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MEMORANDUM

TO: Mayor Gilich  
Council Members

FROM: Peter Abide 

DATE: August 15, 2017

RE: Attorney General Opinion on State Flag

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Attached is the Attorney General's Opinion on the proposed flag ordinance submitted by Councilman Deming. In a nutshell, the Council has the right to submit resolutions that would be subject to mayoral veto. The proposed ordinance would not be the appropriate mechanism as it would serve to bind future councils.

Thanks,  
Peter Abide  
/ls

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

OPINIONS  
DIVISION

August 11, 2017

Peter C. Abide, Esquire  
Biloxi City Attorney  
Post Office Box 429  
Biloxi, Mississippi 39533

Re: Displaying State Flag

Dear Mr. Abide:

Attorney General Jim Hood received your letter of request and assigned it to me for research and reply.

### Background

You state that the City of Biloxi operates as mayor-council form of government pursuant to Mississippi Code Annotated Section 21-8-1 *et seq.* Under that form of government and pursuant to Section 21-8-15, the mayor has "executive powers" and "superintending control of all the officers and affairs of the municipality."

Your letter then states, in part:

On April 24, 2017, the Mayor issued an executive order directing only the U.S. flag be flown at municipal buildings. Miss. Code Ann. Section 3-3-15 provides discretionary authority by the governing authorities to display the state flag. On May 9, 2017, a council member submitted an ordinance .... stating in part, that the state flag "shall be displayed" at municipal buildings. Before voting, the Council voted 6-1 to table and seek an AG opinion on the legality of the proposed ordinance. ....

### Questions and Responses

**Question 1:** Does the Mayor have authority under Section 21-8-15 to manage and operate municipal buildings?

Peter C. Abide, Esquire  
August 11, 2017  
Page 2

In response to your first question, we are of the opinion that the management and operation of municipal buildings are under the control of the mayor and council as a group. The council has the authority to propose and adopt ordinances and resolutions affecting municipal buildings subject to the mayor's veto.

**Question 2:** In conjunction with Question 1, does the Mayor have authority under Section 21-8-15 to direct that only the U.S. flag be flown?

Your second question relates to the past action of the mayor. Pursuant to Section 7-5-25, opinions of the Attorney General are issued on questions of law for the future guidance of those officials entitled to receive them. An Attorney General's opinion can neither validate nor invalidate past action of an officer or agency. Therefore, we must decline to respond to this question.

**Question 3:** Does the Council have authority to direct that the flag shall be flown by ordinance, as such ordinance would be binding on all future councils, potentially removing the discretion of future councils?

**Question 4:** If the answer to 3 is "No", would the current council have authority to direct the same by Resolution during their term of office?

In response to your third and fourth questions, ordinances are enacted to regulate continuing conditions, and such ordinances constitute a permanent rule of government. Ordinances generally continue to operate until formally repealed. Resolutions, on the other hand, are in the nature of declarations of the will of the municipality or of the current governing authorities/board and, as such, are not binding on successors in office. Therefore, we are of the opinion that the adoption of a resolution regarding the flying of the state flag at municipal buildings would be the appropriate mechanism for addressing this matter. As noted, such a resolution would not be binding on successor boards.

### **Applicable Law and Discussion**

Section 3-3-15 provides:

The state flag may be displayed from all public buildings from sunrise to sunset; however, the state flag may be displayed from all public buildings twenty-four (24) hours a day if properly illuminated. The state flag should not be displayed when the weather is inclement, except when an all-weather flag is displayed. The state flag shall receive all of the respect and ceremonious etiquette given the American flag. Provided, however, nothing in this section shall be construed so as to affect the precedence given to the flag of the United States of America.

Peter C. Abide, Esquire  
August 11, 2017  
Page 3

Section 21-17-5 provides, in part:

(1) The governing authorities of every municipality of this state shall have the care, management and control of the municipal affairs and its property and finances. In addition to those powers granted by specific provisions of general law, the governing authorities of municipalities shall have the power to adopt any orders, resolutions or ordinances with respect to such municipal affairs, property and finances which are not inconsistent with the Mississippi Constitution of 1890, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi, and shall likewise have the power to alter, modify and repeal such orders, resolutions or ordinances. Except as otherwise provided in subsection (2) of this section, the powers granted to governing authorities of municipalities in this section are complete without the existence of or reference to any specific authority granted in any other statute or law of the State of Mississippi.

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We have previously opined that, as a group, the mayor and board of aldermen of a code charter municipality have control over the city hall and that an action to place cameras in the town hall would require a motion and successful vote by the board of aldermen, subject to veto by the mayor. The mayor of a code charter municipality, like the mayor of a mayor-council municipality, exercises executive power and also has "the superintending control of all the officers and affairs of the municipality." *MS AG Op.*, Herring (August 31, 2012).

In regard to potentially binding future councils, the Mississippi Supreme Court has held that the governing authorities of a municipality may not bind their successors in office, unless expressly authorized to do so. *Humble Oil and Refining v. State*, 41 So.2d 26 (Miss. 1949); *Smith v. Mitchell*, 1 So.2d 765 (Miss. 1941); *American Oil Co. v. Marion County*, 192 So. 296 (Miss. 1939); *Edwards Hotel & City St. R. Co. v. City of Jackson*, 51 So. 802 (Miss. 1910).

The Court has also made a clear distinction between an ordinance and a resolution. In *Evans v. City of Jackson*, 30 So.2d 315 (Miss. 1947), the Court said:

An ordinance is enacted to regulate continuing conditions, and constitutes a permanent rule of government... . An ordinance generally continues to operate until formally repealed. A resolution 'is merely declaratory of the will of the corporation in a given matter, and in the nature of a ministerial act.' (Citing 43 594 C.J. 519, Sec. 798 Municipal Corporations.)

In reviewing a "document" adopted by the Biloxi City Council recognizing a firefighters

Peter C. Abide, Esquire  
August 11, 2017  
Page 4

association as the collective bargaining agent for certain municipal firefighters, the Court ruled that the "document" was a resolution rather than an ordinance and was not binding on future city councils, reasoning that an ordinance could be deemed permanent in nature, and requires the affirmative action of a subsequent city council to repeal it. The Court further noted that because it was only a resolution (non-binding on successors) it "self-revoked" upon the assumption of office by a new board. *Biloxi Firefighters Ass'n v. City of Biloxi*, 810 So.2d 589 (Miss. 2002).

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Phil Carter  
Special Assistant Attorney General

OFFICIAL OPINION