



ALAN WILSON
ATTORNEY GENERAL

February 15, 2019

The Honorable Tom Davis, Esquire
S.C. Senate
602 Gressette Senator Building
P.O. Box 142
Columbia, SC 29202

Dear Senator Davis:

This Office received your letter dated January 17, 2019. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

"Attached is a copy of the deed whereby Ted Turner conveyed to the State of South Carolina title to St. Phillips Island in Beaufort County. As I related during our call, state PRT officials have on a number of occasions since the state's acquisition of the island forced members of the public to leave the beach, saying it was against state regulations. My inquiries to your office are:

- 1) Does PRT (or any other state agency) have the right to adopt such regulations restricting the public's access to the beach? And*
- 2) If it does have that power, has it exercised it and in what way?"*

Law/Analysis:

The South Carolina General Assembly has determined and codified regarding beaches that "[i]t is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S.C. Code Ann. § 48-39-250. We presume from your first question that the use of the term "beach" is referring to the State-owned portion of property from high tide water mark to the low water mark, noting there are some portions of land below the high tide water mark in South Carolina that are privately owned. See, e.g., S.C. Code Ann. § 48-39-305. This Office is not aware of any state agency with specific authority to restrict the public's access to beaches (below the high water mark) solely for the purpose of restricting access. There are State agencies charged with enforcing the policing powers of the State such as the South Carolina Law Enforcement Division ("SLED"), the Department of Health and Environmental Control ("DHEC"), the Department of Natural Resources ("DNR"), Parks, Recreation and Tourism Department ("PRT") and then there are State agencies who have the authority of the State to conduct business below the high tide water mark, such as the State Ports Authority. Additionally, the Department of Administration oversees State-owned property and must approve any transactions involving real property titled in the State's name. S.C. Code Ann. § 1-11-10 *et seq.*

We have stated numerous times that the State presumptively owns the title to all lands below the high tide water mark, including beaches, in trust for the public. See, e.g., State v. Pacific Guano Co., 22

S.C. 50, 84 (1884); McQueen v. South Carolina Coastal Council, et al., 354 S.C. 142, 580 S.E.2d 116 (2003); Ops. S.C. Att'y Gen., 2017 WL 569547 (S.C.A.G. Jan. 31, 2017); 2012 WL 5376055 (S.C.A.G. Oct. 19, 2012); 2012 WL 3540453 (S.C.A.G. August 3, 2012) (citing Cunard S.C. Co. v. Mellon, 262 U.S. 100, 122 (1923), City of Charleston, S.C. v. A Fiserman's Best Inc., 310 F.3d 155, 160 (4th Cir. 2002), the U.S. Submerged Lands Act, S.C. Code 54-7-620(47), Geneva Convention, Art. 11, etc.); 2003 WL 21790888 (S.C.A.G. July 10, 2003) (citing the Submerged Lands Act); 1995 WL 805820 (S.C.A.G. October 20, 1995) (citing the Submerged Lands Act, S.C. Code § 54-7-620(47)); 1964 WL 11075 (S.C.A.G. February 4, 1964) (citing the U.S. Submerged Lands Act). As you are aware, the South Carolina Constitution is clear regarding the free accessibility of the navigable waters of this State in that:

All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly.

SC Const. Art. XIV § 4.

As a statewide agency, South Carolina Law Enforcement Division (“SLED”) has “specific and exclusive jurisdiction and authority statewide, on behalf of the State” for “(1)... all general criminal investigations...”; (C) “enforcement of all criminal laws, misdemeanors, felonies, and civil laws, ... under the jurisdiction of the Alcoholic Beverage Control Commission,” in addition to other Statewide authority pursuant to the policing powers of the State. S.C. Code Ann. § 23-3-15. Please also note we have addressed the authority of sheriffs on beaches below the high water mark in previous opinions, though we understand your question asks us to address regulations by Statewide authorities restricting access to the beaches of St. Phillips Island. See, e.g., Ops. S.C. Att’y Gen., January 31, 2017 (2017 WL 569547 (January 31, 2017); 2012 WL 5376055 (S.C.A.G. Oct. 19, 2012).

DHEC has authority regarding the following, among other authority:

- 1) “to manage estuarine and marine sanctuaries and regulate all activities therein, including the regulation of the use of the coastal waters located within the boundary of such sanctuary” S.C. Code Ann. § 48-39-50(J);
- 2) “creation of a... beach management plan for the Atlantic Ocean shoreline in South Carolina [including] (2)(b) development of a beach access program to preserve the existing public access and enhance public access to assure full enjoyment of the beach by all residents of this State; (c) maintenance of a dry sand and ecologically stable beach; (d) protection of all sand dunes seaward of the setback line; (e) protection of endangered species, threatened species, and important habitats such as nesting grounds; (f) regulation of vehicular traffic upon the beaches and the beach/dune system which includes the prohibition of vehicles upon public beaches for nonessential uses; (g) development of a mitigation policy for construction allowed seaward of the setback line, which must include public

access ways, nourishment, vegetation, and other appropriate means...” S.C. Code Ann. § 48-39-320; see also S.C. Code Ann. §§ 48-39-250, 48-39-260, et seq.;

3) [the development of] a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program ... In developing the program the department shall:

(A) Provide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas.

(B) In devising the management program the department shall consider all lands and waters in the coastal zone for planning purposes. In addition, the department shall:

...

(5) Establish broad guidelines on priority of uses in critical areas.

(6) Provide for adequate consideration of the local, regional, state and national interest involved in the siting of facilities for the development, generation, transmission and distribution of energy, adequate transportation facilities and other public services necessary to meet requirements which are other than local in nature.

...

(E) Provide consideration for nature-related uses of critical areas, such as aquaculture, mariculture, waterfowl and wading bird management, game and nongame habitat protection projects and endangered flora and fauna.

S.C. Code Ann. § 48-39-80; and

4) limited policing power (See, e.g., S.C. Code Ann. § 48-39-305; 48-39-170).

Additionally, DNR and “all other state and local agencies and commissions shall cooperate with the department [DHEC] in the administration of enforcement of this chapter.” S.C. Code Ann. §§ 48-39-60, 48-39-70; see also S.C. Code Ann. § 48-39-170. DHEC has numerous regulations regarding beaches located primarily within the South Carolina Code of Regulations Chapters 30 and 61. However, Regulation 30-11(D)(3) states that “[t]he Department shall promote public access to the beaches of this state.” S.C. Code Ann. Regs. 30-11. Thus, even where DHEC may have authority concerning the regulation of critical areas, they are required within their regulations to “promote” public access to beaches.

The South Carolina Department of Natural Resources (“DNR”) has statewide jurisdiction to “exercise supervision over the enforcement of the laws of the State, regulatory, tax, license or otherwise, in reference to birds, nonmigratory fish, game fish, shellfish, shrimp, oysters, oyster leases, and fisheries.” S.C. Code Ann. § 50-3-110. Department of Natural Resources officers “when acting in their official capacity, shall have statewide authority for the enforcement of all laws relating to wildlife, marine, and natural resources.” S.C. Code Ann. § 50-3-340. As stated above, DNR has specific statutory authority to assist DHEC and “shall provide additional staff for the department, including any additional enforcement officers, necessary to administer the provisions of this chapter and for which funds are available.” S.C. Code Ann. § 48-39-60; see also S.C. Code Ann. § 48-39-170. DNR also has some regulations regarding

beaches, such as Regulations 123-31, 121-85, and 123-304 but generally do not address access to beaches outside of a Wildlife Management or a Heritage Preserve. After speaking with DNR's legal counsel, it is our understanding unless it is designated as a Wildlife Management Area (S.C. Reg. 123-40 *et seq.*) or a Heritage Preserve (S.C. Code Ann. § 51-17-10(7) *et seq.*; S.C. Reg. 123-203), DNR employees generally do not drive citizens off of beaches unless there is a violation of a law relating to wildlife, marine, and natural resources or unless DNR is specifically notified by another State agency (such as DHEC or S.C. Parks, Recreation & Tourism) of a violation of a law relating to wildlife, marine, or natural resources. Per DNR's legal counsel, it is also our understanding that DNR does not enforce ordinances of local governments. DNR's legal counsel also stated they were not aware of any DNR agent ever driving someone off the beach at St. Phillips Island.

South Carolina Department of Parks, Recreation and Tourism's ("PRT") legal counsel spoke with this Office and informed us that PRT does not control the beach at St. Phillips below the high water mark and that since it does not control the beach below the high water mark that it is not driving people off the beach below the high water mark. After checking with PRT's park director, PRT's legal counsel confirmed this was true of PRT's staff and that similarly boaters have free access to the beach below the high water mark at Hunting Island State Park with no issue. PRT's legal counsel also mentioned that PRT is planning on incorporating St. Phillips Island within Hunting Island State Park. PRT has a statute regarding Hunting Island State Park in Beaufort County, South Carolina. See S.C. Code Ann. § 51-7-10. The statute authorizes it with "complete authority to regulate and prescribe the uses to which the island and its respective zones and areas may be put." S.C. Code Ann. § 51-7-10. If PRT incorporates St. Phillips Island into Hunting Island State Park, the regulation of the St. Phillips Island would fall within PRT's statutory management authority. It is also our understanding that St. Phillips Island is not yet designated a state park or as a part of Hunting Island State Park on PRT's website as of the date of this opinion. PRT's legal counsel did mention that an employee of the previous owner may have previously been driving people St. Phillips Island but such actions were not authorized by PRT.

As far as Regulations that mention St. Phillips Island specifically, this Office is aware of only one, as of the date of this opinion. Regulation 30-21, which is a DHEC regulation, addresses St. Phillips Island as an island owned by a private individual and designated to the University of South Carolina for research purposes whose feasibility of access the regulation recommends looking into a possible ferry. St. Phillips Island is also mentioned within the Code of Laws regarding a trawling zone. See S.C. Code Ann. § 50-5-705.

Conclusion:

While this Office does not generally answer factual questions in a legal opinion, it appears that based on the information provided to us that none of the State agencies we have spoken with regarding your questions are limiting access to the beach below the high water mark at St. Phillips Island. It is our understanding that South Carolina Department of Parks Recreation and Tourism purchased St. Phillips Island with its funds and is in the process of integrating it, both legally and practically, into Hunting Island State Park. Furthermore, if St. Phillips Island is integrated legally into Hunting Island State Park, South Carolina Code Ann. § 51-7-10 grants South Carolina Department of Parks, Recreation, and Tourism "complete authority to regulate and prescribe the uses to which the island and its respective zones and areas may be put." Nevertheless, as we mention above, it is our understanding the legal counsel for South Carolina Department of Parks, Recreation, and Tourism acknowledges that beaches on

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St. Phillips Island below the high water mark will remain owned by the State with free access to the public.

Please note, this opinion highlights some of the State agencies and some of the powers regarding St. Phillips Island's beaches. It is not intended to be exclusive, but strives to give a general overview of some of the Statewide agencies that may have the regulatory authority to deny beach access for a particular purpose for a particular period of time. Moreover, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. This opinion only addresses some of the sources in the subject area, but we can address other authority or additional questions in a follow-up opinion. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code Ann. § 15-53-20. If it is later determined otherwise, or if you have any additional questions or related issues, please let us know.

Sincerely,



Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General