



*Lynn Fitch*  
**ATTORNEY GENERAL**  
OPINIONS AND POLICY

May 10, 2023

Michael R. Moore, Esq.  
Attorney, City of Pascagoula  
Post Office Box 1529  
Pascagoula, Mississippi 39568-1529

Re: Municipal Zoning and Odor Ordinances

Dear Mr. Moore:

The Office of the Attorney General has received your request for an official opinion.

### **Questions Presented**

1. Is the Jackson County Utility Authority, which was created pursuant to Section 49-17-731 of the Mississippi Code, subject to municipal zoning ordinances?
2. Is the city of Pascagoula empowered to adopt and enforce an ordinance establishing objective standards prohibiting the emission of nuisance odors?
3. Assuming that the answer to Question No. 2 is yes, is the city of Pascagoula authorized to enforce such an ordinance as to a treatment facility owned and operated by the Jackson County Utility Authority?
4. Assuming that the answer to Question No. 2 is yes, is the city of Pascagoula authorized to enforce such an ordinance as to a company that generates offending odors outside of the municipal boundaries where such odors enter the city of Pascagoula's boundaries?

### **Brief Response**

1. In general, the Jackson County Utility Authority is subject to municipal zoning ordinances. Whether a particular ordinance is enforceable against the Jackson County Utility Authority is a factual determination that must be made by the municipal governing authorities and is subject to judicial review. While reasonable municipal zoning restrictions may be enforced, the city of Pascagoula may not enact an ordinance that would have the effect of prohibiting the Jackson County Utility Authority from fulfilling its statutory obligations.

2. Yes. The city of Pascagoula has the authority to enact regulations regarding nuisance odors if such regulations are “for the purpose of promoting health, safety, morals, or the general welfare of the community. . . .” Miss. Code Ann. § 17-1-3(1).
3. Whether an ordinance prohibiting the emission of nuisance odors is enforceable against a specific entity is a mixed question of fact and law on which this office cannot opine.
4. The city of Pascagoula has no authority to enforce a nuisance odor ordinance against a company located outside of the municipal boundaries.

### **Applicable Law and Discussion**

As an initial matter, your questions center around the city of Pascagoula’s (“City”) authority to regulate a particular entity, the Jackson County Utility Authority (“JCUA”). Whether a particular entity is subject to or has violated a specific ordinance is a factual determination to be made by the municipality and is subject to judicial review. This opinion is limited to whether county utility authorities are generally subject to municipal regulations and whether a municipality can enact regulations regarding nuisance odors. We offer no opinion on the enforceability of ordinances against a particular entity or the validity of any specific ordinance.

Section 17-1-3(1) grants municipalities the authority to enact regulations governing a variety of purposes, including land use, “for the purpose of promoting health, safety, morals, or the general welfare of the community. . . .” The Mississippi Supreme Court has held that unless specifically exempt, “reasonable zoning restrictions aimed at public safety and the elimination of public nuisances may be enforced” against public entities. *City of Hattiesburg v. Region XII Comm’n on Mental Health and Retardation*, 654 So. 2d 516, 518 (Miss. 1995); *see also* MS AG Op., *Mitchell* at \*2 (June 26, 2006) (opining that absent statutory language to the contrary, a county is generally “subject to reasonable municipal zoning [restrictions] aimed at public safety and the elimination of public nuisances.”) However, the Mississippi Supreme Court also has held that the State Building Commission was exempt from a city building permit requirement because the Legislature had given it “full power” to construct state buildings. *City of Jackson v. Miss. State Bldg. Comm’n*, 350 So. 2d 63, 66 (Miss. 1977) (opining that if the public entity has specific plenary authority, the “grant of specific power denies contrary power.”)

This office was previously asked whether projects constructed by the Mississippi Transportation Commission (“MTC”) on MTC property were subject to local zoning ordinances. MS AG Op., *McGrath* (July 29, 2016). *McGrath* cites Section 65-1-47, which grants the State Highway Commission the following:

[C]omplete authority to issue rules, regulations and orders under which the State Highway Department shall have control and supervision, with *full power and authority* under rules, regulations and orders issued by the commission, to locate, relocate, widen, alter, change, straighten, construct or reconstruct any and all roads on the state highway system heretofore or hereafter taken over by it for maintenance as a part of such system, and shall have *full and complete authority* for regulating the making of all contracts, surveys, plans, specifications and estimates for the location, laying out, widening, straightening, altering, changing, constructing,

reconstructing and maintaining of and the securing of rights-of-way for any and all such highways. . . .

(Emphasis added). In *McGrath*, we opined that “the granting of such broad authority to have ‘complete authority’ and to have ‘control and supervision, with full power and authority’ to the MTC in Section 65-1-47 does constitute ‘plenary power,’ and such power would serve to exempt MTC from being subject to local zoning ordinances.” *McGrath* at \*2. The *McGrath* opinion discusses further the applicability of local zoning ordinances to public entities.

In a distinguishable opinion, this office opined that the Mississippi Department of Information Technology Service (“ITS”) and the Mississippi Wireless Communication Commission (“WCC”) were not exempt from municipal and county zoning ordinances when building the Mississippi Wireless Information Network as authorized by Section 25-53-171. MS AG Op., *Litchliter* (May 15, 2009). Notably, the WCC and ITS have the “sole authority to promulgate rules and regulations governing the operations of the wireless communication system . . . and . . . all legal authority necessary and proper to perform this function.” Miss. Code Ann. § 25-53-171(4). However, this office opined that this statutory authority does not equate to “‘plenary power’ as contemplated by the supreme court in the *City of Jackson v. Mississippi State Building Commission* case.” *Litchliter* at \*4. The *Litchliter* opinion went on to say that “while reasonable zoning restrictions aimed at public safety may be enforced, a municipality and/or county may not enact an ordinance that would have the effect of prohibiting the WCC from fulfilling its statutory obligations.” *Id* at 2.

The JCUA Board of Directors “is granted and may exercise all powers and rights granted pursuant to Sections 49-17-739 through 49-17-773 to promote the health, welfare and prosperity of the general public.” Miss. Code Ann. § 49-17-733(4). Section 49-17-743 grants county utility authorities broad powers with respect to the construction, operation, and management of its wastewater and stormwater systems. These county utility authorities are further required by Section 49-17-745 to promulgate rules and regulations relating to the construction, operation, and maintenance of any water, wastewater, and storm water system within its service area. However, as with the *Litchliter* opinion, it is the opinion of this office that such authority does not equate to plenary power. Accordingly, it is the opinion of this office that municipal zoning ordinances are generally applicable to the JCUA. Consistent with our prior opinions, while reasonable municipal zoning restrictions may be enforced, the City may not enact an ordinance that would have the effect of prohibiting the JCUA from fulfilling its statutory obligations, which include, as stated above, the construction, operation, and management of its wastewater and stormwater systems as well as the promulgation of rules and regulations relating to the construction, operation, and maintenance of any water, wastewater, and storm water system within its service area.

In response to your second question, relying upon a county’s authority under home rule and Section 17-1-3(1), this office has opined that “[i]n the absence of express statutory authority preempting a county from adopting ordinances relating to the appearance, noise, odor, and visibility of solid waste disposal sites, a county may adopt ordinances related to these sites that promote the health, safety, morals or general welfare of the community.” MS AG Op., *Cuevas* at \*2 (Nov. 14, 1996). Similarly, the municipal home rule statute allows municipal governing authorities “to adopt any orders, resolutions or ordinances with respect to such municipal affairs, property and finances which are not inconsistent with the Mississippi Constitution of 1890, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi . . . .” Miss. Code Ann. § 21-17-5(1). Thus,

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it is the opinion of this office that a municipality's authority to adopt ordinances under Section 17-1-3(1) includes the authority to regulate or restrict the emission of nuisance odors.

In response to your third question, whether a specific ordinance is enforceable against a particular public entity is a mixed question of fact and law on which this office cannot opine.

Your fourth question asks whether the City is authorized to enforce a nuisance odor ordinance against a company located outside of the City's boundaries. This office has consistently opined that a municipality only has the authority to enforce ordinances within the corporate limits of the municipality. MS AG Op., *Murdock* at \*1 (Feb. 28, 2014). In MS AG Op., *Jones* at \*1 (Aug. 17, 1994), this office opined that a municipality has no authority to enforce a noise ordinance against a business located outside the municipal corporate limits. Similarly, a municipality has no authority to enforce a nuisance odor ordinance against a company located outside of the municipal boundaries.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ *Beebe Garrard*

Beebe Garrard  
Special Assistant Attorney General

OFFICIAL OPINION