HENRY MCMASTER
ATTORNEY GENERAL

April 6, 2010

The Honorable Glenn F. McConnell
South Carolina Senate
P. O. Box 142
Columbia, South Carlina 29202

Dear Senator McConnell:

We received your letter requesting an opinion of this Office concerning marshland property on Johns Island. You asked the following three questions:

1. [I]f the State owns marshland and someone invades it and fills it in, can it become, over time, owned by the private property owner through adverse possession?
2. [If not], can it become the property of a subsequent owner, if the property is conveyed in a deed to someone else?
3. Does the fact that it has been filled and become high land make it subject to some exception?

Prior opinions of this Office have addressed the question of adverse possession against the State. This opinion will address those prior opinions, relevant statutes, and caselaw.

Law/Analysis

It is well established that "[a]dverse possession does not run against the state." 8 S.C. Jur. Adverse Possession § 45 (citing Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986)); See also, Hilton Head Plantation Property Owners' Ass'n. v. Donald, 375 S.C. 220, 651 S.E.2d 614 (2007); Op. S.C. Atty. Gen., December 5, 2003; January 17, 1968; March 29, 1960. However, there is authority that suggests "where circumstances would render it inequitable . . . a party may be protected to prevent manifest wrong and injustice," under the principal of estoppel.[1] Op. S.C. Atty. Gen., October 11,

[1] Cf. Condon v. City of Columbia, 339 S.C. 8, 528 S.E.2d 408 (2000) ("under the nullum tempus doctrine, statutes of limitation do not run against the sovereign unless the Legislature (continued...)

1965 (citing Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952)). Nevertheless, it is a general rule that estoppel does not bind the sovereign state.

In State v. Yelsen Land Company Inc., 265 S.C. 78, 216 S.E.2d 876 (1975), the Supreme Court held that the "State was presumptively the owner of tidelands." The Court of Appeals also held that "[h]istorically, the State holds presumptive title to land below the high water mark." Hilton Head Plantation, 375 S.C. 220, 224 (2007) (citing McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003); see also Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 396, 252 S.E.2d 133, 135 (1979)).

In an opinion of this Office dated August 19, 1964, we also articulated that the presumption lies with the State:

> [T]here is a legal presumption that the title to all tidal marshlands is in the State. This presumption would hold true regardless of whether someone has . . . filled in a certain area and constructed improvements. The fact remains that the State is presumed to own this land.
>
> Certainly a title derived from a king's grant would overcome this presumption of ownership in the State. There may be other situations where this presumption can be overcome, namely where the General Assembly has disclaimed the interest of the State in certain tidal marshlands. This latter situation may be true in some of your land-fill instances where a municipality is granted certain rights by the Legislature.[2]

In another opinion of this Office, dated December 5, 2003, we addressed the State's ownership of marshland as follows:

> [T]itle to islands in marshlands is possessed by the State, absent judicial proof of a specific grant from the Lords Proprietors, King, or State. The law concerning ownership of the marshlands alone is not novel, but has been developed over the centuries from early South Carolina cases back to previous English cases and authorities and even to Roman law.

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[1](...continued)
specifically provides otherwise"). Just like the Court held that the nullum tempus doctrine prevailed in SC until the Legislature decided otherwise, one can conclude that adverse possession will not run against the state unless and until the Legislature decides otherwise.

[2] While factual questions are beyond the scope of an opinion of the Attorney General, this Office is not aware of the General Assembly having disclaimed interest in the tidal marshlands on Johns Island. The sheer fact that one has filled in the land does not rebut the presumption that the State has ownership.

To rebut the State's presumption of title, one must possess a sufficient plat and grant. In Query v. Burgess, 371 S.C. 407, 639 S.E.2d 455 (S.C. Ct. App. 2006), the Court of Appeals distinguishes the plat in Query from the plat in Hobonny to explain what a sufficient plat must include. The Hobonny court held that "a grant from the sovereign . . . is construed strictly in favor of the government and against the grantee." Hobonny, 272 S.C. 392, 396. However, an "exceptionally detailed and mathematically precise plat can rebut the State's presumption of title to marshes." Query, 371 S.C. 407, 412 (2006) (citing Hobonny, 272 S.C. 392). In Query, the "plat was not sufficiently detailed to rebut the State's presumption of title to land below the high water mark." Query, 371 S.C. at 412.

The Supreme Court indirectly addresses subsequent ownership in State v. Yelsen Land Company, Inc., 265 S.C. 78, 216 S.E.2d 876 (1975). The State brought an action against two claimants to settle the dispute over title to certain tidelands. The court explains that since grants to claimants' predecessors did not convey the tidelands in question, claimants could not assert title based on adverse possession. The court further explains that since "the State is presumptively the owner of the tidelands, the burden rested upon [claimants] to prove that the State had granted title to such lands to their predecessors in title." Yelsen, 265 S.C. 78, 81 (citing State v. Pinckney, 22 S.C. 484; State v. Hardee, 259 S.C. 535).

Conclusion

It is established that adverse possession does not run against the State.[3] Additionally, there is a strong presumption that the State has title to all marshlands, even if someone has filled an area or made improvements to the land. To directly answer your first question, no; if the State owns marshlands and someone invades and fills in the land, the land would not become owned by the invader, over time, through adverse possession.

As for the second question, status as a subsequent property owner is irrelevant when determining the proper owner in circumstances such as these where the action is against the State and is regarding marshlands. Since there is a presumption that the State owns marshlands, the claimant has the burden of proof to demonstrate that the State granted title to such lands to his predecessors in title. Unless the claimant can demonstrate the chain of title from the State's grant to his receipt of title, being a subsequent owner or bona fide purchaser is inconsequential under these circumstances.

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[3] Unless the General Assembly decides otherwise. See generally, Busby v. Florida Cent. & P.R. Co., 45 S.C. 312, 23 S.E. 50 (1895); State v. Pinckney, 22 S.C. 484, 503-05 (1885).

While we, of course, cannot anticipate all factual circumstances which a court may find, the fact that the land has been filled in, generally, does not make the land subject to any exception[4] regarding adverse possession against the State.

Sincerely,

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REVIEWED AND APPROVED BY:

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Robert D. Cook
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[4] Of which this Office is aware