Mississippi College Law Review

Volume 34
Issue 1 *Vol. 34 Iss. 1*

Article 6

2015

To Fee or Not to Fee: Alfonso v. Diamondhead Fire Protection District and Mississippi's Need for a Fee-Tax Delineation

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TO FEE OR NOT TO FEE: *ALFONSO V. DIAMONDHEAD FIRE PROTECTION DISTRICT* AND MISSISSIPPI'S NEED FOR A FEE-TAX DELINEATION

*Andrew R. Norwood**

I. INTRODUCTION

Taxes are not always easy to identify. During the Constitutional Convention when the legislature questioned the difference between a direct tax and an indirect tax, James Madison noted: "No one answd."[1] With the increasing use of fees—as a means of raising public revenues—taxes are now even harder to identify. Fees, in many ways, are similar to taxes but they possess crucial differences. And because fees are not restricted in the same manner as taxes, they are often the perfect vehicle for governments to use as a back door for funding public projects.

Fees have received a lot of attention over the past ten years, and many courts have been forced to address their special characteristics because of their increased use.[2] Mississippi courts have dealt with fees on a few occasions, although these holdings have mainly been limited to impact fees—as opposed to the more commonly implemented user fees. In this Note, the primary focus will be user fees and the case law and statutes surrounding them. User fees were most recently addressed by the Mississippi Supreme Court in *Alfonso v. Diamondhead Fire Protection District*.[3] This specific type of fee is growing rapidly because of its usefulness to districts and local governments. The term "district" in this Note will be used as a reference for fire protection, water, sewer, and garbage collection and disposal districts mentioned in Mississippi Code section 19-5-151. Although this Note will deal mostly with the fees imposed by these districts, the application of the same principles can be applied to a wider array of public entities.

The Court's decision in *Alfonso* is potentially problematic, not simply because of its holding but, more importantly, because of the process used to reach its conclusion. The Court had an opportunity to examine a fee and provide a definitive approach for distinguishing a fee from a tax. Such an approach is needed to accurately categorize public charges so that the proper restrictions can be imposed. But the Court delayed providing the much-needed guidance, and resolved the case by examining the language

* J.D. Candidate, Mississippi College School of Law, 2015. To my wife Kim: thank you for your love and support. To Professor Larry Lee: thank you for your guidance and thoughtful review of this Note; your help throughout the writing process, in addition to your tax expertise, made all the difference. And to the members of the Mississippi College Law Review: thank you for all the tiresome work that went in to preparing this Note for publication.

1. James Madison, *Debates in the Federal Convention of 1787*, *available at* http://www.constitution.org/dfc/dfc-1787.txt (last visited Apr. 2, 2015).

2. David Segal, *Cities Turn to Fees to Fill Budget Gaps*, N.Y. TIMES, Apr. 10, 2009, at A1.

3. Alfonso v. Diamondhead Fire Prot. Dist., 122 So. 3d 54, 55 (Miss. 2013).

of the statute and defining "services rendered." By doing so, the Court evaded a difficult issue, but it might have also provided districts with a dangerous power to be wielded against the individuals in its area.

My intention with this Note is first to display the historical treatment that Mississippi courts, specifically the Mississippi Supreme Court, have given to fees, and how that treatment coincides with the new holding in *Alfonso*. After considering the development of Mississippi's law in this area, I will examine the importance of distinguishing fees from taxes in a systematic and consistent manner; the consequences of failing to do so; the approaches taken by other States; and finally, possible solutions for Mississippi's potential problems.

II. FACTS AND PROCEDURAL HISTORY

The Diamondhead Fire Protection District ("DFPD") began in 1974[4] as a volunteer fire department that served the needs of a specific district in Diamondhead, Mississippi. Originally, the DFPD was funded by ad valorem taxes and donations from the community.[5] All was well until 1993 when the benevolence of the property owners ran dry and donations came to a halt.[6] The DFPD was left at a pivotal juncture. From what source would the new funding come? Their answer: a monthly charge.[7] In order to fund the fire department, all property owners in Diamondhead were assessed fifteen dollars per month.[8] The DFPD felt no initial resistance, so it continued in this manner.[9] In 2002, the DFPD increased their monthly assessment to twenty dollars per month.[10]

Today, the fire department boasts fifteen full-time fire fighters, with four on duty at all times.[11] In addition to responding to approximately 700 emergency calls a year, it also provides post-fire investigations, pre-incident plans, safety education training, and various fire related inspections.[12] In recognition of this work, the DFPD has obtained a "Class Six" fire rating.[13]

4. Not until 1976 did the DFPD become a full-time, paid department. Diamondhead Fire Department, http://dhfire.tripod.com/ (last visited Apr. 2, 2015).

5. More specifically, the DFPD was funded through property taxes assessed by the municipality on real property and through donations. The Diamondhead Country Club and Property Owner's Association made donations to the DFPD. Generally, ad valorem taxes make up a significant portion of the revenue for state and local governments. Diamondhead Fire Department, http://dhfire.tripod.com/ (last visited Apr. 2, 2015).

6. *Alfonso*, 122 So. 3d at 55.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. The Mississippi Insurance Rating Bureau provides a rating for each fire department. The ratings range from Class One, as the best rating possible, to a Class Ten, as the worst. Insurance companies usually base their premiums on the area's fire rating. Considerations for the ratings include: "[t]he fire department, the water department, the fire alarm system, the fire prevention program, the building department[,] and permit's department." Mississippi State Rating Bureau, http://www.msratingbureau.com/minimum_requirements.old.htm (last visited Apr. 2, 2015). For comparison, the best fire ratings attained in Mississippi to date is a Class Three.

All in all, the DFPD is a proficient fire department, capable of meeting the needs of the citizens in its district.

Even so, in March of 2009, property owners in the DFPD decided that they were tired of the monthly charge. They sued the DFPD, along with several members—past and present—on the board of commissioners, for the mandatory monthly assessment.[14] The property owners urged the Hancock County Circuit Court for a declaratory judgment to render the monthly charge void as an illegal tax.[15]

Pursuant to Mississippi Rule of Civil Procedure 57, the trial court found that a declaratory judgment was appropriate.[16] The court opined that the monthly charge is a permissible fee, rather than a tax, according to Mississippi Code section 19-5-195.[17] The trial court focused on the non-restrictive language of Mississippi Code section 19-5-195 as permitting a broad reading of the term "fees."[18] The court further distinguished the DFPD's monthly charge from a tax by citing *Mayor and Board of Alderman, City of Ocean Springs v. Homebuilders Association of Mississippi, Inc.* for the proposition that taxes are generally imposed by a state or municipal legislature as opposed to a fee, which is imposed by an agency on those it regulates.[19]

After the trial court denied the property owner's motion to reconsider, they filed an appeal, which the Mississippi Supreme Court accepted.[20]

III. Background and History of the Law

"The beginning of wisdom is to call things by their proper name."[21] And if Confucius is correct, it can be said that wisdom is needed to sort through fees and taxes. Fees are often improperly named, which tends to blur an already hazy subject. The problem often stems from a failure to artfully use these terms. This naming issue is not specific to Mississippi; it is perplexing in the vast majority of jurisdictions.[22] Development of the

14. *Alfonso*, 122 So. 3d at 54. The complaint also alleged several counts of negligence, intentional assessment, and extortion.

15. Alfonso v. Diamondhead Fire Prot. Dist., No. 09-00145, at ¶ 2 (Miss. Hancock Cnty. Ct. Feb. 17, 2011). Plaintiffs' complaint also demanded actual and punitive damages for past assessments, a figure that the Plaintiffs' claimed was approximately ten million dollars.

16. *Id.* at ¶ 1.

17. *Id.* at ¶ 6.

18. *Id.* at ¶ 4.

19. *Id.* at ¶ 6.

20. The appeal was granted to resolve two issues: (1) "whether the monthly fee is an illegal tax[,]" and (2) "whether the power to tax should be construed narrowly." *Alfonso*, 122 So. 3d at 54.

21. Confucius > Quotes > Quotable Quote, http://www.goodreads.com/quotes/106313-the-beginning-of-wisdom-is-to-call-things-by-their (last visited Apr. 3, 2015).

22. The problem is evident from the literature written on other state's treatment of fees and taxes, such as: Hugh Spitzer, Comment, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335 (2003); Mark Wolowitz ed., *Washington Municipal Ambulance Utility Fee Held to be an Illegal Tax*, Journal of Multistate Taxation and Incentives, Sept. 2004; David Pettinari, *Michigan's Common Law Distinction Between Taxes and Regulatory Fees, User Fees and Special Assessments*, Journal of Multistate Taxation and Incentives, Aug. 2000, at *26-35; Laurie Reynolds, Comment, *Taxes, Fees, Assessments, Dues and the "Get What You Pay For" Model of Local Government*, 56 Fla. L. Rev. 373 (2004).

Mississippi law in this area is not necessarily behind all other states (there is a widespread need for clarification of the distinction between fees and taxes) but it is a far cry from where it could be.

Distinguishing fees from taxes is not an easy endeavor. Even in jurisdictions that have well equipped themselves to segregate the two, the results sometimes seem as though a coin was flipped to decide the matter. But as municipal corporations and districts seek new ways to expand their revenue-gathering powers, fees have become a productive alternative that requires additional consideration—particularly in a poor state such as Mississippi.

A. Early Cases

Mississippi's first case with a fee-tax issue, while only incidental, was in 1883 in *Murray v. Lehman*.[23] There the court addressed a docket fee imposed by a circuit court on its litigants.[24] These docket fees were used to supplement the salary of the judge and chancellor of that particular court.[25] The Court in *Murray* plainly stated that this "docket fee" was no fee at all—it was a tax.[26] The Court, however, did not consider this error worthy of correction, but instead merely made the comment in passing.[27] The name or label of the charge did not make a difference, yet the fact that it was actually a tax changed the reasoning, and ultimate outcome, of the case.[28] By applying tax principles, the Court found that the docket fee did not meet the requirements of equality and uniformity, and hence, was unconstitutional.[29]

The Court's analysis in *Murray* implicitly recognized that there was an important distinction between fees and taxes. Certain restrictions apply to taxes that are not imposed on fees, and for that reason, it was important for the Court to distinguish the docket fee as a disguised tax.

Nevertheless, several decades later the Mississippi Supreme Court treated fees and taxes as though there was no difference between the two.[30] In *Pryor v. State*, the plaintiff sued to contest the validity of a "privilege license tax."[31] The Court used the term "fee" and "tax" interchangeably, at times alternating them within a single sentence to refer to the same charge.[32] More specifically, the Court stated that the privilege tax was administered through a "license fee."[33] As a result, the Court held that a fee

23. Murray v. Lehman, 61 Miss. 283 (Miss. 1883).
24. *Id.* at 283-84.
25. *Id.*
26. *Id.* at 286 ("The docket fee required by the act under consideration is a tax . . . .").
27. *Id.*
28. *Id.* at 286-87.
29. *Id.* at 287.
30. Pryor v. State, 139 So. 850, 851 (Miss. 1932).
31. *Id.* at 850.
32. *Id.*
33. *Id.*

was used to carry out a tax.[34] A similar treatment is found in *City of Grenada v. Andrews*.[35] Again, fees and taxes are treated as one and the same. No distinction is made between a privilege tax and a license fee; rather, a license fee is held to be the method used to carry out a privilege tax.[36] In fact, the charge was called a "privilege tax fee."[37] To further the amalgamation, *Snapp v. Neal* in the same vein classified a "fee for house trailers" as a tax.[38] This was the result of a statute, since repealed, that stated, "the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof."[39]

In early cases before the Mississippi Supreme Court, the lack of clarity between fees and taxes was generally immaterial as the need for distinction was not as prevalent as today. That being said, when delineation was absolutely necessary—such as *Murray v. Lehman*—an implied difference satisfied the court. Because fees and taxes were (and are) often used interchangeably, it is difficult to ferret out the distinction the Court has made over the years. But it is clear that the differences are often overlooked.

B. Later Cases

In the past twenty years, the Mississippi Supreme Court has provided an in depth analysis of fees in only a handful of cases, with the type of fee differing from case to case. Although fees come in all shapes and sizes, the cases before the Mississippi Supreme Court have mostly involved regulatory fees and user fees. *Alfonso* presented the Court with a user fee. For analysis and to avoid confusion, these different fee types will be dealt with separately.

1. Regulatory Fees

Regulatory fees stem from "the government's police powers and are imposed on a regulated individual, entity, property, or business in order to offset the cost of the regulation."[40] The regulatory fee that has sparked much of the fee-tax discussion in Mississippi is impact fees. An impact fee is "a monetary charge imposed by a county or municipal government . . . to regulate new development on real property."[41] This type of fee attempts to offset the cost that comes from new development or growth.[42]

Generally, states grant local governments and districts the authority to implement impact fees in two ways: (1) expressly by enacting impact fee

34. *Id.*
35. City of Grenada v. Andrews, 58 So. 2d 382 (Miss. 1952).
36. *Id.* at 383-84.
37. *Id.* at 382.
38. Snapp v. Neal, 164 So. 2d 752, 758 (Miss. 1964).
39. *Id.* at 756.
40. Reynolds, *supra* note 22, at 407.
41. Mayor & Bd. of Alderman, City of Ocean Springs v. Homebuilders Ass'n of Miss. Inc., 932 So. 2d 44, 51 (Miss. 2006) (quoting TENN. CODE ANN. § 66-5-211(b)(3)).
42. James Kushner, SUBDIVISION LAW & GROWTH MGMT § 6.31 (2d ed. 2013).

enabling legislation; or (2) implicitly through the home rule and a local government's broad police power.[43] The majority of states have authorized impact fees by enacting statutes, which equip local governments with such power.[44] Mississippi does not yet find itself in that category, however, as it has not passed impact fee legislation.

In 1993, the Mississippi Supreme Court handed down its decision in *Sweet Home Water & Sewer Association v. Lexington Estates, Ltd.*.[45] In that case, a public utility imposed an impact fee on a construction company that was in the process of developing a new apartment complex.[46] Interestingly, Sweet Home Water had not assessed an impact fee to anyone before this time and it did not assess anyone else after.[47] When Lexington Estates refused to pay the impact fee, Sweet Home Water & Sewer shut off its water and sewer service, which resulted in Lexington Estates filing the lawsuit.[48]

The Court in *Sweet Home* first considered Sweet Home's power to exact an impact fee.[49] A district is permitted to obtain revenue from "reasonable rates, fees, tolls or charges for the services, facilities and commodities of its system . . . ."[50] The Court noted, however, that those fees "must be reasonably calculated to provide for the system's functioning and growth."[51] Sweet Home's impact fee was not considered a necessary expense to the system's functioning and growth.[52] Further, Sweet Home could only claim that the charge was administered out of a "fear" that Lexington Estates would have a negative impact on the system.[53] The charge was not tied to any legitimate service or administrative expense that Sweet Home had or would provide; consequently, the Court held that the district did not have the authority to charge the impact fee.[54]

The Court in *Sweet Home* recognized that a district's authority to charge for its services should be carefully scrutinized.[55] The Court examined the statute granting a district the authority to raise revenue and its analysis flowed directly from that statute.[56] Instead of interpreting the statute broadly, the Court's analysis made it clear that Mississippi Code section

43. Kenneth Farmer, Comment, *Impact Fees: An Alternative Way to Finance Public Facilities in Mississippi*, 28 MISS. C. L. REV. 287, 291-92 (2009).

44. As of 2006, twenty-seven states have adopted impact fee legislation. Four more states have authorized them in some way other than statutorily. *Mayor & Bd. of Alderman*, 932 So. 2d at 51.

45. Sweet Home Water & Sewer Ass'n v. Lexington Estates, Ltd., 613 So. 2d 864 (Miss. 1993).

46. *Id.* at 866.

47. *Id.*

48. *Id.* at 868.

49. *Id.* at 869.

50. MISS. CODE ANN. § 19-5-195 (West 2014).

51. *Sweet Home Water & Sewer Ass'n*, 613 So. 2d at 870.

52. *Id.*

53. *Id.*

54. *Id.* at 871.

55. *Id.* at 870.

56. *Id.*

19-5-177 and similar provisions were to be strictly and narrowly construed.[57]

The issue of impact fees arose once again in *Mayor & Board of Alderman v. Homebuilders Association of Mississippi, Inc.*[58] In that case, the Homebuilders Association of Mississippi challenged an impact fee ordinance adopted by the City of Ocean Springs.[59] Ocean Springs adopted the new impact fee ordinance as a part of a Comprehensive Plan for the city's growth and development.[60] The Court seemed to pursue a more methodical approach than was seen in *Sweet Home.* First, it considered the City's authority to impose an impact fee.[61] The Court recognized two different sources that provide a district the right to impose an impact fee: one is an impact fee statute and the other is the City's police power.[62] Because Mississippi has not adopted impact fee legislation, the Court spent most of its time pondering the city's police power.[63]

Ocean Springs argued that the Home Rule statute provides it with the authority to impose impact fees.[64] But after considering the applicable statutes, the Court found that neither the Home Rule statute nor any other municipal planning statute, gives "no express grant of authority" for a City to impose impact fees.[65] Again, the Mississippi Supreme Court tethered a local government's use of fees to a specific grant of authority by the legislature. Extending a strict and narrow construction, the Court seemed to be extremely hesitant, if not averse, to implying a district's authority to impose fees.

Although *Sweet Home* and *Ocean Springs* share a similar approach to deciding a district's authority to charge fees, there is one important difference. While *Sweet Home* states that a district can impose an impact fee that is reasonable, *Ocean Springs* does not allow for such a condition. This difference is easily clarified, however, by noting and focusing on the parties who imposed the fees. In *Ocean Springs*, the City of Ocean Springs was attempting to impose an impact fee, whereas in *Sweet Home*, a water and sewer district was administering the fee. A district is expressly granted the power to charge fees for services rendered, whereas a City is given no such express authority. So these holdings are not inconsistent with one another but rather a similar approach applied to different entities.[66]

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57. *Id.*

58. Mayor & Bd. of Alderman, City of Ocean Springs v. Homebuilders Ass'n of Miss. Inc., 932 So. 2d 44, 51 (Miss. 2006) (quoting TENN. CODE ANN. § 66-5-211(b)(3)).

59. *Id.* at 47.

60. *Id.*

61. *Id.* at 50.

62. *Id.* at 51.

63. *Id.* at 52.

64. The Home Rule is found at MISS. CODE ANN. § 21-17-5.

65. *Mayor & Bd. of Alderman*, 932 So. 2d at 53.

66. Some have noted that the *Ocean Springs* case stands for a new approach to impact fees and a harsher treatment of them. But I do not see this as being the case. I think the Mississippi Supreme Court was dealing with different parties, different statutes, and different grants of authority. Kenneth Farmer, *Impact Fees: An Alternative Way to Finance Public Facilities in Mississippi*, 28 MISS. C. L. REV. 287, 304 (2009).

These cases offer insight into the Mississippi Supreme Court's treatment of fees administered on a local level. Although regulatory fees differ from user fees, the Court's analysis reveals that a local government or district's authority to charge fees for services is to be strictly and narrowly construed. I began by examining regulatory fees because the law is more developed than it is for user fees, and hence, it offers more insight into how Mississippi treats fees in general.

2. User Fees

A user fee is a charge "levied by the government in exchange for citizen use of government services or property."[67] Mississippi does not possess a wealth of case law on this subject. But the Mississippi Supreme Court did examine a user fee in *Rogers v. Oktibbeha County Board of Supervisors*.[68] Preceding the *Rogers* case, Oktibbeha County had started a garbage collection district and regularly assessed a monthly fee of $9.75 to all residents within the district.[69] Two of the residents did not use or need the service because they disposed of the little garbage they produced on their own land.[70] Despite never using the service, Oktibbeha County sued to collect their "delinquent" fees.[71]

The Court's treatment of user fees differs from that shown in the impact fee cases. The Court seems to rush to several successive conclusions without extensive analysis. For instance, the property owners that refused to pay the fee were quickly labeled "garbage generators."[72] How did the Court reach this conclusion? By pointing to the defendant's admissions that they did in fact produce garbage on a regular basis.[73] It also stated that they disposed of their garbage themselves, without leaving anything for the County to collect; but their self-disposal was not considered.[74] The Court quickly determined that the defendants were "clearly 'generators of garbage.'"[75]

More importantly, the Court did not decide the issue of whether the "garbage collection fee" was a tax.[76] The Court found that every person in the district was required to pay the garbage collection fee, regardless of use.[77] This holding leaves little room for distinguishing a fee from a tax. The Court qualifies its view by stating that an opt-out provision is available for a county to adopt if it so desires.[78] Read this way, the Court seems to promote a "your choice" provision, allowing counties to decide if they wish

67. Reynolds, *supra* note 22, at 407.
68. Rogers v. Oktibbeha Cnty. Bd. of Supervisors, 749 So. 2d 966 (Miss. 1999).
69. *Id.* at 967.
70. *Id.*
71. *Id.*
72. *Id.* at 968.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 971 (Cobb, J., dissenting).
77. *Id.* at 968.
78. *Id.* at 969.

to tax the residents or charge a fee to those who want to utilize a service. If a county does not adopt an opt-out provision, the county is essentially assessing a tax to the entire county. I say tax because the assessment is no longer tied to a benefit received. Rather, it is a mandatory charge based on a person's status that benefits the community as a whole. These are essential characteristics of a tax. And as previously mentioned, Oktibbeha County had not adopted any such opt-out provision.[79] Yet the Court still stated that the defendants should have requested this exception—even if it didn't exist.

Writing a dissenting opinion in *Rogers*, Justice Cobb states some of these flaws.[80] He remarked how the majority's opinion muddled the distinction between fees and taxes, referencing the district's option to tax the county residents as a funding mechanism if it desired.[81] Mississippi Code section 19-5-21(1) allows the Board of Supervisors to levy an ad valorem tax rather than a user fee, which would "assure that all county property owners would pay, regardless of use."[82] Although the dissent recognized that fees and taxes were improperly mixed in the majority opinion, it did not clarify the proper distinction.

Therefore, we are left with a very unsatisfying result on the fee-tax distinction. The Court in *Rogers* does not provide a proper framework for analyzing a district's use of its authority to charge user fees for the services it provides, or in the alternative, to recognize a tax in fee clothing. While these cases do not provide adequate guidance for delineating fees and taxes, two other areas shed light on the topic: dictum from *Ocean Springs* and Attorney General opinions.

3. Dictum in *Ocean Springs*

The Mississippi Supreme Court offered its most informative opinion on the fee-tax delineation in *Ocean Springs*.[83] The dictum that the Court sets forth in that case lays some foundational truths that apply when differentiating fees and taxes. To determine if a regulatory fee was valid or constituted a tax, the Court in *Ocean Springs* examined some fundamental characteristics of fees and taxes.[84]

The Mississippi Supreme Court looks to the United States Supreme Court for guidance on the distinction between fees and taxes. In *Illinois Central Railroad Co. v. City of Decatur*, the United States Supreme Court offered definitions for a tax and a special assessment.[85]

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79. *Id.* at 970 (Cobb, J., dissenting).

80. *Id.* at 969 (Cobb, J., dissenting).

81. *Id.* at 971 (Cobb, J., dissenting).

82. *Id.* (Cobb, J., dissenting).

83. Mayor & Bd. of Alderman, City of Ocean Springs v. Homebuilders Ass'n of Miss. Inc., 932 So. 2d 44, 54 (Miss. 2006).

84. *Id.*

85. *Id.*

The general levy of taxes is understood to exact contributions in return for the general benefits of government and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special Assessments, on the other hand, are made upon the assumption that a portion of the community is to be especially and peculiarly benefited, in the enhancement of the value of the property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it.[86]

The Fifth Circuit also addressed the distinguishing marks of fees and taxes. In *Homebuilders Association of Mississippi v. City of Madison, Mississippi.*, the Fifth Circuit found "workable distinctions" from case law on the subject.[87] One distinction was that while a tax "sustains the essential flow of revenue to the government" and benefits the community at large, a fee "is linked to some regulatory scheme" and raises money only to offset an "agency's regulatory expenses."[88] Moreover, fees are usually "limited to the proportionate cost of giving the fee payer . . . special attention."[89]

The Court in *Ocean Springs* rejected the City's authority to implement an impact fee because the fee was not shown to offset any of the City's expenses.[90] The Court also gave deference to the Iowa Supreme Court for its decision in *Home Builders Association of Greater Des Moines v. City of West Des Moines.*[91] There, the Iowa Supreme Court was faced with an impact fee imposed on residential building permits that was intended to fund parks in the area. The court held that because the fee was not "compensation for direct service," it was an invalid tax.[92] The Mississippi Supreme Court used that reasoning to sort through the issue it was asked to decide. The Court concluded by stating that a "county and city are not authorized to impose taxes without direct authorization from the Legislature."[93]

The Court's dictum, as well as past case law, unveils an intent to treat a municipal corporation or district's revenue raising mechanisms as either: (1) a fee, which must be tied to a direct service; or (2) a tax, which must be tied to a direct grant of authority by legislature. This treatment is more clearly seen through the Court's opinions on regulatory/impact fees. User fees, on the other hand, have not benefited from any type of similar legal analysis.

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86. Ill. Cent. R.R. Co. v. City of Decatur, 147 U.S. 190, 198-99 (1893).

87. Homebuilders Ass'n of Miss. v. City of Madison, Miss., 143 F.3d 1006, 1011 (5th Cir. 1998).

88. *Id.* at 1011.

89. Mayor & Bd. of Alderman, City of Ocean Springs v. Homebuilders Ass'n of Miss. Inc., 932 So. 2d at 55 (Miss. 2006).

90. *Id.*

91. Home Builders Ass'n of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339 (Iowa 2002).

92. *Id.* at 350.

93. *Mayor & Bd. of Alderman*, 932 So. 2d at 59.

4. Attorney General Opinions

Another source for defining Mississippi's treatment of fees is Attorney General ("AG") opinions. While these opinions are not binding, they are persuasive authority that the Court can, and often does, consult for guidance.[94] The AG is charged with responding to any public body or official who requests his interpretation of a statute.[95] The AG must then "give his opinion in writing . . . upon any question of law relating to their respective offices."[96] Over the years, the AG has frequently been asked for his interpretation of statutes dealing with a municipal corporation or district's authority to charge fees. Many of these opinions deal specifically with fire protection districts, which helps flesh out the issue presented in *Alfonso*.

In 1990, Sylvia Pross queried the AG to determine if a fire district could charge fees for providing fire protection services.[97] In a brief response, the AG announced that he believed that Mississippi Code section 19-5-175 gave a district the power to charge fees "for services rendered."[98] This opinion was followed later with a short clarification of the meaning of "fire protection services."[99] The AG stated that while he was not fully able to give an adequate definition, he opined that making a determination as to what constitutes "fire protections services" is largely a question of fact.[100] He went on to state that a reasonable conclusion would be to find that fire services are those "related to fires and fire fighting, including emergency response and rescue services."[101]

The AG also addressed impact fees and the Court's interpretation of them in light of *Ocean Springs*.[102] The AG stated that although *Ocean Springs* applied to a municipal corporation, as opposed to a district, Mississippi law requires a specific grant of authority to impose impact fees. After reciting and considering Mississippi Code section 19-5-195,[103] the AG opined that impact fees are not included in the district's arsenal.[104] If the statute does not grant such authority, then it is outside of the district's power to charge impact fees. This holding reiterates the Court's narrow interpretation of the statutes and its reluctance to grant power to a district that the legislature has not expressly given.

The AG's opinion offered to the Honorable Randy Wilburn directly addressed a fire district's use of fees.[105] A fire district, which was funded at the time by a portion of ad valorem taxes, wanted to charge dues to its residents to help fund its services. After consideration, the AG declared

94. Poppenheimer v. Estate of Coyle, 98 So. 3d 1059, 1066 (Miss. 2012).
95. MISS. CODE ANN. § 7-5-25.
96. *Id.*
97. Sylvia Pross, Op. Att'y Gen., 1990 WL 548177 (Miss. Nov. 29, 1990).
98. *Id.*
99. Phillip Terney, Op. Att'y Gen., 1998 WL 958140 (Miss. Dec. 11, 1998).
100. *Id.*
101. *Id.*
102. Larry Norris, Op. Att'y Gen., 2007 WL 1229246 (Miss. Mar. 20, 2007).
103. *Id.* This is the same statute that grants a fire protection district with the power to charge fees.
104. *Id.*
105. Randy Wilburn, Op. Att'y Gen., 2000 WL 1207464 (Miss. July 14, 2000).

that "charging 'dues' for fire protection services constitutes a tax that is not authorized by statute and is therefore prohibited."[106] The Mississippi Supreme Court reached a different conclusion in *Alfonso* in what appears to be the same scenario.

Further, the AG later qualified his opinion to Wilburn in an opinion to Charles Marshall.[107] Again, a fire department that was funded largely through ad valorem taxes and donations desired the AG's approval to begin charging mandatory fees to all residents in its district.[108] The AG answered by urging the fire district to take notice of the limits on its authority. While a fire district may charge fees for "services which have already been rendered," it may not "levy rates and charges in anticipation of rendering services."[109] Charging fees for anticipatory services, he claimed, would amount to an unlawful tax.[110]

The opinions of the AG offer pointed insight into the issue of a district's authority to charge fees. The boundaries between fees and taxes are most clearly delineated in the AG opinions. Although these opinions are not binding on the courts, they represent the treatment that will likely be given the certain statutes. That notwithstanding, as seen in *Alfonso*, AG opinions are not always followed or even addressed by the courts.

IV. INSTANT CASE

A. *Majority Opinion*

In *Alfonso v. Diamondhead Fire Protection District*, the Mississippi Supreme Court answered the question of whether a mandatory monthly fee imposed by a fire district on property owners constitutes an illegal tax.[111] Chief Justice Waller authored the opinion for the majority and was joined by Justices Randolph, Lamar, and Pierce.[112]

The majority opinion focused on the meaning of "services rendered" in Mississippi Code section 19-5-177(1)(e).[113] As an issue of first impression, the Court found that meaning to be the crux of the case. Fire protection districts are authorized to charge for "services rendered by or through the facilities of such district . . . ."[114] But, the statute does not define "services rendered." What is a service and when is it rendered? These are the questions the Court endeavored to answer in *Alfonso*.

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106. *Id.*

107. Charles Marshall, Op. Att'y Gen. Op., 2005 WL 3817032 (Miss. Dec. 27, 2005).

108. *Id.*

109. *Id.*

110. *Id.*

111. Alfonso v. Diamondhead Fire Prot. Dist., 122 So. 3d 54, 56 (Miss. 2013). Although the appeal raised two issues, the Court consolidated them into one: "whether the DFPD's fee for fire-protection services is based on services rendered or whether the charge amounts to an illegal tax[.]" *Id.* at 55-56.

112. *Id.* at 56.

113. *Id.* at 57.

114. MISS CODE ANN. § 19-5-177(1)(e).

The majority first reviewed the arguments of the parties. The property owners contended that the fire district did not provide them any services, citing the fact that no fires were put out on their residences.[115] They also cite opinions of the AG[116] to bolster their claim that "anticipatory services" are not included in "services rendered."[117] So they argued that their monthly fee was charged for purely anticipatory services and was an illegal tax.[118]

The DFPD argued that daily services to the property owners are required in order to properly serve them in the event of a fire.[119] It claimed that activities necessary to prepare for fires and other emergencies are services rendered.[120] These activities include: maintaining fire equipment, staffing the fire station, staffing medical technicians, maintaining pre-incident plans, inspecting fire hydrants, and providing safety training.[121] Because all these activities were rendered and benefitted the property owners, the DFPD asserted that it may recover fees in exchange.

After summarizing the stances, the Court looked to a pair of dictionaries to help resolve the matter.[122] Black's Law and Webster's Third New International were consulted for a plain meaning of the term "service."[123] Black's Law Dictionary revealed that a "service," among other things, is "doing something useful for a person . . . ."[124] And Webster's showed that "service" is "the performance of work commanded or paid for by another . . . ."[125]

After quoting the two definitions of "service," the Court discussed the holdings of other courts that have dealt with similar issues, particularly a Washington decision and a Wisconsin decision.[126] The Supreme Court of Washington found that "benefits charges" were permissible because it considered them to be fees for "benefits received."[127] Also, the Wisconsin decision held that the "substance, and not the form, of the imposition is the test . . . ."[128] Therefore, the court declared the charge to be a fee rather than a tax.[129]

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115. *Alfonso*, 122 So. 3d at 56.

116. Attorney General opinions are discussed in more depth *supra*, Part II.

117. Pl. Complaint at 8, Alfonso v. Diamondhead Fire Prot. Dist., No. 09-00145 (Miss. Hancock Cnty. Ct. Feb. 17, 2011).

118. *Id.*

119. *Alfonso*, 122 So. 3d at 56.

120. *Id.*

121. *Id.*

122. *Id.* at 56.

123. The Court is required to give terms in statutes their "common and ordinary acceptation and meaning." MISS CODE ANN. § 1-3-65.

124. *Alfonso*, 122 So. 3d at 56.

125. *Id.*

126. *Id.* at 57.

127. King County Fire Prot. Dist. v. Housing Auth. of King County, 872 P.2d 516, 524 (Wash. 1994).

128. City of River Falls v. St. Bridget's Catholic Church of River Falls, 513 N.W.2d 673, 675-676 (Wis. Ct. App. 1994).

129. *Id.*

The majority jumped from a plain meaning of "service," to other courts' holdings, to reaching its conclusion with little application or transition. It concluded by stating a simple conclusion: "the DFPD provides a valuable service . . . . Therefore, the fee assessed is permissible."[130]

B. Dissenting Opinion

Justice King filed a dissenting opinion and was joined by Justice Kitchens and Chandler, resulting in a 4-3 decision.[131] The dissent interpreted "services rendered" narrowly, tying services to direct fees charged for direct services. With this view, the dissent stated that it found the fee to be an illegal tax.[132]

Justice King considered the three different methods a fire district can utilize to raise funds.[133] The legislature has provided that a fire district can use three means of funding: certain types of taxes,[134] fees for "services rendered,"[135] and revenue bonds.[136] With regard to taxing authority, the Legislature is solely vested with the power to tax.[137] The Legislature has, in turn, granted municipalities the authority to levy special taxes. More specifically, a county Board of Supervisors may collect a special tax for "fire protection purposes."[138] The tax is not to exceed four mills[139] annually, which is the amount that DFPD has received from the municipality.[140] The DFPD utilized this form of revenue to the full extent of the law.[141] A fire-protection district may also use revenue bonds as a source of income.[142] But neither of these methods were disputed in this case. Rather, the property owners claimed the invasion came from an unauthorized fee.

The third method, which was the subject of dispute, was the charging of fees for services rendered. The Legislature authorized fire-protection districts to charge fees for "services rendered by or through the facilities of such district . . . ."[143] The property owners did not contest their authority, but rather limited their argument to the specific definition of "services rendered."[144] The property owners claimed that a fire-protection district can

130. *Alfonso*, 122 So. 3d at 57.

131. *Id.*

132. *Id.*

133. *Id.* at 57-59.

134. MISS. CODE ANN. § 19-5-189.

135. MISS. CODE ANN. § 19-5-177(1)(e).

136. MISS. CODE ANN. § 19-5-181.

137. *See* City of Jackson v. Pittman, 484 So. 2d 998, 999 (Miss. 1986).

138. MISS. CODE ANN. § 19-5-189.

139. A mill is one one-thousandth of a dollar. So where the millage rate is four, the tax would amount to $4 for every $1,000 in property value. *How to Calculate Property Tax Liability*, TAX FOUNDATION, http://taxfoundation.org/article/how-calculate-property-tax-liability-2 (last visited Apr. 3, 2015).

140. MISS. CODE ANN. § 19-5-189.

141. Alfonso v. Diamondhead Fire Prot. Dist., 122 So. 3d 54, 55 (Miss. 2013).

142. MISS. CODE ANN. § 19-5-181.

143. MISS. CODE ANN. § 19-5-177(1)(e).

144. *Alfonso*, 122 So. 3d at 59.

only charge for direct services it provides, i.e., responding to a fire, providing an inspection, etc.[145] The dissent agreed with the property owners.[146]

The DFPD argued that it had rendered real services to the property owners.[147] Even though it may not have responded to a fire at a property owner's house, it was available to respond to an emergency and rendered services in other ways: maintaining and repairing equipment, staffing the fire station with firefighters and medical technicians, developing pre-incident plans, inspections, and safety training.[148] All of these activities, the DFPD counted as necessary services that must be rendered to keep the property owners safe and to be an effective fire protection district.[149] So the DFPD contended that it rendered services that directly benefited the property owners and were necessary for its continuation.

As the dissent noted, the property owners relied on a number of AG opinions that speak to a fire-protection district's authority to charge fees.[150] And while AG opinions are not binding authority, they can be persuasive.[151] The dissent cited four of these opinions and found that they laid a solid framework for interpreting the meaning of "services rendered."[152] The opinions stated that while a fire-protection district can "fix rates . . . for services rendered,"[153] it cannot charge "dues."[154] Further, the opinions noted that a fire-protection district can charge for "emergency response services, or rescue services"[155] and for "services which have already been rendered,"[156] but not "in anticipation of rendering services."[157]

Justice King next addressed the differences between fees and taxes. He noted the parties' reliance on impact fees in relation to their situations.[158] Two prior Mississippi Supreme Court cases shed light on the distinction between a tax and a fee: *Ocean Springs* and *Sweet Home.* The former held that a tax consists of "a mandatory payment, it provides revenue to the government, it is exacted for public purposes, and it provides a benefit to the community as a whole."[159] Alternatively, "a fee is charged by an agency to defray its cost of operation, and it confers a special benefit/service upon the payer."[160] After considering these definitions and holding that the impact fee in dispute was actually a tax, the court warned of the

145. *Id.*
146. *Id.*
147. *Id.* at 60.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 61.
155. Andrew Dulaney, Op. Att'y Gen., 2001 WL 1082630 (Miss. Aug. 24, 2001).
156. Charles Marshall, Op. Att'y Gen., 2005 WL 3817032 (Miss. Dec. 27, 2005).
157. *Id.*
158. *Alfonso*, 122 So. 3d at 62-63.
159. *Id.* (citing Mayor & Bd. of Alderman, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44, 54 (Miss. 2006)).
160. *Id.*

misuse of fees to "evade the Constitutional and Legislative limitations placed upon governing authorities in regard to taxation."[161] The latter case also dealt with impact fees, and the court held that an impact fee cannot be charged in anticipation of extra expenses.[162]

The majority cited two other state court opinions to support its contention that because the property owners benefited from the DFPD's preparation to render fire services, the fee is permissible.[163] The dissent attempted to expose the lack of congruence in these other state court opinions to the case at hand. Particularly, the dissent noted that the Washington opinion was dealing with a benefit charge, which relied on a state statute that Washington had in place but Mississippi does not.[164] In addition, the dissent argued that the Wisconsin opinion has nothing to do with fire-protection fees in general, but rather it was specifically dealing with the storing and providing of water for fire protection.[165] Justice King indicated that another Wisconsin opinion has held that their statute only allows a special charge for "services which are actually performed."[166] Thus, it relied on a "per call calculation."[167]

"Services rendered," as defined by the dissent, is limited to "specific services delivered directly to a specific customer."[168] In other words, when a fire protection district responds to a house to put out a fire. Anticipatory services are not to be charged to the property owners in the form of fees. To do so equates to an illegal tax. In light of these findings, Justice King, Kitchens, and Chandler disagreed with the majority.[169]

V. ANALYSIS

With the *Alfonso* holding handed down by the Mississippi Supreme Court, fees will quickly become ripe fruit for a district's picking. A broad interpretation of fees is subject to abuse by local governments looking for easy sources of funding. More than any other, this recent decision highlights the need for a consistent, systematic approach to dealing with fees. The *Alfonso* decision confused what little delineation there was between fees and taxes. By holding that anticipatory services can be considered "services rendered," the Court provided no standard as to the meaning of "services rendered." And more importantly, it offered no distinction between fees and taxes.

161. *Mayor & Bd. of Alderman*, 932 So. 2d at 56.

162. Sweet Home Water & Sewer Ass'n v. Lexington Estates, Ltd., 613 So. 2d 864, 870 (Miss. 1993).

163. *Alfonso*, 122 So. 3d at 64.

164. *Id.*

165. *Id.* at 64-65.

166. *Id.* at 65 (quoting Town of Janesville v. Rock County, 451 N.W.2d 436, 439 (Wis. Ct. App. 1989).

167. *Id.*

168. *Id.*

169. *Id.*

The following sections highlight the importance of distinguishing fees from taxes, the consequences of failing to do so, approaches taken in other jurisdictions, and possible solutions to Mississippi's current law on the matter.

A. Importance of Distinguishing Fees from Taxes

The power to tax is the power to destroy.[170] For that reason, the power to tax has always been closely guarded by legislators and courts. But what if evading these limitations is as easy as giving a tax a new name?[171] If so, then a fee can be implemented that raises revenue while bypassing the restraints of an ordinary tax. Because of this danger, fees and taxes must be appropriately recognized.

Taxes and fees are mutually exclusive. Taxes are not fees and fees are not taxes; they do not overlap and should not be categorized together.[172] While they are both means of funding governmental entities, their similarities do not extend much further than that. Constitutions and statutes have restricted taxes much more heavily than fees, and consequently, fees slip through without notice. For that reason (and others), implementing a new fee is much less repulsive to the average citizen than implementing a new tax.

The Constitution of the United States and State constitutions have granted the power to tax as a means of raising revenue.[173] This power rests with the legislature and is to be guarded jealously. Rules limit the use of taxes, such as apportionment and uniformity.[174] And more importantly, taxes are regulated by public opinion. Public officials and legislators, fearing re-election, are wary of raising or imposing taxes in a way that would upset the public. The people are the most effective check on their governing officials. Out of the many topics about which citizens keep informed in the political realm, taxes are always on the forefront. Whether the state or federal government is imposing new taxes is sure to get a lot of publicity. Politicians are aware of this and are, thus, more inclined to shy away from taxes if necessary—especially in a re-election year. This is a powerful restriction on taxes, but it is relatively nonexistent in the area of fees.

Fees do not share the same level of popularity. Generally, if fees are raised in a particular area, little or no media coverage will be devoted to it. Fees are an easy way for public officials to raise government revenue, while escaping the public eye.[175] Assessing fees to fund government projects is

170. M'Culloch v. Maryland, 17 U.S. 316, 391 (1819) (stating that "[a] right to tax, without limit or control, is essentially a power to destroy").

171. *See* Samis Land Co. v. City of Soap Lake, 23 P.3d 477, 485 (Wash. 2001) (holding that a charge was really "a tax in fee's clothing").

172. Reynolds, *supra* note 22, at 408.

173. U.S. CONST. art. I, § 8.

174. *Id.*

175. Brain Faler, *Government Fees the Key to Budget Bargain?*, POLITICO, Apr. 3, 2015, http://www.politico.com/story/2013/09/grand-bargain-government-fees-96581.html.

much safer, simply because there is more leniency than with taxes. The term "fee" carries less baggage than "tax." If some government entity charges a fee, it is generally presumed that the fee is a fair reflection of a benefit received. Because fees are generally tied to a particular service, the public does not wage war against a fee (as it might with a tax). Although fees are addressed differently in different jurisdictions, fees usually enjoy more leniency.[176] The limitations surrounding fees are much broader and more open to interpretation, likely because fees are premised on the recoupment of a specific cost. They are not to extend beyond recovering the amount that a public entity has spent to provide a service for a citizen.

Moving closer to home, districts in Mississippi have been given the power to charge for fees but not to tax.[177] The details provided for limiting those fees are scarce. For example, with fire departments in Mississippi, the district is able to charge fees for "services rendered."[178] But there is little guidance for calculating those fees—such as how to come to the value of a fee or what constitutes a fair amount. One reason for the lack of explanation might be that Congress never expected fees to be expanded as they have. Perhaps Congress assumed that fees would be charged to recoup the cost of providing a service; thus, the fee would be fixed as the amount expended by the district to perform a service for an individual. But calculating a fee for a specific benefit is difficult to quantify when the only interaction the district has with a person charged is indirect.[179] The further a district gets from providing a direct service, the harder it is to determine a reasonable fee.

Additionally, valuing "anticipatory services," as opposed to services that have already been rendered, creates even more difficulty. To truly govern a district's fees and ensure that they are a reasonable allocation of its cost, the person or office charged with supervision would be forced to value services before they occur and without respect to any individual. The only reasonable way a fire district could come up with an accurate number would be to calculate their yearly expenses and divide them among the property owners in the district. But this method strays from the main purpose of a fee—to recoup the cost of a service provided.[180] The vast majority of fee payers will receive no direct benefit from the fire district;

176. David Pettinari, *Michigan's Common Law Distinction Between Taxes and Regulatory Fees, User Fees and Special Assessments*, JOURNAL OF MULTISTATE TAXATION & INCENTIVES, Aug. 2000, at *25.

177. MISS. CODE ANN. § 19-5-177(e).

178. MISS. CODE ANN. § 19-5-195.

179. Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 43 (Edwin Cannan ed., 5th ed. 2003). Smith proposed that the "real price of every thing . . . is the toil and trouble of acquiring it." He found that though labor is not necessarily used to estimate the value of a good or service, it does form the foundation for valuing that particular good or service. *Id.* In applying Smith's theory to the present hypothetical, the price becomes more distorted where the labor itself is unclear. *Id.*

180. 84 C.J.S. *Taxation* § 3 (2014) (stating that "the primary purpose of a fee is to cover the expense of providing a service").

likewise, the fire district will spend no resources on the vast majority of the property owners charged. And any indirect benefit is difficult to quantify.

A more pressing question might be: Who is charged with supervising a Commissioner's decision to impose $20 per month instead of $15? The public elects the Board of Supervisors;[181] then the Board of Supervisors appoints the Commissioner.[182] The Commissioner is once removed from a public vote, which significantly diminishes the public check on his powers. Who carries the shield for the fee-paying citizens, other than the judiciary, remains unclear. And even then, as seen in *Alfonso*, the Court will not investigate the accuracy of the fee's valuation but only render an opinion as to whether or not the fee was within the district's authority.

B. Consequences of the Majority's Approach and the Dissent's Approach

The Court's opinion in *Alfonso* will most assuredly cause a reaction from districts and local governments. Although a district's future use of fees is impossible to predict with complete accuracy, broad assumptions can be made from past behavior. Looking to the way districts have acted in the past can shed some light on the way that *Alfonso* will influence their future behavior.[183] Further, economic principles can help paint an accurate picture of what to expect.

But it is also important to note that if the Mississippi Supreme Court were to have ruled the other way, as the dissent pleaded, there would have been consequences as well. Court decisions are not made in a vacuum. They influence the actions of society for better or worse. In order to take a holistic approach to an issue, it is important to note what far-reaching consequences could accompany a single decision.[184] The probable consequences of the *Alfonso* decision, and also the probable consequences of the dissent's approach, will be examined in this section.

1. Implications of the *Alfonso* Holding

The Court in *Alfonso* dodged a bullet. If the DFPD's fee was found to be a tax, then local governments and districts struggling for revenue would have been impaired in raising the necessary funding. But what else happened? Districts and local government were granted a substantial increase in their powers. If districts had any concerns about how they were going to raise additional revenue, they now can rest easier. The lack of analysis

181. MISS. CODE ANN. § 19-3-1.

182. MISS. CODE ANN. § 19-5-167.

183. Matt Moore, *Taxes vs. Fees: What's the Difference Between Bananas and Driver's Licenses?*, TAX FOUNDATION (Jan. 14, 2014, 9:25 AM), http://taxfoundation.org/blog/taxes-vs-fees-whats-difference-between-bananas-and-drivers-licenses.

184. Frank Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 11 (1984). (arguing that "the Court is bound to send the wrong signals to the economic system unless the Justices appreciate the consequences of legal rules for future behavior").

devoted to distinguishing a fee from a tax, coupled with the broad interpretation of what constitutes "anticipatory services," leaves a lot of room for exploitation.

The abundance of inquiries to the AG on whether a district can charge fees shows that the DFPD was not unique. Several other districts have tried to implement similar fees in the past and will continue to do so with more confidence in the future.[185] Why would a district not make use of such an easy source of funds? Armed with the *Alfonso* holding, districts in need of revenue will turn to mandatory monthly fees. These fees are the best source of income a district could ask for: steady, reliable, and court approved.

As previously mentioned, AG Opinions forecast a heavy reliance on fees to fund government entities. Districts have pressed the AG's office for clearance to charge fees for different matters through the years.[186] Across the nation, government entities have begun to turn to fees more frequently as a source of revenue.[187] This trend is not inherently negative, but it does exhibit a tendency for abuse. If courts or legislators do not respond with an apt analysis of such fees, abuse will not be stymied, but encouraged.

Economically, the *Alfonso* holding is problematic for several reasons. First, the Court has encouraged a district's broad use of fees to raise revenue, which further separates the fee from the service. Second, when a fee is separated from the services received in exchange, the fee is more difficult to monitor. Third, the district is shielded from effective supervision that should govern its use of fees and taxes to fund services.

A broad interpretation of fees will lead to a broad use of fees. Consider the same practice as used in the private market. There is nothing wrong with a fire department charging monthly fees for a wide variety of services. In fact, private fire protection companies do this in other regions of the country.[188] This can be effective and reduces the costs of providing fire services. When the marginal cost for providing an additional service is low, the company can bundle products together and offer them at a discounted rate, which benefits the company and the customer. But product bundling is disfavored when there is no competitive influence. If a company has a monopoly on a market, as is the case with fire protection districts, product bundling rarely benefits the customer.[189] More often, it is used as a way to mark up higher profit margins while decreasing the

185. See *supra* note 183.

186. Sylvia Pross, Op. Att'y Gen., 1990 WL 548177 (Miss. Nov. 29, 1990); Phillip Terney, Op. Att'y Gen., 1998 WL 958140 (Miss. Dec. 11, 1998); Alfred Koenenn, Op. Att'y Gen., 1993 WL 294280 (Miss. July 12, 1993); Larry Norris, Op. Att'y Gen., 2007 WL 1229246 (Miss. Mar. 20, 2007); Randy Wilburn, Op. Att'y Gen., 2000 WL 1207464 (Miss. July 14, 2000); Charles Marshall, Op. Att'y Gen., 2005 WL 3817032 (Miss. Dec. 27, 2005).

187. *See supra* note 183.

188. *See* John R. Guardiano et. al, *Fire Protection Privitization: A Cost-Effective Approach to Public Safety*, REASON, Oct. 1, 1992, http://reason.org/news/show/fire-protection-privatization (last visited Apr. 3, 2015).

189. *See* Richard Schmalensee, *Commodity Bundling by Single-Product Monopolies*, 25 J.L. & ECON. 67, 68-70 (1982).

amount of services provided.[190] Particularly, where the customer-citizen has no choice as to whether he pays the fee or not, a district is able to charge much more than actually required to cover its expenses. For example, with the DFPD, it can charge $20 per month, even though its actual expenses per property owner might be only $10 or less. The district does not have to account for each expense and tie it to the fee charged but is allowed to throw a blanket charge over all individuals in the area and move on.

Further, the danger of separating the service provided from the fee charged is that it impairs the ability of anyone to effectively monitor such a fee. In the private market, the consumer provides signals to let the supplier of a service know if its charge is too high or too low.[191] If enough consumers are not willing to pay for a service, then the supplier might reduce the price.[192] If consumers are buying more of the service than the supplier can provide, the supplier will likely increase the price.[193] On the other hand, in the public realm where there is a mandatory charge, this feedback is not provided. For that reason, there are limits placed on taxes and fees to ensure that the governmental entity does not abuse its discretion in implementing the tax or fee. Recognizing this aspect is necessary to understand the statutory limits placed on fees—that they are tied to a specific service. When fees are allowed to be administered more broadly, the courts make it extremely difficult for anyone to protect the citizens from abuse.

By shielding a district's use of fees from effective supervision, the governmental entity is removed from the watch of its regulators: the people and their elected representatives. Who is to protect the property owners if a Commissioner was to abuse the use of fees? The Commissioner is appointed by the Board of Supervisors, who are elected by the people, but is this enough to provide incentive to the Commissioner to walk a straight line? The Board of Supervisors performs many functions; hence, it is hard to envision the people responding to an unreasonable fire protection charge by voting a supervisor out of office for that alone. The law is a more effective vehicle for enforcing a Commissioner's limitations. And that law is already in place: Mississippi Code section 19-5-177.

2. Possible Implications of the Dissent's Approach

The dissent's approach would face some difficult consequences also. But the results are potentially more favorable than the alternative. The main problem with the dissent's approach, to which the majority of the court in *Alfonso* alluded, is that it potentially hamstrings a district in its attempt to raise funds. Most districts and other governmental entities are hard pressed to find means to fund their programs. A narrow interpretation of a "fee" would further frustrate those difficulties.

190. *See id.*
191. Smith, *supra* note 179, at 79-80.
192. *Id.* at 82.
193. *Id.*

As a result of a court's restraining fees to only those charges that are tied to a direct service, local governments would most likely be forced to cut programs. Fire districts would have to cut back on their staffing or reduce the quality of their equipment, or both. This seems to be the most influential factor in the Court's decision in *Alfonso*. Fire protection and other services normally provided by government entities are vital to the public welfare. These services must be protected. The public should have confidence that its fire department is equipped to perform its services adequately. If that confidence is taken away, people will probably move to another location or take other similar measures, and rightfully so. The Court in *Alfonso* was right to take this into consideration, but there may be other ways to ensure the safety and trust of the public without expanding the use of fees.

C. *Approaches Taken by Other Jurisdictions*

Courts in Virginia,[194] California,[195] Washington,[196] Michigan,[197] and other states have already addressed this issue. Examining other jurisdictions shows that there is more than one way to resolve the fee-tax issue. But it also shows how important the distinction is and that it requires a consistent approach.

The Supreme Court of Virginia addressed a similar issue in *Marshall v. Northern Virginia Transportation Authority*. In that case, a statute was passed that allowed the NVTA to impose "regional taxes or fees."[198] These "taxes or fees" were mainly used to recoup the cost of issuing vehicle licenses, vehicle registrations, inspections, and vehicle repairs.[199] The court considered whether the legislature had the right to delegate such an authority to nonelected officials.[200] In its analysis, the court first determined whether the charges were a tax or a fee. In doing so, it looked to the "primary purpose" of the charge: if the primary purpose of the charge was to raise revenue, it is a tax.[201] Consequently, the court determined that the charge before it was a tax and moved on to whether the authority to tax could properly be delegated to the NVTA. The court concluded by stating, "taxes must be imposed only by a majority of the elected representatives of a legislative body."[202]

A similar test was established by the Washington Supreme Court in *Covell v. City of Seattle*.[203] In that case, the court addressed whether a

194. Marshall v. N. Va. Transp. Auth., 657 S.E.2d 71 (Va. 2008).
195. Bay Area Cellular Tel. Co. v. City of Union City, 162 Cal. App. 4th 686 (Cal. Ct. App. 2008).
196. Covell v. City of Seattle, 905 P.2d 324 (Wash. 1995).
197. Gorney v. City of Madison Heights, 535 N.W.2d 263 (Mich. Ct. App. 1995).
198. *Marshall*, 657 S.E.2d at 74.
199. *Id.*
200. *Id.* at 77.
201. *Id.*
202. *Id.* at 79.
203. Covell v. City of Seattle, 905 P.2d 324 (Wash. 1995).

charge for residential street utility was a regulatory fee or an unconstitutional tax.[204] The court found that the charge was an unconstitutional tax.[205] The court considered three factors to help distinguish a fee from a tax:

> [W]hether the primary purpose of the county [or city] is to accomplish desired public benefits which cost money, or whether the primary purpose is to regulate . . . . . If the primary purpose of the charges is to raise revenue, rather than to regulate, then the charges are a tax. Conversely, if the primary purpose is regulatory, "the charges are properly characterized as 'tools of regulation', rather than taxes." The second factor is whether the money collected must be allocated only to the authorized regulatory purpose. The last inquiry is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.[206]

In this manner, a regulatory fee was identified, but the same analysis can be applied to a user fee or any other type of fee.

And Michigan was also quick to make a distinction between taxes and fees. In 1876, the Michigan Supreme Court decided *Jones v. Board of Water Commissioners of Detroit*, which the court created a test for separating a tax from a fee.[207] There, the court developed two main distinguishing marks of a fee: (1) the amount of the charge reflects the consumption by the payer; and (2) consumption of the service is voluntary—the payer is not compelled to use the service.[208] In applying these factors, the court found that a water service charge was an unconstitutional tax because the charge was mandatory and did not reflect the user's consumption of a specific quantity of water.[209]

The California Court of Appeals utilized another approach in *Bay Area Cellular Telephone Company v. City of Union City*.[210] Before the court was a fee charged to all persons using a telephone line within the city limits.[211] The fees were collected and allocated directly to a fund for providing an emergency call center.[212] In examining the fee, the court there noticed several distinguishing marks that indicate when a charge is a tax and not a user fee: (1) "those who paid the Fee received no benefit not received by those who did not pay," (2) there was "no discrete group that is

204. *Id.* at 326.
205. *Id.* at 333.
206. *Id.* at 327 (internal citations omitted).
207. Jones v. Bd. of Water Comm'rs of Detroit, 34 Mich. 273 (1876).
208. *Id.* at 275.
209. *Id.* at 277.
210. Bay Area Cellular Tel. Co. v. City of Union City, 162 Cal. App. 4th 686 (Cal. Ct. App. 2008).
211. *Id.* at 690.
212. *Id.* at 691.

specially benefitted by the imposition," and (3) the fee was not based on the use of a service but rather access to a service.[213] All of these points lead the court to hold the charge to be a special tax, not a fee.[214]

The three distinguishing marks noted by the court in *Bay Area* were also present in *Alfonso*. Those who paid the monthly fire protection fee were not benefitted any more than those who did not. Consider an out-of-state driver passing through the Diamondhead area who is involved in a serious car accident. The DFPD responds to the call and extricates the individual from his smashed car. The DFPD has just provided services to someone who did not pay the fee. Or consider a person from Biloxi who travels to Diamondhead to play golf and, while on the course, has a heart attack. EMS arrives and takes him to the hospital. The DFPD, once again, has provided services to someone regardless of the fee. Furthermore, assuming that fire services would not be denied to a property owner who failed to pay that month's fee, no benefit is gained by paying for the service that may or may not be used. So paying the fee gives a property owner no benefit over any other person that does not pay the fee.

The second distinction pointed out in *Bay Area* was not present in *Alfonso*—a discrete group that was benefited: the residents of the Diamondhead area. The fee in *Alfonso*, however, was not based on the use of the service but instead on access to the service. A resident was forced to pay the fee even if no firemen ever provided him with any direct service. The DFPD did not send a bill for the work they performed. Rather, they charged a fee to everyone regardless of the number of fires or emergencies they experienced that month.

Virginia, Washington, Michigan, and California's tests are all imperfect. But they provide a framework by which a fee can be consistently distinguished from a tax. Mississippi's approach lacks that consistency because no framework exists to establish exactly what a fee looks like.

D. Solutions for Mississippi

The distinction between fees and taxes can be clarified in Mississippi in several different ways. The statutory law in place is adequate to protect consumers and allow for government entities to raise the needed funds. It will only take a small step for the Legislature to limit the use of fees or a common law framework to label charges as a fee or tax. As previously noted, neither solution will be a panacea, but both would go a long way in recognizing and restricting fees as intended.

Before examining possible solutions, it is important to remember that several mechanisms are in place for districts to raise revenue. Only one of these is charging fees. Other mechanisms for raising revenue are collecting taxes pursuant to the municipality's allocation and issuing bonds.[215] If a

213. *Id.* at 695-96.
214. *Id.* at 696.
215. MISS. CODE ANN. § 19-5-189 (special tax); MISS. CODE ANN. § 19-5-181 (issuance of bonds).

strict and narrow interpretation is pursued, it does not strip districts of all ability to raise revenue. To the contrary, if the Legislature determines that sources of funding are too limiting, it may act to raise taxes, or a district may act itself to issue bonds. A strict interpretation of fees serves to limit only one tool that a district possesses so that it may not be used to gain more control than that which is provided by the Legislature.

One way to ensure a more narrow reading of Mississippi Code section 19-5-177, the Legislature can amend that section to clarify it meaning. The majority of the court in *Alfonso* focused more on breaking down "services rendered" than on the distinction between fees and taxes. So another remedy could be to define "services rendered" as the AG has opined: direct services, not anticipatory services. This will tether a district's use of fees more tightly to a direct service, rather than letting it use broad fees to accumulate general revenues. This solution may be too pointed to have a wide effect though. It would clear up some confusion for districts that get their authority from Mississippi Code section 19-5-151, but it would not have much affect outside of that. Other fees may still continue to face the same issues. But more importantly, legislation that is direct and to the point could stem the tide of district fees, which could come quickly after the *Alfonso* decision.

Statutes are more efficient when their terms are defined and the courts can easily interpret them. If a definition was added to give the phrase "services rendered" a clear meaning, the public would stand to benefit. Public entities would see their limits more clearly and individuals would be aware of the meaning of the current law. Laws should be transparent and should give notice to all. Some might argue that the Mississippi Supreme Court has already accomplished this by handing down the *Alfonso* decision, and that is certainly true. My solution would be to alter that definition. "Services rendered" should be strictly construed to mean only those direct services that a district provides to a specific citizen or group of citizens. Including anticipatory services and other non-direct services lends itself for abuse. It provides governmental entities with too much wiggle room when deciding how to fund their respective programs. For that reason, legislation is appropriate to properly restrict this behavior.

The Court's decision in *Alfonso* appears to be the result of the-ends-justifies-the-means reasoning—where the Court justified a broad definition of services rendered and a loose interpretation of fees for strong public policy reasons. But strong public policy should not control the Court's decision. The Mississippi Constitution, in Article 1, Section 2, states that if one branch of the government is given a certain power, then no other branch can exercise that same power.[216] Because the Legislature has been given the power to pass laws in accordance with public policy, the Mississippi Supreme Court cannot rewrite a statute simply because it feels there

216. MISS. CONST. art. I, § 2.

are strong public policy reasons for doing so.[217] So the Court has the authority to read a statute broadly without being accused of rewriting a statute. And a broad reading, rather than a rewriting of the text, could describe the outcome of the *Alfonso* holding.

Nevertheless, if a broad reading is to be the favored result, then it is simply the means that needs adjusting. To provide the term "fee" with a broad scope, a more developed legal analysis will serve to ensure consistency rather than relying on a case-by-case judgment. Factors, such as the ones employed by Virginia, Michigan, Washington, and California courts, can be administered to give effect to a broad interpretation while also giving courts a proper framework to rightly distinguish between fees and taxes. But if there is no standard, the results will vary widely from case to case. For this reason, the Mississippi Supreme Court needs to adopt a standard and use it in its application to the facts of cases such as *Alfonso*. The results need not change, but the process will benefit taxpayers and districts alike by giving them a specific standard by which they can judge their individual fees.

VI. CONCLUSION

As fees become more and more prevalent, the need for a consistent, analytical approach increases. The Court could have addressed this issue with *Alfonso* but chose to decide the case on different merits—namely the definition of "services rendered." The use of fees post-*Alfonso* will reveal to what extent a broad definition of "services rendered" will have on local governments and districts. Regardless of that impact, Mississippi would benefit greatly from a fee-tax delineation that has been made by other jurisdictions.

Drawing a definite line in the sand between fees and taxes will benefit taxpayers by protecting them from potential abuse of fees. If fees are not tethered tightly to a specific definition, they can be used to circumvent statutory restrictions that have been placed on governmental entities. To avoid this, the courts and legislators should establish protections that will restrict the improper use of fees.

217. MISS. CONST. art. IV, § 88.