ALAN WILSON
ATTORNEY GENERAL

October 19, 2012

The Honorable Tom Davis
Senator, District No. 46
P.O. Box 142
Columbia, SC 29202

Dear Senator Davis:

We received your request for an opinion of this Office regarding the enforcement of beach regulations on Fripp Island, a gated community in Beaufort County. Upon information and belief, Fripp Island relies upon a private security force employed by the Fripp Island Property Owner's Association ("FIPOA") and regulated by the South Carolina Law Enforcement Division ("SLED") to enforce rules and regulations on the property. You ask whether this private security force may issue citations to individuals violating beach regulations established by FIPOA.

Law/Analysis

The authority and regulation of private security guards is provided for in S.C. Code Ann. §§40-18-10 *et seq*. We have previously advised that private security guards are considered law enforcement officers only within the boundaries of the property they or their company have contracted to protect. See, *e.g.*, Ops. S.C. Atty. Gen., March 21, 2012 (2012 WL 1036298); March 16, 2011 (2011 WL 1444710). To enable private security guards to protect this property, they are empowered to effect arrests as a sheriff by virtue of §40-18-110, which provides for the law enforcement authority of a private security guard licensed by SLED. This provision states:

> [a] person who is registered or licensed under this chapter and who is hired or employed to provide security services on specific property is granted the authority and arrest power given to sheriff's deputies. The security officer may arrest a person violating or charged with violating a criminal statute of this State but possesses the powers of arrest only on the property on which he is employed. [Emphasis added].

In its decision in City of Easley v. Cartee, 309 S.C. 420, 424 S.E.2d 491 (1992), the South Carolina Supreme Court explained that:

> [t]he legislature has granted licensed security guards the authority and power of sheriffs to arrest any person violating the criminal statutes of this State ... The power is limited only by the requirement that the arrest must be made on property that the security officer is licensed to protect ... Thus, like the police,

> licensed security officers perform a law enforcement function and act in an official capacity when making an arrest. Cf. State v. Brant, 278 S.C. 188, 293 S.E.2d 703 (1982) (security guard is a law enforcement officer for purpose of resisting arrest prosecution); Chiles v. Crooks, 708 F.Supp. 127, 131 (D. S.C. 1989) (arrest by security guard on licensed premises is action under color of state law within scope of 42 U.S.C. §1983).

City of Easley, 424 S.E.2d at 492.

Away from the property, however, a private security guard only has the same arrest authority as does a private citizen. Ops. S.C. Atty. Gen., September 25, 2012 (2012 WL 4711427); May 23, 1995 (1995 WL 367934); December 21, 1988 (1988 WL 383573). Thus, the private security guard has no power to engage in "hot pursuit" of offenders off assigned property. Op. S.C. Atty. Gen., August 4, 1987 (1987 WL 245481). Likewise, we have advised that a private security guard should not transport to jail an individual he has lawfully placed under arrest on the assigned property, but should utilize a law enforcement officer for such purpose. Op. S.C. Atty. Gen., September 25, 2012. As a result, we have previously opined that a municipality could not contract with a private security agency for the purpose of enabling private security guards to arrest on public property. Op. S.C. Atty. Gen., February 1, 2010 (2010 WL 928439). Private security officers carry with them on public property no more authority than private citizens. Ops. S.C. Atty. Gen., May 8, 2009 (2009 WL 1649235); April 7, 2008 (2008 WL 1960276). However, if a private security guard observes an offense occurring off designated property, he "could make an arrest within the same constraints placed upon any other private citizen." Ops. S.C. Atty. Gen., May 23, 1995; August 29, 1986 (1986 WL 289648); see also §§17-13-10, -20 [provisions allowing citizens' arrests]; State v. McAteer, 340 S.C. 644, 532 S.E.2d 865 (2000) [discussing scope of State laws regarding citizen's arrest].

Based upon the foregoing, we advise that properly licensed private security guards employed by FIPOA would not have law enforcement authority beyond the private property they are assigned to protect. In the situation described in your letter, we believe that the private property would extend down to the high water mark. These private security guards would thus have no authority to enforce FIPOA's beach regulations down to the low water mark.

We refer to our opinion dated May 23, 1995, where we addressed an agreement between the Kiawah Island homeowners' association and the Town of Kiawah Island ("Town") to allow the association's security force to provide enforcement of Town ordinances on the beaches. We recognized that the limits of law enforcement authority of the private security guards extended only upon the private property they were employed to guard or patrol. However, we concluded the association's security guards had no law enforcement authority between the high-tide line (the limit of the homeowners' association's private property) and the low-tide line on the Town's beaches, and were thus unable to enforce the Town's beach ordinances down to the low-water mark.

In support of this conclusion we note that, historically, the State holds presumptive title in land below the high water mark. In McQueen v. South Carolina Coastal Council, *et al.*, 354 S.C. 142, 580

S.E.2d 116 (2003), the South Carolina Supreme Court reaffirmed the State's ownership interest. The Court stated that:

> [a]s a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State. State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); see also State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972); Rice Hope Plantation v. South Carolina Public Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950), *overruled on other grounds*, McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)....
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> The State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality or public access. Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995); see also Heyward v. Farmers' Min. Co., 42 S.C. 138, 19 S.E.2d 963 (1884) public trust land cannot be placed entirely beyond direction and control of the State); Cape Romain Land and Improvement Co. v. Georgia - Carolina Canning Co., 148 S.E. 428, 146 S.E. 434 (1928) (protected public purposes of trust include navigation and fishery).

McQueen, 580 S.E.2d at 149-50; accord Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133, 135 (1979) ("This Court has held that lands lying between the usual high water line and the usual low water line on tidal navigable watercourses enjoy a special or unique status, being held by the State in trust for public purposes"); Op. S.C. Atty. Gen., July 2, 1962 (1962 WL 8961) ["The strand area of a beach is state property and the other portion is private property"]; see also Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 22 (1935) [when the sea, or a bay, is named as a boundary, line of ordinary high-water mark is always intended where common law prevails]; Sotomura v. County of Hawaii, 460 F. Supp. 473, 480 (D. Haw. 1978) [holding the "'mean high water mark' is the line of division between private and public property" along the beach]; Secure Heritage, Inc. v. City of Cape May, 361 N.J. Super. 281, 825 A.2d 534, 547 (2003) ["The public trust doctrine, which is premised on the common rights of all citizens to use and enjoy tidal land seaward of the mean high water mark, dictates that the beach and the ocean must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible"]; City of New York v. Feltman, 230 A.D. 299, 243 N.Y.S. 625, 626 (1930) (holding "a grant of land lapped by the open sea carried title at common law to the high-water mark if the grant contained no reference to either the low or high water mark," and that "[t]his doctrine is too long recognized and is too thoroughly established as the law... be questioned or disturbed now"); Brower v. Wakeman, 88 Conn. 8, 89 A. 913, 914 (1914) [title to beach below high-water mark held to be in the state]; Johnson v. State, 114 Ga. 790, 40 S.E. 807, 807 (1902) (holding "the boundary of landowners abutting on the sea [or] where there was a regular rise and fall of the tide, extended only to high-water mark... This rule, so far as the boundary of the abutting landowner is concerned, has been almost

universally followed in the United States"); cf. State v. Yelsen Land Company Inc., 265 S.C. 78, 216 S.E.2d 876, 878 (1975) [holding that the "State was presumptively the owner of tidelands"].

Furthermore, "the State's presumptive title may be overcome only by showing a specific grant from the sovereign which is strictly construed against the grantee." McQueen, 580 S.E.2d at 119 n.6. For example, in State v. Hardee, 259 S.C. 535, 193 S.E.2d 497, 499 (1972), the South Carolina Supreme Court examined whether a grant exists giving the grantee rights to property below the high-water mark. The Court construed the grant or deed giving such rights strictly in favor of the State and the general public against the grantee, holding that:

> [i]n the absence of specific language, either in the deed or on the plat, showing that it was intended to go below high water mark, the portion of the land between high and low water mark remains in the State in trust for the benefit of the public. The burden was upon the appellant to prove her title to the land to the low water mark on Salt Creek. She has failed so to do and, therefore, cannot prevail.

Id., 193 S.E.2d at 501; see Hobonny Club, 252 S.E.2d at 136-37 [holding that a plat showing tidelands, which was incorporated by reference in the grant, was sufficient to show intent to convey the tidelands].

Although we find that FIPOA's private security guards have no law enforcement authority to enforce FIPOA's beach regulations down to the low water mark, there are several available alternatives with regard to FIPOA's concerns about the safety and cleanliness of Fripp Island beaches.[1]

In our 1995 opinion, we suggested that the Town could appoint members of the Kiawah Island homeowners' association's security force to the position of "code enforcement officer" to enforce the Town's beach ordinances. See §5-7-32 [providing for the appointment of municipal code enforcement officers]. For our purposes, §4-9-145 allows Beaufort County to appoint and commission FIPOA's private security guards as code enforcement officers to enforce County beach ordinances. This section provides that:

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[1]But cf. §5-7-140 ["The corporate limits of any municipality bordering on the high-tide line of the Atlantic Ocean are extended to include all that area lying between the high-tide line and one mile seaward of the high-tide line. These areas are subject to all the ordinances and regulations that may be applicable to the areas lying within the corporate limits of the municipality. . ."]; §5-7-150 ["Every coastal municipality has criminal jurisdiction over piers and other structures and the waters of the ocean, a sound, or an inlet within one mile of those portions of the strand within the corporate limits. The corporate limits of the municipality are extended in a straight line from the strand into the ocean, inlet, or sound from the point where the corporate limits of the municipality reach the high-water mark of the strand"]. Therefore, the corporate limits of a municipality which borders on the Atlantic Ocean includes that area between the high-tide line and one mile seaward. See Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361 (1999).

> . . . the governing body of a county may appoint and commission as many code enforcement officers as may be necessary for the proper security, general welfare, and convenience of the county. These officers are vested with all the powers and duties conferred by law upon constables in addition to duties imposed upon them by the governing body of the county. However, no code enforcement officer commissioned under this section may perform a custodial arrest . . . These code enforcement officers must exercise their powers on all private and public property within the county. The governing body of the county may limit the scope of a code enforcement officer's authority or the geographic area for which he is authorized to exercise the authority granted.

Further, §56-7-80 provides for counties and municipalities to adopt and use an ordinance summons for the enforcement of ordinances by law enforcement and code enforcement officers. A uniform ordinance summons may not be used to perform a custodial arrest. See §56-7-80(B). The ordinance summons gives the code enforcement officer an alternative method for enforcing ordinances and gives the magistrate's court jurisdiction over the matter without the code enforcement officer having to resort to the use of a ticket or arrest warrant.

Accordingly, such "code enforcement officers" would be authorized to enforce Beaufort County ordinances promulgated to protect the public beaches in the area between the high and low tide line. See, *e.g.*, Beaufort County Code, §90-63. Although these code enforcement officers would be authorized to exercise their authority on any private or public property within the County, consistent with §4-9-145 they may not perform custodial arrests. See, *e.g.*, Ops. S.C. Atty. Gen., November 8, 2000 (2000 WL 1803586) [code enforcement officers are not "law enforcement officers" for the purposes of issuing Uniform Traffic Tickets pursuant to §§56-7-10, -15, because they lack custodial arrest powers]; April 14, 2000 (2000 WL 655478) [a code enforcement officer has no authority to detain a suspect].

We would add a word of caution, however. In an opinion of the Office dated August 4, 2010 (2010 WL 3505050), we addressed a county's policy of delegating its authority to enforce the county's tree removal ordinance to homeowner's associations. Although we determined that the county may appropriately delegate police powers to the code enforcement officers in accordance with §4-9-145, we warned that there was no statutory authority allowing counties to otherwise delegate their zoning enforcement authority to private entities or groups, such as homeowner's associations. In the 1995 opinion referenced above, we similarly warned that the Town, by appointing code enforcement officers to enforce the Town's ordinances on public property, must not abdicate its police power responsibilities to the private homeowners association. We advised:

> [a]s we stated in Op. Atty. Gen., No. 85-81, p. 217 (August 8, 1985), "[i]n essence, no governmental agency can by contract or otherwise suspend its governmental functions." Supra at p. 229. In that same opinion, however, we concluded that the State could contract with a private entity for the operation and management of a prison so long as the State maintains sufficient supervision and control, in essence, so long as it retains its governmental functions through the contract. As we observed in that opinion,

> [t]he validity of any specific contract is in large measure dependent upon the particular duties delegated to the corporation and the degree of control which the State maintains over it. Important policy considerations would underlie the legal questions involved.

Similarly, in an opinion of this Office dated April 7, 2008 (2008 WL 1960276), we addressed a special tax district's ability to contract with a private company to provide law enforcement. The county ordinance creating the special tax district specifically charged it with the responsibility for providing police protection for its area. The special tax district then contracted with a private security company to provide this service. Citing to a prior opinion stating that municipalities cannot contract with a private company for the purpose of providing law enforcement, we restated our opinion that municipalities may not "by contract part with the authority delegated it by the State to exercise the police power." Accordingly, we found that "a county would not be authorized to contract with a private security company for law enforcement purposes even though services, while not 'police protection', would constitute private security." Also relevant is G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980), where the South Carolina Supreme Court declared invalid an agreement whereby the North Charleston Sewer District entered into an agreement with a private company to transfer the privately owned sewer system to the district. Pursuant to the agreement, the company retained the power to approve or disapprove for connection to the system "any project other than a single family dwelling and small commercial establishments of a defined class." The Court, in concluding that the delegation of power to a private company was unlawful, reasoned that the district could not "delegate away those powers and responsibilities which give life to it as a body politic." The Court determined that "[a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise." Id., 266 S.E.2d at 85.

In addition to the authority of FIPOA's private security guards to enforce Beaufort County beach ordinances if appointed as code enforcement officers pursuant to §4-9-145, the Sheriff's Department may enforce State and County laws in this regard. We have consistently advised that a sheriff's jurisdiction encompasses the entire county. An opinion of this Office dated March 1, 2005 (2005 WL 774155) commented that:

> [t]he general law in this State presently requires a sheriff and his deputies to patrol their county and provide law enforcement services to its citizens. Such is consistent with an opinion of this office dated May 8, 1989 which recognized the status of a sheriff as the chief law enforcement officer of a county.

See also §23-13-70 [duty of deputy sheriffs to patrol the entire county]. Further, in an opinion of this Office dated December 21, 1988 (1988 WL 383573), we advised that the sheriff is the chief law enforcement officer of a county and that a deputy has full law enforcement authority in any area of his county, including areas under the protection of licensed private security guards. See Op. S.C. Atty. Gen., June 2, 2010 (2010 WL 2678696) [nothing prevents a sheriff from assigning a deputy to patrol the territory of a homeowner's association]; see also Ops. S.C. Atty. Gen., October 20, 1997 (1997 WL 783371) [deputy sheriffs may enforce the laws of the State or county within the entire county, and

whether an offense occurs on private property is immaterial]; October 2, 1985 (1985 WL 166080) [the distinction as to whether property is private or public is irrelevant to the question of the authority of a law enforcement officer to make arrests or investigate crimes generally].

Conclusion

It is the opinion of this Office that, in recognition of the public trust doctrine, the State, rather than private property owners, holds title to property below the high-water mark, unless explicitly conveyed by the State as evidenced by specific language in a grant or deed. Barring a specific grant of property below the high-water mark by the State, we follow the presumption that the State owns the land. We thus do not believe that a member of FIPOA's private security force has law enforcement authority to enforce FIPOA's beach rules and regulations below the high water mark.

However, we advise that FIPOA's private security guards may be appointed by Beaufort County as code enforcement officers to enforce County beach ordinances, provided their duties are limited to those set forth in §56-7-80 and they do not have the power of custodial arrest.[2] We advise that the County would be precluded from otherwise delegating its police powers to FIPOA in this regard. In addition, the sheriff, as the chief law enforcement officer in the County, has jurisdiction to enforce State and County laws on the beaches of Fripp Island.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

[2]In the May 23, 1995, opinion, we advised that the Town, by ordinance, should specify that the members of the private security force serve as County code enforcement officers in *ex officio* capacity in order to remove any possibility of dual office holding. See, *e.g.*, Op. S.C. Atty. Gen., October 2, 2012 (2012 WL 4836949) [statute provided that deputy coroners may hold *ex officio* certification as Class 3 law enforcement officers without violating dual office holding prohibitions]; see also Ops. S.C. Atty. Gen., February 9, 2004 (2004 WL 323939) [because private security guards have full police powers on the property they are hired to guard, they are officers for purposes of dual office holding]; February 9, 2001 (2001 WL 265263) [code enforcement officers exercise police powers and are thus officers for dual office holding purposes].