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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

December 5, 2003

The Honorable Arthur Ravenel, Jr.
Senator, District No. 34
635 East Bay Street
Charleston, South Carolina 29403

Dear Senator Ravenel:

You have requested our opinion regarding a matter which "affects critical salt marsh habitat – oysters, clams, shrimp, crabs, many species of fish as well as birds and animals." You indicate that this question "also impacts our tourist based economy, water quality, and the scenic beauty of the low country." By way of background, you provide the following information as to your specific question:

> OCRM is authorized to issue permits for the construction of bridges to islands under S.C. Regulations 30-12N and 30-12F. These islands are usually marsh lands in the public tidelands. Permits for private bridges have been granted by OCRM to provide access across the public tidelands to allow the private development and use of the island by the applicant, most often for residential purposes. Current OCRM regulations and procedures require proof of ownership but do not specifically require that the applicant demonstrate a King's grant or deed from the State for the island in the applicant's chain of title. In Coburg v. Lesser, S.C. 252, 422 S.E.2d 96, the Supreme Court of South Carolina held: "Presumption of title to marshland rests in the State of South Carolina, to be held in trust for the benefit of the public. Further, ownership of islands situate within marshland follows ownership of the marshland." 422 S.E.2d at 97. Additionally, Sections 1-11-65 and 1-11-100 S.C. Code provide that the State cannot grant title or an easement to its lands or tidelands unless the deed is signed by the governor and approved by the Budget and Control Board.

Your question is stated as follows:

> [i]s it legal for OCRM to consider and grant permits for bridges to islands, whose title is presumed to be in the state, for private development and use where the permit is tantamount to a de facto conveyance of these state lands (or the use of these state lands) and the ouster of the public, without requiring that the applicant clearly and convincingly demonstrate, by means such as an attorney's opinion and accompanying

title abstract, a grant from the State or predecessor sovereign, e.g. a King's grant or Lords Proprietor's grant, in the applicants chain of title sufficient to overcome the state's presumption of ownership of the island?

Law / Analysis

Unquestionably, the State possesses a presumptive title in land below the high water mark. Just this past April, the South Carolina Supreme Court, in McQueen v. South Carolina Coastal Council, et al., ____ S.C. ____, 580 S.E.2d 116 (2003), reaffirmed the State's ownership interest. There, the Court stated:

> [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). The State's presumptive title applies to tidelands. State v. Yelsen Land Co., 265 S.C. 78, 216 S.E.2d 876 (1975).
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> Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 458 S.E.2d 547 (1995). Proof that land was highland at the time of grant and tidelands were subsequently created by the rising tidal water cannot defeat the State's presumptive title to tidelands. State v. Fain, 273 S.C. 748, 259 S.E.2d 606 (1979).

580 S.E.2d at 149-150.

With this background, we turn to the specific question which you have raised. Two related decisions of the South Carolina Supreme Court are crucial in resolving this issue. In Coburg, Inc. v. Lesser, 309 S.C. 252, 422 S.E.2d 96 (1992) (Coburg I); the Court stated the law as follows:

> [p]resumption of title to marshland rests in the State of South Carolina to be held in trust for the benefit of the public .... Further, ownership of islands within the marshland follows ownership of the marshland. Coburg I, 309 S.C. at 253, 422 S.E.2d at 97 (citations omitted).

In Coburg I, Lesser received a permit from the Coastal Council to construct a walkway over the marsh to an island on Wappoo Creek, a navigable tidal stream in Charleston, and from there to a floating dock on the creek. Lesser began construction, but Coburg brought suit against Lesser claiming ownership and seeking to quiet title to the marshland as well as the two islands and the causeway within the marshlands.

The Master in Equity found that Coburg was the owner of the islands to the exclusion of all others. Further, the Master found that Coburg was the owner of the marshland to the exclusion of all, except the State of South Carolina. On appeal, the Supreme Court corrected the Master on the ground that since the State was the presumptive owner of the islands, the State (not the Coastal Council alone) was a necessary party to any proceeding to determine title to the property. The Supreme Court also did not find persuasive Coburg's contention that it held title to the marshland secondary to the State's presumed ownership. The Court remanded for a new trial on the ground that the State was a necessary party since title to marshland is presumed to rest in the State.

On remand, the Master again quieted title in Coburg. The State, through the Attorney General, appealed, contending that it was the fee simple owner of the marshland as well as the islands. The Supreme Court, in Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 512, 458 S.E. 2d 547, 548 (1995) (Coburg II) agreed, again stating the governing law in South Carolina:

> Land lying between the usual high water mark and the usual low water mark on a tidal navigable watercourse enjoys a unique status since it is held by the state in trust for public purposes. (Citation omitted). One asserting title to this land must prove a specific grant from the sovereign which is strictly construed against the grantee... Title to islands situate within marshland follows title to the marshland. Coburg I, 309 S.C. at 253, 422 S.E. 2d at 97.

Coburg II, 318 S.C. at 511, 458 S.E.2d at 548. (emphasis added).

In Coburg II, the Court noted that Coburg was asserting its ownership based on a 1967 deed which it traced back to a 1703 grant from the Lords Proprietors to Robert Gibbes. Early in South Carolina's colonial history, grants of land were made by the Lords Proprietors who were granted

enormous tracts of land in America by Charles II, King of England. The Lords Proprietors owned all of Carolina and acted in the stead of the sovereign in making land grants.

In Coburg II, the only evidence of the 1703 grant to Gibbes was contained in a memorial of a subsequent deed, dated 1733, thirty years after the original grant. A memorial is essentially a landowner's description of his own property. Expert testimony at trial indicated that around 1733, the royal government, fearing many landowners had inaccurate land grants, required landowners to register their land including its derivations. According to the 1733 memorial, the original grant provided in pertinent part that the land granted to Robert Gibbes was "to the northward and westward of the Wappoo Creek." There was no plat incorporated by reference.

Based on these facts and S.C. law, the Supreme Court in Coburg II concluded as follows:

> Where a tidal navigable waterway is a boundary in a grant, the area below the usual high water mark remains in the state absent specific language conveying it. In this case, there is no evidence of specific language in the grant showing an intent to convey the land below the high water mark of Wappoo Creek. Title to the marshland therefore remained in the sovereign at the time of this conveyance. The extended marsh created by encroachment of the waters of Wappoo Creek also belongs to the state... Title to islands situate within marshland follows title to the marshland... Accordingly, we hold the marshland and islands in question belong to the state.

Coburg II, 318 S.C. at 511, 458 S.E. 2d at 548 (citations omitted) (emphasis added).

Both Coburg I and II are controlling with respect to this area of the law. This is so because in two recent, unanimous decisions the highest court of this State has twice stated with clarity that title 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. See Clineburg and Krahmer, The Law Pertaining to Estuarine Lands in South Carolina, 23 S.C. L. Rev 7 (1971).

However, the holding in Coburg I and II that islands in marshlands are subject to the same ownership rules as the marshlands is novel in the sense that the Supreme Court had not had occasion to directly address that issue in prior decisions. An 1850 case cited in Coburg I supports the proposition that islands are owned by the owners of the surrounding submerged lands when non-navigable waters are involved. McCullough v. Wall, 4 Rich. 68, 53 Am. Dec. 715 (1850) (involving private ownership of an island in a non-navigable fresh water stream; this case is consistent with the Coburg I and II holdings which are based on concepts of public trust protection for navigable waters). See, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.J. 762 (1970). It is well recognized that "[a]n island, when formed in a stream or body of water by the deposit of alluvial matter therein, belongs to the owner of the land beneath

the water, on which the island is formed, whether such owner be the state or an individual." Tiffany, Law of Real Property, Section 1229.

Although Coburg involved two small islands, its holding would apply equally to large islands as well. Similar to the principle that the State has presumptive title to all marshes, not just small marshes, likewise, there is no legal distinction between small islands in the marshland and larger islands for purposes of the State's presumptive title. The basic reasoning in Coburg that title to islands in the marsh follows title to submerged surrounding marshes allow for no logical distinction between small and large islands. In all probability, early land owners may have sought grants of large, economically useful islands, and there may be a higher percentage of grants of larger islands; however, such does not affect the basic proposition that South Carolina holds presumptive title for the benefit of the public to all its marshlands as well as marsh islands. Indeed, Coburg was not limited to ownership of only small islands, but the Court expressly stated that "ownership of islands within the marshland follows ownership of the marshland." Coburg I, 309 S.C. at 253, 422 S.E. 2d at 97. See also, State v. McQueen, supra, 354 S.Ct. at 149, n. 6 ["The State's presumptive title may be overcome only by showing a specific grant from the sovereign which is strictly construed against the grantee."]; Op. S.C. Atty. Gen., March 25, 1964 ["An individual claiming title to tidelands (marshlands) must trace his title in an unbroken chain of title to a state, royal or proprietary grant ...."].

Of course, an administrative agency "has only such powers as have been conferred by law, and must act within the authority granted for that purpose." Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1995). The agency cannot change or alter the statute conferring authority upon it. Fisher v. J.H. Sheridan Co., 182 S.C. 316, 189 S.E. 356 (1937). Moreover, Art. III, § 31 of the South Carolina Constitution mandates that "[l]ands belonging to or under the control of the State shall never be donated, directly or indirectly to private corporations or individuals ...."

DHEC has promulgated regulations setting forth specific project standards for tidelands and coastal waters. See, S.C. Reg. 30-12. Subsection (N) relates specifically to "Access to Small Islands." While OCRM (Office of Ocean and Coastal Reserve Management) is the State's permitting authority for bridges, and possesses authority to issue permits for bridges to state owned marsh lands, it does not possess the power to issue such a permit where the result would result or potentially result in divesting the State of title (through estoppel, usage or adverse possession) thereby creating the possibility that the island could be developed and/or sold by a private owner. Issuance of such permits is a divestiture of the public trust lands and is clearly outside the scope of authority granted to OCRM.

Furthermore, S.C. Code Ann. Sec. 1-11-65 and 1-11-100 provide that the State cannot grant title or an easement to its lands or tidelands unless the deed is signed by the Governor and approved by the Budget and Control Board. Of course, no mention of OCRM is contained in these statutes. Accordingly, any issuance of a permit by OCRM to divest the State of its lands and marshlands (and thus to violate the public trust) is without legal authority and is ultra vires. Indeed, OCRM's

regulations recognize this by providing that "No permit shall convey nor be interpreted to convey, a property right in the land or water in which the permitting activity is located. No permit shall be construed as alienating public property for private use or as alienating private property for public use." S.C. Reg. 30-4(E).

Thus, in order to protect the State's interest in public trust lands, prior to issuance of a permit to a marsh island for the purpose of development, there should be a determination concerning ownership of the island by the Attorney General. Any applicant for a permit for a bridge to any marsh island should first submit a copy of the document upon which it relies for the original grant of the marsh island from the sovereign, together with an attorney's title opinion and accompanying abstract of title. This would insure that the Attorney General is in possession of the material necessary to determine the sufficiency of the original grant. OCRM should rely upon these opinions in responding to permit requests.

Without such a prior ownership determination, OCRM could not lawfully grant permits for bridges to islands – whose title is presumptively in the State – for private development and use. In addition, requiring the submission of such a document would prevent an applicant from the trouble and great expense of the permitting process without an awareness that the State has presumptive title to all marsh islands. Such a process would forewarn applicants that the deed conveying the adjoining highland or even purporting to convey the marsh and marsh island is insufficient without a legally sufficient original grant from the sovereign.

Conclusion

The South Carolina Supreme Court has ruled in both Coburg I and Coburg II that the State has title to marshes and marsh islands absent clear and convincing demonstration otherwise. Accordingly, OCRM possesses no authority to consider and grant permits for bridges to these islands, whose title is presumed to be in the State, for private development and use. Such a permit is tantamount to a de facto conveyance of these state lands (or the use of these state lands) and the ouster of the public. See, Art. III, § 31 of the South Carolina Constitution. OCRM must require that the applicant clearly and convincingly demonstrate to this office, such as by means of an attorney's title opinion and accompanying title abstract, the existence of an original grant from the State or predecessor sovereign, (e.g. a King's grant or Lords Proprietors' grant), in the applicant's chain of title sufficient to overcome both the State's presumption of ownership of the island as well as the fact that any such grant is strictly construed in favor of the State.

Yours very truly,

Henry McMaster