GreenLaw®
Giving Georgia's Environment Its Day In Court

May 2, 2013

Samuel S. Olens
Attorney General
Georgia Department of Law
40 Capitol Square SW
Atlanta, Georgia 30334-1300

Dear Mr. Olens:

I am an attorney with GreenLaw and am writing with regard to the Jekyll Island Authority's ("JIA") request for legal guidance related to the 65/35 Task Force Report that has been issued as part of the JIA's preparation of an updated master plan that will guide future development on Jekyll Island. *See* O.C.G.A. § 12-3-243.1.

As you know, O.C.G.A. § 12-3-243 limits development on Jekyll Island to "not more than 35 percent of the **land area** of Jekyll Island which lies above water at mean high tide" (emphasis added). Thus, the first logical question is what constitutes "land." This issue must be addressed because thousands of acres of marsh lie on the western side of the Island.

A. The Land vs. Marsh Issue

The Task Force relied upon the common understanding and definition of "land" as well as the definitions of marsh and upland in the Coastal Marshlands Protection Act ("CMPA") and Department of Natural Resources Rules implementing the CMPA to find that marsh is not land. *See* O.C.G.A. § 12-5-282(3) and Ga. R. & Regs. 391-2-3-.02(2)(b) and (p).

Any person who steps off the land on Jekyll and into the marsh will easily discern that marsh is not land. This comports with the plain meaning of land as "the solid part of the earth, especially where not covered by water." *See Webster's Collegiate Dictionary of the English Language*, ed. 2002. The Task Force finding on this issue is also consistent with the U.S. Fish and Wildlife Service definition of salt marshes as areas that are "found in flat, protected waters within the protection of a barrier island, estuary, or along low-energy coastlines" and as "situated **between the land and the sea**." *See* http://www.fws.gov/verobeach/MSRPPDFs/SaltMarsh.pdf (emphasis added).

As required by long-established rules of statutory construction, adherence to the above plain and ordinary meaning of land is required unless a statute directs a contrary result. Here, the CMPA

and its implementing rules do not direct a contrary result, but, in fact, are consistent with the plain meaning by making a clear distinction between marsh and land.[1]

The CMPA defines "marshlands," in part, as "any marshland intertidal area, mud flat, tidal water bottom, or salt marsh in the State of Georgia within the estuarine area of the state, whether or not the tidewaters reach the littoral areas through natural or artificial watercourses." The definition further defines marsh by various forms of vegetation and soil type. *See* O.C.G.A. § 12-5-282(3). "Estuarine area" is defined as "all tidally influenced waters, marshes, and marshlands lying within a tide-elevation range from 5.6 feet above mean tide level and below." *See* O.C.G.A. § 12-5-282(7).

On the other hand, DNR's Rules define "upland" as "lands that are neither coastal marshlands nor wetlands." *See* Ga. R. & Regs. 391-2-3-.02(2)(p). There could hardly be a clearer distinction between marsh and land in the CMPA and DNR's implementing Rules. *See also* Ga. R. & Reg. 391-2-3-.02(4) (further distinguishing between marsh and upland by noting that "There is established a 50-foot marshlands buffer applicable to the **upland** component of the project as measured horizontally inland from the **coastal marshland-upland interface**, which is the Coastal Marshlands Protection Act jurisdiction line . . . .") (emphasis added).

This legislative analysis is supported by existing legislative history. In 1971 and 1972, Mike Egan, the sponsor of the current statutory language in O.C.G.A. § 12-3-243, wrote two letters to the JIA contemporaneously with and shortly after his bill was introduced and passed by the legislature in which he stated unequivocally that marsh should not be included in the total land area for purposes of applying the development limitation on the Island:

1. ". . . no more than one-third of the high land will be developed in any way and that two-thirds of the ***land* and *all marshes*** will be left in their natural states" (February 2, 1971 letter attached to the Task Force Report) (emphasis added); and

2. "After further discussion with a number of legislators [and with the agreement of the JIA], I requested that a bill be drafted which would limit the Authority's power to improve and develop the Island to 35% of the ***ground*** beyond the high water mark. As you know, the resulting legislation was passed by overwhelming votes in the House and Senate and signed by the Governor." (August 7, 1972 letter attached to Task Force Report) (emphasis added).

To the extent that you are not convinced by any of the above analysis, we would like to invite you to accompany us for a short site inspection on the Island. We have no doubt that you would immediately appreciate the difference between marsh and land when you step off of the island into the marsh and get your feet wet. You will also see visually a clear demarcation between marsh and land. This is a serious offer, and we stand ready to accompany you at your convenience.

---

[1] The Jekyll statute does not contain any definitions for marsh or land. Given that the CMPA, however, is a comprehensive statute intended to protect all of the marsh on the Georgia coast, including the marsh contiguous to Jekyll Island's western shore, the CMPA's definition of marsh and DNR's definition of upland should be considered and applied.

B. The Method for Demarcating the Land from the Marsh.

The real question in this case is not whether marsh is land because, as shown above, no reasonable person could equate marsh with land. Rather, the question is how to demarcate the marsh from the land in a measurable way. The Task Force considered several methods and reasonably decided to use DNR's marsh/land jurisdictional line. That line is established in the CMPA as a mean tide level of 5.6 feet which DNR has adjusted for sea level rise to 4.89 feet. *See* O.C.G.A. § 12-5-282(3) and (7). As noted above, this methodology is expressly required by DNR's Rules implementing the CMPA. *See* Ga. R. & Regs. 391-2-3-.02(4).

C. Rejection of the Task Force Findings Will Set a Dangerous Precedent for Enforcement of the CMPA.

In passing the CMPA, the General Assembly set forth numerous legislative findings regarding the importance of protecting Georgia's unique and invaluable coastal marshlands. *See* O.C.G.A. § 12-5-281. As discussed above, to provide adequate protection for the marshlands, the legislature (and DNR through lawful implementing regulations) defined marsh and the method for determining the marsh/land boundary. The Task Force fully honored this legislative intent. Disregard of the Task Force findings would endanger enforcement of the CMPA contrary to the clear legislative intent. If hundreds of acres of marsh contiguous to Jekyll Island are considered to be land, thousands of acres of marsh that lie between mean high tide and the upland along the entire Georgia coast will be susceptible to development. It would be nonsensical to conclude that marsh is land for purposes of the statute restricting development on Jekyll but is not land for purposes of the CMPA.

D. JIA's Arguments Miss the Mark.

As of this date, non-JIA staff members of the Task Force and the public have not been given the courtesy of a copy of the JIA's four page summary of its objections to the Task Force Report. Daryl Robinson with your office has told me that this document is being withheld based upon attorney-client privilege. Please consider this letter as our formal objection to withholding this document and any other documents that relate in any way to the work of the Task Force. Concealing this document is contrary to the JIA's public commitment to an open master plan review process, undermines public confidence in the integrity of the process, and prevents a full response to the JIA's objections. If the JIA believes it has valid objections to the Task Force Report, as a public authority, it should be willing to subject those objections to public scrutiny. In the absence of full and honest disclosure, this response is limited to what little information the JIA and your office have made available.

In its request for your evaluation of the Task Force Report, the JIA argues that O.C.G.A. § 12-3-243 and *Smith v. State of Georgia,* 248 Ga. 154 (1981)[2] require use of mean high water to correctly measure the land area of the Island. However, O.C.G.A. § 12-3-243 says nothing regarding what constitutes the "land area" of Jekyll. Similarly, the *Smith* case says nothing generally regarding what constitutes land.

The fundamental flaw in the JIA's position is that it ignores the first logical step in the process of complying with O.C.G.A. § 12-3-243. That first step requires a determination of what constitutes land before determining whether that land lies above mean high tide. Mean high tide ("MHT"), mean high water ("MHW"), and mean higher high water ("MHHW") have nothing to do with determining what is land or where the land begins and the marsh ends. It is the CMPA and its implementing rules that determine what is land and what is marsh, and it is DNR's marsh/land jurisdictional line that determines where the marsh ends and the land begins. Therefore, any disagreement regarding whether MHT may be equivalent to MHW or MHHW and whether MHW, MHHW, or some other methodology should be used to comply with O.C.G.A. § 12-3-243 is completely irrelevant to the Task Force's finding that marsh should not be included in the "land area" of the island.[3]

The other principal flaw in the JIA's position is that it ignores another cardinal rule of statutory construction that every word in a statute must be given meaning. The JIA's position violates this cardinal rule by ignoring the General Assembly's use of the key word "land" in the statute. If the General Assembly had intended that **everything** above mean high tide, including marsh, be included in the area of the island, it would not have included the additional term "land" in the statute. Instead, the General Assembly simply would have limited development to "the area which lies above water at mean high tide." By not doing so, the General Assembly clearly meant to limit the size of the Island in order to limit the overall amount of development that could occur on the Island. The Authority's position ignores this clear legislative intent.

Last, JIA Executive Director Jones Hooks has made public comments implying that because the sand dunes above mean high tide are protected by the Shore Protection Act, yet are included in the land area of the Island, the marsh above mean high tide that is protected by the Coastal Marshlands Protection Act should similarly be included in the land area of the Island. This argument is specious because the sand dunes above mean high tide are clearly land. On the other hand, as already discussed, marsh is not land. Similarly, Mr. Hooks also suggests that because the marsh is under the "stewardship" of the JIA and is otherwise protected by the CMPA, the marsh must be counted as part of the Island. The conclusion does not follow logically from the premise. Simply because the marsh is protected by another law or is under the stewardship of the JIA does not mean that it is part of the land area of the Island and should be counted to artificially inflate the number of land acres that may be developed.

---

[2] In its submission to you, the JIA merely refers to the case name without any citation, but presumably we have noted the correct citation as the case concerns the meaning of mean high tide and mean high water. It should also be noted that, contrary to the JIA's assertion, this case was never presented to the Task Force for its consideration.

[3] As the *Smith* case, at best, merely found that mean high tide may be equivalent to mean high water for purposes of that case, any such holding in that regard is simply irrelevant to the Task Force's finding that marsh is not land and that the DNR marsh/land jurisdictional line should be used to delineate the marsh from the land.

E. JIA's Current Position Contradicts Its Task Force Position.

Notably, JIA staff explicitly advocated that the Task Force use DNR's marshland jurisdictional line for delineating the marsh/land interface. John Hunter, JIA Director of Historic Resources, prepared and distributed with the advice of his in-house counsel in August 2012 a memorandum to the Task Force members which stated that "Jekyll Island Authority staff recommends . . . [t]he use of DNR's regulatory MHW measurement of 5.6' (adjusted to 4.89) on the western shore to minimize the amount of marsh included." (Copy of memo attached as Exhibit 1.) Therefore, before the JIA knew the actual percentage of developed and undeveloped land on the island, the JIA championed the precise approach that the Task Force ultimately adopted.

F. Adoption of JIA's Current Position Could Result in the Illegal Development of an Additional 604 Acres and Destroy the Pristine Nature of Jekyll Contrary to Express Legislative Findings.

We hope that any guidance you provide in this matter will comport with the overall express intent of the legislature when it established the Island as a state park where all Georgians could enjoy a beautiful pristine barrier island and where, to accomplish this primary purpose, development would be limited to 65% of the land area of the Island:

> The Georgia General Assembly finds that Jekyll Island is home to some of the state's most treasured natural and cultural resources and it is the expressed intent of this body to ensure the preservation of these resources for the enjoyment of all Georgians now and for future generations to come. For this reason, the state shall continue its commitment that **not less than 65 percent of the land area** of Jekyll Island which lies above water at mean high tide **shall remain undeveloped**. Jekyll Island proudly displays one of Georgia's largest stretches of barrier island property . . . . Jekyll Island is recognized by this body as "Georgia's Jewel," and its remarkable beauties are hereby preserved so that they may continue to shine for all citizens of Georgia.

Ga. L. 2007, Act 367, § 1, p. 711.

The JIA's position that marshland should be included in the total land area of the Island is contrary to this express legislative intent and artificially increases the overall size of the Island which makes possible excessive development on the Island.

The JIA admits that adoption of its position would result in increasing the total size of the Island by approximately 1725 acres (from 3817 as found by the Task Force to 5542 acres) thereby increasing the number of developable acres by 604 acres (35% of 1725).[4] To better appreciate the impact that additional development of this magnitude would have and the public outcry that necessarily would follow, please consider that this amount of development is more than 10 times

[4] If one factors in the amount of over-development that has already occurred as found by the Task Force, the JIA would still be able to develop an additional 467 acres. The JIA contends that the land area of the Island is 5542 acres, and 35% of that figure is 1939 acres. The JIA accepts the Task Force finding that 1472 acres are currently developed. The difference between 1939 and 1472 is 467.

the amount of development that would have taken place under the Linger Longer development plan that imploded just a few years ago due largely to strong public opposition. I am sure you are aware that the Linger Longer proposal was a complete fiasco and a public relations nightmare for those involved. Simply put, development of the magnitude that would be permitted under the JIA's position would completely destroy the special character of Jekyll Island contrary to express legislative intent.

G. No Conflict of Interest Exists for Any Public Member of the Task Force.

At the beginning of the master planning process, the JIA went to great lengths to assure the public that the process would be open and would involve several concerned stakeholders. Now, it has subverted that process by requesting advice from your office clearly intended to stop the process in its tracks because it does not like the preliminary results of its own Task Force that includes several JIA staff. But the Authority has not stopped there. It now seeks to disqualify and remove an unnamed member of the Task Force on the spurious ground that this public citizen has threatened a lawsuit.

Undoubtedly, the unnamed person is David Egan who is Co-Director of the Initiative to Protect Jekyll Island. First, it is astounding that the JIA has the temerity to claim a conflict by anyone when it has four JIA staff on the Task Force and 8 of 14 members on the JIA Master Plan Steering Committee who were considering the Task Force findings until the JIA short-circuited the process with its one-sided demand to you. These individuals obviously must answer to the wishes of the Executive Director and ultimately to the Board itself. The JIA has now made its true position abundantly clear in its demand to you for a finding that 604 additional acres on Jekyll may be developed. Under these circumstances, the staff on the Task Force and the Steering Committee can hardly be trusted in any future proceedings to exercise independent judgment.

Second, neither David Egan nor the Initiative to Protect Jekyll Island has threatened a lawsuit. What the Initiative has done is retain GreenLaw to provide counsel and advice regarding the master plan review process and to consider all appropriate legal options as this process continues. Just because those legal options may ultimately involve a lawsuit if the JIA Board does not properly follow Georgia law does not create a conflict of interest. The JIA members of the Task Force and the Steering Committee have had legal counsel throughout these proceedings, have obtained legal advice from their in-house counsel and have now sought advice from you. In short, if David Egan has a conflict, so do the JIA staff.

Third and finally, let us call the JIA's latest move what it really is. It is an effort to remove David Egan from the process solely because he has been very effective in advocating a rational, scientific and legal basis for the Task Force findings much to the chagrin of the JIA. If the JIA and the Attorney General's office want to further erode public confidence in the integrity of the master planning process, I cannot think of a much better way to do it than to attack a dedicated public citizen who has conscientiously devoted countless hours of his time to the process (and who the JIA itself invited to be a part of that process) simply because the JIA now does not like the result of its own planning process.

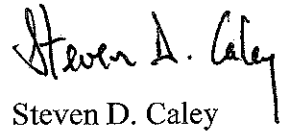
H. Conclusion.

We reiterate our request for a complete copy of all documents the JIA has submitted to your office in support of its analysis of and/or objections to the Task Force Report. Upon our receipt of those documents, we request that you provide us with 10 days to respond. We also ask that you not issue any guidance or opinion until we have been provided with this information and a 10 day period to respond. Given the public importance of this issue, we believe this is a reasonable request.

To the extent that full disclosure and an opportunity to respond to the JIA's position is refused, we urge you to advise the JIA that the Task Force Report properly concluded that marsh should not be included in the land area of Jekyll Island for purposes of the development limitation contained in O.C.G.A. § 12-3-243. We also urge you to reject the JIA's attempt to remove any public citizen from the master planning process for an alleged conflict of interest based solely on a supposed threat of a lawsuit.

I would appreciate receiving a copy of whatever guidance or opinion you may ultimately issue in this matter. In the meantime, if you have any questions, please do not hesitate to contact me.

Very truly yours,



Steven D. Caley

cc: Nancy Gallagher