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June 28, 2011

Andy Bauer, Director  
Planning and Zoning Department  
City of Gulf Shores  
205 Clubhouse Drive, Suite B  
Gulf Shores, Alabama

Re: Alabama Regulation of Seafood Safety and Sales (MASGC 11-008-06)

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Dear Andy:

On March 18, 2011, we met to discuss several projects the City of Gulf Shores is interested in pursuing to enhance its working waterfront areas. As requested during the meeting, the Mississippi-Alabama Sea Grant Legal Program has been conducting research on some of the legal issues raised by potential projects. One project involved developing a public seafood market. This memo focuses on regulation of seafood sales through a public market. The following information is intended as advisory research only and does not constitute legal representation of the City of Gulf Shores, Alabama or its constituents. It represents our interpretations of the relevant laws and regulations.

As I understand the goal of this project, the City would like to emphasize its historic fishing community origins and create a venue for local fishermen to sell their catch to the public. During our last meeting on June 22, 2011, we discussed two possibilities for a public seafood market: 1) the creation of a direct seafood exchange, or 2) the creation of a traditional farmers' market with an emphasis on seafood sales.

Under the first option, the City could initiate a direct seafood exchange with limited need for physical infrastructure. The Port of Delcambre Direct Seafood Program, located in south central Louisiana, is a successful seafood exchange model. The Port of Delcambre implemented the direct seafood marketing program in 2010. Through the exchange, commercial fishermen market

and sell seafood directly to the public. The Delcambre Direct Exchange is an internet-based portal that instantly connects fishermen with consumers. The fishermen post their recent catches, pricing, and contact information on the exchange, and in turn, consumers directly contact the fishermen to place orders and arrange for pickup. The Port of Delcambre also provides a meeting place for the fishermen and consumers, and the Port is currently constructing a seafood market pavilion and increased boat docking facilities for fishermen. More information about the Delcambre Direct Seafood Exchange can be found at: <http://www.portofdelcambre.com/>.

The second option involves the creation of a city-sponsored farmers' market that emphasizes seafood sales. Regulation of farmers' markets varies throughout the country. Many Alabama cities have regularly held farmers' markets and some permit the sale of fish and seafood. In addition, the Alabama Farmers' Market Authority (FMA) is a state agency with authority to establish state agricultural markets and provide marketing facilities where farm products, including fish products, farm-raised fish, shellfish, and wild fish, may be processed, graded, packaged, displayed, or exhibited. Under FMA guidelines, only raw meats, including fish and seafood, that are processed, packaged, and labeled at an inspected facility or are otherwise exempted from inspection may be sold at a farmers market. FMA rules apply to FMA-run farmers' markets and are not binding on locally created farmers' markets. The City may adopt local ordinances governing a farmers' market, so long as those rules are compatible with state law. For instance, the City may wish to limit sellers to those whose goods are locally sourced. At the onset, a farmers' market may require more infrastructure, such as public facilities and parking, than the seafood exchange model.

Under either model, a significant amount of regulation falls on the individual selling the seafood. A fisherman selling his catch will need to comply with both public health requirements addressing seafood safety as well as licensing requirements for seafood dealing. Although the bulk of regulation falls on individual participants, the City should ensure that persons selling seafood through any City-sponsored market have the appropriate permits. This may be accomplished by requiring vendors to provide copies of the necessary permits to the City before participating in the market. While beyond the scope of this memo, other requirements may apply including food labeling, sales tax, and labor laws. The remainder of this memo provides an overview of seafood safety and sales regulations that may apply to the City's project.

### Regulation of Seafood Safety and Sales

The U.S. Food and Drug Administration (FDA) provides federal regulation of seafood intended for human consumption. Much of the FDA's oversight focuses on exports and imports and regulations for seafood processors. At the state level, Alabama Department of Public Health (ADPH) regulates food safety at all establishments where food is sold for human consumption.<sup>1</sup> ADPH's Seafood Branch (Seafood Public Health) oversees seafood safety issues within the state, including additional oversight of shellfish safety discussed below. In addition, the Alabama Department of Conservation and Natural Resources (ADCNR) provides further regulation of fish and seafood sales.

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<sup>1</sup> ALA. CODE § 22-20-5 (2011).

## *Seafood Safety*

Anyone selling food to the public must have a permit to operate from the ADPH and may require an inspection prior to selling food. Regulation depends on the classification of the vendor and the type of food being sold. In addition to its own regulations, Alabama has adopted the U.S. Department of Health and Human Services Food Code (2005 edition) that defines food to include raw items such as fresh seafood. An establishment that offers food for sale to consumers for off-premises consumption is considered a retail food store. Under Alabama law, retail food stores are considered food establishments, meaning that they require a permit from the county health officer.<sup>2</sup> Potentially, sales from a vessel may be considered a mobile food establishment. ADPH has authority to grant variances where appropriate.

Additionally, vendors at a farmers' market may be considered temporary food establishments. A temporary event is one that is community wide and does not last more than 14 days.<sup>3</sup> If the City's farmers' market qualifies as a temporary food service establishment, the City, as the event sponsor, may apply for a permit from the ADPH that lists all vendors. All listed vendors in the permit will be covered and will not require individual permits for this event.

The type of permit required also depends on what type of food is being sold. Priority Category 3 establishments are those where unpackaged raw food from an animal source is handled, prepared, or used. Seafood markets may potentially fall within the higher designation of Priority Category 4, which refers to a Category 3 food establishment that performs operations requiring a variance under ADPH rules or requiring a Hazard Analysis and Critical Control Points (HACCP) plan.

ADPH's Seafood Branch (Seafood Public Health) oversees state seafood safety regulations. Generally, seafood sales are subject to HACCP food safety regulation for seafood processing. FDA's definition of seafood processor includes: handling, storing, preparing, heading, eviscerating, shucking, freezing, changing into different market forms, manufacturing, preserving, packing, labeling, dockside unloading, or holding. However, retail establishments are specifically excluded from this definition, making retail establishments such as a seafood market exempt from these processing regulations.<sup>4</sup> FDA guidance further suggests that retail seafood markets are exempt from regulation even if they process fish and seafood products, so long as all sales are to retail customers. Still, products sold for wholesale in interstate commerce are subject to HACCP regulations, even if the establishment's primary business is retail.

## *Shellfish Regulation*

Shellfish have additional regulations. ADPH defines shellfish as crab, lobster, oyster, shrimp, crayfish, clam, and scallops.<sup>5</sup> For shellfish regulation, the FDA and the ADPH work cooperatively through the National Shellfish Sanitation Program (NSSP). The NSSP promotes safety of shellfish produced for human consumption through state cooperation and uniformity of

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<sup>2</sup> ALA. ADMIN. CODE r. 420-3-22-.08.

<sup>3</sup> ALA. ADMIN. CODE r. 420-3-22-.01(4).

<sup>4</sup> 21 C.F.R. § 123.3(k).

<sup>5</sup> ALA. ADMIN. CODE r. 420-3-22-.01(4)28.

state shellfish programs. Seafood Public Health oversees state shellfish safety regulations. Alabama has adopted the model ordinance for molluscan shellfish regulation developed by the National Shellfish Sanitation Program, 2001 Revision.<sup>6</sup> Shellfish sales are subject to the same HACCP requirements as other seafood but retail establishments remain exempt from these requirements.

### *Seafood Sales*

The ADCNR oversees permitting seafood sales within Alabama. For licensing purposes, Alabama law distinguishes freshwater fish from seafood. In addition, state law specifically prohibits recreationally licensed fishermen from selling shrimp, crabs and oysters and harvesting non-game freshwater fish is prohibited without a commercial fishing license. The sale of both freshwater game fish and saltwater game fish by any person is prohibited, except for game fish raised in approved fish hatcheries. In general, the sale of any recreationally caught fish is discouraged and federal law prohibits the sale of certain recreationally caught fish from federal waters.<sup>7</sup> The following provides an overview of licenses needed by fishermen to sell their catch directly to consumers in Alabama.

#### *Freshwater Fish Sales*

ADCNR requires separate licenses for the sale of freshwater fish. To sell freshwater fish, either a wholesale or retail license is required. Anyone selling freshwater fish for resale is considered a wholesale dealer of freshwater nongame fish and needs a wholesale license. Those persons selling freshwater fish to consumers are considered retailers. Retail licenses that allow direct sales to consumers cost \$11.00 per year.<sup>8</sup>

#### *Seafood Sales*

The sale of seafood requires a seafood dealer's license. Seafood is defined as "all oysters, saltwater fish, saltwater shrimp, diamond back terrapin, sea turtle, crabs and all other species of marine or saltwater animal life existing or living in the water within the territorial jurisdiction of the State of Alabama."<sup>9</sup> In Alabama, anyone who sells fresh or frozen seafood is considered a seafood dealer and must possess a seafood dealer's license.<sup>10</sup> Although commercial fishermen do not require a license to sell to a seafood dealer, any commercial fisherman wishing to sell directly to the public must have a seafood dealer's license.

A seafood dealer's license is available from ADCNR for an annual fee of \$201.00 for residents and \$401.00 for nonresidents. To obtain a license, applicants must provide proof of a business license and the appropriate seafood health permit. A seller needs a dealer's license for each

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<sup>6</sup> ALA. ADMIN. CODE r. 420-3-18-.09. A copy of the 2001 Model Ordinance is available at: <http://www.adph.org/foodsafety/assets/ShellfishModelOrdinance.pdf>

<sup>7</sup> 50 C.F.R. § 622.45.

<sup>8</sup> ALA. CODE § 9-11-153.

<sup>9</sup> ALA. CODE § 9-2-80.

<sup>10</sup> ALA. CODE § 9-12-125.

individual place of business (if the seller has more than one location). This requirement also extends to any vehicle selling seafood (also known as truck sales), and licenses to sell from vehicles are \$101.00 per vehicle.

Either seafood market model will require participating fishermen to comply with applicable public health and licensing requirements. Although much of this falls onto participants, the City should adopt appropriate rules governing the market as a safeguard to ensure fishermen compliance is met. Early consultation with ADPH can provide valuable insight into how this type of seafood sale will be regulated, allowing the City to tailor its rules to address any potential areas of concern. Furthermore, this information will enable the City to better inform fishermen of the necessary permits for participating in the seafood market.

I hope you find this information helpful. The next step for this project is working with the ADPH to establish specific public health requirements for this project. Guidance from ADPH will help determine the viability of the proposed market models and may assist the City in choosing which market model to pursue. After a market approach is decided, work can begin to educate local fishermen about how to participate in the market.

If you have any additional questions, please let me know.

Sincerely,

/s/ Niki L. Pace  
Research Counsel