

Mississippi-Alabama Sea Grant Legal Program 254 Kinard Hall, Wing E University, MS 38677

Phone: (662) 915-7775 FAX: (662) 915-5267

Email: waterlog@olemiss.edu Internet: http://masglp.olemiss.edu

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Jennifer Evans-Cowley, PhD, AICP Associate Professor and Section Head City and Regional Planning Austin E. Knowlton School of Architecture The Ohio State University 275 West Woodruff Avenue Columbus, OH 43210-1138

Re: Municipal Use of Impact Fees in Mississippi (MASGC 11-008-12)

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Dear Jennifer:

As requested during our meeting on September 6, 2011, the Mississippi-Alabama Sea Grant Legal Program has conducted research on some of the legal questions you raised related to the Mississippi Plan for Opportunity project. This first memo focuses on your question about Mississippi municipal authority to adopt impact fees. This information is intended as advisory research only and does not constitute legal representation of the Plan for Opportunity partners or their constituents.

As you explained during our meeting, you are working with others on a statewide planning project entitled the Plan for Opportunity; you are leading the water subcommittee. When we met to discuss the project, you requested the Legal Program provide an overview of local government authority to use impact fees as a planning tool in Mississippi. In particular, you asked whether Mississippi considers impact fees to be a tax, and if so, whether local governments need state legislative authorization to impose impact fees on local projects.

In short, the Mississippi Supreme Court ruled that municipal use of impact fees constitutes an invalid tax in *City of Ocean Springs v. Homebuilders Ass'n of Mississippi*, 932 So.2d 44 (Miss.

2006). The court found no express legislative authorization for impact fees under existing state law, and no new enabling legislation has been passed since that time. The Mississippi legislature would have to enact a new law authorizing municipal governments to adopt impact fees before local governments could lawfully use impact fees as a planning tool. The remainder of this memo provides a summary of the Mississippi Supreme Court decision on this issue.

Impact Fees Constitute Unauthorized Tax in Mississippi

In 2006, the Mississippi Supreme Court considered whether the City of Ocean Springs could incorporate impact fees into its comprehensive plan. The City had adopted seven impact fee ordinances related to various public improvements, including water facilities. The ordinances defined a development impact fee as:

A fee relating to a capital expenditure or service provided by the City which is imposed on new development as a condition of approval of such development as a pre-requisite to obtaining development approval and which is calculated to defray all or a portion of the costs of capital improvements required to accommodate new land development at city-designated level of service standards and which reasonably benefits the new land development.

The impact fees would be paid in addition to other related fees and conditions associated with land-use, zoning, and planning. After the City adopted the ordinances, a group of developers challenged the ordinances in court, claiming the impact fees were illegal taxes imposed by the City.

Before providing its analysis, the court summarized several legal issues raised by this case. Of particular relevance to the question about impact fees, the court addressed the following questions:

- (1) Whether the Mississippi Constitution, state law, or common law authorize the implementation of development impact fee ordinances;
- (2) Whether municipal home rule power related to police powers and general planning and zoning statues authorized the use of development impact fees; and
- (3) Whether the impact fee was a valid exercise of police power or an invalid tax.

The court determined that "there is no constitutional basis, legislative enactment, or common law doctrine" allowing municipal governments to implement development impact fees. The court went on to acknowledge that Mississippi's Home Rule authority allows municipalities to impose fees but not taxes disguised as fees.

Under Mississippi law, the primary distinction between a tax and a fee "is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer." The court found that the impact fees at issue here went beyond covering administrative expenses of the City and therefore did not qualify as permissible regulatory fees under Mississippi's Home

Rule authority. Instead, the City's impact fees were "simply a revenue-raising measure" which made the fees an illegal tax. In reaching this conclusion, the court placed particular emphasis on the fact that the fees would be used for the general health and well-being of the entire community rather than purely administrative costs.

This case reflects the current status of Mississippi law on the issue of municipal impact fees. As the court acknowledged, impact fees are not per se illegal but the power to implement the fees lies with the state legislature. Municipalities may not impose impact fees unless, at some future time, the legislature enacts a state law that grants local governments this authority.

I hope you find this information useful. In addition to impact fees, you also requested information on Mississippi's regulation of water utilities and the rate-making process. That information will follow in a separate memorandum.

Please let me know if you have any additional questions.

Sincerely,

/s/ Niki L. Pace Research Counsel