IN THE SUPREME COURT OF MISSISSIPPI

MAYOR AND BOARD OF ALDERMEN
CITY OF OCEAN SPRINGS, MISSISSIPPI,

Appellants,

vs. CASE NO. 2004-CC-1278

HOMEBUILDERS ASSOCIATION OF MISSISSIPPI, INC., HOMEBUILDERS ASSOCIATION OF THE MISSISSIPPI COAST, INC., SOUTHEAST MISSISSIPPI HOME BUILDERS ASSOCIATION, INC., MISSISSIPPI ASSOCIATION OF REALTORS, INC., GULF PROPERTIES, SOLE PROPRIETORSHIP, GREG WILLIAMS and KIM WILLIAMS, GULF COAST ASSOCIATION OF REALTORS, INC., WRH PROPERTIES, INC., SINGLETON DEVELOPMENT, CARL B. HAMILTON, INC., LOUIS W. BRELAND, ADAMS HOMES, LLC, L.H.F., INC., RANDALL CORP. OF MS., JAMES E. PLATT, PIERCE BLAKENSHIP, GULF COAST PROPERTIES, INC./SECURED MINI STORAGE, LIFESTYLES 2000, INC., ANCHOR REALTY & DEVELOPMENT, INC., MAGNUM ONE, LLC, CHARLES CARR, AND MAGNOLIA STATE DEVELOPMENT GROUP, LLC

Appellees.

On Appeal from the Circuit Court of Jackson County, Mississippi
Circuit Court No. 2003-93 (3)

BRIEF OF *AMICI CURIAE* AMERICAN PLANNING ASSOCIATION AND MISSISSIPPI CHAPTER OF THE APA

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INTEREST OF THE *AMICI CURIAE*

The American Planning Association ("APA") is a non-profit, public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. The APA, and its professional institute, the American Institute of Certified Planners, represent more than 37,000 practicing planners, officials, and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land use regulations.

The organization has forty-six regional chapters representing all fifty states, including the Mississippi Chapter, which joins in filing this *amicus* brief. There are approximately 130 members in the Mississippi Chapter. The APA's members work for development interests as well as state and local governments. Members of the APA are routinely involved in comprehensive land use planning and its implementation through land use regulation.

As the need arises, the APA develops policies that represent the collective thinking of its membership on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and divisions of APA. Following such a deliberative process, the APA first drafted a policy guide on impact fees in 1988, which was ratified by its Board of Directors that same year. That policy guide was later revised and updated in 1997.[1]

The APA has a substantial legitimate interest in ensuring that development impact fees remain a vital and necessary tool within the community's toolbox of land use and development

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[1] *See*, American Planning Association, *Policy Guide on Impact Fees*, Ratified by Board of Directors, April 1997, http://www.planning.org/policyguides/impactfees.html (Last visited March 24, 2005)

regulations. The APA submits this *amicus curiae* brief to explain the critical role of impact fees in advancing important community planning goals and objectives.

An overriding concern of the APA is that in order for comprehensive land use planning to foster orderly and beneficial development, communities must have the tools and legal authority to deal effectively with a variety of land uses. One of the areas of expertise developed by its members is the preparation and implementation of comprehensive plans including the planning for, funding, and provision of capital infrastructure for public facilities like roads, sewers, potable water, parks, fire and police facilities. This case raises issues of importance to planners and communities in Mississippi because it involves the authority of local governments in Mississippi to support comprehensive planning, orderly development, and economic growth through the use of development impact fees.

As an advocate for good planning, the APA regularly files *amicus* briefs in cases of importance to the planning profession and the public interest. A few of the cases in which APA has participated as *amicus curiae* include: *Agins v. Tiburon*, 447 U.S. 255 (1980), *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), *Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of the County of La Plata*, 38 P.3d 59 (Colo. 2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002). Most recently, the APA filed an *amicus curiae* brief in *San Remo Hotel L.P. v. City and County*

of San Francisco, California, United States Supreme Court, No. 04-340; *Kelo v. City Of New London,* United States Supreme Court, No. 04-108; and *Lingle v. Chevron USA,* United States Supreme Court, No. 04-163.

STATEMENT OF THE CASE

Amici hereby adopt the Statement of the Case as presented in the City of Ocean Springs' Brief. However, the following points are of particular significance to the arguments set forth in APA's *Amicus* Brief.

On June 19, 2001, the City of Ocean Springs adopted a Comprehensive Plan (the "Plan").[2] The Plan estimates there will be significant growth and development in the City between 2000 and 2020 – a 41 percent increase in population. This growth and development will require the City to build additional transportation, water, park and recreation, police, fire, and general municipal capital facilities to accommodate this new growth and development.

The Plan includes a "Community Services and Facilities Element" and a number of policies addressing the coordination of community facilities with growth. The pertinent policies in the City's Plan related to its impact fees program include the following:

> "*Policy 57: Plan for and equitably fund the efficient provision of public facilities and services.*
> ...
> *Policy 59: Provide quality municipal services as a primary contribution to the community's economic development effort. Assure that the provision of municipal services is efficient and does not shift the costs of facilities to serve new residents and businesses to existing residents and businesses.*
> ...
> *Policy 61: Coordinate development decisions with the ability of the City and other service providers to adequately meet service demands concurrently with the creation of those demands.*

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[2] The City of Ocean Springs, Mississippi - Comprehensive Plan - Designing for the Future - Adopted: June 19, 2001. http://www.oceansprings.org/comp_plan.htm (Last visited on March 25, 2005).

Policy 62: Require new development to fund its fair share of the costs of serving the development."[3]

The Plan enumerates specific recommendations to implement these policies and discusses in some detail how the City of Ocean Springs will prepare and implement an impact fee program. Clearly, impact fees are not a mere after-thought in the City's planning process, but an integral part of the City's decision regarding how to implement its Plan. The Plan describes the City's impact fee program at some length, which is worth noting here.

"***Develop a Defensible Impact Fee Program***. *Ocean Springs has been fortunate to be experiencing growth, and is projected to continue to experience a high rate of growth in the future. As a consequence, the City is experiencing public facility and service problems typical of growing communities, nationally. In response to projected growth trends, the City will be unable to continue to bear the full burden for the cost of capital improvements required to meet the demands of new residents, nor can this burden be fairly imposed on existing City residents. In order to respond to this problem and to continue to provide adequate public facilities and services to all residents, existing and new, at appropriate level of service ("LOS") standards, the City plans to enact development impact fees, as an integral element of the Plan implementation process, to offset the costs of additional roads and parks and recreation facilities, public safety facilities and other needed infrastructure required to serve new development at the City's adopted level of service standard.*

Impact fees are premised on the policy that new development should bear the costs, in whole or in part, of additional public facilities and services whose demand is created by such development. The premise that developers should be financially responsible for the costs of extending services to new development has gained widespread acceptance – their use is increasing nationwide, with more than 60% of all communities levying some type of exaction on new development to fund governmental facilities and services. This cost-shifting, in fact, has a long history in American planning, land use and development law and practice, starting with subdivision improvement requirements dating back to the Standard City Planning Enabling Act adopted in the 1920's and sewer and water connection fees in the early 1900's. Over time, the concept has expanded dramatically to embrace more and more types of public facilities and improvements and to include requirements not only for public improvements, but also for dedication of land for public facilities. By the 1950's and 1960's, the courts helped set the stage for the development and use of impact fees when municipalities were held to be authorized not only to require dedications of land,

[3] *Id*.

but also to require the payment of money in-lieu-of land.

> *The City impact fee program will be designed to impose a fair pro rata share of the cost of public facilities and necessary infrastructure needed due to new development, on such development, in proportion to the demand created by such development, as measured by the adopted level of service standards and as identified in the applicable capital improvements plans. In this manner, development impact fee funds will be generated as growth occurs, and development impact fee funds will be expended, as accumulated, to provide park and recreation, library and road facilities to serve the new residents of the City."*[4]

The Mayor and Board of Aldermen of the City of Ocean Springs implemented this Plan to ensure "the adequate provision of transportation, water, sewerage, schools, parks and other public requirements," in two ways. Miss. Code Ann. §17-1-9. First, by preparation of a study that determines the proportionate impact new development has on the need for new capital facilities for transportation, water, park and recreation, police, fire, and general municipal services. And second, by adoption of a development impact fee ordinance for these capital facilities. Specifically, the impact fee ordinance exacts fees on new development for the purpose of off-setting the proportionate costs the City will incur to provide new capital facilities to accommodate the new development.

ISSUE PRESENTED

Whether the City of Ocean Springs has the authority to exact regulatory impact fees from developers of land within the City, in accordance with the City's planning authority.

SUMMARY OF ARGUMENT

Municipal growth brings costs as well as benefits. Although new subdivisions might increase tax revenues, they also place new demands on streets, schools, parks, water and sewage facilities, police and fire departments, and other community services. Local governments have

[4] *Id*.

few options for meeting these demands, resulting in increased pressure to ensure that development 'pays its own way.' Regardless of whether or not there is explicit enabling authority in Mississippi, if the City of Ocean Springs' impact fees are consistent with the community's adopted Plan and meet certain clearly-defined standards, they should be upheld as a lawful exercise of the City's police powers and planning authority.

ARGUMENT

The Circuit Court held the City of Ocean Springs' impact fees ordinance is unauthorized for two reasons. First, the court found no express legislation authorizing cities in Mississippi to adopt development impact fees; and second, the court said the fee is an unconstitutional tax. The Circuit Court's decision in both instances contravenes the clear and prevailing law and should be reversed. The City's brief provides ample support and authorities for this conclusion, and these arguments will not be repeated here. This *amici curiae* brief explains the critical role that impact fees play in the future growth and development of our communities and why the City's planning authority is an appropriate basis for such fees.

I. Impact Fees are a Critical Component in Successfully Addressing The Challenges of Growth and Development

Impact fees are payments required by local governments of new development for the purpose of providing new or expanded public capital facilities required to serve that development. The fees typically require cash payments in advance of the completion of development, are based on a methodology and calculation derived from the cost of the facility and the nature and size of the development, and are used to finance improvements offsite of, but to the benefit of the development.[5]

[5] American Planning Association, *Policy Guide on Impact Fees*, Ratified by Board of Directors, April 1997, http://planning.org/policyguides/impactfees.html [last visited March 24, 2005]

> "The purpose of an impact fee, as the name suggests, is to require new development to pay for the impact it makes upon the infrastructure of the local government, rather than have the cost paid by both new and existing development through taxes and user fees. Put another way, an impact fee requires the developer or owner of new development to pay a cost generated by the development but which would otherwise be paid by the taxpayers in general."[6]

Taxes are distinguished from fees by their objectives. The primary goal of taxes is raising general revenue to fund general expenses of government. Development impact fees, on the other hand, are used to ensure orderly growth and development by providing a local government the capacity to plan for and then coordinate the provision of needed capital facilities as new development occurs. The development impact fee assists a local government to accomplish these objectives by requiring that new development pay a fee to the local government that is proportionate to the costs the local government will incur to provide the necessary capital infrastructure to accommodate the new development.

Development charges have been part of the legal landscape as far back as colonial days.[7] *See*, Jerry T. Ferguson & Carol D. Rasnic, *Judicial Limitations on Mandatory Subdivision Dedications*, 13 Real Est. L.J. 250, 252 (1984)(stating that development charges existed "in colonial town ordinances, royal directories, and early state charters"). Beginning in the 1920s, it became customary for municipalities to require subdividers to dedicate land for streets, sidewalks, and the like.[8] Development charges thus embrace a wide range of permit conditions,

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6 GROWING SMART[SM] LEGISLATIVE GUIDEBOOK, 2002 Edition, American Planning Association, Stuart Meck, FAICP, General Editor, at 8-141 - 8-142.

7 Brief of *Amici Curiae* TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND AMERICAN PLANNING ASSOCIATION, *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, Texas Supreme Court, No. 02-0369, February 28, 2003.

8 *See, eg.*, Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* 217 (2003) at 340; Rutherford Platt, *Land Use and Society:*

including compelled dedications of land, impact fees, and improvement requirements.

Local governments throughout the country are increasingly using impact fees to shift more of the costs of financing public facilities from the general taxpayer to the beneficiaries of those new facilities.[9] As a general matter, impact fees are capitalized into land values, and thus represent an exaction on the incremental value of the land attributable to the higher and better use made possible by the new public facilities.[10]

Impact fees, when based on a comprehensive plan and used in conjunction with a sound capital improvements plan, can be an effective tool for ensuring adequate infrastructure to accommodate growth where and when it is anticipated.[11] Many local communities have expanded the use of impact fees to finance a wide variety of public facilities. The most widespread use of these fees is for sewer and water facilities, parks, and roads.[12] Impact fees are also being used for schools, libraries and public facilities. It is important that communities rely on zoning and other land use regulations, consistent with a comprehensive plan, to influence patterns of growth and to more accurately predict new infrastructure needs.

Local government experimentation with impact fees has been paralleled by increasing state court involvement in the review of these fees. A general trend in the state courts has been to require a "rational nexus" between the fee and the needs created by development and the

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Geography, Law and Public Policy 297-98 (1996).

9 2005 National Impact Fee Survey, Clancy Mullen, Duncan Associates February 2005.

10 http://www.impactfees.com/ (Last visited on March 25, 2005).

11 American Planning Association, *Policy Guide on Impact Fees*, Ratified by Board of Directors, April 1997, http://planning.org/policyguides/impactfees.html (Last visited March 24, 2005).

See eg., Arthur C. Nelson and James B. Duncan, *Growth Management Principles & Practices*, Planners Press, American Planning Association, 1995.

12 Mullen, *supra* note 9.

benefits incurred by the development.[13] This analysis is a moderate position between a standard that requires that the fee be "specifically and uniquely attributable" to the needs created by new development, and the relaxed standard that the fee be "reasonably related" to the needs created by development.[14] Development charges are widely accepted by the courts as important tools for plan implementation. *See*, *eg.*, *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 693 (Colo. 2003) ("Local governments often require various forms of development fees in order to apportion some of the capital expense burden they face to developers and new residents."); *Rogers Machinery Inc. v. Washington County*, 45 P.3d 966 (Or. 2002), *cert. denied*, 538 U.S. 906 (2003) ("Local governments and municipalities often impose such charges on developers as a condition of zoning changes, building and development permits, or other governmental approvals necessary for new and, generally more intensified development to occur.").

Impact fees and other non-dedication requirements in particular have become an increasingly common exaction device, "lauded by local governments in recent years as a welcome means to 'shift a portion of the cost of providing capital facilities to serve new growth from the general tax base to the new development generating the demand for the facilities.'" *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 684-85 (Minn. 1997)(citation omitted).

The concern that development pay its fair share is especially acute in this age of "sprawl", with more development occurring far from central cities, thereby exacerbating the cost of providing new services. The APA has observed that residential development cost one rural

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13 *See*, *eg.,* David L. Callies, Daniel J. Curtin, Jr., and Julie A. Tappendorf, *Bargaining for Development - A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities*, Environmental Law Institute (2003).

14 *Id.*

county $1.22 in services for every tax dollar it created.[15] Other studies show that the cost of providing services in outlying areas is at least twice the cost of servicing new development located near existing facilities.[16]

The Report Card for America's Infrastructure, prepared by the American Society of Civil Engineers, identifies more than $1.6 Trillion infrastructure needs in the United States over the next five years.[17] The nation's infrastructure (including roads, water systems, parks, etc.) has declined from an overall grade of C in 1988 to D in 2005, due primarily to the decreased funding from the federal level.[18] The obvious fiscal burden for important infrastructure projects is shifting to local and state governments, which must address this challenge first, by planning responsibly, and then by implementing their plans. Successful implementation requires that local governments, such as the City of Ocean Springs, have the necessary tools for implementation.

II. Impact Fees Must Be Consistent with Sound Planning Principles.

A community cannot pull impact fees out of thin air and create a defensible impact fee program. Rather, impact fees must be developed in the context of a strong planning process, consistent with sound planning principles. The City of Ocean Springs' impact fee ordinance, unlike the City of Madison's earlier impact fee ordinance[19], is consistent with these principles.

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15 American Planning Association, *Paying for Sprawl*, available at http://www.planning.org/viewpoints/sprawl.htm (Last visited March 24, 2005).

16 *See*, *eg.,* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 Penn. L. Rev. 873, 876 (2000) (citing studies).

17 *Supra* note 15

18 American Society of Civil Engineers, *Report Card for America's Infrastructure*, http://www.asce.org/reportcard/2005/assets/pdf/summary_of_findings.pdf (Last visited March 25, 2005).

19 *Twin City Fire Ins. Co. v. City of Madison*, 309 F.3d 901 (5th Cir. 2002).

The APA has identified a number of "impact fee standards" which we believe must be present, either in the state enabling legislation and/or the local impact fee program, in order to sustain an impact fee which is legally-defensible and consistent with sound planning principles.[20]

* The imposition of an impact fee must be rationally linked (the "rational nexus") to an impact created by a particular development and the demonstrated need for related capital improvements pursuant to a capital improvement plan and program.

* Some benefit must accrue to the development as a result of the payment of a fee.

* The amount of the fee must be a proportionate fair share of the costs of the improvements made necessary by the development and must not exceed the cost of the improvements.

* A fee cannot be imposed to address existing deficiencies except where they are exacerbated by new development.

* Funds received under such a program must be segregated from the general fund and used solely for the purposes for which the fee is established.

* The fees collected must be encumbered or expended within a reasonable timeframe to ensure that needed improvements are implemented.

* The fee assessed cannot exceed the cost of the improvements, and credits must be given for outside funding sources and local tax payments which fund capital improvements.

* The fee cannot be used to cover normal operation and maintenance or personnel costs, but must be used for capital improvements, or under some linkage programs.

* The fee established for specific capital improvements should be reviewed at least every two years to determine whether an adjustment is required, and similarly the capital improvement plan and budget should be reviewed at least every 5 to 8 years.

* Provisions must be included in the ordinance to permit refunds for projects that are not constructed.

Although state enabling authority for impact fees is certainly preferable so that these standards can be uniformly applied, the absence of such enabling authority is not fatal to the

[20] American Planning Association, *Policy Guide on Impact Fees*, Ratified by Board of Directors, April 1997, http://www.planning.org/policyguides/impactfees.html (Last visited March 24, 2005)

validity of a local impact fee program. The courts in at least five states without such enabling authority have held that local governments have implied authority to adopt impact fees.[21] The basis for recognizing this implied authority has been either through home rule statutes, zoning and planning statutes, plan consistency statutes, home rule powers authorized in the state constitution, or on the theory that development impact fees are land use regulations and that a local government with general land use authority may enact them as part of that power.[22]

The Kansas Supreme Court held that the City of Leawood may enact development impact fees under its home rule authority. *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan.1995). The Wyoming Supreme Court held that the City of Rawlins is authorized to adopt a park in-lieu fee regulation under the state's general zoning enabling legislation because impact fees are a valid exercise of police power,"[e]ven without a specific grant of authority." *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983).

The Florida Fourth District Court of Appeals held that Palm Beach County had implied authority to adopt road impact fees through three sources: (1) the state's planning legislation, which required local governments to adopt comprehensive plans and then implement them, (2) general home rule powers to carry out municipal purposes under the state constitution, and (3) a state statute which allowed the county to build and fund roads. *Homebuilders and Contractors*

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21 *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan.1995); *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983); *Homebuilders and Contractors Ass'n of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County*, 446 So.2d 140 (Fla. 4th DCA 1984), *review denied*, 451 So. 2d 848 (Fla.), *appeal dismissed*, 469 U.S. 976, 105 S. Ct. 376, 83 L. Ed. 2d 311 (1984); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (2000); *Home Builders Ass'n. of Utah v. City of American Fork*, 973 P.2d 425 (Utah 1999).

22 Julian C. Juergensmeyer and Thomas E. Roberts, *Land Use Planning and Control Law*, St. Paul: West Group Publishing (1998) at 421.

Ass'n of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1984), *review denied*, 451 So. 2d 848 (Fla.), *appeal dismissed*, 469 U.S. 976, 105 S. Ct. 376, 83 L. Ed. 2d 311 (1984). *See also*, *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983).

The Ohio Supreme Court upheld the City of Beavercreek's impact fee ordinance in the absence of enabling authority, holding that there must be a reasonable relationship between the city's interest in constructing new roadways and the increase in traffic generated by new development, as well as a reasonable relationship between the impact fee imposed upon the developer and the benefits accruing to the developer from the construction of the new roadways. *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (2000). Prior to the adoption of Utah's impact fee enabling law, the Utah Supreme Court upheld the City of American Fork's impact fees for sewer and water facilities based on the *Banberry*[23] factors for determining reasonable impact fees. *Home Builders Ass'n. of Utah v. City of American Fork*, 973 P.2d 425 (Utah 1999).

The City of Ocean Springs engaged in a thoughtful planning process, prepared and adopted a comprehensive plan which identified the challenges the community is confronting as a result of growth and development, and then selected policies and implementation techniques to address these challenges. The City's recently-adopted impact fees program is only one method the City expects to use, but it is integrally connected to a number of the policies crafted by the City to address the anticipated costs of growth and development.

The Mississippi Code provides the City of Ocean Springs authority and responsibility to

[23] *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981).

plan for the "*coordinated physical development*" of the community *"in accordance with present and future needs*" [Miss. Code §17-1-11(1)(a)] along with the authority to enforce and implement the plan ["*enforce the comprehensive plan, zoning ordinance, subdivision regulations and capital improvements program as recommended by the local planning commission after a public hearing"*. Miss. Code §17-1-11(2)]. The City reasonably relied on this planning authority in the preparation and adoption of its impact fees program. Without such authority, the City's Plan and subsequent efforts to implement its Plan, would be toothless.

CONCLUSION

Impact fees are playing an increasingly important role in ensuring that development "pays its way" by controlling the ill-effects of urban sprawl, promoting the public interest, and ensuring fairness in the land-use planning process. By mistakenly designating the City of Ocean Springs' impact fees as an unlawful tax, the Circuit Court ruling threatens the continued viability of this critical planning tool. We urge this Court to preserve the legitimate role of impact fees in the implementation of the City's adopted Plan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of *Amici Curiae* has been served upon the following individuals by United States mail, postage prepaid, this 1st day of April 2005:

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