June 11, 2007

Bob Schowalter, State Forester
South Carolina Forestry Commission
5500 Broad River Road
Columbia, SC 29212

Dear Mr. Schowalter:

We received your request for an opinion on behalf of the State Forestry Commission (the "Commission") "concerning a possible conflict of Charleston County's Zoning and Land Development Regulations and the South Carolina Forest Management Protection Act, Section 50 Chapter 2 of the 1976 Code of Laws."

Law/Analysis

The South Carolina Forest Management Protection Act (the "Act') is contained in chapter 2 of title 50 of the South Carolina Code. As part of these provisions, section 50-2-50 of the South Carolina Code (Supp. 2005), provides as follows:

> (A) No established forestry operation is or may become a nuisance, private or public, if the forestry operation adheres to best management practices as promulgated by the South Carolina Forestry Commission. This section does not apply whenever a nuisance results from the negligent, improper, or illegal operation of a forestry operation.
>
> (B) For the purposes of this chapter, the established date of operation is the date on which the forestry operation commenced operation. If the operation is expanded subsequently or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and the commencement of the expanded operation does not divest the forestry operation of a previously established date of operation.

> (C) An ordinance of a county or municipality that makes a forestry operation following best management practices as promulgated by the South Carolina Forestry Commission a nuisance or providing for abatement as a nuisance in derogation of this chapter is null and void. The provisions of this section do not apply whenever a nuisance results from the negligent, illegal, or improper operation of a forestry operation.

Section 50-2-30 of the South Carolina Code (Supp. 2006) defines the terms "forestry operation" and "forest management activities."

> (A) A forestry operation is an area where forest management activities are conducted for the production of timber resources for wood products or providing wildlife habitat, outdoor recreation, or other environmental values. A forestry operation inherently includes lengthy periods between forest management activities and shall be deemed continuously operating so long as the operation supports an actual or developing forest.
>
> (B) Forest management activities include, but are not limited to, timber harvest, site preparation, controlled burning, tree planting, applications of fertilizers, herbicides, and pesticides, weed control, animal damage control, fire control, insect and disease control, forest road construction, and any other generally accepted forestry practices.

S.C. Code Ann. § 50-2-30. According to these provisions, as long as a property owner conducts forest management activities on his or her property and is doing so in compliance with the best management practices promulgated by the South Carolina Forestry Commission, not only can such activities not become a nuisance, but municipalities and counties are prohibited from adopting ordinances making such activities a nuisance.

Attached to your request, you included a copy of the Charleston County Zoning and Land Development Regulations (the "Regulations") in question. You included a separate letter with your request in which you explain your concerns with regard to the Regulations as follows:

> These regulations no longer fully exempt commercial timber operations as a forest management practice in five (5) designated zoning districts within the county . . . Specifically, it requires that a legitimate commercial timber operation comply with tree protection

> and preservation provisions . . . These provisions stipulate that all grand trees (a tree measuring 24 inches or greater in diameter at breast height, excluding pines) must be retained and protected . . . To comply with these provisions, the landowner must hire a surveyor to measure, map, and record the location of every grand tree on the forest tract schedule for harvest . . . The landowner must erect tree protection fencing around each tree, protect it from damage or removal, and replant the area with landscape-sized trees . . . In order for the landowner to remove trees 24" in diameter or larger, he/she must apply for a grand tree removal permit from the Board of Zoning Appeals . . . .

Furthermore, you point out the provision in the Regulations stating: "If the provisions of this Ordinance are inconsistent with those of the state or federal government, the more restrictive provision shall control, to the extent permitted my law." Thus, you question whether the Regulations are lawful or are in conflict with section 50-2-50 cited above.

As stated previously, section 50-2-50 prohibits established forestry operations from being or becoming a private or public nuisance. Furthermore, this provision also prevents counties and municipalities from passing ordinances that make a forestry operation a nuisance or provide for the abatement of such as a nuisance. The determination as to whether section 50-2-50 prevents the adoption of the Regulations attached to your request depends on whether the Regulations are considered an ordinance making forestry operation a private or public nuisance. The terms "private nuisance" and "public nuisance" are not defined in chapter 2 of title 50 of the South Carolina Code. Moreover, in our research, we did not find any statutory definition of these terms in the South Carolina Code. However, several court decisions shed light as to the meaning of these terms.

In O'Cain v. O'Cain, 322 S.C. 551, 561, 473 S.E.2d 460, 466 (Ct. App. 1996), the South Carolina Court of Appeals concluded: "Nuisance law is based on the premise that every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property . . . A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property." Further, that Court described a private nuisance as

> that class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, personal or real . . . A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. It is anything which hurts, inconveniences, or damages; anything which essentially interferes with the enjoyment of life or property.

Id. at 561-62, 473 S.E.2d at 466. Citing 20 R.C.L. Nusiances, section 7, page 384, the Supreme Court in State v. Turner, 198 S.C. 487, 495-96, 18 S.E.2d 372, 375 (1942) described a public nuisance as follows:

> "A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights. Such nuisances always arise out of unlawful acts. According to Blackstone (4 Com. 166), 'common or public nuisances are offenses against the public order or economical regimen of the state, being either the doing of a thing to the annoyance of the king's subjects or the neglecting to do a thing which the common good requires,' . . . The difference between a public nuisance and a private nuisance does not consist in any difference in the nature or character of the thing itself. It is public because of the danger to the public. It is private only because the individual as distinguished from the public has been or may be injured . . . ."

Based on these definitions of a public and private nuisance, we do not believe the Regulations make forestry practices a nuisance. Pursuant to section 4-9-30(9) of the South Carolina Code (1986), counties have the authority "to provide for land use and promulgate regulations pursuant thereto subject to the provisions of Chapter 7 of Title 6 . . . ." The Regulations appear to be an exercise of this authority by Charleston County. As you noted in your letter, several provisions in the Regulations place restrictions on the use of some classifications of property with regard to commercial timber operations. These limitations include restrictions on the removal of trees and provisions aimed at protecting and preserving trees. However, in our review of the provisions contained in the Regulations, we do not believe they make forestry operations a nuisance, private or public, under the definitions above.

The Regulations do not state that the conduct of forestry operations in areas restricting commercial timber operations automatically create a nuisance. As stated otherwise, the Regulations neither proclaim those performing commercial timber operations are per se unreasonably interfering with an individual's enjoyment of property, nor do they indicate such activities are contrary to "public order, decency, or morals, or constitute an obstruction of public rights." Turner, 198 S.C. at 495, 18 S.E.2d at 375. Thus, we opine the Regulations do not constitute an ordinance making forestry operations a public or private nuisance. Therefore, we do not believe the Regulations violate section 50-2-50 of the South Carolina Code.

Conclusion

Based upon our interpretation of the term nuisance contained in section 50-2-50 as compared to the operation of the Regulations adopted by Charleston County, we are of the opinion that such Regulations do not make forestry operations conducted within the county a nuisance. Therefore, we believe the Regulations are not in violation of section 50-2-50 of the South Carolina Code.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

_____

Robert D. Cook
Assistant Deputy Attorney General