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OFFICIAL OPINION

Mr. C. Jones Hooks
Executive Director
Jekyll Island – State Park Authority
100 James Road
Jekyll Island, Georgia 31527

Re: Based on the relevant statutory language, the Jekyll Island State Park Authority does not have discretion to adopt the "65/35 Task Force" Recommendation to the extent that it uses a measurement reference point other than Mean High Tide.

Dear Mr. Hooks:

You have requested my official opinion on the limited question whether the Jekyll Island State Park Authority ("JIA") has the discretion to adopt the 65/35 Task Force recommendation regarding the measurement of the land area of Jekyll Island in connection with amending the JIA Master Plan ("Master Plan"). For the reasons that follow, the answer to that question is relatively simple – while some may view the Task Force's recommendation as commendable from a policy perspective, it is not supported by the applicable statutes.

As everyone involved agrees, Jekyll Island is a state treasure that should be preserved in accordance with the wishes of the people, as expressed through their elected representatives. I am sensitive to the concerns that have been expressed about future development on Jekyll Island. It is not within my purview, however, to make policy in this area. My role is to interpret the law as written. In that regard, I note that my opinion will not necessarily settle this issue – that will be up to the legislature (or the courts if litigation is pursued).

Given the importance of this issue to Georgia's citizens and the potential for litigation, you may wish to consider the following as you proceed. The current land area of the island, as set forth in the 1996 Master Plan, has been a matter of public record for seventeen years and the General Assembly has not seen fit to amend the applicable statutes, thereby tacitly approving that plan. If the Authority is considering modifying the 1996 Master Plan so as to increase substantially the measured land area of the island above MHW (for example, by choosing to replace the 4.3′ level adopted in 1996[1] with the 2.59′ level currently recognized as the MHW mark by the National Oceanic and Atmospheric Administration (NOAA)), I would recommend that any such proposal be thoroughly evaluated in a public process and that final action be deferred until the General

[1] The source of the 4.3′ mark adopted in the 1996 Master Plan is uncertain. Whatever its source, and as the Plan itself acknowledges, it was not the MHW mark established by the National Ocean Service (NOS) within NOAA which, according to the Plan, was confirmed with NOS as "3.4′ above NGVD" (National Geodetic Vertical Datum of 1929). Final Master Plan IV(2), at 6. According to the Plan's language, "[t]he planning team concluded that the 4.3′ value was most consistent with the intent of the statute." *Id.*

Assembly has been given the opportunity to weigh in by amending, if so desired, the statute with which this opinion is concerned. Indeed, taking into account the various proposals for measuring the island, the General Assembly could simply declare the size of the island or state precisely how much acreage is subject to development. Such a determination would certainly prove more definite and dependable than one that can be altered in the future by scientific advancements or changing tides.

Background

JIA created several task forces composed of volunteers and JIA staff to make a recommendation for compliance with the requirements set forth in O.C.G.A. §§ 12-3-243 and -243.1 for delineation between the 35% of Jekyll which JIA is authorized to survey, subdivide, improve, and lease or sell, and the 65% which must remain unimproved (said development restriction commonly referred to as the "65/35" rule).

O.C.G.A. § 12-3-243 provides:

> The authority is empowered to survey, subdivide, improve, and lease or sell to the extent and in the manner provided in this part, as subdivided and improved, not more than 35 percent of the land area of Jekyll Island which lies above water at mean high tide, provided that the authority shall in no way sell or otherwise dispose of any riparian rights; and provided, further, that the beach areas of Jekyll Island will never be sold but will be kept free and open for the use of the people of the state.

O.C.G.A. § 12-3-243(a)(1). JIA is restricted from developing the remaining 65% of Jekyll under a mirrored provision in O.C.G.A. § 12-3-243(2)(A).

In addition to O.C.G.A. § 12-3-243, the General Assembly in 1995 enacted O.C.G.A. § 12-3-243.1, which provides:

> The authority shall, on or before July 1, 1996, cause to be created a master plan for the management, preservation, protection, and development of Jekyll Island. The master plan shall delineate, based upon aerial survey, the present and permitted future uses of the land area of Jekyll Island which lies above water at mean high tide and shall designate areas to be managed as environmentally sensitive, historically sensitive, and active use areas. The master plan shall also delineate the boundaries of the area or areas delineated on the master plan as the 65 percent of the land area of Jekyll Island which lies above water at mean high tide and over which the authority has no power to improve, lease, or sell pursuant to subsection (a) of Code Section 12-3-243. If the aerial survey demonstrates that the percentage of undeveloped land on Jekyll Island is presently less than 65

> percent, then no further development of undeveloped land shall be permitted in the master plan.

O.C.G.A. § 12-3-243.1(a).

The Task Force submitted its recommendation (hereinafter "Recommendation") in which it described its responsibilities as "making recommendations for creating the most accurate land use map based on current best practices and the best available data." Related to the question you have raised, the Recommendation is two-fold, and suggests excluding all "marsh" at the outset from any total island mass calculation from which to draw the 65/35 delineations. It also recommends utilizing two different measurement methodologies to calculate the area and boundaries of the eastern and western shores of Jekyll, respectively, neither of which utilizes "mean high tide" as the measurement, as the express language of O.C.G.A. § 12-3-243(a)(1) requires.[2] The question to be determined is whether the foregoing portions of the Recommendation comply with the requirements of O.C.G.A. § 12-3-243.1 that JIA establish by aerial survey the "land area of Jekyll Island which lies above water at mean high tide," as well as the 65/35 delineation requirements of O.C.G.A. § 12-3-243(a).

Analysis

The question you have raised is answered by the statutory language adopted by the General Assembly. The first and most basic rule of statutory construction is to determine the intent of the legislature in enacting the law, and then to provide that construction which will effectuate that intent and purpose. *Hollowell v. Jove*, 247 Ga. 678, 681 (1981); *City of Jesup v. Bennett*, 226 Ga. 606, 608 (1970); *see also* 1990 Op. Att'y. Gen. 90-9 (cardinal rule is that statutes must be construed to conform to the intent of the General Assembly). However, "where the language of an Act is plain and unequivocal, judicial construction is not only unnecessary but is forbidden." *City of Jesup v. Bennett*, 226 Ga. at 609. "In other words the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." *Caminetti v. United States*, 242 U.S. 470, 490 (1917), *quoted in Hollowell v. Jove*, 247 Ga. at 681. Courts cannot substitute language or add language to a statute for the clear, unambiguous language in the statute so as to change the meaning. *Frazier v. Southern Ry.*, 200 Ga. 590, 593 (1946). Further, where words are not defined by a particular statute, they are to be given their ordinary meaning, except for "words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter." O.C.G.A. § 1-3-1(b).

The JIA enabling statute, O.C.G.A. §§ 12-3-230 to -277 (hereinafter referred to as the "Act"), does not define either "land," "land area," or "mean high tide." The Recommendation suggests that marsh should be excluded from the total land mass calculation of Jekyll because an earlier

[2] The Recommendation suggests using Mean Higher High Water ("MHHW") as the measurement for the eastern, or ocean, shore and using the 4.89′ Coastal Marshlands Protection Act of 1970 ("CMPA"), O.C.G.A. §§ 12-5-280 through 12-5-297, "jurisdictional boundary" as the measurement for the western shore.

codification of O.C.G.A. § 12-3-243 used the term "highland portion" in place of the current phrase "land area . . . which lies above water at mean high tide" as the measurement of Jekyll for purposes of the Act. *See* 1950 Ga. Laws 152, § 10.[3] However, the plain meaning of the language used in the current version of the Act does not reflect any legislative intent that "marsh" is to be excluded from Jekyll's "land area" calculation. First, neither the word "land" nor the words "land area" can properly be taken out of the context of the entire statutory scheme. "The meaning of a clause depends upon the intention with which it is used as manifested by the context and considered with reference to the subject-matter to which it relates." *Thomas v. MacNeill*, 200 Ga. 418, 424 (1946).

> It is inadmissible to mutilate a statute by lifting a mere segment out of its context and construing it without consideration of all other parts of the act. The intention of the legislature is to be gathered from the statute as a whole so as to give effect to each of its parts and at the same time harmonize, if possible, the component parts.

State v. Cherokee Brick & Tile Co., 89 Ga. App. 235, 239 (1953) (citation omitted), *quoted in In re Georgia Air, Inc.*, 345 F. Supp. 636, 637 (N.D. Ga. 1972). Therefore, the language used in O.C.G.A. §§ 12-3-243 and 12-3-243.1 should be considered in relation to the other components of the Act in order to determine the intent of the Legislature. In addition, when a statute has been revised the courts must give significance to removal of language from the former statute in determining the legislature's intent in the current version. *Cox v. Fowler*, 279 Ga. 501, 502 (2005). Therefore, the removal of the phrase "highland portion" from the Act cannot properly be equated with legislative intent to exclude marsh from Jekyll's measurement where no such intent is expressed. Rather, the legislative intent must be gleaned from the language in the *current* statute.

JIA is entrusted with the management and preservation of Jekyll on behalf of the State and the citizens of Georgia under the Act pursuant to a long term lease from the State. O.C.G.A. § 12-3-241. Specifically included within the lease is a description of "Jekyll Island" as follows:

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[3] Concerns have been raised that if marsh areas are included within the measurement of Jekyll's total land area pursuant to O.C.G.A. § 12-3-243.1, then such areas necessarily will be available for development. However, there are a variety of state and federal laws and regulations, in addition to the express restrictions in O.C.G.A. § 12-3-243(a) and (b), that govern construction and development activities in or over marshlands which would prevent such a result. For example, the CMPA, to which JIA is subject, provides that "[n]o person shall remove, fill, dredge, drain, or otherwise alter any marshlands or construct or locate any structure on or over marshlands in this state within the estuarine area thereof without first obtaining a permit from the [Coastal Marshland Protection] committee . . . ." O.C.G.A. § 12-5-286(a). Additionally, you have advised that because the CMPA uses the 5.6′ Mean Tide Level (adjusted to local variations) as its jurisdictional regulatory line, most marsh area on Jekyll is included within the CMPA regulations. For additional restrictions pertaining to JIA's marshlands, *see, e.g.*, the Shore Protection Act, O.C.G.A. §§ 12-5-230 through 12-5-248; the Georgia Water Quality Control Act, O.C.G.A. §§ 12-5-20 through 12-5-53; the Erosion and Sedimentation Act of 1975, O.C.G.A. §§ 12-7-1 through 12-7-22; and the federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 through 1387 (1972), commonly referred to as the Clean Water Act.

> [A]ll of that island of the State of Georgia, County of Glynn, being known as Jekyll Island and the marshes and marsh islands adjacent and adjoining the same owned by the State of Georgia; *being that island of 11,000 acres*, more or less, lying east of the mainland coast of Georgia, County of Glynn, bounded on its easterly shore by the Atlantic Ocean; bounded upon its northerly shore by Brunswick River, bounded on its westerly shore by Brunswick River, Jekyll Creek, Jekyll River, and Jekyll Sound; and bounded on its southerly shore by Jekyll Sound, together with the adjacent and adjoining marshes and marsh islands . . . .

O.C.G.A. § 12-3-241(a) (emphasis added). Thus, the whole of Jekyll for purposes of JIA's responsibilities and authority under the Act includes all "marshes" and "marsh islands," and makes up approximately 11,000 acres in total area.

Based upon information provided to me, approximately 5,500 acres of this 11,000 acres lies to the west of the westerly boundary of Jekyll (this boundary recognized as the Jekyll Creek/Jekyll River) as described above, and is made up of the "adjacent and adjoining marshes and marsh islands" (known as Latham Hammock), to which the statute refers. As such, the calculation of Jekyll's "land area," as mandated by O.C.G.A. §§ 12-3-243 and -243.1, is to be done within the boundaries as described in O.C.G.A. § 12-3-241, and therefore necessarily requires exclusion of *some* marsh areas which fall outside of said boundaries, leaving approximately 5,500 acres of area to be accounted for by JIA's survey in its Master Plan.

There is no language in the Act directing that the measurement or survey exclude "marsh" or "marshlands," and such terms are not even mentioned in the relevant Code sections. Indeed there is no reference to any specific feature or surface area of the coastal region in descriptive terms except in O.C.G.A. § 12-3-243(a)(1), where, following the directive of the 35% restriction on development, it states "provided, further, that the *beach areas* of Jekyll Island will never be sold but will be kept free and open for the use of the people of the state." O.C.G.A. § 12-3-243(a)(1) (emphasis added). There is no similar reference excepting "marshes" from the calculation of "land area . . . above water at mean high tide" or requiring special treatment of such areas.[4] As the rules of statutory construction forbid the addition or alteration of statutory language which would change its meaning, an exclusion of marshes should not be read into the methodology for measuring Jekyll pursuant to O.C.G.A. § 12-3-243.1. *Frazier v. Southern Ry.*, 200 Ga. at 593.

Further, the words "land" and "land area" should not be read in a vacuum, but must be read in the context of the entire Code provisions within which they are used as well as within the context

[4] There are areas in addition to marshes that make up part of Jekyll, classified by distinct physical features, such as "dunes," "beaches," and "wetlands," that are affected by the ebb and flow of the tides, just like "marsh," and therefore inundated with water at periods of certain high tides, just like "marsh." Yet the 65/35 Task Force does not recommend excluding such areas from the total calculation of Jekyll. Excluding marsh from the "land area" calculation under O.C.G.A. §§ 12-3-243 and -243.1 while including other tidally-influenced categories of land is not a logical or consistent interpretation of the statutory language. *See* n.3 and accompanying text *supra*.

of the entire Act. *In re Georgia Air, Inc.*, 345 F. Supp. at 637; *Thomas v. MacNeill*, 200 Ga. at 424. "Land area" is modified by the phrase "which lies above water at mean high tide." "Mean high tide" (hereinafter "MHT"), though not defined in the Act, is a phrase that is considered a term of art and one which relates to a specific subject matter such that the words should have the "signification attached to them by experts in such trade or with reference to such subject matter." O.C.G.A. § 1-3-1(b).

MHT has a specific, definite meaning and is a standardized measurement with universal recognition and acceptance. Mean High Water ("MHW"), which is identical to MHT,[5] is defined by the National Oceanic and Atmospheric Administration as

> [a] tidal datum. The average of all the high water heights observed over the National Tidal Datum Epoch. For stations with shorter series, simultaneous observational comparisons are made with a control tide station in order to derive the equivalent datum of the National Tidal Datum Epoch.

NOAA, http://tidesandcurrents.noaa.gov/mhw.html (last visited June 25, 2013). MHW/MHT has been used historically as a line of measurement for regulatory and jurisdictional purposes. *See, e.g., Borax Consolidated v. Los Angeles*, 296 U.S. 10, 22 and 26-27 (1935) (a case involving federal versus state rights to tidal lands in which the U. S. Supreme Court held that the "tideland extends to the high water mark" which was defined as the United States Coast and Geodetic Survey definition of MHT, and further stated that "[t]his does not mean . . . a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides"); *U.S. v. Sexton Cove Estates*, 526 F.2d 1293, 1297 (5th Cir. 1976) (citing to 33 U.S.C. § 403, Rivers and Harbors Act of 1899, § 10, relating to the U.S. Army Corps of Engineers regulation of navigable waters *up to* the mean high tide mark, stating: "After the passage of the Act, the Corps apparently adopted the MHTL [Mean High Tide Line] as a self-imposed jurisdictional boundary. That this occurred is not surprising. The MHTL traditionally had been the limit of admiralty jurisdiction in tidal waters." (citations omitted)).

In 1981, the Georgia Supreme Court likewise adopted the U.S. Coast and Geodetic Survey definition of MHT, discussing *Borax* at length. *Smith v. State*, 248 Ga. 154 (1981). In doing so, the Court stated:

> We adopt the definition of mean high tide or water given by the U.S. Coast and Geodetic Survey and hold that the mean high water at any given point along the coast is the elevation of the mean level of high water calculated by averaging the height of *all* the high waters at that place over a period of 19 years. We further hold that the mean high water *mark* is to be determined by projecting the tidal plane of the mean high water to the point of its intersection with the shore.

[5] Mean High Tide and Mean High Water are deemed to mean the same. *See, e.g., Smith v. State, infra.*

Id. at 157 (emphasis in original).[6]

In addition, the use of an MHT line to define those tidally-influenced bodies of land which do or do not constitute an "island" has been recognized by the U.S. Supreme Court. *See U.S. v. Alaska*, 521 U.S. 1, 26-27 (1997) (use of a "mean" tide measurement to determine whether an area of frequently submerged land qualified as an island is appropriate because, "even if a feature would be submerged at the highest monthly tides during a particular season or in unusual weather, the feature might still be above 'mean high water' and therefore qualify as an island").[7] *See also U.S. v. California*, 382 U.S. 448, 449-50, (1966) ("'Island' means a naturally-formed *area of land* surrounded by water, *which is above the level of mean high water*; . . . 'Mean high water' means the average elevation of all the high tides occurring over a period of 18.6 years") (emphasis added)).

In short, both the U.S. Supreme Court and the Supreme Court of Georgia have recognized MHT as a standardized line of measurement in tidally-influenced areas. In addition, as stated by the Supreme Court in *Borax*, an appropriate measurement of a coastline does not depend upon "a physical mark made upon the ground by the waters," upon descriptive features such as the vegetation that grows thereon, or the occasional times that such areas may have their features submerged by tidal waters. Rather, the use of a "mean" measure of tides affords a standardized measurement that takes into account variations over time, and includes areas that are only sometimes affected by the high tide. *U.S. v. Alaska*, 521 U.S. at 26-27.

Thus, when viewed in the context of its purpose, i.e., to provide a method for measurement of Jekyll so as to delineate the 65/35 designations under the Act, the phrase "land area . . . which lies above water at mean high tide" should be construed with reference to the meaning of MHT as adopted by the Georgia Supreme Court in *Smith v. State*, as well as the meaning ascribed to it as a term of art. When so viewed, it is apparent that the intent of the legislature was to use MHW as a measure of Jekyll's total area, rather than including or excluding certain areas based on their descriptive features. In that manner, a standardized measurement point of reference, capable of surveying, can be used to determine the land area of Jekyll for purposes of making the 65/35 designations. Excluding "marsh" from Jekyll's measurement would constitute an inappropriate alteration of the statutory language and is not supported by a proper construction of the phrase "which lies above water at mean high tide." Furthermore, excluding interior marsh areas from the total calculation of Jekyll would have the unintended consequence of excluding such areas from the total island area which is leased to JIA under O.C.G.A. § 12-3-241, thus resulting in pockets of interior marsh areas that will not be included in either the 65% or 35% delineation of Jekyll.

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[6] Georgia law has recognized a distinction between MHT and "Ordinary High Water Mark," the latter being defined in the Shore Protection Act, and expressly deemed therein as "not synonymous with 'mean' high-water mark." O.C.G.A. § 12-5-232(11).

[7] The 1958 Convention on the Territorial Sea and the Contiguous Zone, Art. 10(1), cited in *U.S. v. Alaska*, 521 U.S. at 22, defines "island" as "a naturally-formed area of land, surrounded by water, which is above water at high-tide."

Similarly, the Task Force's suggestion that two different measurements be utilized for the eastern and western shores of Jekyll, *see* n.2 *supra*, is not supported by a proper construction of O.C.G.A. §§ 12-3-243 and -243.1. Any substitution of alternative measurements for the MHW line would clearly contradict the plain language of the statutes and is therefore impermissible. *Frazier v. Southern Ry.*, 200 Ga. at 593. Had the legislature intended for JIA to adopt the CMPA jurisdictional boundary as an element of measurement, it would have expressly so indicated. The General Assembly is presumed to know of other laws in existence which relate or may relate to the subject matter at hand.[8] *Wigley v. Hambrick*, 193 Ga. App. 903, 905 (1989) ("'[I]t is well settled in this jurisdiction that all statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it; that they are to be construed in connection and in harmony with the existing law; and that their meaning and effect will be determined in connection, not only with the common law and the Constitution, but also with reference to other statutes and the decisions of the courts.'" (quoting *Spence v. Rowell*, 213 Ga. 145, 150 (1957)).

Therefore, it is my official opinion that, based on the relevant statutory language, the Jekyll Island State Park Authority does not have discretion to adopt the "65/35 Task Force" Recommendation to the extent that it uses a measurement reference point other than Mean High Tide. I reiterate, however, my recommendation that any proposal to modify the 1996 Master Plan so as to increase substantially the measured land area of the island be thoroughly evaluated in a public process and finally adopted only after the General Assembly has been given the opportunity to weigh in on the proposal.

Issued this 27th day of June, 2013.

Sincerely,

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Prepared by:

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[8] The CMPA does not contain any definition for "mean high tide" or "mean high water," and thus would not provide any guidance to JIA in complying with O.C.G.A. § 12-3-243 or -243.1. The CMPA is a regulatory statute applying to the "estuarine area" of the coastal region of the State, as defined therein, and has no application to measuring Jekyll for purposes of JIA's responsibilities under the Act. *See also Thompson v. Georgia Power Co.*, 73 Ga. App. 587, 597-98 (1946) (the courts will not apply a definition of one legislative act to construe another in the absence of a defined statutory term).