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STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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Honorable L. Daniel Mims  
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952 Government Street  
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Dauphin Island Park and Beach Board –  
Easements – Public Corporations – Mobile  
County

The Dauphin Island Park and Beach Board  
("Board") possesses the legal authority to  
create conservation easements on real  
property owned and maintained by the  
Board.

Any charitable corporation, charitable  
association, or charitable trust that meets  
the commonly understood meaning, as well  
as the applicable state and federal law  
requirements, regarding these terms would  
qualify as a holder for purposes of section  
35-18-1 of the Code of Alabama.

A conservation easement may be perpetual  
if the Board designates a term for the  
conservation easement.

Dear Mr. Mims:

This opinion of the Attorney General is issued in response to your request  
on behalf of the Dauphin Island Park and Beach Board.

QUESTIONS

Pursuant to the powers granted to public  
corporations under section 11-22-1, *et seq.*, of the Code  
of Alabama and specifically pursuant to sections 11-22-  
2 and 11-22-8, does the Dauphin Island Park and Beach  
Board possess the legal authority to create conservation  
easements on real property owned and maintained by

the Dauphin Island Park and Beach Board consistent with the requirements of section 35-18-1, *et seq.*, of the Code of Alabama?

Assuming the answer to the first question is in the affirmative, is there any limitation on the identity of the holder of the conservation easement given the fact that the Dauphin Island Park and Beach Board is a public corporation incorporated pursuant to section 11-22-1, *et seq.*, of the Code?

May a conservation easement be perpetual, or is the duration of the easement limited by either section 11-22-8(a)(11) [applicable to leases] or by the thirty-year/life of the grantor provision contained in section 35-18-2(c), assuming, as here, there is no eminent domain involved?

#### FACTS AND ANALYSIS

The Dauphin Island Park and Beach Board, Inc., is a public corporation created pursuant to sections 11-22-1 through 11-22-19 of the Code of Alabama. ALA. CODE §§ 11-22-1 to 11-22-19 (2008). In your letter of request, you informed this Office that the Board is the owner of certain tracts of real property that are currently being used as public parks. In an effort to preserve certain tracts of largely undeveloped land, you question whether the Board may place such plots of property in a conservation easement and convey that property to a charitable organization.

Section 35-18-1 of the Code sets forth the definition of “conservation easement” as follows:

(1) CONSERVATION EASEMENT. A nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, silvicultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, paleontological, or cultural aspects of real property.

Nothing in this provision expressly authorizes or restricts a public corporation from creating a conservation easement. Section 11-22-8 of the Code, which is the specific authority applicable to the Board, sets forth the powers of the Board. This particular provision authorizes the Board to accept, convey, and lease real property. *See, generally*, ALA. CODE § 11-22-8 (2008). Accordingly, it is the opinion of this Office that the Dauphin Island Park and Beach Board possesses the legal authority to create conservation easements on real property owned and maintained by the Board.

Next, you question whether there are any limitations on the identity of the holder of the conservation easement. In a subsequent conversation, you further clarified your inquiry by questioning whether a holder, in the instance of a charitable corporation, was required to be a domestic charitable corporation. The definition of “holder,” as set forth in section 35-18-1 of the Code, states as follows:

(2) HOLDER. Either of the following to whom a conservation easement is conveyed:

a. A governmental body empowered to hold an interest in real property under the laws of this state or the United States.

b. A charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, silvicultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, paleontological, or cultural aspects of real property.

ALA. CODE § 35-18-1 (Supp. 2013).

Pursuant to section 35-18-1 of the Code, the only entities that may be holders of a conservation easement are governmental bodies or a charitable corporation, charitable association, or charitable trust. *Id.* Nothing in this particular provision specifies whether the charitable organization, association, or trust is required to be a domestic entity. Based on the plain language used in the statute, it is the opinion of this Office that any charitable corporation, charitable association, or charitable trust that meets the commonly understood meaning, as well as the applicable state and federal law requirements, regarding these terms would qualify as a holder for purposes for section 35-18-1 of the Code of Alabama.

Finally, you question whether a conservation easement may be perpetual or if the duration of such an easement is limited. In your inquiry, you make reference to sections 11-22-8(a)(11) and 35-18-2(c) of the Code. These provisions respectively state as follows:

(11) To lease land to others for a period not to exceed 40 years, or to grant to others privileges, licenses, or permits for the use of land for the construction and operation of public accommodation facilities and to authorize such lessees or grantees to mortgage their interest, rights, and properties to finance the construction, enlargement, and improvement of such public accommodation facilities[.]

ALA. CODE § 11-22-8(a)(11) (2008).

(c) Except as provided in subsection (b) of Section 35-18-3, the term of a conservation easement shall be the term stated in the instrument creating the easement or, if no term is stated, the lesser of 30 years or the life of the grantor, or upon the sale of the property by the grantor.

ALA. CODE § 35-18-2(c) (Supp. 2013).

The provisions of sections 11-22-1 through 11-22-19 of the Code are specific provisions that are applicable to the Board. As such, these provisions take precedent over other statutory authority that is of a general nature. Although section 11-22-8(a)(11) does place a limit on the length of a lease, this section does not place a limit on the length of time allowable for a grant of a privilege to another. An easement is not a lease of land, but instead, a grant of a right or privilege to another. Black's Law dictionary defines an easement as "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose." BLACK'S LAW DICTIONARY 586 (9<sup>th</sup> ed. 2009). To lease or convey the property would mean that the Board would be giving a third party something more than a nonpossessory interest as that term is used in section 35-18-1(1) of the Code.

Because relevant authority applicable to the Board does not state a term or length restriction on a grant of a privilege to another, the Board should make sure that its actions are in compliance with section 35-18-2 of the Code. Pursuant to section 35-18-2(c), the Board may either designate a term or length of the easement, or the conservation easement would be limited by the lesser of 30 years or the life of the grantor or the sale of the property by the grantor. By stating that an easement is perpetual, the Dauphin Island Park and Beach Board

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would not be subject to the term limitations found in section 35-18-2(c) of the Code. Instead, the conservation easement would forever run with the land.

CONCLUSION

The Dauphin Island Park and Beach Board possesses the legal authority to create conservation easements on real property owned and maintained by the Board.

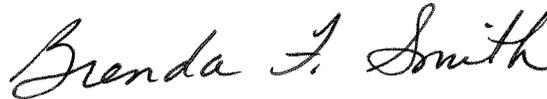
Any charitable corporation, charitable association, or charitable trust that meets the commonly understood meaning, as well as the applicable state and federal law requirements, regarding these terms would qualify as a holder of purposes for section 35-18-1 of the Code.

A conservation easement may be perpetual if the Board designates a term for the conservation easement.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE  
Attorney General  
By:



BRENDA F. SMITH  
Chief, Opinions Division

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