclude that mobile home parks were not subject to regulation).
- The definition also includes multifamily development such as apartments or condominiums. See *Dyess v. Bay John Developers*, 13 So.3d 390 (Ala. Civ. App. 2007).

Under Ala. Code § 11-24-1(a)(4), “development” includes, but is not limited to:

- The design work of lot layout
- The construction of drainage structures
- The construction of buildings or public use areas
- The planning and construction of public roads
- The placement of public utilities

Under Ala. Code § 11-24-1(b), the county commission can regulate:

- The minimum size of lots
- The planning and construction of all public roads
- The planning and construction of drainage structures
- The proper placement of public utilities

The placement of utilities shall not be inconsistent with the requirements of the Southern Standard Building Code or state and federal laws and regulations. If the county commission requires the placement of public utility facilities in a manner other than the most economical method available from an engineering standpoint, the developer shall reimburse the utility for the difference in cost between the method required by the county and the most economical method available.

The authority to enforce subdivision regulations extends to both new developments and additions to existing subdivisions where the subdivisions are situated outside of the corporate limits of any municipality. Ala. Code § 11-24-1(b). However, subdivision regulations do not apply to construction or development of roads or buildings on agricultural property. Ala. Code § 11-24-1(a)(4). Additionally, Ala. Code § 11-24-4 provides that the subdivision regulation law shall not be interpreted to impair any right of eminent domain or other authority granted to public or private utilities by statutes, franchises, certificates of convenience and necessity, licenses, or easements.

- The county's authority exists even if the roads in the subdivision will remain private roads. See, *e.g.*, A.G. No. 97-00077.
- The county's subdivision regulations apply in an industrial park. A.G. No. 2012-047.
- The county's approval of a subdivision is not subject to restrictive covenants, which may be enforced by the private parties involved and not by the county. See A.G. No. 2006-063.

As discussed in more detail below, the county commission has authority to require the developer to file and post a reasonable surety bond with the county commission to guarantee that the actual construction and installation are in accordance with approved plans before actual sale, offering for sale, transfer, or lease of any lots. Ala. Code § 11-24-2(a). Additionally, the county commission may charge inspection fees not to exceed the actual costs of inspection. Ala. Code § 11-24-3(c).

## **2. Utilities**

Ala. Code § 11-24-4 provides that the law authorizing county regulation of subdivisions shall not be interpreted to impair any right of eminent domain granted by law to public or private utilities, nor their right to exercise authority conferred by statutes, franchises, certificates of convenience and necessity, licenses, or easements.

## **3. Board of Developers**

Ala. Code § 11-24-1(c) authorizes, but does not require, the county commission to establish a board of developers to make suggestions to the commission regarding the development and division of subdivisions. The board may advise the commission on the contents of the regulations and revisions that need to be made to the regulations. The board may also assist in resolving disputes between the commission and developers.

#### 4. Regulation within a Municipal Planning Commission's Planning Jurisdiction

As a general rule, if a county commission has adopted subdivision regulations, these regulations "shall apply to the development of subdivisions within the planning jurisdiction of a municipal planning commission outside the corporate limits of a municipality and shall be regulated and enforced by the county commission in the same manner and to the same extent as other subdivision development governed by the county's subdivision regulations." Ala. Code § 11-52-30(e)(1)a. Absent such county regulations, with certain exceptions, a municipal planning commission's authority to regulate subdivision development extends to the outer boundaries of its statutorily prescribed planning jurisdiction.

##### a. Municipal Planning Commission's Planning Jurisdiction

Pursuant to Ala. Code § 11-52-30(a)(2), beginning January 1, 2023, the planning jurisdiction of a municipal planning commission includes:

"[A]ll land located in the corporate limits of the municipality and all land not located in any other municipality within a mile and a half outside the corporate limits, unless extended by local law enacted after January 1, 2023, to include all land not located in any other municipality within three miles outside the corporate limits[.]"

However, Ala. Code § 11-52-30(a)(2) goes on to provide that:

"[I]n the case of any nonmunicipal land lying within the planning jurisdiction of more than one municipality having a municipal planning commission, the jurisdiction of each municipal planning commission shall terminate at a boundary line equidistant from the respective corporate limits of the municipalities."

While the planning jurisdiction of a municipal planning commission is altered by annexations, Ala. Code § 11-52-30(a)(3) provides that any alterations to a municipal planning jurisdiction based upon the annexation or de-annexation of property shall be effective only once a year on the first day of January for any annexation or de-annexation finalized on or before the preceding October 1.

It is important to note that, following the enactment of Act 2021-297, which effectively prohibited the extension of the police jurisdiction of municipalities beyond the boundaries of the police jurisdiction on January 1, 2021, the planning jurisdiction of a municipal planning commission does not necessarily cover the same territory as the municipality's police jurisdiction. For a further discussion of Act 2021-297, see Chapter Two.

##### b. County Regulation within the Municipal Planning Commission's Planning Jurisdiction

As noted above, Ala. Code § 11-52-30 provides that, *subject to certain exceptions*, if the county commission has adopted subdivision regulations, those regulations will generally apply within the planning jurisdiction of the municipal planning commission outside the corporate limits of the municipality and the county commission will be responsible for regulation and enforcement pursuant to those regulations. Ala. Code § 11-52-30(e)(1)a.

- The county's regulation and enforcement will be as provided in the county's subdivision regulations adopted pursuant to Ala. Code § 11-24-1 to -7.
- All penalties assessed will also be as provided in the county's regulations.
- If the county commission has not adopted subdivision regulations, the municipal planning commission shall have sole jurisdiction for subdivision development regulation and enforcement. Ala. Code § 11-52-30(f).

**c. Exceptions**

Ala. Code § 11-52-30 contains certain exceptions to the general rule that the county commission that has adopted subdivision regulations will regulate subdivision development in the unincorporated areas within the municipal planning commission's planning jurisdiction.

**i. Written Agreement Under Ala. Code § 11-52-30**

The county commission and the municipal planning commission may enter into a written agreement providing for the municipal planning commission to be responsible for regulation and enforcement. Ala. Code § 11-52-30(e)(1)b.1.

This agreement must be approved by resolution of the county commission, an ordinance of the municipal governing body, and a resolution of the municipal planning commission. Ala. Code § 11-52-30(e)(1)b.2.

Pursuant to Ala. Code § 11-52-30(e)(2), if the county commission has adopted subdivision regulations and the municipal planning commission has been unsuccessful in reaching an agreement with the county, the municipal planning commission shall discontinue the regulation of subdivisions outside of its corporate limits and shall cease levying any charges or fees relating to subdivision regulation within the planning jurisdiction.

The municipal planning commission must discontinue these activities no later than 24 months after receipt of written notice by the municipal planning commission from the county commission detailing that the county commission has adopted subdivision regulations.

**ii. Withdrawal of Jurisdiction by County Commission**

The county commission, by resolution, may withdraw jurisdiction over future subdivisions located in the municipal planning jurisdiction, effective six months after receipt of written notice by the municipal planning commission from the county commission detailing the adoption of the resolution.

After withdrawal by the county commission, the municipal planning commission may resume subdivision regulation and the levying of related charges or fees within its planning jurisdiction outside the corporate limits.

The county commission, no sooner than 24 months following withdrawal, may adopt a resolution to reinstate subdivision regulation in the municipal planning jurisdiction, effective six months after receipt of written notice by the municipal planning commission from the county commission detailing the adoption of the resolution.

The municipal planning commission shall then discontinue the regulation of subdivisions outside of its corporate limits and shall cease levying any charges or fees relating to subdivision regulation.

**d. Road Responsibility within Municipal Planning Commission's Planning Jurisdiction**

If the municipal planning commission accepts responsibility for the development of a subdivision within its planning jurisdiction, the county commission shall *not* accept any roads or bridges within the subdivision for county maintenance unless the county engineer certifies to the county commission that the road or bridge meets the minimum road and bridge standards of the county. Ala. Code § 11-52-30(i).

**e. Agreement between County and Municipality Under Ala. Code § 11-24-6**

Counties and municipalities still have the authority to reach an agreement regarding the exercise of jurisdictional authority over proposed subdivision developments. Ala. Code § 11-24-6.

- Any agreement must be with the municipality and not the municipal planning commission. See A.G. No. 2005-111.
- The agreement must be published once a week for two consecutive weeks in a newspaper of general circulation in the county and the affected municipality before it takes effect.

**B. STATUTORY REQUIREMENTS AND PROCEDURES**

**1. Proposed Plat Approval and Permit to Develop**

Ala. Code § 11-24-2(a) provides that, prior to beginning any construction or development, the owner or developer shall submit the proposed plat to the county commission for approval and obtain a permit to develop following approval.

The permit to develop must be obtained prior to the actual sale, offering for sale, transfer, or lease of any lots from the subdivision to the public and shall only be issued upon approval of the proposed plat by the county commission. Once the permit to develop has been issued, all construction must be completed in conformity with the statute and the county's regulations.

- A contract to sell lots prior to plat approval is void and will be unenforceable by the courts. See *Limestone Creek Developers v. Trapp*, 107 So.3d 189 (Ala. 2012).
- The fine for failure to properly obtain the permit to develop is \$1,000 per lot sold, leased, or offered for sale or lease. Ala. Code § 11-24-3(a).
- There is a limited exception to this rule where a developer receives authority from the county engineer to obtain "pre-sale agreements" prior to submission of the proposed plat. See Ala. Code § 11-24-2.1 and Section I, B, 7 below.

The county commission may require any of the following for approval of the proposed plat:

- Filing and posting of a surety bond to guarantee that the actual construction and installation are in accordance with approved plans.
- Names and addresses of each adjoining landowner and utility subject to notice of the application.

- A permit fee, not to exceed \$25.

No proposed plat shall be approved or disapproved by the county commission without first being reviewed by the county engineer or his or her designee, who shall certify to the commission whether the plat meets the county's regulations. If the county engineer determines that the proposed plat meets the regulations, it **shall** be approved by the county commission.

- The county engineer's approval of a subdivision plat evidences that it meets the county's regulations and is due to be approved by the county commission. A.G. No. 2005-077.
- If the county engineer certifies that the plat meets the county's regulations, the county commission has no authority to deny approval and must approve the plat. A.G. No. 98-00127; *see also Ex parte Pine Brook Lakes, Inc.*, 617 So.2d 1014 (Ala. 1992).

If the county engineer determines that the plat is deficient in any regard, he or she shall detail the deficiency to the county commission along with a recommendation that the development be disapproved.

- It is important that the county commission set forth sufficient standards to give applicants notice of what is required of them, and it cannot arbitrarily alter standards as applied to an applicant. *See Providence Park, Inc. v. Mobile City Planning Commission*, 824 So.2d 769 (Ala. Civ. App. 2001).

Plat approval requirements do not apply to the sale, deed, or transfer of land by the owner to an immediate family member. Ala. Code § 11-24-2(d). *See also* A.G. No. 2006-082. However, if there is a sale, deed, or transfer by the owner or immediate family member to someone other than an immediate family member, the subdivision regulations will apply. Ala. Code § 11-24-2(d).

- "Immediate family member" includes a person's spouse, parent, child, stepchild, adopted child, and sibling. A.G. No. 2007-010.

The approval of a subdivision plat does not constitute acceptance of the roads. *Baldwin County Commission v. Jones*, 344 So.2d 1200 (Ala. 1977). (*See* Chapter Two for detailed discussion of acceptance of roads by the county commission.)

## 2. Notice Requirements

Ala. Code § 11-24-2(b) provides that notice of the engineer's recommendation regarding approval of a proposed plat shall be sent to the owner or developer at least ten days before it is presented to the county commission.

- The notice shall be sent by registered or certified mail.

A similar notice must be mailed to the owners of land immediately adjoining the platted land as their names appear on the plats in the tax assessor's office and as their addresses appear in the directory or tax records of the county and to each utility affected.

- The Attorney General has opined that the purpose of this notice is to apprise adjoining property owners of the recommendation of the engineer and notice must be given of either a favorable **or unfavorable** recommendation. A.G. No. 98-00127.

- The Attorney General has also held that a municipal planning commission's failure to provide statutory notice to adjoining landowners invalidates the approval of a subdivision plat. A.G. No. 2001-045. It is likely that a similar finding would be made under the county's subdivision regulation law.

As previously mentioned, notice shall also be mailed to each utility affected.

- Each utility notified in writing by the commission shall be given at least ten days to review the proposed plat and submit a written report to the commission as to whether all provisions affecting the service to be provided by the utility are reasonable and adequate.
- If any utility affected by the plat is not properly notified, the approval or disapproval of the plat shall not be valid until the utility has been given at least ten days' notice.

### 3. Requirements of the Developer

Ala. Code § 11-24-2(a) provides that the owner/developer must have all construction completed in conformity with the statute and the county's regulations.

- Construction must be in accordance with current regulations in effect and not previously enacted regulations. A.G. No. 2003-089.

### 4. Final Plat Approval

Pursuant to Ala. Code § 11-24-2(c), once the owner or developer has met all of the county's requirements for the development, he or she shall submit the final plat to the county engineer for signature verifying that the subdivision meets the county's regulations.

### 5. Plat Approval within Municipal Planning Jurisdiction

Act 2012-297 altered the process for the county engineer to "approve" maps or plats of subdivisions developed within the municipal planning commission's jurisdiction prior to recording. Under Ala. Code § 11-52-30(j), if the county commission is responsible for regulating and enforcing subdivision development, the recording of any map or plat shall be governed by the county's subdivision regulations and Ala. Code §§ 11-24-1 to -7.

However, if the municipal planning commission is responsible for such regulation and enforcement, no map or plat shall be recorded (and no property shall be sold) until and unless approved by the municipal planning commission. Following this approval, the county engineer or his or her designee shall simply certify that the municipal planning commission has approved the plat for recording using specific language set out in Ala. Code § 11-52-30(k). This certification by the county engineer shall *not* constitute approval in lieu of or on behalf of any municipality. Ala. Code § 11-52-30(l). Nothing in Ala. Code § 11-52-30 shall be construed to grant the county commission or county engineer the authority to regulate subdivision development or approve maps or plats for any developments within the corporate limits of a municipality. Ala. Code § 11-52-30(p).

### 6. Recording of Plat

After the final plat has been signed by the county engineer, it shall be filed in the probate office.

See Ala. Code § 11-24-2(c).

- It is a violation of the subdivision regulations law for the developer to file or have filed any plat, deed, property description, or document of property transfer without full compliance with Ala. Code § 11-24-2.

## 7. Pre-Sale Agreements

The Alabama Legislature amended the subdivision regulation law in 2014 to allow a developer to obtain “pre-sale agreements” from prospective buyers under very limited circumstances. See Act 2014-332 and Ala. Code § 11-24-2.1. Under this provision, the county engineer may authorize the developer to obtain “pre-sale agreements” prior to submitting a proposed plat for approval if the developer can establish to the satisfaction of the county engineer that:

- The developer has a preliminary plan for the subdivision development that is likely to be approved under the county’s subdivision regulations; *and*
- The developer has explained to the satisfaction of the county engineer the reasons for requesting authorization to secure pre-sale agreements.

All pre-sale agreements executed under the authority of this section shall make clear that there can be no final sale until a permit to develop is obtained by the developer. Ala. Code § 11-24-2.1(c).

The general purpose for granting the developer authority to obtain “pre-sale agreements” is to aid him or her in efforts to obtain financing for or investments in the proposed development. Ala. Code § 11-24-2.1(b) requires that once the developer has received authorization to secure pre-sale agreements, he or she shall notify the county engineer in writing when financing has been obtained.

- If no such notification is received within six months of the date the authority is granted, the authority shall be revoked by the operation of law; and
- Once revoked, any further efforts to secure pre-sale agreements shall be a violation of the law punishable by fines as set out in Ala. Code § 11-24-3.

The developer may request from the county engineer an extension to allow the developer additional time to secure pre-sale agreements.

The law also clearly states that failure to comply with Ala. Code § 11-24-2.1 shall result in the county engineer revoking the authority granted to secure pre-sale agreements for the proposed development.

Additionally, the authorization to secure pre-sale agreements from prospective buyers of property included in a proposed subdivision development “shall in no way affect the developer’s requirement to comply with the county’s subdivision regulations and, in particular, to obtain the permit to develop as provided in Section 11-24-2 prior to the actual sale, offering for sale, transfer, or lease of any lots from the subdivision except as specifically authorized in [§ 11-24-2.1].”

## C. ENFORCEMENT OF REGULATIONS

### 1. Inspectors and Enforcement Officers

Ala. Code § 11-24-3(c) provides that the county commission may employ inspectors to see that its rules and regulations are not violated and that plans and specifications are not in conflict with those rules and regulations.

- As noted above, this section provides that the county commission may charge inspection fees not to exceed the actual costs of inspection, to be paid by the owners of the property inspected.

The county commission may also appoint county license inspectors to enforce the law and county regulations using the same authority granted to license inspectors to enforce revenue laws. See Ala. Code § 40-12-10 regarding the appointment and authority of license inspectors.

### 2. Issuance of Citations

The county license inspector has authority under Ala. Code § 11-24-3(d) to issue citations for the failure to properly obtain the permit to develop or for other violations of the law.

- The fine for any violation is \$1,000 per lot sold, offered for sale, transferred, or leased to the public. Ala. Code § 11-24-3(a).
- Subsequent citations may be issued if after 30 days the developer has still not properly applied for the permit to develop.
- All applicable fines shall be doubled and separately assessed against the owner or developer for each subsequent citation issued.

### 3. Injunctive Relief

The county commission may file a lawsuit to enjoin the developer or owner from action in violation of the county's regulations and may recover the penalties in court or file a suit to compel the owner or developer to comply with the law in the event that work on the subdivision has been completed. See Ala. Code § 11-24-3(b).

- In addition to injunctive relief, as a part of its suit, the county commission may recover penalties for violation as provided in Section 11-24-3(a), i.e., fines of \$1,000 per lot sold, offered for sale, transferred, or leased to the public.

## II. FLOOD-PRONE AREAS

The Legislature has declared in Ala. Code § 11-19-2 that there is a "clear and definite public need for a program to provide flood insurance coverage in flood-prone areas in the state." To this end and as discussed below, the Legislature has granted the county commission broad powers to control and regulate land use in flood-prone areas outside the corporate limits of a municipality. See Ala. Code §§ 11-19-1 to -24.

## A. STATUTORY PURPOSE AND DEFINITIONS

### 1. Purpose of Statute

Ala. Code § 11-19-2 states that the declared purpose of this Code chapter to provide each county a comprehensive land-use management plan for flood-prone areas by:

- Constricting the development of land exposed to flood damage in flood-prone areas;
- Guiding development of proposed construction away from locations threatened by flood hazards;
- Assisting in reducing damage caused by floods; and
- Improving long-range management and use of flood-prone areas.

### 2. Definitions

The following definitions set out in Ala. Code § 11-19-1 apply to this statute on flood-prone areas:

- **Flood or flooding:** The general and temporary condition of partial or complete inundation of normally dry land areas:
  - From the overflow of streams, rivers, and other inland waters; or
  - From tidal surges, abnormally high tidal waters, tidal waves, or rising coastal waters resulting from tsunamis, hurricanes, or other severe storms.
- **Flood-prone area:** Any area with a frequency of inundation of once in 100 years as defined by qualified hydrologists or engineers using methods that are generally accepted by persons engaged in the field of hydrology and engineering.
- **Land-use and control measures:** Zoning ordinances, subdivision regulations, building codes, health regulations, and other applications and extensions of the normal police power to provide safe standards of occupancy for prudent use of flood-prone areas.

## B. COUNTY COMMISSION AUTHORITY

### 1. Broad Discretionary Powers

Ala. Code § 11-19-3 provides that the county commission shall have broad authority to adopt zoning ordinances and building codes for flood-prone areas outside the corporate limits of any municipality in the county. Ala. Code § 11-19-3 specifically authorizes the county commission to do the following:

- Establish comprehensive land-use and control measures based on probable exposure to flooding. See Ala. Code § 11-19-4 regarding land use and control measures.
  - These include prohibiting inappropriate new construction or improvements in flood-prone areas and controlling land uses and elevations of all new construction within the flood-prone areas. Ala. Code § 11-19-4.

- The regulations may require that all improvements and developments in flood-prone areas provide adequate sewer and water systems that will not be adversely affected by flooding. A.G. No. 2000-039.
- The Supreme Court of Alabama has held that planning commissions are specifically authorized to prohibit inappropriate construction in the flood-prone areas through implementation of the land-use and control measures established under the broad authority conferred on county commissions. According to the Court, this means that while some development in flood-prone areas may be permitted as appropriate, development in such areas shall be denied where it is deemed by the relevant planning authority to be inappropriate. *Ex parte Baldwin County Planning and Zoning Commission*, 68 So.3d 133 (Ala. 2010).
- Establish building codes and health regulations covering all public and private construction and development as set out in Ala. Code § 11-19-6. *See also* A.G. No. 2000-039.
  - It is not necessary that the building code be the one specified in Ala. Code § 41-9-166. A.G. No. 2002-161.
- Provide standards of occupancy for the prudent use of flood-prone areas.
- Provide for the preparation of maps clearly delineating flood-prone areas and floodways in the county.
- Make necessary studies.
- Employ technical and advisory personnel, including a county planning commission. (See Section II, C below for further discussion of county planning commissions.)
- Adopt ordinances for the enforcement of regulations.
  - The Attorney General has held that the broad authority granted to the county includes the authority to require a utility to deny service until the applicant presents a building permit from the county commission. A.G. No. 81-00281.
  - However, the county has no authority until and unless it has adopted or established comprehensive land-use and control measures or building codes for flood-prone areas. *Jefferson County v. Johnson*, 333 So.2d 143 (Ala. 1976).
  - The authority is limited to imposing regulations for purposes of preventing flood damage. A.G. No. 83-00400.

## 2. Required Actions

Pursuant to Ala. Code § 11-19-7, in addition to the authority granted under Ala. Code § 11-19-3, any county commission participating in this program ***shall***:

- Require all persons, firms, corporations, and agencies to submit plans and specifications for proposed construction and development in flood-prone areas. (See Section II, D below for further discussion on this issue.)
- Issue permits where the plans and specifications meet the rules and regulations adopted by the county commission.

- No permits shall be required for placement of utility poles, lines, etc. or any utility facilities constructed pursuant to authority conferred by statutes, franchises, certificates of convenience and necessity, licenses, and easements.
- Charge reasonable issuance fees to be placed in a special fund for the enforcement of the county's flood-prone area management program.

Additionally, pursuant to Ala. Code § 11-19-19, any county commission participating in this program shall provide for the appointment of a board of adjustment to hear grievances, appeals, and requests for exceptions. The statute establishes procedures for appointment and operation of the board of adjustment and for appeals from the board.

### **3. Enforcement of Law**

Ala. Code § 11-19-21 authorizes appropriate legal action to prevent the violations of the county's subdivision regulations, building codes, or zoning ordinances adopted pursuant to Ala. Code §§ 11-19-1 to -24. The action may be filed to restrain, correct, or abate such violation, or to prevent the occupancy of any such building, structure, or subdivision of land or to prevent any illegal act, conduct, business, or misuse in or upon any premises regulated under the authority conferred under Ala. Code §§ 11-19-1 to -24.

Ala. Code § 11-19-22 provides that any person, company, or agency who fails to obtain required permits or who violates any other regulation, zoning ordinance, or building code shall be guilty of a misdemeanor and, upon conviction, may be fined not more than \$500.00 and/or imprisoned in the county jail for not more than one year.

## **C. COUNTY PLANNING COMMISSION**

### **1. Purpose and Creation**

Ala. Code § 11-19-10 provides that the purpose of the county planning commission is to:

- Make and maintain comprehensive surveys and studies of existing conditions and probable future developments in flood-prone areas; and
- To prepare comprehensive plans for physical, social, and economic growth as will best promote the public health, safety, and general welfare as well as efficiency and economy in the development of flood-prone areas in the county.

Ala. Code § 11-19-8 provides that the county commission may create the county planning commission by resolution and shall appoint the members of the commission.

- There shall be not less than five nor more than eleven members.
- The chairman of the county commission shall serve as an ex officio member of the planning commission.
- The county commission is specifically authorized to appoint one or more of its members to serve as members of the county planning commission.
- Appointments shall be for four-year terms.

## **2. Powers and Duties of the County Planning Commission**

Pursuant to Ala. Code § 11-19-10, the county planning commission is granted powers as appropriate to enable it to fulfill its functions and duties and has authority to:

- Promote public interest and understanding of the necessity for long-term, coordinated county planning.
- Confer and cooperate with federal, state, municipal, and other county and regional authorities for proper coordination of county development.
- Prepare and recommend a zoning ordinance and map for flood-prone areas to the county commission as provided in Ala. Code § 11-19-18. (See Section II, E for further discussion of zoning ordinances.)
- Prepare and recommend to the county commission subdivision regulations as set out in Ala. Code § 11-19-12. (See Section II, D for further discussion of subdivision regulations.)

## **D. SUBDIVISION REGULATIONS**

### **1. Purpose of Regulations**

Ala. Code § 11-19-5 provides that, in addition to land-use restrictions commensurate with the degree of the flood hazards in various parts of the flood-prone area, there shall be subdivision regulations as necessary to:

- Prevent the inappropriate development of flood-prone lands;
- Encourage the appropriate location and elevation of streets, sewers, and water systems and the reservation of adequate and convenient open space for utilities;
- Provide for adequate drainage so as to minimize exposure to flood hazards and to prevent the aggravation of flood hazards; and
- Require as necessary the minimum elevation of all new developments.

### **2. Procedures for Adoption**

Ala. Code § 11-19-11 provides that the county planning commission shall have the authority to prepare and submit proposed subdivision regulations to the county commission for adoption.

- The requirements for development of the subdivision regulations are set out in Ala. Code § 11-19-12.
- Prior to adoption of the regulation, there shall be a public hearing.
- Notice of the hearing shall be published in a newspaper of general circulation once a week for two consecutive weeks prior to the hearing.
- A copy of the proposed regulations shall be made available to interested persons prior to the hearing.
- A copy of the adopted regulations shall be certified to the office of the judge of probate.

### 3. Approval of Plats

Pursuant to Ala. Code § 11-19-13, following adoption of the subdivision regulations, no plat of a subdivision that lies within the flood-prone area shall be filed or recorded until it has been submitted to and approved by the county planning commission and such approval is entered in writing on the plat by the chairman and secretary of the planning commission.

Under Ala. Code § 11-19-14, the planning commission has 30 days from submission to approve or disapprove a subdivision plat and must state any grounds for disapproval.

- No action can be taken on a subdivision plat without notice and hearing as set out in Ala. Code § 11-19-14.
- Approval does *not* constitute acceptance by the public of any street or open space on the plat.
- If the planning commission fails to act on an application within 30 days, it shall be deemed approved unless the applicant waives this requirement and consents to an extension.

### E. ZONING

Ala. Code § 11-19-16 authorizes the county commission to divide the flood-prone area of the county into districts and provide standards relating to location, bulk, height, minimum elevation, size of buildings and other structures and spaces, density and distribution of population, and uses of buildings and land. See A.G. No. 2000-039.

The county commission may include adjacent non-flood prone areas in its territorial unit for a comprehensive zoning plan when necessary to accomplish the purposes and provisions of the statute. A.G. No. 87-00201.

#### 1. Preparation and Adoption of Zoning Plan

Ala. Code § 11-19-18 addresses the development and adoption of zoning ordinances. The planning commission is charged with preparing a zoning plan, including written ordinances and a map or maps showing district boundaries.

Ala. Code § 11-19-17 authorizes the planning commission to develop and certify a single zoning plan for all the territory of the area which lies within the jurisdiction of the county planning commission or separate and successive zoning plans for parts of the flood-prone area for which technical information is available or which for other reasons it deems appropriate as set out in that Code section.

Ala. Code § 11-19-18(a) provides that the planning commission may hold public hearings regarding the zoning plan and shall certify the zoning ordinance and map to the county commission.

- However, once the county commission receives the zoning ordinance and map from the planning commission, the county commission *shall* hold a public hearing on the proposed ordinance and map, after which it may adopt the plan as recommended, adopt it with modifications, or reject it.

## 2. Amendment of Plan

Ala. Code § 11-19-18(b) provides that the adopted zoning plan may be amended, modified, or repealed, but only after submission to the county planning commission and a public hearing.

- Ala. Code § 11-19-18(c) provides that the public hearing on amending the plan shall be advertised once a week for two consecutive weeks in a newspaper published in the county, with the first notice published not less than 15 days prior to the date of the hearing.
- Pursuant to Ala. Code § 11-19-18(c), the notice shall include the date, time, and location of the hearing and the location where the proposed amendments may be reviewed by the public.
- Ala. Code § 11-19-18(b) also states that if the planning commission makes no recommendation within 30 days after the amendment is referred to it, the amendment or modification is deemed to be favorably recommended. See A.G. No.2006-139.

## 3. County Board of Adjustment

Ala. Code § 11-19-19 authorizes the county commission to appoint a board of adjustment consisting of five members appointed to a three-year term. The appointments shall be made from residents of the county.

The board of adjustment shall, in appropriate cases, make special exceptions to the zoning ordinance or regulations in harmony with its general purposes and interests and rules adopted pursuant to the law. The board of adjustment shall have the following powers:

- To hear appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative body or official in the enforcement of the law or zoning ordinance;
- To hear and decide on requests for special exceptions to the terms or provisions of a zoning ordinance; and
- To authorize upon appeal in special cases such variance from the yard, open space, bulk, and height requirements of the ordinance as will not be contrary to the public interest, where appropriate as set out in the law.

Ala. Code § 11-19-20 provides for circuit court appeal of decisions of the board of adjustment.

## III. AIRPORT ZONING

Ala. Code §§ 4-6-1 to -15 provides for airport zoning by counties and municipalities in "airport hazard areas." Ala. Code § 4-6-3 states that the prevention and removal of airport hazards are public purposes for which political subdivisions, such as the county commission, may raise and expend public funds and acquire land or property interests therein.

"Airport hazard" is defined in Ala. Code § 4-6-2(2) as "[a]ny structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at any airport or is otherwise hazardous to such landing or taking-off of aircraft."

An "airport hazard area" is "[a]ny area of land or water upon which an airport hazard might be established if not prevented as provided in [the law]." Ala. Code § 4-6-2(3).

#### A. COUNTY AUTHORITY

Ala. Code § 4-6-4 authorizes counties and municipalities to adopt airport zoning regulations to prevent airport hazards within an airport hazard area within its zoning jurisdiction.

- The provisions of Ala. Code § 4-6-4 shall not apply to counties having a population of not less than 54,500 nor more than 56,000 according to the most recent (1970) federal decennial census.
  - The Attorney General's Office has held that this language eliminates only counties with a population between 54,500 and 56,000, and that counties with a population of less than 54,500 or more than 56,000 do have the authority to adopt airport zoning regulations. A.G. No. 2001-271.
- The zoning jurisdiction of the county is all unincorporated areas in the county, except within the police jurisdiction of any municipality and the area within two miles of an airport owned or operated by a municipality when said municipality exercises or declares its intention to exercise zoning control over these areas unless provided otherwise by local law.
- Ala. Code § 4-6-13 authorizes the county to acquire air rights or easements where necessary to effectuate the purposes of this law.
- Ala. Code § 4-3-10 exempts all airport authorities organized pursuant to Ala. Code §§ 4-3-1 to -24 from all zoning laws, ordinances, and regulations. See A.G. No. 2006-148.
- Airport authorities have the same zoning powers conferred under Ala. Code §§ 4-6-1 to -15 with respect to zoning of airports. Ala. Code § 4-3-10.

#### B. ADOPTION AND ENFORCEMENT OF REGULATIONS

The procedures for the adoption and enforcement of airport zoning regulations are set out in Ala. Code §§ 4-6-4 to -15.

- The county commission may create an airport zoning commission or utilize an existing planning commission to recommend boundaries. Ala. Code § 4-6-5.
- The county commission cannot act until it has received the final report of the planning commission.
- The procedures for adoption of the regulations, including notice and public hearing, are set out in Ala. Code § 4-6-6. The regulations must be reasonable. Ala. Code § 4-6-7.
- Ala. Code § 4-6-8 provides for permitting and variances.
- Ala. Code §§ 4-6-9 and -10 provide for administration and enforcement of regulations through an administrative agency.
  - Ala. Code § 4-6-11 provides for appeals from decisions of the administrative agency.
  - Ala. Code § 4-6-12 provides for correction or abatement of violations.

#### IV. BUILDING CODES

There are two general statutory provisions authorizing counties to adopt building codes: the Home Builders Licensure Law found at Ala. Code §§ 34-14A-1 to -20 and the law on the state minimum building

standards code found at Ala. Code §§ 41-9-160 to -167.

## **A. AUTHORITY UNDER HOME BUILDERS LICENSURE LAW**

Ala. Code §§ 34-14A-1 to -20 were enacted to provide for the licensure of persons engaged in home building, private residence construction, and home improvement industries; to establish an Alabama Residential Building Code; to provide guidance, assistance, promotion, and support for code inspections of residential construction; and to support education within the construction trades and construction inspections. The Legislature recognized that “significant harm to the public may result from the provision of inadequate, unsafe, or inferior building services by unqualified, incompetent, or dishonest home builders and remodelers.” Ala. Code § 34-14A-1.

The Home Builders Licensure Board, which is responsible for licensing and enforcement of the standards and requirements for licensing and home building, is created under Ala. Code § 34-14A-3. Effective October 1, 2024, the Home Builders Licensure Law was amended by Act 2024-443, most notably to authorize the Board to adopt two statewide codes: the Alabama Residential Building Code and the Alabama Residential Energy Code. A local building code adopted by a county after January 1, 2027, must meet these codes’ minimum standards but cannot exceed the provisions of the Alabama Residential Energy Code unless local conditions or compliance with a federal mandate requires it. Ala. Code § 34-14A-12(a) and (b).

The Home Builders Licensure Law was previously amended in 2006 (Act 2006-105). While most of the changes did not affect the county’s authority under the law, it did repeal the law allowing counties with a population of less than 30,000 to be exempt from the provisions of this law. Washington County was the only remaining county exempt at the time of passage of this act.

### **1. Scope of County’s Authority**

Ala. Code § 34-14A-12 provides that the county commission may, by resolution, adopt building laws and codes to apply in the unincorporated areas of the county.

- Authority within Unincorporated Areas (other than Municipal Police Jurisdictions)
  - The county commission shall provide a copy of the resolution to the Home Builders Licensure Board within 10 business days of adopting the resolution.
  - The local building law or code may not take effect until 120 days after the resolution was adopted. However, in the case of an insurance claim requiring work and activities for which a license is required by this law, the effective date for the building law or code shall be the date of adoption by the local jurisdiction.
- Authority within Incorporated Areas: The building laws and codes may apply within the corporate limits of a municipality only with the express consent of the governing body of the municipality.
- Authority within Municipal Police Jurisdictions
  - The building laws and codes of the county commission may be enforced within a municipality’s police jurisdiction outside of the municipality’s corporate limits as provided in Ala. Code § 11-40-10(b)(2).

- If the county is not enforcing building laws and codes within the police jurisdiction of a municipality, the municipality may continue the enforcement of ordinances regulating the construction of buildings in the area of its police jurisdiction, if such ordinances were in effect and being enforced on January 1, 2021.
- A county commission or municipality shall provide to the Home Builders Licensure Board a copy of any resolution, ordinance, or agreement adopted pursuant to Ala. Code § 11-40-10(b)(2) within 10 business days of its adoption.
- The county or the municipality may subsequently terminate an agreement made pursuant to Ala. Code 11-40-10(b)(2). However, the termination may only take effect 24 months after receipt of written notice by the non-waiving body from the waiving body detailing the adoption of the ordinance or resolution.
- Enforcement
  - The county commission may employ building inspectors to see that its laws or codes are not violated and that plans and specifications for buildings are not in conflict with the county's building code.
  - The county commission may also exact fees to be paid by owners of property inspected.
  - The county commission, by resolution, may discontinue its administration and enforcement of the building laws and codes. However, the discontinuation shall not take effect until 120 days after the resolution was adopted. The county commission shall provide a copy of the resolution to the Home Builders Licensure Board within 10 business days of adopting the resolution.
  - The county commission may condemn buildings or structures dangerous to the public, may prohibit the use of such buildings, and may abate such buildings as a nuisance.
    - Counties can abate nuisances using the same authority and procedures municipalities utilize pursuant to Ala. Code §§ 11-53A-20 to -26.
    - The Attorney General has held that the term "structure" as used in the nuisance abatement statute for municipalities includes mobile homes and trailers. This would likely apply here, as well. A.G. No. 2004-162.
  - The county commission may enter into agreements, compacts, and contracts for the administration and enforcement of building laws and codes. The county commission must provide a copy of the mutual agreement, compact, or contract to the Home Builders Licensure Board within 10 business days of its execution.

## 2. Permit Issuance

Pursuant to Ala. Code § 34-14A-13, the building official charged with the duty of issuing building permits in the county has a duty to:

- Refuse to issue a permit for any undertaking requiring a license under Ala. Code §§ 34-14A-1 to -83 unless the applicant has furnished evidence that he or she is either licensed or exempt.
- Report any person violating the law to the Home Builders Licensure Board.
  - The licensing requirements and exemptions are set out in Ala. Code §§ 34-14A-5 to -8.
  - Local governments do not have the authority to charge state agencies permit and inspection fees. See A.G. No. 2002-119.

## B. MINIMUM BUILDING STANDARDS CODE

Ala. Code § 41-9-166 provides that any county commission may, by resolution, adopt and enlarge the applicability of any model building code published by the Southern Building Code Congress International and the National Electrical Code published by the National Fire Protection Association. Municipalities are granted the same authority under this section.

Prior to adoption, the county commission shall publish notice that it proposes to adopt a code. The notice shall be posted in a county newspaper once a week for four weeks and posted at the courthouse door.

- There is no requirement for the county to advertise or post the code itself.
- The Attorney General's Office has held that counties and municipalities are not limited to adoption of the building code specified in Ala. Code § 41-9-166. A.G. No. 2002-161.

Changes in the building code by the state building commission (now the Division of Construction Management within the Alabama Department of Finance) may similarly be adopted by the county. The county cannot apply the building code to state buildings and construction of public schoolhouses. See A.G. Nos. 2004-165 and 2002-119.

Model building codes adopted by the county shall only apply to structures and facilities on the customer's side of the electric meter and not to any electric power generation, transmission, or distribution facilities on the electric service provider's side of the electric meter.

The Attorney General's Office has offered guidance on adoption and enforcement of building codes by local governments. Some examples are set out below:

- In opinions addressing regulations of the State Fire Marshal, the Attorney General has held that a municipal ordinance can be enhanced and more restrictive than the regulations of the Fire Marshal, but it cannot conflict with or be less restrictive than those regulations. A.G. Nos. 92-00305 and 89-00340. Although these opinions deal with municipal ordinances, the same opinion would likely be issued to a county, particularly considering that municipalities have broader authority than counties to regulate in this and other land use areas.
- The county can enlarge the applicability of the state's building code to coastal structures but cannot promulgate or adopt additional regulations. A.G. No. 99-00176.
- Counties have general authority to adopt building codes under Ala. Code §§ 34-14A-12, -3, and -6, and are not limited to the adoption of the building codes specified in Ala. Code § 41-9-166. A.G. No. 2002-161.
- The Attorney General has held that the county may enact codes related to inside plumbing for and may perform inspections of inside plumbing in unincorporated areas of the county, but where county regulations conflict with those of the health department, the health department's regulations control. A.G. No. 2005-170.

## V. THE ALABAMA LIMITED SELF-GOVERNANCE ACT

The Alabama Limited Self-Governance Act (found at Ala. Code §§ 11-3A-1 to -7) authorizes the county commission to establish programs to abate certain health and safety nuisances in the unincorporated areas of the county if the power to adopt such ordinances is approved by voters in the unincorporated areas of the county at a referendum held in conjunction with a primary, general, or special election called for another purpose. See Ala. Code § 11-3A-5. If the county obtains these powers through local referendum, Ala. Code § 11-3A-2(a) provides that it can establish programs for the abatement of the following nuisances pursuant to procedures set out in the law:

- Weeds
- Animal nuisances
- Litter and rubbish
- Junkyards
- Noise
- Unsanitary sewage
- Pollution

### A. LOCAL REFERENDUM PROCEDURE

Pursuant to Ala. Code § 11-3A-2(b), the local referendum to grant the county commission these powers may be called in one of two ways:

- Upon resolution adopted by a majority of the county commission members; or
- Upon verification of a petition signed by 10% of the qualified voters of the county who reside in the unincorporated areas of the county.

Ala. Code § 11-3A-5 states that an election authorized under the Limited Self-Governance Act can only be held once every 48 months, which means that if the referendum fails, the county will not be able to try again for four years.

### B. ADOPTION AND ENFORCEMENT OF ORDINANCES

If the referendum passes in a county, the county commission may adopt ordinances to abate these nuisances under procedures set out in Ala. Code § 11-3A-3. The county is not required to adopt any ordinances and may pass ordinances on all, some, or none of the issues authorized in the law.

Some of the most important provisions related to the adoption and administration of ordinances under the Limited Self-Governance Act are as follows:

- Notice of consideration of any proposed ordinance must be posted at least 30 days before being considered at a county commission meeting.
- The county may hold a separate public hearing prior to adoption of any ordinance.
- All ordinances must be passed at a regularly scheduled commission meeting.
- The county commission may establish and enforce administrative and civil penalties, including fines, for the enforcement of ordinances.

- The fines shall not exceed one hundred fifty dollars (\$150) per day.
- Each day the violation continues shall constitute a separate offense, but the total fine shall not exceed five thousand dollars (\$5,000).
- All ordinances must include an appeals process allowing review before the county commission prior to a matter going to any court of law. Ala. Code § 11-3A-2(c).

#### C. REPEAL OF SELF-GOVERNANCE POWERS

The Limited Self-Governance Act includes a process for the voters to petition for a vote on repealing the powers granted in a previous referendum. Ala. Code § 11-3A-6. As with the passage of the referendum to authorize the powers, the referendum on appeal can only be held in conjunction with a primary, general, or special election called for another purpose.

- Since Ala. Code § 11-3A-5 provides that an election authorized by law cannot be held more often than once every 48 months, a referendum for repeal cannot be held until the powers have been in place for at least four years.

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# Governmental Agencies, Boards & Authorities

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# CHAPTER TEN

## GOVERNMENTAL AGENCIES, BOARDS, AND AUTHORITIES

There are several agencies in Alabama that have a direct or indirect relationship to county government and impact, to some extent, the work of the county engineering department. Additionally, there are many statutes that specifically provide for and address various county boards and authorities that serve a quasi-governmental purpose or involve or affect county government in areas overseen to some extent by the county engineer.

A detailed discussion of these agencies and boards is beyond the scope of this manual. However, a listing of some of the agencies and statutory provisions with which the county engineer may have some contact — except the Alabama Department of Transportation, which is outlined separately in Chapter Five — are set out below.

### I. INDUSTRIAL AND ECONOMIC DEVELOPMENT

Ala. Code § 11-3-11(a)(19) authorizes the county commission to set aside, appropriate, and use county funds or revenues for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories, and other industries in the county. It is also authorized to enter into contracts with any person, firm, corporation, or association to carry out these purposes.

The Attorney General's Office has consistently interpreted this Code section, among others, as granting very broad powers to the county commission in the area of industrial and economic development. *See, e.g.*, A.G. No. 2006-137; 94-00264; and 86-00087. *Cf.* A.G. No. 98-00094 (holding that the county commission may donate property to the industrial development board, but that it has no control over the expenditure of funds by the industrial development board).

There are also several statutory provisions specifically providing for and setting out the powers of industrial and economic development boards aimed at the promotion and retention of industrial and economic development in the state. *See, e.g.*, Ala. Code §§ 11-20-30 to -50 (county industrial development boards); §§ 11-23-1 to -8 (county industrial parks); §§ 11-92-1 to -11 (county or municipal industrial parks); §§ 11-92A-1 to -23 (county industrial development authorities).

#### A. STATE AGENCIES

##### 1. Alabama Department of Economic and Community Affairs

Ala. Code §§ 41-23-1 to -281.

## 2. Alabama Department of Commerce

Ala. Code §§ 41-29-1 to -507 (formerly the Alabama Development Office).

- Ala. Code § 11-85-40 authorize this department, along with regional planning commissions and municipal and county planning commissions, to perform comprehensive advisory planning, research, and other services for urban areas in the state, counties, and municipalities.

## 3. State Industrial Development Authorities

Ala. Code §§ 41-10-20 to -32 provide for the creation of state industrial development authorities to promote industrial development in the state.

### B. COUNTY BOARDS AND AUTHORITIES

#### 1. Industrial Development Boards

There are several Code sections authorizing the creation of industrial parks and boards in the county:

- a. Ala. Code §§ 11-20-30 to -50 provide for the incorporation and powers of an industrial development board in the county to promote industry, develop trade, and further the use of agricultural products and natural and human resources of the state.
  - i. A county cannot incorporate one entity to serve as both an industrial development board and a public building authority. A.G. No. 99-00119.
- b. Ala. Code §§ 11-92A-1 to -23, similarly, authorize the formation of county industrial development authorities, referred to in § 11-92A-2 as "independent public corporations having as their general purposes the promotion of industrial development and having the power to issue bonds."
- c. Municipal industrial development boards are provided for in Ala. Code §§ 11-54-80 to -101.

#### 2. Industrial Parks

Ala. Code §§ 11-23-1 to -8 allow any person, firm, or corporation to petition the county commission to have an industrial park designated wholly within the boundaries of the county and outside of any municipality.

- Ala. Code § 11-23-6 provides that industries within the industrial park are responsible for maintaining the facilities and for some services usually provided by local government.
- Ala. Code § 11-23-4 provides that once an industrial park has been designated, no facilities that are not industrial in nature can be located in the area.
- Ala. Code § 11-23-6(b) provides that a county industrial park cannot be subject to municipal annexation or be considered part of a municipal police jurisdiction.
- The county's subdivision regulations apply within an industrial park. A.G. No. 2012-047.

Ala. Code §§ 11-92-1 to -11 authorize a county or municipality to acquire and develop an industrial park by itself or together with other participants.

## II. UTILITIES AND SERVICES

### A. WATER, SEWER, AND FIRE PROTECTION

#### 1. Water, Sewer, and Fire Protection Authorities

Ala. Code §§ 11-88-1 to -21 provide for the creation and operation of independent water, sewer, and fire protection authorities within the county in areas where there are not adequate services for water, sewer, or fire protection.

- Of particular interest to the county engineer, and as discussed in *Chapter Three*, these authorities are granted use of the county right of way with the consent of the county governing body, subject to regulations established by the county and applied uniformly to all such authorities. Ala. Code § 11-88-14.
- A sewer authority does not have general regulatory authority over sewers in subdivisions. Its regulatory power is limited to rules governing the use of any sewer system owned or controlled by the authority. A.G. No. 2009-049.
- These authorities do not have the power to compel use of their sewer services. Counties are specifically authorized to require that properties be connected to their sewer systems under Ala. Code § 11-3-11(a)(15). A.G. No. 2009-049.
- These authorities do not have the power to require a developer installing a sewer system in a subdivision to dedicate the system to the Authority. A.G. No. 2009-049.
- A water authority's jurisdiction is not exclusive. A.G. No. 2009-035.
- A water authority may extend its services to the service area of another water authority if the county commissions of the areas proposed to be served make findings that there is no public water system adequate to serve the area. A.G. No. 2009-035.

#### 2. Water, Sewer, Solid Waste Disposal, and Fire Protection Districts

Ala. Code §§ 11-89-1 to -19 authorize the creation of water, sewer, solid waste disposal, and fire protection districts to provide these services in member counties and municipalities.

Ala. Code § 11-89-14 grants these districts the use of public rights of way without prior approval of the county (or other) governing body but does require the district to restore all roads and rights-of-way where work is done at its expense.

### B. WATERWORKS PLANTS OR DISTRIBUTION SYSTEMS

Ala. Code §§ 11-21-1 to -4 authorize a county to purchase or acquire and operate a waterworks plant or distribution system located in the county.

### C. UTILITY SERVICE FACILITIES

Ala. Code §§ 11-97-1 to -27 provide for additional and alternative methods of providing for the construction and improvement of certain utility services, which are defined in § 11-97-2(24) as any services for:

1. The collection, treatment, and delivery of water; and
2. The collection, treatment and disposal of sewage, wastewater, industrial effluent, or other fluid waste.

### D. SOLID WASTE AUTHORITIES

Ala. Code §§ 11-89A-1 to -25 authorize the creation of solid waste authorities by counties and municipalities under the procedures set out in the chapter. The “legislative findings” in Ala. Code § 11-89A-1 setting out the need and purpose for these authorities states, in relevant part, the following:

[I]n order to provide for the collection and disposal of solid waste and to encourage planning of solid waste collection and disposal service and resource recovery through the development of systems for the recovery of material or energy from solid waste, it is necessary and desirable to authorize the creation by counties and municipalities (or any two or more thereof) in the state of authorities which will have the power to issue and sell bonds and notes and using the proceeds of such bonds and notes to acquire and construct such facilities.

See also Ala. Code § 22-27-1 to -18 (the “Solid Wastes and Recyclable Materials Management Act”), which authorize counties to provide solid waste programs for its residents, including the authority to require mandatory participation in such programs. See, *in particular*, Ala. Code §§ 22-27-3 and -5.

### E. 8-1-1 AND THE UNDERGROUND DAMAGE PREVENTION AUTHORITY

Ala. Code §§ 37-15-1 to -11 provide requirements for notification and precautions to avoid damage to underground utility facilities by excavation or demolition activities. The definition of “excavate” or “excavation” in Ala. Code § 37-15-2(1) excludes routine roadway maintenance activities if all of the following requirements are met:

- The activities occur entirely within the right-of-way of a public road, street, or highway.
- The activities are carried out with reasonable care so as to protect any utility facilities placed in the right-of-way by permit.
- The activities are carried out within the limits of any original excavation on the traveled way, shoulder, or drainage ditches of a public road, street, or highway.
- If involving the replacement of existing structures, including traffic control devices, the activities replace such structures in their approximate previous locations and at their approximate previous depth.

Ala Code § 37-15-3 prohibits excavation, blasting, or demolition activities in any street, highway, public easement, private easement, or implied easement of a facilities operator, or in proximity of an operator's underground facilities, without first ascertaining the location of underground facilities. Before excavation, notification must be made to the statewide One-Call Notification System (8-1-1) pursuant to the requirements provided in Ala Code § 37-15-4. *But see* Ala Code § 37-15-7 (concerning emergency excavation or demolition).

Following notification, each operator with underground facilities in the area shall mark the approximate location of their underground facilities in the appropriate colors. Ala Code § 37-15-6. Damage to an underground facility must be reported to its operator or the One-Call Notification System immediately upon discovery of such damage. Ala. Code § 37-15-9.

Enforcement, penalties, and training are administered by the Underground Damage Prevention Authority created under Ala Code § 37-15-10.1. Alabama county engineers have an appointment to the Authority's board.

More information about the Alabama Underground Damage Prevention Authority may be found at [aludpa.org](http://aludpa.org). More information about the One-Call Notification System can be found on the Alabama 8-1-1 website: [www.al811.com](http://www.al811.com).

### III. ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

The Alabama Department of Environmental Management (ADEM) is created and governed by the provisions of Ala. Code §§ 22-22A-1 to -17. In enacting this law, the Legislature found that the resources of the state must be managed in a manner compatible with the environment, and the health and welfare of the citizens of the state. To respond to the needs of its environment and citizens, the Legislature found that the state must have a comprehensive and coordinated program of environmental management. Ala. Code § 22-22A-2.

The agency is headed by a director appointed by the Environmental Management Commission established in Ala. Code § 22-22A-6. The director serves at the pleasure of the Commission. See Ala. Code § 22- 22A-4.

#### A. GENERAL AGENCY POWERS AND AUTHORITY

The general powers and responsibilities of ADEM are set out in Ala. Code § 22-22A-5. Some of ADEM's duties that are of particular interest to county engineers are to:

1. Administer appropriate permitting, regulatory and enforcement functions.
2. Promulgate rules, regulations, and standards to carry out the provisions and intent of the environmental management laws, coordinating with the Alabama Department of Public Health where necessary and prescribed by law.
3. Serve as the state agency responsible for administering federally approved or federally delegated environmental programs.
4. Serve as the state's clearinghouse for environmental data.
5. Develop, conduct, and disseminate education and training programs.

6. Establish and maintain regional or field offices to provide more effective and efficient services to the citizens of the state.
7. Issue, modify, suspend, or revoke orders, citations, notices of violation, licenses, certifications, or permits.
8. Hold administrative hearings relating to any provision of the law or its administration.
9. Enforce all provisions of the law.
10. Apply for, accept, receive, and administer grants or other funds from public and private agencies, including the federal government, for the purpose of carrying out any of the functions, purposes, or provisions of the law.
11. Adopt rules and regulations relating to charging and collecting fees sufficient to cover the reasonable anticipated costs incurred by the department and directly related to the issuance, reissuance, modification, or denial of any permit, license, certification, or variance.

County engineers have regular involvement with ADEM, particularly in the areas of pollution control and waste management and remediation programs.

#### **B. SOLID WASTE PLANS**

One area in which ADEM and county government work very closely is the development and periodic revision of the county's "10-year" solid waste plan, required under Ala. Code §§ 22-27-40 to -49. *See, in particular*, Ala. Code § 22-27-47, regarding local plans. These plans — originally required to be submitted to and approved by ADEM in 1991 — are supposed to be revised and submitted to ADEM:

1. At least three years prior to the time all remaining available permitted capacity for the jurisdiction will be exhausted; or
2. When otherwise required by the department.

ADEM has generally required a revised or updated plan every 10 years. County engineers (and the regional planning commissions discussed in *Section VI, B* below) are typically involved in the development of the revisions to these county plans.

### **IV. EMERGENCY MANAGEMENT**

#### **A. ALABAMA EMERGENCY MANAGEMENT ACT**

Ala. Code §§ 31-9-1 to -140 create the state emergency management agency (AEMA), and sets out the powers of the agency, its director, and the governor in relation to emergencies within the state.

In addition, this act authorizes and directs each political subdivision in the state (including county commissions) to establish a local organization for emergency management in accordance with the state emergency management plan and program. *See*, Ala. Code § 31-9-10.

Among the duties of the Governor (as carried out by AEMA) under this statute, Ala. Code § 31-9-6(2) requires:

[A] comprehensive plan and program for the emergency management of this state, such plan and program to be integrated and coordinated with the emergency management plans of the federal government and of other states to the fullest possible extent, and to coordinate the preparation of plans and programs for emergency management by the political subdivisions of this state, such plans to be integrated into and coordinated with the emergency management plans and programs of this state to the fullest possible extent.

County engineers, working with the county emergency management agency director, play an important role in developing and implementing these comprehensive emergency plans for the county and provide front-line aid in the aftermath of a disaster affecting the county road system and other infrastructure. The county engineer also works closely with AEMA and the Federal Emergency Management Agency (FEMA) in ensuring disaster recovery and response is conducted under the federal and state requirements for reimbursement of costs.

#### **B. 9-1-1 DISTRICTS**

Ala. Code §§ 11-98-1 to -16 authorize the creation of an emergency communications district (9-1-1 districts) by resolution of a municipality or county. The act provides for the creation of a 9-1-1 board and sets out the procedures for establishing and providing 9-1-1 service in the designated district.

One of the more significant sections of this law for counties, and in particular, for the county engineer is Ala. Code § 11-98-6(d), which provides that the 9-1-1 board and the governing body of the county or city affected by the district “shall be jointly responsible for purchasing and installing the necessary signs to properly identify all roads and streets in the district.” See A.G. No. 2001-079.

- 9-1-1 funds may be used to establish a common address and location identification program, which may include the development of appropriate maps. A.G. No. 93-00136.
- Replacement of street signs is the joint responsibility of the county commission and the local 9-1-1 Board, although the local 9-1-1 Board is not responsible for maintenance of the signs. A.G. No. 2006-051.

Ala. Code § 11-98-4.1 creates the Statewide 9-1-1 Board. The Statewide Board is responsible for administering the 9-1-1 Fund, collecting the statewide 9-1-1 charge, and distributing monthly revenues to local 9-1-1 districts. Ala. Code §§ 11-98-5 and -5.2.

#### **C. ALABAMA LAW ENFORCEMENT AGENCY**

In 2013, the Legislature created the Alabama Law Enforcement Agency (ALEA) to coordinate public safety in the state. See Ala. Code § 41-27-1 to -63. The Alabama Department of Public Safety and the Alabama Bureau of Investigations are divisions of ALEA. The statutory duties and responsibilities of the Department of Public Safety (including traffic control and accident investigation) are generally found in Ala. Code §§ 32-2-1 to -11. The Director of the Department of Public Safety is now appointed and supervised by the Secretary of ALEA and that agency's programs now fall under the direction of ALEA. Ala. Code § 41-27-6.

Alabama Department of Homeland Security, which is also part of ALEA, is responsible for coordinating

homeland security activities, response, and funding. This agency oversees and directs all governments and emergency agencies in homeland security preparedness and emergencies. See Ala. Code §§ 31-9A-1 to -16. When ALEA was created in 2013, the duties of the Homeland Security Advisor were transferred to the Secretary of ALEA. Ala. Code § 41-27-2(d). The Secretary may appoint a designee to serve as Homeland Security Advisor. Ala. Code § 41-27-2.1.

## V. PARKS AND RECREATION

Ala. Code §§ 11-22-1 to -19 authorize counties to create a public park and recreation board to acquire, enlarge, improve, expand, own, operate, lease, and dispose of properties to promote public interest and participation in sports, athletics, and recreational activities and to provide or improve public parks in this state, including all buildings, facilities, and improvements.

Ala. Code §§ 11-86-1 to -6 also provide for the creation of a recreation board in any county or in any municipality with a population of not more than 100,000 to direct, supervise, and promote recreation programs "as will contribute to the general welfare of the residents of the county or municipality." Ala. Code § 11-86-3.

- The population limitation applies only to municipalities. Any county may create a recreation board. A.G. No. 92-00183.

## VI. REGIONAL PLANNING AND DEVELOPMENT

Ala. Code §§ 11-85-1 to -73 provide for the creation and operation of regional planning and development commissions upon petition to the Governor by a municipal planning commission, a county commission, or 100 citizens. If the commission is authorized, it may make, adopt, amend, extend, and add to a master regional plan for the physical development of its region. There are currently twelve regional planning and development commissions within the state that provide a variety of services to local governments and regional areas of the state.

### A. GENERAL POWERS AND DUTIES

Ala. Code § 11-85-23 sets out the powers and duties of regional planning commissions, which are summarized as follows:

1. To perform comprehensive advisory planning and research for the region, including those areas extending into adjoining states in instances and situations where such planning and related activities for such bi- or multi-state areas may be authorized by compact or otherwise;
2. To provide planning assistance, upon request duly evidenced by ordinance or resolution, to
  - a. Any city, other municipality or county;
  - b. Any group of adjacent communities, incorporated or unincorporated, having common or related urban planning or development problems; or
  - c. Any other regional planning agency;
3. To apply for and accept and utilize grants and assistance from the federal government or from any other public or private source that may legally make such grants or afford such other assistance; and
4. To contract with the federal government or with private or public sources that may legally contract as to such planning to receive advances or progress payments.

## B. SOLID WASTE PLANS

In addition to the general powers and authorities set out above, the regional planning commissions play a statutory role in the review and development of county solid waste plans. Ala. Code § 22-27-46 required regional planning commissions to “prepare and adopt a regional needs assessment evaluating solid waste management needs in their respective regions” prior to the development by counties and municipalities in 1991 of their initial local solid waste plans as required by Ala. Code § 22-27-47. While it is not routinely done, Ala. Code § 22-27-46 also requires that this assessment be revised and submitted to the Alabama Department of Environmental Management and local governments in the region annually. *See Section III, B above for further discussion of solid waste plans.*

More information about available programs can be found from the website of the Alabama Association of Regional Councils: [www.alarc.org](http://www.alarc.org).