



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

January 14, 2022

John Keith Perry, Jr.
Attorney, Tunica County Board of Supervisors
5699 Getwell Road, Bldg. G5
Southaven, Mississippi 38672

Re: Miss. Code Ann. § 27-31-46 and Fee-in-lieu of Ad Valorem Taxes

Dear Mr. Perry:

The Office of the Attorney General has received your request for an official opinion.

Background

According to your request, the Tunica County Board of Supervisors (the “Board”) and local economic development representatives have entered into discussions with the developer of a renewable energy project (the “Project”). Your request states the developer is interested in locating the Project in Tunica County and spending in excess of \$100,000,000.00 in capital investment. The developer wants the Board to grant not only a fee-in-lieu of ad valorem taxes, but also an ad valorem tax exemption under the recently enacted Mississippi Code Annotated Section 27-31-46.

Questions Presented

1. May the 50% exemption granted pursuant to Section 27-31-46 exceed a period of ten years?
2. If the 50% exemption is limited to ten years in duration, does the substantial completion date trigger the beginning of the exemption period, or is there any discretionary flexibility in determining the beginning of the period?
3. May the Board legally approve and grant, if it chooses to do so, the exemption under Section 27-31-46, while simultaneously granting the fee-in-lieu pursuant to Section 27-31-104, or is the Board limited to granting one or the other?
4. If the Board may legally approve and grant both the fee-in-lieu pursuant to Section 27-31-104 and the 50% exemption under Section 27-31-46, may the Board include the agreement for the 50% exemption in the fee-in-lieu agreement, and may the Mississippi Development

Authority (“MDA”) certify the fee-in-lieu agreement if it contains such 50% exemption agreement in addition to the fee-in-lieu agreement?

Brief Response

1. The exemption granted pursuant to Section 27-31-46 may only exceed ten years if the Board determines that Article 7, Section 182 of the Mississippi Constitution does not apply.
2. If the Board determines that Article 7, Section 182 of the Mississippi Constitution applies, the exemption must commence from the date of completion of the new enterprise.
3. This office is unaware of any prohibition against the Board granting the tax exemption and fee-in-lieu concurrently. However, only the MDA can determine whether the Project is statutorily eligible to qualify for a fee-in-lieu of ad valorem taxes.
4. Section 27-31-46 authorizes the Board to grant an ad valorem tax exemption up to 50% of the total assessed value of the project, and Section 27-31-104 authorizes the Board to negotiate an agreement granting a fee-in-lieu of ad valorem taxes subject to final approval by the MDA. However, the MDA’s grant of authority is limited to approving a fee-in-lieu agreement only to the extent that it complies with the statute, and it has no authority to approve peripheral agreements incorporated into a fee-in-lieu agreement.

Applicable Law and Discussion

Section 27-31-46 reads as follows:

(1) As used in this section, "project" means a facility, placed in operation after the effective date of this act, generating energy through the use of a renewable energy source such as wind, water, biomass or solar.

(2) In any project with a capital investment from private sources of not less than One Hundred Million Dollars (\$100,000,000.00), all property, whether real, personal or mixed, including fixtures and leaseholds utilized in the project, including, but not limited to, operational and environmental property utilized in the project, may be exempted by the county board of supervisors from ad valorem taxation up to an amount not to exceed fifty percent (50%) of the total assessed value of the project.

As an initial matter, whether the Project meets the definition of “project” in Section 27-31-46 or whether the capital investment requirements of Section 27-31-46 are met are questions requiring factual determinations, which must be made by the Board. Pursuant to Section 7-5-25, official opinions of the Attorney General may only address prospective questions of law; they may not address fact questions. MS AG Op., *Barton* at *2 n.2 (May 17, 2021) (identifying questions of fact as one of various kinds of questions that cannot be addressed by official opinion).

As noted in your request, Section 27-31-46 makes no mention of how long the exemption lasts or when the exemption commences.

Article 7, Section 182 of the Mississippi Constitution governs tax exemptions granted by the Legislature for the purpose of encouraging development within the state, providing:

The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, *except that the Legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding ten (10) years on each such enterprise hereafter constructed, and may grant exemptions not exceeding ten (10) years on each addition thereto or expansion thereof, and may grant exemptions not exceeding ten (10) years on future additions to or expansions of existing manufactures and other enterprises of public utility. The time of each exemption shall commence from the date of completion of the new enterprise, and from the date of completion of each addition or expansion, for which an exemption is granted.* When the Legislature grants such exemptions for a period of ten (10) years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility, entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined.

MISS. CONST. art. VII, § 182 (emphasis added).

Before application of Article 7, Section 182, the Board must determine two things: whether the Project is a “corporation” as envisioned by the Constitution, and whether the Project qualifies as a manufacture or other new enterprise of public utility. The Constitution defines corporation as “all associations and all joint-stock companies for pecuniary gain having privileges not possessed by individuals or partnerships.” MISS. CONST. art. VII, § 199. These are questions of fact on which this office cannot opine. If the Board determines that the Project comes under the purview of Article 7, Section 182, then the exemption granted by Section 27-31-46 may not exceed a period of ten years. However, an exemption not exceeding ten years also may be granted on each addition and expansion thereto. MISS. CONST. art. VII, § 182.

This constitutional section also dictates the commencement date of the exemption period, which is the subject of your second question. Again, if the Board determines that the Project comes within the purview of Article 7, Section 182, then the “exemption shall commence from the date of completion of the new enterprise,” and there is no discretionary flexibility.

Next, you ask whether the Board may grant the tax exemption under Section 27-31-46 at the same time it grants a fee-in-lieu of taxes pursuant to Section 27-31-104. Section 27-31-104 empowers boards of supervisors to enter into fee-in-lieu agreements with certain enumerated categories of enterprises; however, “[a]ny grant of a fee-in-lieu of ad valorem taxes shall be evidenced by a written agreement negotiated by the enterprise and the county board of supervisors and/or municipal authority, as the case may be, **and given final approval by the Mississippi Development**

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Authority as satisfying the requirements of this section.” Miss. Code Ann. § 27-31-104 (3) (emphasis added). While this office finds no statutory prohibition against a party contemporaneously enjoying the benefits of the exemption authorized by Section 27-31-46 and a fee-in-lieu, the MDA has to finally approve any grant of a fee-in-lieu and whether a project comports with the statutory scheme.

Your last question asks whether the Board may include the exemption provided by Section 27-31-46 in a fee-in-lieu agreement submitted to the MDA for its approval, and whether the MDA can certify the fee-in-lieu agreement if it contains the tax exemption. As stated previously, the statute is clear that the MDA’s authority does not extend beyond approving a fee-in-lieu agreement’s compliance with the requirements of Section 27-31-104. The enterprise and the Board are responsible for negotiating a written agreement evidencing the grant of a fee-in-lieu, but the MDA’s final approval rests upon the satisfactory fulfillment of Section 27-31-104’s requirements. Miss. Code Ann. § 27-31-104 (3). While the tax exemption may impact the calculation of any potential fee-in-lieu, the actual incorporation of a peripheral agreement such as the tax exemption into a fee-in-lieu agreement and submitting such to the MDA for its approval requires action that is outside the scope of the MDA’s authority.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ Misty Monroe

Misty Monroe
Special Assistant Attorney General