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October 20, 2011

Eric Meyer  
Director of Community Development and Planning  
City of Ocean Springs  
1018 Porter Avenue  
Ocean Springs, MS 39566-1800

Re: Wetland Setbacks – Measurement of Setback Line (MASGC 11-008-14)

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Dear Eric:

As requested during our meeting on August 15, 2011, the Mississippi-Alabama Sea Grant Legal Program has conducted research on some of the legal issues you raised during the meeting. This first memorandum examines where boundary lines begin for the purposes of measuring wetland setbacks. This information is intended as advisory research only and does not constitute legal representation of the City of Ocean Springs, Mississippi or its constituents.

You asked whether local wetland setback requirements along marshes can be measured from the shoreline instead of the property line. In response, I have provided information on two issues. The first section includes a short overview of how the public trust doctrine impacts property line boundaries along marshes. The second section discusses how setback lines can be measured from points other than the property line.

#### *Property Boundaries on Undeveloped Tidelands*

Along marshes, coastal property lines and shorelines are frequently the same because the state generally holds title to all naturally submerged lands and lands subject to the ebb and flow of the tide under the public trust doctrine. To resolve disputes over shoreline property boundaries,

Mississippi enacted the Public Trust Tidelands Act in 1989.<sup>1</sup> The law clarifies that the property line between state public trust lands and private ownership along undeveloped tidelands remains the mean high tide line. The boundary continues to track the mean high tide line where shorelines meander as a result of natural erosion or natural accretion. Only in cases of artificial changes or avulsive events will the shoreline and property line differ from the mean high tide line. In other words, undeveloped tidelands naturally submerged belong to the state. This applies to all undeveloped tidelands regardless of navigability. Consequently, marshland property boundaries will frequently be the same as the mean high tide mark.

### *Measuring Setback Lines*

While setback requirements are frequently measured from property lines, setbacks may also be measured from other points as specified within a setback ordinance. The Mississippi municipal home rule statute provides municipalities with the authority to adopt ordinances related to municipal affairs, finances, or property. State planning laws go on to authorize local governments to regulate development “for the purpose of promoting health, safety, morals, or the general welfare of the community.”<sup>2</sup> Under this authority, local governments may adopt a wetland setback so long as the regulation is rationally related to a legitimate government interest (such as the health, safety, or welfare of the community) and is otherwise in accordance with law.

With wetland or riparian setbacks, measurement of the setback may begin at the edge of a waterway such as the mean high tide line. In other cases, an ordinance may specify that measurement of the setback starts at the edge of the delineated wetlands and measures a set distance away from the wetland edge. Likewise, a wetland setback or buffer may be crafted in such a way as to ensure the inclusion of all necessary wetlands. One way to achieve this goal is to clearly define the setback as including the wetlands. Consider this determination of a wetland setback:

Wetland setbacks are established as follows: a minimum of 75 feet surrounding and including all EPA Category 3 Wetlands, or current equivalent EPA classification.

By using the words “surrounding and including,” the ordinance identifies the regulator’s intent to include the wetlands within the setback area. Such clear language alleviates confusion by property owners and aids consistent implementation of the ordinance.

Generally speaking, an ordinance can use a point of measurement other than that of the property boundary but: (1) the alternate measuring point should be clearly identified in the ordinance, (2) use of an alternate measuring point should be rationally related to the goal of the ordinance, and (3) the ordinance itself must be rationally related to promoting the health, safety, morals, or

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<sup>1</sup> Miss. Code Ann. § 29-15-1 to -23 (2011); *See also* Bayview Land, Ltd. v. State, 950 So.2d 966 (Miss. 2006).

<sup>2</sup> Municipal home rule statute, Miss. Code Ann. § 21-17-5; Local planning authority, Miss. Code Ann. 17-1-3 (the governing authority of any county, in its discretion, are empowered to regulate the height, number of stories and size of building and other structures, the percentage of lot that may be occupied, the size of the yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes).

welfare of the community. For example, setbacks along public roadways sometimes use the right-of-way instead of the property line as the starting point for measuring the setback.<sup>3</sup>

While Mississippi courts have not considered this issue, courts in other jurisdictions have upheld the measurement of a setback from other defined points. For instance, a Maine court upheld a shoreline setback that measured the setback from the seawall. There, the court looked at the plain language of the ordinance, which clearly required a setback of “twenty feet from the seawall,” and rejected the property owner’s argument that the setback should be instead measured from a jetty. The court also found that the setback requirement was reasonably related to the town’s public health, safety, or welfare.<sup>4</sup> Many other states have also upheld setbacks along lakes, shorelines, and floodplains.

In conclusion, wetland setbacks may use points other than the property line as the starting point for measuring setback distances. But to alleviate confusion, the city should clearly state in its setback ordinance where the setback measurement will begin or how the setback measurement may be altered in certain circumstances. To withstand legal challenges, the alternate setback position must rationally relate to the ordinance purpose and the ordinance itself must achieve a legitimate government interest.

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

Sincerely,

/s/ Niki L. Pace  
Research Counsel

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<sup>3</sup> See Miss. Admin. Code 33-3-1:7.1 (measurement of setback for sign placement begins at right-of-way on dedicated streets in Pearl River Valley Water Supply District).

<sup>4</sup> *Our Way Enterprises, Inc. v. Town of Wells*, 535 A.2d 442 (Me. 1988) (20-foot setback from seawall).