Limitation of Development of the Land Area of Jekyll Island State Park

Legislative/Historical Perspective

[Original version was a hand-out copy by Dr. Fred Marland to 65/35 Task Force members at 1st meeting 9 April, later revised by Drs. Dave Egan & Marland 18 Aug. 2012. For the complete legislative history of Jekyll, the reader should refer to the GA Secretary of State website and type in Jekyll or go to: http://sos.georgia.gov/archives/InformationForGovernmentAgencies/Current_Issues/Jekyll_Island.htm]

In **1950**, the Jekyll Island State Park Authority Act (JISPAA) defined the powers and responsibilities of the newly created Jekyll Island Authority. Section 10 of this enabling legislation states, *"The authority is empowered to survey, subdivide, improve and lease as subdivided not more than* **one-third of *the highland portion*** *of Jekyll Island, the leased property described aforesaid."* (L. 1950, p. 152 (Act 630)

The terms of the lease granted to the Jekyll Island Authority by the 1950 JISPAA also distinguish Jekyll Island from the adjoining and adjacent marshes:

"To the Authority is granted hereby for and on the part of the State of Georgia a lease for a term of ninety-nine (99) years, beginning upon the date this Act becomes law, to all 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…."***

In **1952**, the JISPAA was amended with respect to the percentage of the highland portion of Jekyll Island that may be developed. Section 10 was changed to read: *"The Authority is empowered to survey, subdivide, improve, and lease as subdivided and improve not more than* ***one-half*** *of* ***the highland portion*** *of Jekyll Island, the leased property described aforesaid."* (Ga. L. 1952, p. 276 (Act No. 860)

In **1953**, the JISPAA was amended once again: *"The Authority is empowered to survey, subdivide, improve and lease as subdivided and improved not more than* ***one-half*** *of* ***the land area*** *of Jekyll Island which lies above water at mean high tide." (*Ga. L. 1953 of Jan-Feb session, p. 261 (Act No. 261) The amendment did not specify that marsh was to be considered part of the land area pf Jekyll Island which lies above water at mean high tide.

In **1970** The Georgia Law defined precisely a tidal salt marsh vs. high land in the Coastal Marshlands Protection Act (CMPA) of 1970: Ga. L. 1970, p. 939 or OCGA 12 -5-233 et. seq. The Law distinguished land from marshes by defining the marsh as *"any 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 water courses."* The estuarine area of the state was 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." ***(O.C.G.A. 12-5-280, et seq.)***

In **1971**, the distinction between "marshes" and "land area" with respect to the law limiting development on Jekyll Island was reinforced with the passage of legislation introduced by State Rep. Michael J. Egan, Jr. which amended the JISPAA by requiring the creation of a master plan for Jekyll Island and reducing the percentage of the island's land area eligible for development (http://statutes.laws.com/georgia/title-12/chapter-3/article-7/part-1/12-3-243-1). In a February 2, 1971 letter to Horace Caldwell, Director of the Jekyll Island Authority, Rep. Egan stated: ***"…I have instructed the Office of Legislative Counsel [Virlyn Slaton] to prepare a bill to provide that no more than one-third of the highland will be developed in any way and that two-thirds of the land and all of the marshes will be left in their natural states."***

In an August 7, **1972** letter to the Jekyll Island Authority's Board of Directors, Rep. Egan reaffirmed that the legal limitation of development applied to the high ground of Jekyll Island. He also stated that the members of the Jekyll Island Authority and his fellow legislators with whom he conversed when drafting his 1971 legislation all understood that the law pertained to **the high land** of Jekyll Island.

Rep. Egan states: *"During* [Jekyll Island Authority Director] *Horace Caldwell's appearance before the Joint Appropriation Committee meetings in 1971, it was obvious from the questions of the legislators that they had concern about the rapid developments taking place on Jekyll Island with the accompanying destruction of natural areas.* ***Mr. Caldwell advised that we need have no fear about this because, as he stated it, 'the law prevented the development and improvement of not more than a third of the high ground of Jekyll Island.'*** *I checked the law and found that the provision to which Mr. Caldwell had reference applied to 50% of the Island and not one-third as he had recalled. I conversed with a number of the members of the Authority at that time and found that they considered this to be a limit on their right to improve and develop the Island and further that they had no objection to reducing the limitation from 50% to 35%.* ***After further discussion with a number of legislators, 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."*

In **1996**, the current Jekyll Island Master Plan was adopted. In it, the 65/35 law was construed as meaning that tidal salt marsh above mean high tide could be included as part of Jekyll island's land area for the purpose of determining the number of acres eligible for development. This resulted in 367 acres of tidal salt marsh being counted as part of Jekyll Island in the 1996 Master Plan, thus increasing by 128 the number of acres eligible for development. The Master Plan did not provide any rationale for including salt marsh as part of Jekyll Island's land area or for discounting the meaning of the 65/35 law with respect to the marsh as twice explained in writing to the JIA by the author of that legislation.

Conclusion

Historically, legislation restricting development on Jekyll Island has referred to the high land portion of the island, not the marshes. At the time the 65/35 law was enacted, the Jekyll Island Authority, Rep. Michael J. Egan, and other state legislators all understood that Jekyll's "land area" excluded the adjoining and adjacent marshes. Despite this fact, the 1996 Master Plan, for reasons unspecified, conflated tidal salt marsh with high land, thus artificially increasing the island's area by several hundred acres beyond its true size.

In order to honor the meaning of the 65/35 law, the 1996 Master Plan should be revised so as to exclude marsh acres when calculating Jekyll Island's land area. Amended this way, the Master Plan would confirm that the 35% limit on development has been topped, which would mean no new development would be allowable by law. If this were done, a "give back" of developed land would not be required, as the 65/35 law does not mandate restoration of natural land if the 35 percent limit has been exceeded. The JIA's right to redevelop land that has already been developed and to develop land that has already been platted but is currently undeveloped would also not be affected.

The 65/35 problem could thus be settled in a way that respects Georgia law, gives the JIA various redevelopment opportunities, and enhances the integrity of the Master Plan review effort.

ADDENDUM

The Coastal Marshlands Protection Act 1970 et. seq., OCGA 12-5-280, provides three tests that determine a marsh: (1) Elevation with respect to sea level; (2) Types of Marsh Vegetation; and (3) Soils. The empirical number of 5.6 feet above Mean Tide Level [Mean Tide Level is the same as half tide and Mean Sea Level (MSL)] is now less because of sea level rise of nearly one foot in the last 82 years since NAVD 29. The contemporary elevation test is not 5.6 feet but now NAVD 88 elevation of 4.89 feet above Mean Sea Level. Perhaps one reason that the 1996 Master Plan did not use the jurisdiction elevation of 5.6 feet is that they we not able to properly calibrate sea level rise into their study. The extent of sea level rise is more clearly understood 16 years later. Further language of the CMPA defines the unique plant life of the marsh as: "'*Vegetated marshlands' shall include those areas upon which grow one, but not necessarily all, of the following: salt marsh grass, black needlerush, saltmeadow cordgrass, big cordgrass, saltgrass, coast dropseed, bigelow glasswort, woody glasswort, saltwort, sea lavender, sea oxeye, silverling, false willow, and high-tide bush."*

Army Corps, Section 10 and Section 404 Federal law, also clearly defines salt marsh and distinguishes it from land. Federal sister agencies of U.S. Fish & Wildlife Service and EPA rely on the 1987 Corps of Engineers Wetlands Delineation Manual.

From U.S. Fish and Wildlife Service: http://www.fws.gov/verobeach/MSRPPDFs/SaltMarsh.pdf *"Salt marshes are found in flat, protected waters within the protection of a barrier island, estuary, or along low-energy coastlines. Situated between the land and the sea, salt marshes experience the effects of both salt and fresh water."*

From the EPA, Clean Water Act, Official Regulatory Definition:
http://www.epa.gov/oecaagct/lcwa.html#Wetlands *"Those areas that are inundated or saturated by surface or ground water (hydrology) at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation (hydrophytes) typically adapted for life in saturated soil conditions (hydric soils). Wetlands generally include swamps, marshes, bogs, and similar areas."*

Task Force Members please note when interpreting legal terms and definitions it is customary to use the Plain Meaning Rule, also known as the literal rule, when interpreting the statutory language applied by the lawmakers and the courts. This calls for strict construction of words which do not expand their meaning. For example, in Black's Law Dictionary a moat and a river are distinct. The words are that which is intended to be. The uses of the words land or marsh have strict and exact meanings. Their meanings are sharply defined both in Georgia Law and by plain meaning.

The *New International Webster's Collegiate Dictionary of the English Language*, 2002 edition defines the following terms:

Land, n. The solid part of the earth, especially where not covered by water.

High and dry land is above the reach of the tide.

Marsh, n. is defined as a tract of low, wet land. [It is where the sea has dominion and overflows it. This includes the high marsh all the way to the upland boundary and interior **marshes,** whether reached by natural or artificial water courses.]

Salt marsh, n. is defined as low coastal land frequently overflowed by the tide, usually covered with coarse grass.

In sum, any attempt to include salt marshes as part of Jekyll Island's land mass would violate common understandings of our language and be legally indefensible as well.