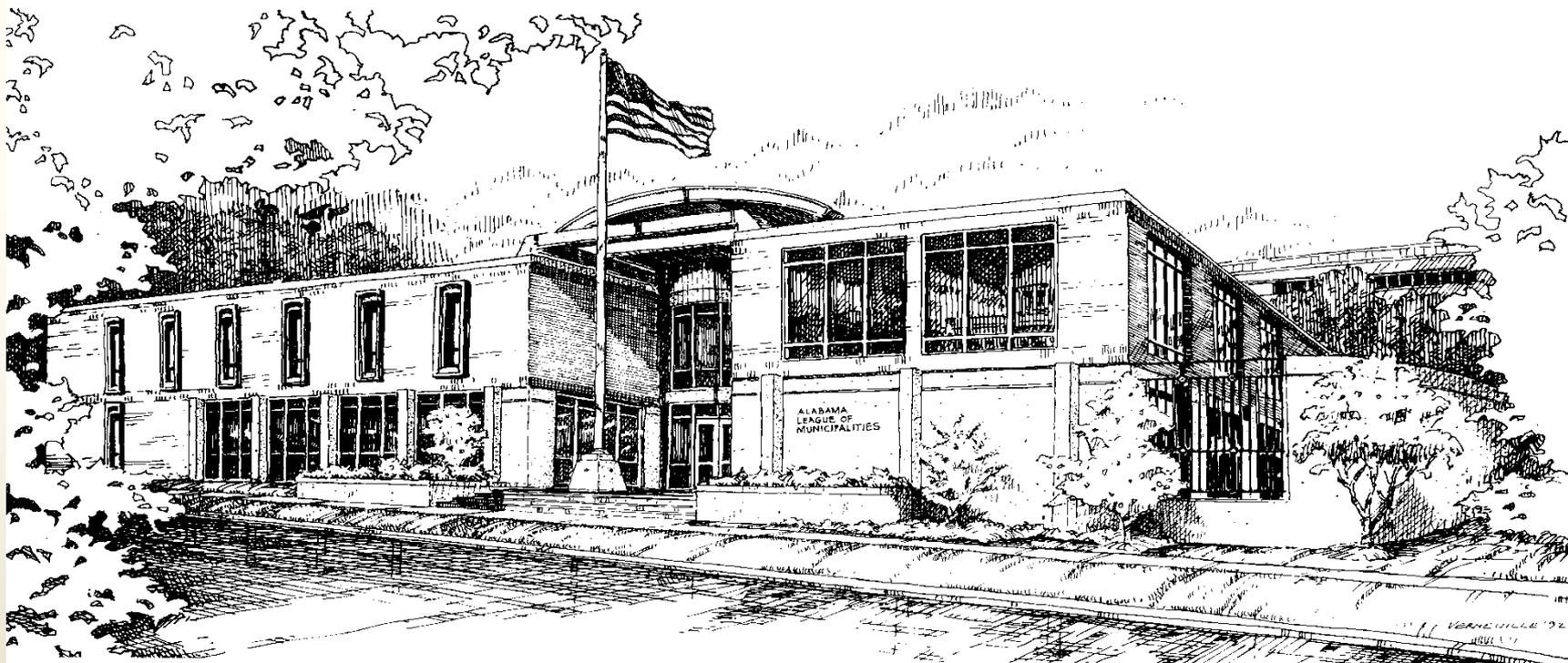




Legal/Legislative Update



Serving Alabama's Municipalities since 1935

Utility Facilities on Municipal Property



Who Regulates?

Utility Company's use of Municipal Streets

City of Wetumpka v. Alabama Power Company

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **City creates revitalizing plan for historic downtown business district.**
 - **Objectives:**
 - **Improve flow of pedestrian and automobile traffic,**
 - **Pedestrian handicap access,**
 - **Shade and shelter for weather,**
 - **Attractive appearance,**
 - **Reinforce historic character of downtown**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **City plan - overhead utility facilities located in streets and sidewalks**
 - **Undergrounded or relocated**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

➤ **Plan's Purpose:**

- **Remove barriers to improve traffic flow**
- **Preserve historic characters**
- **Maintain modern requirements for functioning of business district**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

➤ **Municipal Ordinance**

- **Mandates overhead utility facilities are prohibited on streets downtown,**
- **All utility companies having poles, lines or systems in ROW**
- **Of the block of historic downtown**
- **Shall relocate them underground or elsewhere**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

➤ **APCO**

- **Would not comply with ordinance, unless**
- **City reimbursed APCO for relocation expenses**
 - **Prior to scheduling the work**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **AT&T: Responded that city ordinance is unlawful and invalid**
- **Charter:**
 - **Acknowledged certain obligations pursuant to franchise agreement**
 - **declined to proceed**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **City filed Complaint for Declaratory Judgment in Elmore County Circuit Court on June 20, 2017.**
- **APCO & AT&T filed**
 - **AT&T: Seeking declaratory judgment that Ordinance is invalid**
 - **APCO: Motion to Dismiss for Lack of Subject Matter Jurisdiction**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **APCO: a consumer rates case**
 - **Ordinance would require APCO to bear costs,**
 - **Would directly impact consumer rates**
 - **Alabama Public Service Commission (“PSC”) has jurisdiction**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **Circuit Court grants APCO's Motion on May 21, 2018.**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **Concluded PSC has exclusive jurisdiction to determine validity of a municipal ordinance**
 - **Requiring relocation of utility systems from local streets and ROWs**
 - **Deemed necessary for safety and convenience**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Facts:

- **City appealed to the Alabama Supreme Court**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Issue:

Who has jurisdiction to determine the extent of a municipality's police power over its ROWs?

Courts or PSC?

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Arguments: Rates vs. Reasonable

APCO: “does this effect *rates*?”.

City: “is this regulation *reasonable* and within the police power of the municipality under its broad and exclusive franchise authority?”

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

- **Ala. Const. Art. XII, 220 (1901) expressly grants municipalities plenary authority to regulate utilities' use of municipal streets and rights-of way,**
- **Ala. Code § 37-1-35 expressly excludes the PSC's authority to limit a municipality's express plenary power to regulate its streets and rights-of-way.**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

***BellSouth Telecomms., Inc. v. City of Mobile*, 171 F. Supp. 2d 1261 (S.D. Ala. 2001)**

- a municipal ordinance resulting in a cost to a utility did not fall within the PSC's rate-setting jurisdiction, and
- Ala. Code § 37-1-35 specifically limits the PSC's jurisdiction over a municipality's power to maintain its streets or to require utilities to maintain them.

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

- Ala. Code § 37-1-31
 - Grants PSC exclusive jurisdiction over a utility's
 - rates
 - Service regulations governing a utility's operations, and
 - equipment

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Possible Consequences:

- **PSC scrutiny of**
 - **Municipal business license ordinances,**
 - **Municipal franchise ordinances**
 - **Municipal franchise agreement terms**
 - **Other municipal revenue-based ordinances**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

Possible Consequences:

- **Delays on city planning**
 - **decision allowing PSC jurisdiction to determine the validity of Wetumpka's ordinance in this case,**
 - **will likely tie municipalities up in litigation**
 - **determining the extent to which the PSC has a say in regulating a PSC regulated utility.**

Utility Facilities on Municipal Property



Wetumpka v. Alabama Power Company

- **Supreme Court heard oral arguments on September 4, 2019 .**

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Facts:

- **2002 and 2003, several property owners requested to be annexed in to City of Lincoln**

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Facts:

- **State of Alabama petitioned to have state-owned property annexed into City of Lincoln.**

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Facts:

- **State-owned property consisted a portion of I-20.**
- **I-20 was contiguous to city's boundary.**

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Facts:

- **13 years later, Citizens Against Lincoln Expansion, Inc. (“CALE”) filed lawsuit.**
- **Circuit Court of Talladega County**
- **Sought to have 2003 annexation ordinances declared invalid**

Annexation



City of Lincoln

v.

Citizens Against Lincoln Expansion, Inc.

Facts:

- **CALE argument: annexation involved a public road = “long lasso” annexation = improper.**

Annexation



City of Lincoln

v.

Citizens Against Lincoln Expansion, Inc.

Facts:

- **City: annexations can cross public highways without petition = Not a “long lasso” annexation = proper**

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Facts:

➤ **Act 2011-214 amended Section 11-42-5, Code of Alabama 1975**

“Every annexation undertaken prior to May 4, 2011, under any statutory procedure for annexation by any municipality and which the annexation procedure has been completed, notwithstanding any irregularity or defect in the procedure, is ratified and confirmed and given effect in all respects as if all provisions of law relating to the annexation proceeding had been duly and legally complied with...”
(emphasis added)

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Facts:

➤ **City argument #2:**

➤ **Section 11-42-5 validates 2003 annexation**



Annexation

City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Issue #1:

- Did annexation including a public road constitute “long lasso” annexation?

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Issue #2:

- Does Section 11-42-5, Code of Alabama 1975 ratify the annexation?

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

- July 13, 2018: Circuit court invalidated annexation ordinance.

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

Circuit Court:

- Section 11-42-5 only fixes procedural irregularities or defects.
- Does not fix every annexation
- Has no application to 2003 annexation ordinance

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

- City appealed to Alabama Supreme Court
- Request to withdraw Circuit Court order

Annexation



City of Lincoln

V.

Citizens Against Lincoln Expansion, Inc.

September 14, 2018:

- Alabama Supreme Court affirmed circuit court.
- No Opinion

Short Term Residential Rentals



Concerns:

- STRs moving existing housing out of long-term rental market
- Exacerbate housing shortages
- Negative impact on affordability
- Increased traffic, parking
- Increase police patrols
- Building safety standards
- Concerns of full-time residents about quiet and aesthetics

Short Term Residential Rentals



Concerns:

- Concerns of full-time residents about quiet and aesthetics
- Adverse impact on character of residential neighborhoods
- Health and safety risks to permanent residents and guests

Short Term Residential Rentals



Local Government Challenges:

- crafting regulations distinguishing between hosts occasionally renting spare bedrooms and
- people and companies renting out multiple units

Short Term Residential Rentals



Local Government Solutions:

- Boston
 - Impose fees based on intensity of use
 - Difficult to administer
 - Simplified framework equivalent of hotel tax and exempting hosts who rent a limited number of nights

Short Term Residential Rentals



Local Government Solutions:

- Boston – ban on unhosted short-term rentals
- New Orleans – ban on whole-unit rentals in specific neighborhoods
- Chicago – limits on concentration of short-term rentals on building or neighborhood

Short Term Residential Rentals



Local Government Challenges:

- data necessary for compliance
 - City registration system requiring property owners to register

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Facts:

- **AirBnb challenged city ordinance regulating short-term residential rentals**

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Facts:

- city ordinance:
 - Penalties for booking a unit that is not an eligible residential unit
 - Booking agents must agree to enforce ordinance
 - agree to remove a listing for exceeding maximum number days residential unit may be offered as STR

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Facts:

➤ City ordinance:

➤ Data sharing

➤ Listing locations

➤ Listings for room or whole unit

➤ Number of nights unit is occupied

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Facts:

- Airbnb: ordinance violates Federal law
 - Communications Decency Act
 - Stored Communications Act
 - 1st and 4th U.S. Constitution Amendment violations

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Airbnb's argument:

- Communications Decency Act
 - Section 230(c)(1)
 - “[*no*] *provider or user* of an interactive computer service *shall be treated as the publisher or speaker* of any information provided by another information provided by another information content provider.”

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Airbnb's argument:

- Communications Decency Act
 - City's penalty for providing and receiving a fee for booking services of an unregistered unit requires them to actively monitor and police 3rd party listings
 - Treats them as a publisher because it involves traditional publication functions
 - Reviewing
 - Editing
 - Deciding whether to publish or withdraw
- Airbnb protected from being compelled to monitor and remove 3rd party content or suffer complete banishment

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Airbnb's argument:

- Airbnb protected from being compelled to monitor and remove 3rd party content or suffer complete banishment

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Decision:

- Communications Decency Act
 - Cited STR challenges in previous California
 - *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019)
 - *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016)

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

California Court Decisions:

- Communications Decency Act
 - Does not protect Airbnb from providing listing information
 - City ordinance does not treat Airbnb as “publishers” or “speakers” of the rental listings
 - Does not regulate “what can or cannot be said or posted on listings.”
 - Does not create an obligation on plaintiffs to
 - Monitor,
 - Edit,
 - Withdraw, or
 - Block content

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

California Court Decisions:

- City ordinance holds Airbnb liable only for their own conduct
 - Providing and collecting a fee for services in connection with unregistered unit.

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Decision:

- Stored Communications Act
 - Not likely violated for provisions subjecting booking agents to fines for accepting fee for booking ineligible units.
 - Likely violated for provisions requiring booking agents to actively prevent, remove or de-list any ineligible listings
- 4th Amendment not violated
 - No reasonable expectation of privacy for Airbnb or users
- 1st Amendment not violated
 - No burden on commercial speech

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Decision:

- 4th Amendment (reasonable expectation of privacy, against unreasonable search and seizure)
- Not likely violated for provision requiring monthly disclosure of listings in city whether listing for “room” or whole unit”
- Likely violated for provision requiring monthly disclosure of number of nights that room or unit was occupied during preceding month
 - No reasonable expectation of privacy for Airbnb or users

Short Term Residential Rentals



Airbnb, Inc. v. City of Boston, 386 F.Supp.3d 113
(2019)

Decision:

- 1st Amendment not violated
 - No burden on commercial speech

Short Term Residential Rentals



Airbnb, Inc. v. City of New York

373 F.Supp.3d 467

January 3, 2019

- Airbnb and HomeAway challenged city's data-collection ordinance requirements
- Require platforms to turn over data monthly regarding hosts and listings

Short Term Residential Rentals



Airbnb, Inc. v. City of New York

373 F.Supp.3d 467

January 3, 2019

- Ordinance requirements:
 - Physical address of STR
 - Full name, physical address, phone number, email of host
 - Name, number and URL of listing
 - Number of days STR rented
 - Total amount of fees
 - Account name, identifier for account number

Short Term Residential Rentals



Airbnb, Inc. v. City of New York, 373 F.Supp.3d 467 (S.D.N.Y. filed Jan. 3, 2019)

- Ordinance requirements:
 - Booking service provide from each host lawful consent to provide information

Short Term Residential Rentals



Airbnb, Inc. v. City of New York, 373 F.Supp.3d
467 (S.D.N.Y. filed Jan. 3, 2019)

➤ Claims

- Ordinance violates 1st and 4th Amendment
- Ordinance violates Stored Communications Act

Short Term Residential Rentals



Airbnb, Inc. v. City of New York, 373 F.Supp.3d 467 (S.D.N.Y. filed Jan. 3, 2019)

➤ Court:

- Airbnb and HomeAway likely to prevail under 4th Amendment challenges
 - Puts in place a search and seizure regime that implicates protected privacy interests

Short Term Residential Rentals



Airbnb, Inc. v. City of New York, 373 F.Supp.3d 467 (S.D.N.Y. filed Jan. 3, 2019)

➤ Court:

- **Not** likely to prevail under 1st Amendment challenges
- Likely to prevail under Stored Communications Act

Short Term Residential Rentals



Keep Chicago Livable v. City of Chicago, 913 F.3d 618 (7th Cir., Ill. 2019)

- The city's ordinance required hosts to register with the city and acquire a business license before listing their homes for rent on home-sharing websites.
- Prospective home-sharing hosts failed to make specific allegations as to how the city's shared housing ordinance was preventing or hampering their home-sharing activities.

Alabama Cases: Zoning and Planning



- City council's adoption of conditions prior to approving a proposed zoning ordinance violated the statute on notice requirements for ordinances. *Ex parte Buck*, 256 So.3d 84 (Ala. 2017).

Alabama Cases: Property Sales



Property Sales: Residents lacked standing as taxpayers to challenge the sale of a public middle school building by the county board of education to the town since the sale would bring money into the public treasury.

Richardson v. Relf, 265 So.3d (Ala. 2018).

Alabama Cases: Zoning and Planning



- **Zoning and Religion:**
 - *Thai Meditation Association of Alabama, Inc. v. City of Mobile*, 349 F.Supp.3d 1165 (S.D.Ala. 2018).
 - City, in denying zoning applications of Buddhist religious organization and landowners seeking to construct Buddhist meditation center in residential district, did not impose a substantial burden on applicants' religious exercise under RLUIPA.
 - City did not pressure applicants to forego their religious precepts, although applicants' religious exercise allegedly required them to locate in a quiet and serene area, such as the subject property, these qualities were attributable to various properties, not just to this property.

Alabama Cases: Zoning and Planning



- **Zoning and Religion:**
 - *Thai Meditation Association of Alabama, Inc. v. City of Mobile*, 349 F.Supp.3d 1165 (S.D.Ala. 2018).
 - The applicants did not show that their religion required them to locate at this particular site.
 - The organization held overnight retreats only two to three times a year and so applicants' inability to host monks at this property was, at most, an inconvenience, and applicants' safety concerns did not implicate religious exercise.
 - However, the court found that a triable issue of fact existed as to whether the city acted with a discriminatory purpose in denying the applications

Alabama Attorney General's Opinions



Property Forfeiture:

- When the location of a property owner is unknown,
- an action to declare property abandoned must be served at the last known address of the owner and by publication pursuant to section 15-5-64 of the Code of Alabama.
- Seized property cannot be deemed abandoned when the owner is unknown because both methods of service cannot be completed. AGO 2019-022.

Alabama Attorney General's Opinions



Buildings: A city, by ordinance, may cease requiring building permits for construction. A county commission may require permits in the corporate limits if the city council consents for the county to apply its building codes. AGO 2019-023.

Alabama Attorney General's Opinions



Planning Commission: Because the proposed recreational vehicle park involves building development, it is a subdivision under section 11-52-1(6) of the Code of Alabama and the town subdivision regulations that is subject to regulation by the town planning commission.
AGO 2018-028.

Alabama Attorney General's Opinions



Streets and Roads: The town should assume responsibility for the public streets in the areas annexed during the 24 months following incorporation at the same time it begins to assume responsibility for the streets in the newly incorporated town. AGO 2019-049.

Alabama Attorney General's Opinions



Commercial Development:

- The Commercial Development Authority (CDA) may take actions and expend funds related to the acquiring, owning, and/or leasing of projects to induce new commercial enterprises to locate in the city and to expand existing facilities.
- The CDA may make improvements to property acquired as projects. The CDA may sell or donate such property to businesses or structure leases with beneficial terms related to a project.
- The CDA may not award financial grants to businesses. The city may make improvements to its property unrelated to a project through the net earnings of the CDA remaining after the payment of all expenses.
- The CDA may provide financial assistance to its board members attending conferences, seminars, and workshops related to the promotion of commerce and trade.
- The CDA may hire employees. While it may not hire them to work for other agencies, it may enter into an employee-sharing agreement with another agency so long as each compensates the employee in proportion to the work performed for that agency.
- The CDA may share its conference room if used for business related to the purposes in section 11-54-170. AGO 2018-051.

2019 Legislation: Broadband



- Rural Broadband Deployment – ACT 2019 – 326
 - Rural, underserved, and unserved areas
 - authorization of advanced communications capabilities to be installed by electric providers within existing easements and other rights—of-way.
 - limited grant of authorization to electric providers reasonably related to the proposed legislative objective of providing advanced communications capabilities, broadband facilities, and services.

- Broadband Internet Grants – ACT 2019 - 327

2019 Legislation: Broadband



- Broadband Internet Grants – ACT 2019 – 327
 - increase the percentage of project costs that may be funded
 - broaden the permitted use of other federal and state support, including loans and grants, in projects receiving grants.

2019 Legislation: Micromobility



- Act 2019-437
 - Amended current Code Sections regarding micromobility
 - Scooter
 - Shared micromobility device
 - Shared micromobility device system

2019 Legislation: Municipal Zoning Authority



- Act 2019-251
 - Municipalities incorporated after 1990
 - located in a county in which another municipality in that county has zoning authority in its police jurisdiction
 - may divide the territory within its police jurisdiction
 - into business,
 - industrial, and
 - residential zones or districts

2019 Legislation: Small Cell Deployment



➤ SB264

- would have given small cell deployment providers
 - preemption of local rights of way authority,
 - capped fees and
 - allowed for exemptions for placement of this technology.
- The small cell providers worked with legislators in adopting a resolution creating the Advanced Small Wireless Deployment Task Force.
- SJR92 creates the task force comprised of three members of the Senate and three for the House of Representatives to meet and provide proposed legislation to the leadership on October 1, 2019.

2019 Legislation: Police Jurisdiction



- SB23 : Failed
- would have frozen the current police jurisdictional territories around the state,
- would have removed all building code enforcement authority in the police jurisdictions, and
- amended the planning jurisdictional authority.

2018 Legislation: TNCs



- Act 2018-127
 - digital network transportation companies
 - created the framework for the statewide regulation of TNCs and TNC drivers
 - removed municipal taxing and licensure authority on TNCs
 - Placed TNCs under the regulatory jurisdiction of the Alabama Public Service Commission (“PSC”).

2018 Legislation: Police Jurisdiction



- Act 2018-17
 - Constitutional Amendment
 - Any territory outside in Calhoun County
 - would not be subject to the police jurisdiction or planning jurisdiction of the municipality
 - if the municipality is not located entirely in the county
 - exception for the City of Oxford.

2017 Legislation: ZBA Decisions



- SB124 : Failed
 - Would have specified that an appeal of a final judgment or decision of a board of zoning adjustment would be required to be filed directly with the circuit court.

Questions

