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February 23, 2012

Matthew W. Capps, Executive Director
Dauphin Island Park & Beach Board
109 Bienville Blvd.
Dauphin Island, AL 36528

Re: Impact of User Fees on Liability under the Alabama Recreational Use law
(MASGC 12-008-01)

This product was prepared by the Mississippi-Alabama Sea Grant Legal Program under award number NA10OAR4170078 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Matthew:

As you requested, the Mississippi-Alabama Sea Grant Legal Program has conducted research on the how charging user fees may impact Dauphin Island's liability. This memo provides an overview of those issues. This information is intended as advisory research only and does not constitute legal representation of the Dauphin Island Park & Beach Board or its constituents.

By email and follow-up phone conversation on January 27th, you related that Dauphin Island Park & Beach Board is considering charging a modest environmental fee for use of some of beach areas. The Board is considering implementing this fee for users of the Public Beach Parking Area and possibly walk-ins as well. The fee would be used for maintenance of the beach area. Your concern is whether charging this modest fee for maintenance costs will remove the liability protection afforded to the Park & Beach Board under Alabama's Recreational Use statute. In short, the answer is a qualified no. The details of this response are laid out below.

Alabama's Recreational Use law (Ala. Code § 35-15-1 through 35-15-28) protects owners of outdoor recreational land from liability when the landowner allows the public to recreate on the land for non-commercial purposes. Under the statute, landowners of non-commercial public recreational land have no duty to inspect or keep land safe for entry or use, or to give any warning of dangerous condition, use, structure or activity, and must instead, have actual

knowledge of particular risk for liability to arise. (Ala. Code § 35-15-25). Therefore, Dauphin Island Park & Beach Board, as owner of the land, is afforded all liability protections available under the statute so long as the land is used for non-commercial purposes.

In determining the Board's liability, the critical issue becomes whether the modest user fee charged is profit-motivated, and thus destroys the liability protections provided for non-commercial purposes. The Alabama Supreme Court considered this question in *Owens v. Grant* where the court noted that charge of an entry fee alone does not necessarily mean the land use is "profit-motivated." 569 So.2d 707, 711 (Ala. 1990). In other words, the question is whether the purpose of the fee is to derive a profit.

Using that analysis, the court upheld a determination that admission fees charged by the City of Gadsden to users of Noccalula Falls Park were not profit-motivated even though the fees generated money. The court noted that the city was not trying to accrue a profit by charging the fees; the fees "only partially defrayed the cost of operating the park." *Martin v. City of Gadsden*, 584 So.2d 796 (Ala. 1991). Since the fees were not profit-motivated, the city remained protected from liability under the Recreational Use law.

Applying that analysis to the situation at hand, the Park & Beach Board should retain all liability protections under the Recreational Use statute so long as the user fee is not profit-motivated. Based on our conversations, you indicated that the small fee will be used for park and beach maintenance and will not generate a profit. As such, the user fee should not alter the Park & Beach Board's liability protection for public recreational use of its properties. As a practical matter, the Board may wish to carefully articulate its reasoning when adopting the user fee to specify that the fee will be used for maintenance purposes and will not be used to generate a profit.

I hope you find this information helpful. If you have any additional questions, please let me know.

Sincerely,

/s/ Niki L. Pace
Research Counsel