May 14, 2008

The Honorable Harry Cato
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Cato:

We received your letter requesting an opinion of this Office concerning public access to navigable waters from the right-of-way of a public road. Along with your letter, you included a memorandum prepared by Kevin T. Miller, the Upstate South Carolina Regional Coordinator for American Whitewater. Mr. Miller's memorandum explains that the Department of Natural Resources ("DNR") has been issuing citations to fishermen in northern Greenville for trespassing due to the fact that they were "standing on land beneath the navigable waters of South Carolina." As stated in Mr. Miller's letter, you ask that this Office address the three main concerns arising under these circumstances:

> May a member of the recreating public gain access from the right-of-way of a public road to a stream or river between the ordinary high water marks?
>
> May a member of the recreating public stand on the land of a navigable waterway between the ordinary high-water marks?
>
> In some cases, property deeds claim private ownership of land beneath navigable waters. May the deed holder prevent a member of the recreating public from standing on said land? If so, must the deed holder prove a historical payment to the State of South Carolina for said land or must an individual prove no payment was ever made to rebuke a claim to said land?

Law/Analysis

According to your letter, the waterway in question is a navigable water. Section 4 of Article XIV of the South Carolina Constitution (1976) provides:

> 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.

Furthermore, section 49-1-10 of the South Carolina Code (1987) states:

> All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly. If any person shall obstruct any such stream, otherwise than as in Chapters 1 to 9 of this Title provided, such person shall be guilty of a nuisance and such obstruction may be abated as other public nuisances are by law.

Thus, according to these provisions, the public has a constitutional and statutory right to use navigable waters.

Many jurisdictions recognize that although the public has the right to use navigable waters, the public does not have a right to cross private property to gain access to navigable waters. See Charpentier v. Von Geldern, 236 Cal. Rptr. 233 (Cal. Ct. App. 1987), Bd. of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, 272 So.2d 209 (Fla. Dist. Ct. App. 1973), Sheftel v. Lebel, 689 N.E.2d 500 (Mass. App.Ct. 1998), Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984). South Carolina courts have yet to address whether members of the public may access navigable waters by crossing private property. Nonetheless, based on the authority in other jurisdictions, we believe our courts would also find the ability to access navigable waterways is similarly limited.

Accordingly, in the situation you described in your letter, we are presented with the question of whether members of the public may access a navigable waterway via a right-of-way over private property held by the South Carolina Department of Transportation ("DOT"). In an opinion of this Office issued in 1966, we considered whether the State Highway Department may permit an adjacent landowner to place signs and construct a private driveway on the unused portion of its right-of-way. Op. S.C. Atty. Gen., June 15, 1966. In that opinion, we explained:

In this case, the Department did not acquire the fee, but only an easement for a public purpose. An easement is, of course, the right to use the land of another for a specific purpose. Steele v. Williams, 204 S.C. 124, 28 S.E. (2d) 644 (1944). "In the absense of statutes affecting the rule, the public acquires only an easement in highways, title to the fee remaining in the owner. The highway, whether a fee or easement was acquired, is the property of the public, or of the state in trust for the public." 39 C.J.S., Highways, Sec. 136. "Generally, when the highway is discontinued or abandoned the servitude is discharged and absolute title reverts to the owner of the fee." 39 C.J.S., Highways, Sec. 137. "The title of the owner, subject only to the easement remains perfect and the public has no rights incongruous with highway purposes." 39 C.J.S. Highways, Secs. 138 and 139. In this State, an abutting landowner, upon execution of an unqualified right of way for construction of a state highway, owns the fee to the center of the highway, subject to the public easement. Such an easement gives no right for another and different easement subversive to its proper use "(b)ut when a use is granted by proper authority, and does not constitute an additional burden on the fee, no compensation is due to the owner." Leppard v. Central Carolina Telephone Co., 205 S.C. 1, 30 S.E. (2d) 155 (1944). See Charleston Rice Milling Co. v. Bennett and Co., 18 S.E. 254 (1882); Baring v. Heyward, 2 Speers 553 (1844); 1960-61 Op. A.G. 329; 1960-61 Op. A.G. 319; 1950-51 Op. A.G. 167; 1950-51 Op. A.G. 98; 1960-61 Op. A.G. 206; 1956-57 Op. A.G. 170; In Leppard v. Central Carolina Telephone Co., supra, the Court stated, at page 8:

> "(T)he grant or a condemnation of a public street or highway must have been presumed to have been made not for such purposes and usuages only as were known to the landowner at the time of the grant but for all public purposes, present or prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate."

And at page 6, the Court stated:

> "Whether an easement authorizes the use of land in a particular way depends upon the nature and extent of the easement."

Id. Based on this analysis, we determined maintenance of a driveway is not for a public purpose, and therefore, the owner of the land upon which the easement was located could restrict the use of the excess right-of-way not devoted to highway purposes. Id.

From our 1966 opinion, we believe that the determination as to whether members of the public can gain access to a navigable water via a DOT right-of-way depends upon the scope of the easement given to the DOT by the property owner. According to our 1966 opinion, the scope of a DOT right-of-way depends upon whether or not the activity in question is for "highway purposes." However, we also keep in mind the presumption that the right-of-way was granted to the DOT not only for such purposes known at the time of the grant, but also all public purposes consistent with the character of the road as a public highway.

In his letter, Mr. Miller mentioned an opinion issued by the Montana Attorney General's Office assessing the issue of whether the public may use public roads to access navigable water. In addition, Mr. Miller attached a copy of this opinion to his letter, which you also provided us. Op. Mont. Atty. Gen., May 26, 2000. Like our 1966 opinion, the Montana Attorney General concluded that public roads are easements. Id. Further, the Montana Attorney General found: "The holding of an easement, rather than holding the land underneath the public highway in fee, does not limit the public's use of the county road." Id. The opinion notes that the Montana Supreme Court applies "'a liberal interpretation of public highway easement uses.'" Id. (quoting United States v. Gates of the Mountains Lakeshore Homes, Inc., 565 F. Supp. 788, 796 (D. Mont. 1983), rev'd on other grounds, 732 F.2d 1411 (9th Cir. 1984)). Thus, the Attorney General determined:

> Given that the public has a right to use public highways for any manner or for any purpose consistent with or reasonably incidental to public travel, I conclude that this right includes using public rights-of-way created by county roads to gain access to streams and rivers. Using the county road as an access point from one public right-of-way, the road, to another public right-of-way, the stream or river, is consistent with and reasonably incidental to the public's right to travel on county roads.

Id.

To support his opinion, the Montana Attorney General cited cases from several other jurisdictions indicating public roads may be used to access public waters. One of these cases is a Michigan Court of Appeals case, Jacobs v. Lyon Township, 502 N.W. 2d. 382 (Mich. Ct. App. 1993). In Jacobs, lakefront property owners sued the town over its regulation of the public's use of roads running perpendicular to the lake. Id. The Court considered the fact that an original plat dedicated the streets including those running to the water and dedicated them "'to the use of the Public.'" Id. at 384. Citing previous Michigan Supreme Court opinions, the Court stated: "Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide

public access to the water." Id. Finding evidence that the platter intended to include access to the lake as part of the dedication, the Court affirmed the trial court's decision holding "the scope of the dedication permitted the installation of one nonexclusive dock at the end of each of the roads leading to the lake, and that the public was entitled to reasonable use of the water for boating, swimming, and fishing." Id. However, the Court limited its finding by stating that the erection of boat hoist and shore activities such as sunbathing, lounging, and picnicking, are outside the scope of the plat dedication. Id. at 384-85.

Although not cited in the Montana Attorney General's opinion, we discovered several other court opinions coming to conclusions similar to the Court in Jacobs. Subsequent to Jacobs, the Michigan Court of Appeals again addressed whether the public has a right to access a lake via a road dedicated under a subdivison plat in Higgins Lake Property Owners Association v. Gerrish Township, 662 N.W.2d 387 (Mich. Ct. App. 2003). Similarly, the Court looked to the scope of the dedication to determine whether it provided the public access to the lake. The Court stated: "The use of the terms 'streets' and 'alleys' implies passage, and public roads that terminate at the edge of navigable waters are presumed to provide public access to the water." Id. at 403. But, the Court again limited the use of the road by stating that other activities would not be included in the scope of the dedication because they were unlikely at the time of the dedication due to the "sparse population in the area at the time these subdivisions were platted . . . ." Id. at 404.

The Maryland Court of Appeals came to an analogous conclusion when faced with the issue of whether an implied easement over a road between two subdivision lots extending to a creek provided access to the waterway. Koch v. Strathmeyer, 742 A.2d 946 (Md. Ct. Spec. App. 1999). The Court looked to fact that the road was referenced in the subdivision plat. According to the Court's opinion:

> The parties do not deny that an easement over the road in favor of all lot owners exists. Their dispute lies in the scope of that easement. The petitioners assert that it is limited to ingress and egress between the individual lots and the public road, and the respondents insist that it also exists to provide their property with water access.

Id. at 949. The Court cited the general rule for implied easements as "implied easements over roads boarding property conveyed is that the easement only exists 'until it reaches some other street or public way.'" Id. Applying this general rule, the Court found:

> The implied easement in this case does extend all the way to the water, not because it fits within any exception to the general rule, but because it follows the general rule. Under the general rule of implied easements over roads contiguous to lots conveyed, the scope of the easement is limited to the next "street or public way." Hawley, 33 Md. at 280. Lerch's Creek, a public navigable and tidal waterway, is

> owned and maintained by the State. Unlike private land owned by a third party, Lerch's Creek is a "public way." As a result, the fact that "Lerch's Point" is bounded on one side by a public waterway rather than a roadway does not affect the operation of the rule. All lot owners with property abutting the 16 foot road enjoy an implied easement over that road in order to access the County Road on the east side and to Lerch's Creek on the west side.

Id. at 950.

South Carolina courts have yet to address whether DOT rights-of-way may be used to access navigable waters. However, we discovered two South Carolina cases that could be read to infer that easements running to navigable waters imply a right of the public to access such waters via the easements. In Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992), the South Carolina Supreme Court considered whether a street end providing access to a beach had been dedicated for public use. Id. The Court did not specifically consider whether the publicly dedicated street end could be used to access the beach. However, such use can be implied from the Court's opinion. The Court relied in part on testimony from residents stating that "the street end had been utilized continuously by the public for beach access and parking since the road was opened in 1942" to conclude that the public accepted the offer of dedication. Id. at 27, 413 S.E.2d at 823. Thus, indicating that use of the street end for beach access is within the scope of the easement by dedication.

In Cleland v. Westvaco Corp., 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993), the Court of Appeals considered, similar to the Court in Helsel, whether the public had the right to use a road based upon an easement by prescription or implied dedication. The plaintiff presented evidence that the public used the road to access a portion of a river. However, the Court found that the plaintiff did not present "evidence that any of the successive owners of this property clearly, convincingly, or unequivocally intended to dedicate the property for public use in a positive or mistakable manner" and ultimately found no public dedication of the road. Nonetheless, from our reading of the opinion, it appears that had the plaintiff presented sufficient evidence, the Court, like the Court in Helsel, would have found the public had a right to use the road, which included access to the river.

The determination as to whether a public right of access to navigable waters is within the scope of an easement held by the DOT involves significant factual determinations. Because this Office may not serve as the finder of fact, we must defer to the courts to make the ultimate decision as to whether such access is within scope of the DOT rights-of-way. Op. S.C. Atty. Gen., August 24, 2006 ("[O]nly a court, not this Office may serve as a finder of fact and conclusively determine the outcome of a factual issue."). Nonetheless, based on the analysis in our 1966 opinion, Helsel and Cleland, and authority from other jurisdictions, arguably a court may find access to navigable waters is within the scope of a DOT right-of-way.

As we previously mentioned, section 4 of article XIV of the South Carolina and section 49-1-10 of the South Carolina Code ensure the public's right of free use of all navigable waters. Although the landowner granting the easement may not have contemplated the use of such rights-of-way as a means to access navigable waters, finding that these rights-of-way provide such access would further the public purpose of allowing access to navigable waters. Furthermore, use of the rights-of-way in this manner is consistent with their character as providing a means of travel for the public. Section 4 of article XIV specifically refers to navigable waters as "public highways." DOT rights-of-way are also used as "public highways." Therefore, we believe a court could find that the facilitation of access from one public right-of-way to another is consistent with the purpose of the DOT rights-of-way. While not free from doubt, because finding DOT rights-of-way provide the public with access to navigable waters is both consistent with the public policy of this State concerning navigable waters and appears consistent with the use of such rights-of-way as a public highway, we believe it reasonable for a court to conclude such access is available to the public.

In addition to inquiring as to the public's right to access navigable waters via a DOT rights-of-way, you also inquire as to the public's right to stand on the land underlying a navigable water and as to the ownership of such land. As we previously mentioned, article XIV section 4 of the South Carolina Constitution and section 49-1-10 of the South Carolina Code protect the public's right to use navigable waters. In addition, according to common law principles, the public not only has a right to use navigable waters, but maintains a special type of ownership interest in the property underlying the navigable waters. As summarized in 65 C.J.S. Navigable Waters § 22 (citations omitted):

> The flow of a navigable stream is not private property, and navigable waters have been held not capable of, or subject to, ownership, although private persons have an interest in the navigable streams of the state. A riparian owner does not own the water opposite his land, although he has been said to have a usufructuary property right therein.
>
> . . .
>
> Title to public waters is held by the state in its sovereign capacity for the purpose of ensuring that it is used for the public benefit, subject only to regulation of navigation by Congress. A state's original title to navigable waters includes the navigable as well as the nonnavigable parts of those waters. However, it has also been held that a nonnavigable stream belongs to owner of lands through which it flows.

According to the South Carolina Supreme Court in McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003), "the State holds presumptive title to land

below the high water mark." Recognizing the public trust doctrine, our courts hold that property below the high-water mark is held in trust for the benefit of all citizens of the State. Id. According to the Court of Appeals in State v. Head, 330 S.C. 79, 86, 498 S.E.2d 389, 392 (Ct. App. 1997), "while the adjacent property owners hold title from their shoreline to the center of the stream bed, the public has an easement in use of the waterway." 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, 354S.C. at 149 n.6, 580 S.E.2d at 119 n.6.

In State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972), examining 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. The Court held:

> In 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. at 543, 193 S.E.2d at 501. Thus, the Court concluded that if the title to tidal streams is not specifically conveyed on the deed or plat, it does not pass from the State to the property owner. Id. Nonetheless, in Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (1979), the Supreme Court held that a plat showing tidelands, which was incorporated by reference in the grant, was sufficient to show intent to convey the tidelands.

In light of the South Carolina case law cited above and our courts' recognition of the public trust doctrine, we believe the State, rather than a private property owner, holds title to the property below the high-water mark unless explicitly conveyed by the State as evidenced by specific language in the grant or deed. Barring a specific grant of property below the high-watermark by the State of property below the high-water mark, we follow the presumption that the State owns the land. Further, because such land is held for the benefit of the public, we do not believe a member of the recreating public may be prohibited from standing on land below the high water mark by an adjacent property owner.

Furthermore, we also address you and Mr. Miller's question as to what a deed holder must prove in order to establish a grant from the State of property below the high-water mark. Although property owners must provide evidence of a specific grant from the State, we are not aware of any requirement that those property owners provide proof of payment to the State of South Carolina. Rather, we believe these property owners must prove intent of the State to convey such property

through the language in the deed or grant, or in some cases by reference to such property in a plat incorporated as part of a deed.

Conclusion

Although our courts have yet to address whether the public may access navigable waters via a DOT right-of-way, we are of the opinion that a court could find, as other jurisdictions have found, that the public's right to access navigable waters is incidental to the public's right to travel the roadways established on such rights-of-way. Furthermore, we believe that in accordance with statutory and constitutional provisions, in addition to the common law principles of the public trust doctrine, a court would presume that members of the public have the right to stand on land between the high-water marks of a navigable stream. This presumption may be overcome only by proof that the State conveyed such property to the abutting landowner. However, we are not aware of any requirement by the courts stating that the deed holder must prove a payment to the State for such land.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

_____

Robert D. Cook
Deputy Attorney General