9247-9797

ALAN WILSON
ATTORNEY GENERAL

November 25, 2014

Captain Leonardo Ortiz
Anderson Soil & Water Commissioner
4324-G Belton Highway
Anderson, South Carolina 29621

Dear Captain Ortiz:

In your letter dated June 14, 2014, you have requested the opinion of this Office as to the suitability of implementing a land-use regulation permitting the Anderson Soil and Water Conservation District and each watershed director of the watersheds within the Anderson Soil and Water Conservation District the authority to issue and enforce criminal trespass notices to protect against "malicious trespass, damage and pollution to the watersheds, structures, and easements thereof." The first question you ask reads as follows: "[p]ursuant to SC Law, the Conservation Districts have the authority to create land-use regulations to help better protect the watershed districts within the Conservation District. The individual watershed districts within a Conservation District do not have the authority to create land-use regulations. Is this correct or not, and if not, why not?"

Second, you state: "[t]he problem encountered, which I am attempting to solve [by way of proposal of a land-use regulation], is that recently, persons were found trespassing on one of our watersheds, creating damage to the structure(s) established and maintained by the watershed district, which is apparently a sub-agency of the Conservation District." You also provide the referendum questions you propose be presented to the landowners of the District, ask specific questions relating to their enforceability within each of the four watersheds that comprise the District, and question the perpetuity of the ordinances to future landowners and watersheds should the ordinance pass.

While soil and water conservation districts have broad authority to implement land-use regulations following approval from the landowners of the district by referendum for the purpose of conserving soil and soil resources and preventing and controlling soil erosion, we question whether implementing a land-use regulation for the situation you are trying to remedy would be appropriate. Alternatively, we believe other statutory authority provides soil and water conservation districts the ability to protect against trespass. As it appears damage to watershed structures is the problem at hand, it is with that in mind that we write this opinion.

Law/Analysis

I. Soil and Water Conservation Districts of Land-Use Regulations

a. A History

Our Nation's push towards the creation of soil and water conservation districts ("SWCDs") and the authority to propose land-use regulations arose from the dust bowl of the 1930s and President Roosevelt's urge for states to adopt the Standard State Soil Conservation Districts Law (the "Standard

Law") to combat soil erosion. Jess Phelps, A Vision of the New Deal Unfulfilled? Soil and Water Conservation Districts and Land Use Regulation, 11 Drake J. Agric. L. 353, 354 (2006). Under the Standard Law, SWCDs were given authority through both project power and regulatory power to fight soil erosion at the local level. Id. at 361. Through project powers, the Standard Law sought to give SWCDs broad authority to do things such as conduct research and establish demonstrational projects, carry out preventative measures on farmsteads, work in cooperation with other agencies, purchase and acquire property, provide expertise and equipment, construct and maintain structures, develop comprehensive land use plans, and administer soil conservation projects. Id. In addition, regulatory powers – i.e. the authority to issue land-use ordinances – were proposed under the Standard Law to ensure landowner compliance with district objectives. Id. at 354. However, many states were hesitant to implement regulatory powers as such were seen as an encroachment by the federal government on state authority. Id. at 362, 364. By 1947, all states permitted the creation of SWCDs. Id. at 364. While thirty-three states eventually provided their SWCDs with regulatory authority, many states required ninety-percent approval before a regulation could be enacted. Id. at 365. As a result, this made enforcement of land-use ordinances in many states extremely difficult. Id.

South Carolina was one of the first states to adopt the Standard Law in 1937 through enabling legislation titled "Soil Conservation Districts Law." The project powers provided to SWCDs and their commissioners within South Carolina are established in S.C. Code Ann. § 48-9-1270 (2008) and closely mirror those provided in the Standard Law, as set forth above. Furthermore, the ability and requirements of South Carolina SWCDs to propose land-use regulations among the landowners of a SWCD are set forth in S.C. Code Ann. § 48-9-1510 (2008), *et seq.* In South Carolina, land-use regulations, which are embodied in a proposed ordinance, can be imposed into law upon two-thirds approval by landowners in the district voting in the referendum, at the discretion of the commissioners once the ordinance passes. S.C. Code Ann § 48-9-1540; § 48-9-1550.

By 1967, SWCDs in three states, including Colorado, North Dakota, and Oregon, had implemented land-use ordinances Id. at 367. Colorado was the most aggressive with several districts imposing regulations to address problems related to grazing, plowing up sod land, and handling of land subject to wind erosion; however in 1945, the Colorado Legislature set aside all ordinances due to poor administration and required re-enactment by a supermajority of landowners affected. Id. 367-68. In North Dakota and Oregon, only one SWCD in each state implemented a land-use regulation. Id. at 369. A North Dakota SWCD regulated grazing by issuing permits according to the capacity of the land, and an Oregon SWCD imposed a land-use regulation requiring owners to control sand-drifting. Id.

A small surge of land-use ordinances were enforced in the 1970s by New Jersey, Montana, and Wisconsin to fight "nonpoint source pollution." Id. Specifically, a SWCD in New Jersey issued soil and sediment regulations in 1975, a Montana SWCD passed a similar regulation, and a SWCD in Wisconsin also adopted a land-use regulation aimed at sediment control. Id. Although implementation of land-use ordinances by SWCDs remains rare, a recent land-use ordinance was passed in 2004 by referendum in the Rosebud Conservation District of Montana to address environmental concerns of soil erosion caused by the production of coal-bed methane mining. Id. at 370; see also Op. Mont. Att'y Gen., 2004 WL 1956773 (August 31, 2004) (discussing whether the Rosebud Conservation District had authority to implement a land-use regulation following a referendum by the voters, to conserve soils, protect the soil structure from coal-bed methane water, and to conserve water resources of the district).

While this history illustrates the overall rarity of implementation of land-use ordinances by SWCDs, our purpose in providing this background is to show that land-use ordinances serve to ensure that landowners use their land in manners consistent with soil conservation and prevention against soil erosion. As outlined above, examples of land-use ordinances that have been adopted include policies

landowners must comply with regarding grazing, plowing, wind erosion, soil and sediment regulations, and coal-bed mining. As one commentator noted, land-use regulations are best utilized "when a SWCD recognizes a local environmental concern, and is unable to rally the other levels of government to address the problem. In this sense the true purpose behind the SWCD concept can be realized – local action driven by local environmental concerns – a vision too infrequently obtained." Jess Phelps, A Vision of the New Deal Unfulfilled? Soil and Water Conservation Districts and Land Use Regulation, 11 Drake J. Agric. L. 353, 379 (2006).

b. Land-Use Ordinances: Statutory Construction

In addition to the history surrounding the creation of SWCDs and examples of their use of regulatory power, we must also employ the rules of statutory construction in determining our opinion of whether the Anderson County SWCD Commissioners can propose a land-use ordinance to the landowners of the District proposing that commissioners and watershed directors have the ability to issue and enforce trespass notices on lands within the SWCD. As the cardinal rule of statutory construction is to ascertain the intent of the legislature, we will begin there. See State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). Within S.C. Code Ann. § 49-9-20 (2008), our Legislature made extensive findings as to its intent in enacting the Soil and Water Conservation Districts Law, stating that to:

> conserve soil and water resources and control and prevent soil erosion and prevent floodwater and sediment damages, and further the conservation, development, utilization, and disposal of water, it is necessary that *land-use practices* contributing to soil wastage and soil erosion *be discouraged and discontinued and appropriate soil-conserving and land-use practices* and works of improvement for flood prevention or the conservation, development, utilization, and disposal of water be adopted and carried out . . .

S.C. Code Ann. § 49-9-20(3) (emphasis added). The Legislature thereafter set forth the "procedures for necessary widespread adoption" and declared that "the policy of the General Assembly" is:

> to provide for the conservation of the soil and water resources of this State and for the control and prevention of soil erosion, and for the prevention of floodwater and sediment damages, and for furthering the conservation, development, utilization, and disposal of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, promote recreational development, provide water storage for beneficial purposes, protect the tax base, protect public lands and protect and promote the health, safety, and general welfare of the people of this State.

Id.

With the Legislature's intent in enacting the Soil and Water Conservation Districts Law in mind, being in part to discourage land-use practices contributing to soil erosion and to implement land-use practices appropriate for soil conservation, we now turn to S.C. Code Ann. § 48-9-1570 (2008) which states the subjects land-use regulations may include. S.C. Code Ann. § 48-9-1570 reads as follows:

> [t]he regulations to be adopted by the *commissioners*[1] under the provisions of this article may include:

[1] To fully address the first question you raise, it is our opinion that formation of a land-use regulation is exclusive to SWCDs and do not extend to watershed conservation districts. The general powers of watershed

> (1) Provisions requiring the carrying out of necessary engineering operations, including the construction of terraces, terrace outlets, check dams, dikes, ponds, ditches and other necessary structures;
> (2) Provisions requiring observance of particular methods of cultivation, including contour cultivating, contour furrowing, lister furrowing, sowing, planting, strip cropping, changes in cropping systems, seeding and planting of lands with water-conserving and erosion-preventing plants, trees and grasses, forestation and reforestation;
> (3) Specifications of cropping programs and tillage practices to be observed;
> (4) Provisions requiring the retirement from cultivation of highly erosive areas or of areas on which erosion may not be adequately controlled if cultivation is carried on; and
> (5) Provisions for such other means, measures, operations and programs as may assist conservation of soil resources and prevent or control soil erosion in the district, having due regard to the legislative findings set forth in § 48-9-20.

As the subjects of subsections (1)-(4) of S.C. Code Ann. § 48-9-1570 do not embody a commissioner or director the power to issue and enforce trespass notices, we surmise that use of subsection (5) is the provision you rely on. Under the doctrine of *ejusdem generis*, specific provisions in a statute qualify more general catchall provisions so as to protect the legislature's intent in enactment. See generally Henderson v. McMaster, 104 S.C. 268, 272, 88 S.E. 645, 646 (1916) ("[G]eneral words—and it makes no difference how general—will be confined to the subject treated of."). Furthermore, the principle of *ejusdem generis* infers that "general words are not to be construed in their wildest extent but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." 80 Am. Jur. 2d Wills § 985 (August 2014).

In a 2004 opinion, the Office of the Montana Attorney General opined on the appropriateness of the Rosebud Conservation District's issuance a land-use ordinance, upon referendum approval, seeking to implement reasonable measures to protect the soil structure from coal-bed methane water. Op. Mont. Att'y Gen., 2004 WL 1956773 (Aug. 31, 2004). Applying the doctrine of *ejusdem generis* to a Montana statute identical to S.C. Code Ann. § 48-9-1570, the Office of the Montana Attorney General concluded that the provisions of its land-use regulation statute were intended to be "forward-looking" and "designed to provide flexibility to address changing conditions over time." Id. at *5. Thus, it concluded that while CMF runoff was not a direct threat when Montana's statute was enacted in 1939, it now constitutes as a specific threat to soil and water. Id. Because the proposed land-use regulation was consistent with the Legislature's intent in enactment, the Montana Office of the Attorney General opined that the coal-mining land-use regulation was an appropriate use of the power provided to the district under the statute's "catchall" land-use regulation subsection. Id. Specifically, the opinion stated that:

> [a]ny regulations proposed by a conservation district . . . may be adopted for such means, measures, operations, and programs as may assist a conservation district in the conservation of soil and water resources. Conserving the water and soils from saline seeps and blowing salts appears to be fully contemplated within the purpose for which

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conservation district are enumerated in S.C. Code Ann. § 48-11-110 (2008). None of these powers include the authority to issue land-use regulations, nor is this power provided elsewhere in the code. As the law is clear that governmental agencies, being creatures of statute, only have such powers that are expressly or impliedly granted to them by statute, it is our opinion that the power to formulate land-use regulations rest solely with SWCDs. See Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948); see also Op. Att'y Gen., 1968 WL 12165 (April 2, 1968) ("[T]he law is clear that governmental or administrative agencies, as a Soil and Water Conservation District, being creatures of statute, have only such powers as are granted them by statute, expressly or impliedly").

> conservation districts were formed—and any ordinance enacted which adopts means, measures, operations or programs that assist in preventing the saline seeps and blowing salts that would destroy the soil structure and make the water unusable for irrigating the lands is clearly within the purpose and authority of the district.

Id.

The land-use regulation proposed by the Rosebud Conservation District is yet another example of a practice to be carried out by the landowners to protect against a local environmental concern threatening the soil and water quality. In contrast, the ordinances you propose be presented to the landowners of the Anderson SWCD do not involve land-practices to be carried out by the landowners. Thus, in review of the history of SWCDs and prior examples of imposed land-use ordinances, our Legislature's intent in the creation of the Soil and Water Conservation Districts Law, the specific subjects the Legislature provides that land-use ordinances may cover as specified by S.C. Code Ann. § 48-9-1570(1)-(4), and using the Rosebud Conservation District as a presumably appropriate "catchall" regulation compliant with the doctrine of *ejusaem generis*, it is our opinion that a court would find authorizing SWCD commissioners and watershed directors the ability to issue trespass notices within the lands of the SWCD runs astray to the subjects land-use ordinances were intended to cover. In contrast, it is our opinion that land-use ordinances are intended to provide a means to regulate a landowner's use of his or her land for the conservation of soil and water and prevention of soil erosion threatened by environmental concerns at the local level.

II. Protections Against Damage to Watershed Structures

Despite our conclusion that a court would find the proposal of a land-use ordinance would likely not be appropriate to afford commissioners and watershed directors the ability to protect watershed structures from damage caused by trespassers, it is our opinion that other statutory provisions afford SWCDs and watershed conservation districts protection. Subsequent to the establishment of SWCDs the South Carolina Legislature, as a result of the Federal Watershed Protection and Flood Prevention Act of 1954, authorized the ability to create watershed conservation districts within one or more SWCDs in 1967. 1967 Act No. 613, 1967 S.C. Acts 1158-71. Both watershed conservation districts and SWCDs are political subdivisions of the state and public bodies corporate. See S.C. Code Ann. § 48-11-10(1), (3) (2008). S.C. Code Ann. § 48-11-20 (2008) provides the purpose of watershed conservation districts, stating in part that they can be established "within one or more soil and water conservation districts to develop and execute plans and programs relating to a phase of the control or prevention of soil erosion or flooding; the conservation, protection, improvement, development, or utilization of soil and water resources; stormwater management; or the disposal of water." S.C. Code Ann. § 48-11-20. Watershed conservation districts are formed upon the approval of the commissioners of the SWCD(s), and their powers are also subject to the commissioners' general supervision. See S.C. Code Ann. § 48-11-60 (2008); 48-11-110 (2008).

Research reveals that the Anderson SWCD is comprised of four watersheds, including the Bushy Creek Watershed, located in Pickens and Anderson Counties that occupies 25,075 acres; the Big Creek Watershed, located in Anderson County that occupies 11,193 acres; the Broadmouth Creek Watershed, located in Abbeville and Anderson Counties that occupies 28,764 acres; and the Three & Twenty Creek Watershed, located in Anderson and Pickens Counties that occupies 47,590 acres. While you have not provided documentation as to the ownership over the lands comprising the watersheds, both SWCDs as well as watershed conservation districts are provided, to different extents, the ability to acquire property interests in land, as well as the power to sue.

Subject to the supervision of the board of commissioners of the SWCD, two of the powers the Legislature have given to watershed conservation districts include the power to:

> (1) acquire by purchase, exchange, lease, gift, grant, bequest, devise, or through condemnation actions lands, easements, or rights-of-way needed to carry out an authorized purpose of the watershed conservation district, and sell, lease, or otherwise dispose of its property or interests in the property for the purposes and provisions of this chapter. The condemnation of an existing public use must be denied unless it may be shown that the specific property to be condemned is absolutely essential to the watershed conservation district, and the use to be condemned materially does not impair the existing public use [and the power to]
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> . . .
>
> (4) sue and be sued in the name of the district, have a judicially noticed seal, have perpetual succession unless terminated as provided in this chapter, and make and execute contracts and other instruments necessary or convenient to the exercise of its powers. . . .

S.C. Code Ann. § 48-11-110(1), (4).

Additionally, SWCDs are given the authority to:

> (5) To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property, real or personal, or rights or interests therein; to maintain, administer and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and provisions of this chapter;
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> . . .
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> (10) To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as provided in Article 9 of this chapter; to make and execute contracts and other instruments necessary or convenient to the exercise of its powers; and to make, amend and repeal rules and regulations not inconsistent with this chapter to carry into effect its purposes and powers.

S.C. Code Ann. § 48-9-1270(5), (10). Also, watershed conservation districts are authorized to "construct, reconstruct, repair, enlarge, and improve works of improvement . . . and shall provide operation and maintenance for works of improvement." S.C. Code Ann. § 48-11-110(2). SWCDs are similarly authorized to "construct, improve, operate, and maintain such structures as may be necessary or convenient for the performance of any of any of the operations authorized in this chapter." S.C. Code Ann. § 48-9-1270(7).

a. Trespass

You state in your correspondence that the Anderson SWCD Commissioners and the directors of its watershed conservation districts seek the authority to issue criminal trespass notices on watershed lands by approval of an ordinance passed in the form of a land-use regulation. The statute governing criminal trespass, also referred to as trespass after notice, is S.C. Code Ann. § 16-11-620 (2003). In relevant part, this statute reads as follows:

> [a]ny person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to

> do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

S.C. Code Ann. § 16-11-620 (2003) (emphasis added). In State v. Hanapole, 255 S.C. 258, 178 S.E.2d 247 (1970) our Supreme Court held that S.C. Code Ann. § 16-11-620 applies only to trespass on private property. In its analysis, the court reasoned that because the public airport where the trespass notice was issued was owned by the Richland-Lexington Airport District, a political subdivision of South Carolina, it was public property. Id. at 267 (citations omitted). Therefore, the court concluded that since criminal trespass only applies to private property, it had no application to public property and a conviction for an alleged trespass could not be sustained under the criminal trespass statute. Id. at 268. Furthermore, the Court stated that criminal trespass was: "clearly for the purpose of protecting the rights of the owners or those in control of private property and the owner of such property may lawfully forbid any and all persons, to enter upon any part of his premises which are not devoted to public use." Id. (citations omitted). From Hanapole it can be concluded that issuance and enforcement of a criminal trespass generally cannot be sustained on public property.

However, in the case of In Interest of Joseph B, 278 S.C. 502, 299 S.E.2d 331 (1983), the Supreme Court distinguished its ruling in Hanapole when it held that public schools, even though owned by political subdivisions, are able to prosecute for trespass on public school grounds, using a specific statute pertaining to trespass upon public school property as its justification. Id. at 503, 299 S.E.2d at 332. Specifically, S.C. Code Ann. § 16-11-530 provides that trustees of the school districts shall be deemed owners and possessors of all school property for purposes of determining whether a trespass has occurred. S.C. Code Ann. § 16-11-530 (2003). Given this specific statute, the Court determined prosecution for criminal trespass was able to be enforced by public schools, the rationale being that public schools "lack [ ] the hallmarks which attend other property of the public. It is not devoted to the use of the entire public nor is there a universal right of access to it." of In Interest of Joseph B, 278 S.C. at 504, 299 S.E.2d at 332.

While not specifically directed towards trespassing, S.C. Code Ann. § 48-9-1290 (2008) pertaining to land owned by SWCDs states that: "[n]o provision with respect to the acquisition, operation or disposition of property by other public bodies of this State shall be applicable to a district organized under the provisions of this chapter unless the General Assembly shall specifically state. . . ." Given the distinction the Legislature makes between land owned by SWCDs and other public lands in S.C. Code Ann. § 48-9-1290, a SWCDs authority to sue on behalf of the District, the interest of public safety, as well as the Legislative intent in enacting the Soil and Water Conservation Districts Law, it is our opinion that a court would find SWCDs have the authority to protect lands within the watershed that are owned by the District by issuing criminal trespass notices pursuant to S.C. Code Ann. § 16-11-620. To advise the public against trespassing, it is our opinion that lands owned by the District should be properly posted, pursuant to S.C. Code Ann. § 16-11-600. S.C. Code Ann. § 16-11-600 (2003) ("When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing").

While you have relayed in conversation that the Anderson SWCD or its watershed conservation districts have easements over privately owned land, we are unaware of the scope of those easements and are therefore unable to comment fully in the matter. However, while outside of our State's jurisdiction, we note that in Town of Morganton v. Hudson, 207 N.C. 360 (1934) the North Carolina Supreme Court

ruled that a town owning an easement for protection of its watershed and municipal water supply had an interest in the land and could maintain an action for trespass, along with the fee simple owner of the land, against the defendant. Similarly, our courts have recognized that establishment of an easement creates an interest in the land to the easement holder. See, e.g., Morris v. Townsend, 253 S.C. 628, 172 S.E.2d 819 (1970) ("An easement gives no title to the land on which the servitude is imposed. It is, however property or an interest in the land."); Stuckey v. D.W. Alderman & Sons Co., 107 S.C. 426, 93 S.E. 126 (1917) (holding that "[t]he complaint alleged injuries to real estate, and the answer *sets up an easement, and therefore an interest in the land itself*") (emphasis added). Although we have not found specific case law in our state similar to Town of Morganton v. Hudson, it is our opinion that a court within our jurisdiction would find an interest in the land established by way of easement would permit a SWCD or a conservation district the ability to maintain a joint action for trespass for lands it has an interest in by easement along with the fee simple owner of the land.

Dependent on the facts related to the case at hand, it is also our opinion that a court would find criminal prosecution could be brought for offences against deliberate damage to personal property on land the SWCD or watershed conservation district have a property interest in. See, e.g., S.C. Code Ann. § 16-11-510 (relating to malicious injury to personal property); S.C. Code Ann. § 16-11-520 (relating to malicious injury to tree, house, outside fence, fixture, on real property).

b. Agreements with Landowners and Occupiers

As for lands not owned by the SWCDs, it is our opinion that a court would find S.C. Code Ann. § 48-9-1280 serves as a means to prevent damage by trespassers to watershed structures on privately owned lands presumably by way of easement or some other interest or agreement permitting the structure to be established and maintained on land. S.C. Code Ann. § 48-9-1280 (2008) states that:

> [a]s a condition to the extending of any benefits under this chapter to, or the performance of work upon, any lands not owned or controlled by this State or one of its agencies the commissioners may require contributions in money, services, materials or otherwise to any operations conferring such benefits and *may require landowners and occupiers to enter into and perform such agreements or covenants as to the permanent use of such lands as will tend to prevent or control erosion and prevent floodwater and sediment damage thereon.*

S.C. Code Ann. § 48-9-1280 (emphasis added). Given the broad scope of this provision, it is our opinion that a court would find SWCDs could require landowners to take measures, such as proper positing and issuances of trespass notices, to prevent damage to watershed structures caused be trespassers on privately owned land given the presumed benefit the structures provide.

c. Rules and Regulations imposed by a SWCD

SWCDs and their Commissioners are also authorized to "to make, amend and repeal rules and regulations not inconsistent with this chapter to carry into effect its purposes and powers." S.C. Code Ann. § 48-9-1270(10). In our opinion, proposal of a rule or prohibition against trespass to posted watershed lands for the protection of structures established and maintained by the watershed would be appropriate under the powers afforded to SWCDs in § 48-9-1270(10).

In Hudson v. Town of Morganton, 205 N.C. 353 (1933) the North Carolina Supreme Court upheld a the trial court's dismissal of a case brought by a landowner in a watershed district alleging the Town of Morganton "deprived the plaintiff of the beneficial use and occupation of her land. . . by forbidding trespassing on the watershed or interfering with the water system." Id. at 329. This case has

been cited for the proposition that regulations governing the use of property by its owners, consistent with the public welfare and rights of others, do not constitute a "government taking" for which compensation must be made. 11 McQuillin Mun. Corp., Taking under police power distinguished—Regulations § 32:31 (2014). The current North Carolina regulation in place reads as follows: "[s]igns advising the public of the watershed boundaries and prohibiting trespassing by all unauthorized persons shall be posted at the water works intake and along the boundaries and at entrances and accesses throughout the watershed area of an unfiltered public water system. It shall be the duty of the watershed inspectors and other water supply officials to see that these signs are posted and maintained." 15A NCAC 18C.1107.[2] If a similar regulation were imposed by a SWCD, we presume the same finding – that such regulation would not constitute as a government taking – would result.

d. Cooperation with Counties, Municipalities, and State Agencies

Last, we note our opinion that a court would find S.C. Code Ann. § 48-9-50 affords protection against damage to structures on publicly owned lands within the watershed, presuming the SWCD or watershed conservation district have permission by way of easement or some other interest or agreement allowing the structure to be established and maintained on land. Specifically, this provision states that:

> [a]gencies of this State which shall have jurisdiction over or be charged with the administration of any State-owned lands and agencies of any county or other governmental subdivision of the State which shall have jurisdiction over or be charged with the administration of any county owned or other publicly owned lands, lying within the boundaries of any district organized under this chapter, shall cooperate to the fullest extent with the commissioners of such districts in the effectuation of programs and operations undertaken by the commissioners under the provisions of this chapter. The commissioners of such districts shall be given free access to enter and perform work upon such publicly owned lands. . . .

S.C. Code Ann. § 48-9-50.

While criminal trespass generally cannot be enforced on publicly owned lands pursuant to the Supreme Court's ruling in Hanapole, if a structure is maintained on land owned by a county, municipality, or other state agency, it is likely a court would uphold proper posting to prevent interference with structures on watershed lands given the intent of the Legislature in enacting the Soil and Water Conservation Districts Law, its inclusion of S.C. Code Ann. 48-9-1290 distinguishing the acquisition, operation or disposition of property by SWCDs from other public bodies, and the extreme measures it has taken to protect the land encompassing the watershed districts. We also note counties and municipalities have the statutory authority to enact rules, resolutions, and ordinances not inconsistent with the Constitution and general law of the State. See S.C. Code Ann. § 4-9-25 (pertaining to the powers bestowed on counties to enact regulations, resolutions, and ordinances); see also S.C. Code Ann. § 5-7-30 (pertaining to powers conferred upon municipalities to enact regulations, resolutions, and ordinances).

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[2] Regulations in other states have also been imposed prohibiting trespass to watershed lands. See, e.g., 10 NYCRR 148.3(d)(iv) (New York Codes, Rules and Regulations pertaining to the Village of Woodridge stating in part "[a]ll watershed lands shall be posted and trespassers will be prosecuted."); N.H. Code Admin. R. Env-Dw 902.36(g)(1)(New Hampshire Administrative Code titled "Protection of the Purity of Upper Beech Pond and Its Watershed" and stating "[n]o trespassing on town land around said pond shall be allowed.").

Conclusion

Based on the foregoing analysis, it is our opinion that statutory authorities, other than the proposal of a land-use ordinance, afford SWCDs and watershed conservation districts protection against damage to its structures by trespassers. It is our opinion that protections against trespass can be initiated as follows: directly by the SWCD through criminal trespass notice and enforcement for lands owned by the district; commissioner agreements with landowners that the landowner prevent damage to structures maintained on privately owned land and land that the SWCD or watershed conservation district has an easement on; through the general authority of a SWCD to implement rules and regulations to carry out its purpose; and cooperation with municipalities, counties, and other state-agencies for protection of structures maintained on public lands.

We caution that this opinion only reflects the law and our interpretation of how a court may interpret and enforce it. We have repeatedly stated that this Office cannot and does not resolve factual disputes or make findings of fact. This is particularly relevant in the questions presented in this opinion since we are unaware of the exact interest the SWCD or the watershed conservation district have in the lands in questions and the type of structures maintained on those lands. Thus, we reiterate that we cannot determine in an opinion how a particular set of facts might apply to the law; only a court of competent jurisdiction can make such a determination. Op. S.C. Att'y Gen., 2013 WL 650579 (Feb. 11, 2013); Op. S.C. Att'y Gen., 2012 WL 4283913 (Sept. 12, 2012).

As to the portions of this opinion that involve criminal statutes, our office has also opined that we recognize the day-to-day decisions as to whom to charge with a crime are made primarily by law enforcement officers, and that police officers and agencies are afforded by law broad discretion to carry out their arduous daily tasks of enforcing the law. Op. S.C. Att'y Gen., 2013 WL 650579 (Feb. 11, 2013). In addition, law enforcement officers should evaluate each particular situation as it arises and gauge whether there is a likelihood of a violation of the law. Id. at *3 (citing Op. S.C. Att'y Gen., 2011 WL 4592377 (Sept. 22, 2011)). This office adheres to its long standing policy that the judgment call as to whether prosecution of a particular individual is warranted or legally sound in a particular case is a matter within the discretion of the local prosecutor. Id.

If you have any further questions regarding this opinion, please do not hesitate to contact our Office.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Solicitor General