



ALAN WILSON
ATTORNEY GENERAL

January 6, 2016

Philip L. Lawrence, Esquire
General Counsel
South Carolina Ports Authority
P.O. Box 22287
Charleston, SC 29413

Dear Mr. Lawrence:

The Ports Authority has requested an opinion “as to whether certain maintenance renovations to the existing passenger facilities presently located and operating on the southern end of Union Pier Terminal (UPT) in Charleston County, South Carolina (collectively, Passenger Facility) would be exempt from permitting under the Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 et seq. (CZMA).” By way of background, you provide the following information:

UPT is a fully operational marine terminal located on approximately 63 acres adjacent to the Cooper River on the Charleston peninsula. It is owned and operated by the Ports Authority with, at present, approximately 2,470 linear feet of continuous pile supported wharf and berth space. UPT has been used for different types of commercial shipping for more than 100 years. UPT also has accommodated passenger vessel calls for nearly 100 years. Passenger vessels—including cruise vessels—have called on the Passenger Facility each and every year since it was dedicated in 1973.

The Passenger Facility was constructed pursuant to permits issued by the United States Army Corps of Engineers (Corps) and by the South Carolina Budget and Control Board (BCB). On February 18, 1972, the Corps issued Permit 71-05-37 authorizing the Ports Authority to “construct a passenger facility on existing dock including necessary dredging to provide flotation for the construction barges and pile-driving equipment.” Ex. A (Permit 71-05-37 (Revised)). The BCB previously had authorized construction of the terminal facilities by its Permit 71-26 dated May 1, 1971. Ex. B (BCB Permit 71-26). The terminal facilities were constructed on areas filled pursuant to permits by the Corps and the BCB. Ex. C (Permit 71-06-68 (June 28, 1971)) (authorizing “fill and rip-rap” at southern end of UPT); Ex. D (BCB Permit 71-6.3 (June 17, 1971)) (authorizing work proposed in application for Permit 71-06-68). After the terminal facility was authorized,

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the Corps and the BCB authorized construction of “a dolphin with a connecting walk” adjacent to the terminal. Ex. E (Permit 74-3B-059 (April 5, 1974)); Ex. F (BCB Permit P/N 74-07 (March 28, 1974)).

The Ports Authority is currently considering future operations at UPT, such as renovating the existing Passenger Facility. Under this option, the Ports Authority would upgrade the Passenger Facility to improve security and accessibility for the conduct of passenger vessel operations. These renovations could include the construction of elevators and escalators within the Passenger Facility, addition of square footage, and could require the installation of pile clusters underneath the Passenger Facility to support these renovations as part of the maintenance of the Passenger Facility.

You also provided as exhibits to your request letter the permits issued by the Corps and the Budget and Control Board authorizing the construction of the Passenger Facility (Exhibits A through E), a letter issued by the Corps, dated May 12, 1977, confirming that the Passenger Facility was completed prior to the effective date of the CZMA (Exhibit G), and a Memorandum of Understanding with the United States Customs and Border Protection (CBP) stating that continued passenger operations should have improved security at UPT (Exhibit H).

In your letter, you argue that “because the proposed renovations to the existing Passenger Facility have the purpose of maintaining and continuing structures and associated operations authorized by permits issued by the Corps and by the Budget and Control Board in 1972 – well before the CZMA became effective – these renovations to the Passenger Facility appear to be exempt from permitting under the CZMA.” You reference the “grandfather clause” provision, contained in § 48-39-130(C), which exempts projects authorized by permits issued before September 28, 1977. You cite S.C. State Ports Authority v. S.C. Coastal Council, 270 S.C. 320, 322-23, 242 S.E.2d 225 (1978) in support thereof. Thus, it is your contention that:

The proposed renovations to the Passenger Facility are not a change in use that would render the project subject to DHEC review and permitting. Rather, these renovations allow the Ports Authority to maintain an existing use within the existing UPT footprint conducted within the general parameters of permits issued by the BCB and the Corps prior to the effective date of the CZMA. Permit 71-05-37 expressly requires the Ports Authority to “maintain the structure or work authorized herein in good condition and in accordance with the plans and drawing attached hereto.” Moreover, because the governing permits expressly contemplated the installation of pilings under the existing Passenger Facility, the installation of additional pilings as part of renovation and maintenance of the permitted facilities is a mere furtherance of that use. In short, the terms of the “use” permitted by the Corps and the BCB require maintenance of the Passenger Facility

structures, which includes maintaining adequate structural support for these previously-permitted facilities.

Concluding that renovations to the Passenger Facility structures, including the installation of pilings, is a change in use would require rejecting not only the express provisions of the governing permits, but also the self-evident requirement that ongoing maintenance is a necessary aspect of any constructed asset currently in use. For example, if an individual's home is not maintained, it will deteriorate, and the maintenance necessary to preventing that deterioration sometimes involves installing structural supports under the foundation. This situation is no different. Maintenance and renovations are routine aspects of owning any building and, thus, are essential to properly maintaining an asset permitted prior to September 28, 1977.

Further, the installation of pilings is maintenance to address security requirements for the ongoing operation of the Passenger Facilities. In 2006, the Ports Authority entered into a Memorandum of Understanding with the United States Customs and Border Protection (CBP) for the conditional approval of ongoing cruise operations on a continuing trial basis with the understanding that a passenger terminal facility with improved security would be needed for continued operations. See Ex. H, Ports Authority-CBP MOU (June 20, 2006, as amended). Thus, these upgrades are not a new use but are renovations to improve security and maintain the operation of the Passenger Facility within the existing UPT footprint.

Law/Analysis

The CZMA was enacted in 1977 “to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.” S.C. Code Ann. § 48-39-30; see also Beard v. S.C. Coastal Council, 304 S.C. 205, 207, 403 S.E.2d 620, 621 (1991) (The CZMA was enacted “to protect, restore and enhance the coastal environment.”). South Carolina’s “coastal zone” includes “all coastal waters and submerged lands seaward to the State’s jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas.” S.C. Code Ann. § 48-39-10(B). Pertinent here, Charleston County is specifically identified as containing one or more of the “critical areas.” Id. A “critical area” is defined to include “coastal waters,” which in turn means “the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark.” S.C. Code Ann. § 48-39-10(F), (J).

To further its legislative purpose of protecting these critical areas, the CZMA generally requires that “[90] days after July 1, 1977, no person shall utilize a critical area for a use other than the use of critical area was devoted to on such date unless he has first obtained a permit

from the department” and, further, that “no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department.” S.C. Code Ann. § 48-39-130(A), (C). It is our understanding that a portion of UPT is located in a critical area.

As referenced in your letter, the CZMA also contains the following provision:

Provided, however, that a person who has legally commenced a use such as those evidenced by a state permit, as issued by the [Budget Control Board], or a project loan approved by the rural electrification administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without obtaining a permit.

S.C. Code Ann. § 48-39-130(C) (emphasis added).¹ The Ports Authority’s position is that the proposed renovations to the Passenger Facility fall squarely within the terms of this provision and therefore it is not required to obtain a permit from DHEC before proceeding with renovations to the Passenger Facility. We agree.

In S.C. State Ports Authority v. S.C. Coastal Council, 270 S.C. 320, 242 S.E.2d 225 (1978), our Supreme Court addressed the question whether the Ports Authority was required to obtain a DHEC (then Coastal Council) permit for a project on the Wando River authorized by a permit from the Budget and Control Board and initiated prior to the effective date of the CZMA. The Court quoted the “grandfather clause,” contained in § 48-39-130(C), and noted that the Coastal Council “interpreted the exemption contained in the proviso to Section 48-39-130(C) as only applying to those projects that had actually broken ground on or before September 28, 1977.” 270 S.C. at 323, 242 S.E.2d at 226. Following this administrative resolution by the Coastal Council, the Ports Authority sought a declaratory judgment action in the Charleston County Court of Common Pleas to construe § 48-39-130(C) and an order setting aside the Coastal Council’s administrative ruling.

Circuit Judge Clarence Singletary issued his order on December 20, 1977, declaring the grandfather exemption controlling. On appeal, the Supreme Court agreed with Judge Singletary’s ruling. The Court adopted the position of the Ports Authority that any use commenced prior to September 28, 1977 and authorized by any of the permits listed in § 48-39-130(C) was exempt from Coastal Council (now DHEC) review. Coastal Council, 270 S.C. at 323, 242 S.E.2d at 226. Notably, the Court expressly rejected the argument that the “use” had not commenced prior to September 28, 1977 because the groundbreaking had not occurred on or before that date. See id. 270 S.C. at 323-24, 242 S.E.2d at 226. Accordingly, the “use” contemplated by Section 48-39-130(C) is not limited to physical construction undertaken prior to September 28, 1977, but must be decreed to include pertinent and related actions contemplated,

¹ Prior to enactment of the CZMA, the Budget Control Board was the state entity responsible for granting permits for construction in navigable tidal waterways. See Op. S.C. Att’y Gen., No. 89-94 (Sept. 20, 1989).

planned or required as part of a qualifying permit issued prior to the effective date of the CZMA. As Judge Singletary held, in an order adopted as part of the Supreme Court's opinion, the CZMA "is prospective." 270 S.C. at 325, 242 S.E.2d at 227.

Consistent with the Supreme Court's ruling in Coastal Council, we have addressed DHEC's permitting jurisdiction with respect to projects authorized by permits prior to the effective date of the CZMA. For example, in Op. S.C. Att'y Gen., 1988 WL 383527 (No. 88-44) (May 31, 1988), we concluded that if a valid permit for a project authorized by the Budget and Control Board was issued prior to the effective date of the CZMA, DHEC did not possess permitting jurisdiction over the project and thus no permit from DHEC was required. As we there stated, "(DHEC) could not reopen a permit which had been validly granted by the [Budget and Control Board]." And, in Op. S.C. Att'y Gen., 1989 WL 406184 (No. 89-94) (September 20, 1989), we advised that "(i)f indeed the Ports Authority has in this instance 'legally commenced a use' for purposes of Section 48-39-130(C), then no permit issued by [DHEC] is required." We quoted with approval Judge Singletary's conclusion, adopted by the Supreme Court in Coastal Council, that the CZMA is prospective.

We turn now to your specific request. In light of the Coastal Council case, which relied upon § 48-39-130(C), as well as our above-discussed prior opinions, and the specific language in the applicable permits, it is our opinion that a court would likely conclude that the proposed renovations would be exempt from permitting. For more than 100 years, UPT has been used for commercial shipping. Passenger vessels have called upon UPT for almost this same time period. Based upon the documents which you have provided, both the Corps of Engineers, as well as the Budget and Control Board, authorized the construction of a passenger terminal facility in 1972 and that Facility was completed prior to the CZMA's effective date. Accordingly, prior to September 28, 1977, the Ports Authority "legally commenced a use such as those evidenced by a state permit, as issued by the [Budget and Control Board], . . ." and also "received a [Corps] . . . permit" and is thus expressly authorized to "continue such use without obtaining a permit." § 48-39-130(C).

The proposed renovations to the Passenger Facility are not a change in use that would render the project subject to DHEC review and permitting. Rather, these renovations allow the Ports Authority to maintain an existing use within the existing terminal footprint conducted within the general scope of permits previously issued by the Budget and Control Board and the Corps prior to the effective date of the CZMA. As you indicate, it is common sense that maintenance is part of the original use. Permit 71-05-37 expressly requires the Ports Authority to "maintain the structure or work authorized herein in good condition and in accordance with the plans and drawing attached hereto." Moreover, because the governing permits expressly contemplated the installation of pilings under the existing Passenger Facility, the installation of additional pilings as part of renovation and maintenance of the permitted facilities is a mere furtherance of that use. In short, the terms of the "use" permitted by the Corps and the Budget and Control Board include maintenance of the Passenger Facility structures, this includes ongoing adequate structural support for these previously permitted facilities.

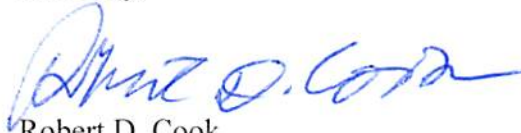
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Concluding that renovations to the Passenger Facility structures, including the installation of pilings, is a change in use would require rejecting not only the express provisions of the governing permits, but also the self-evident requirement that ongoing maintenance is a necessary aspect of any existing and operable construction asset. Maintenance and renovations are routine aspects of operating any building and, thus, are necessary to maintaining an asset permitted prior to September 28, 1977.

Conclusion

Based upon the information that you have provided, it is our opinion that renovations to the Passenger Facility, including the installation of additional support pilings, would be exempt from CZMA permitting. Such a conclusion is entirely consistent with the express language of § 48-39-130(C), the holding of the Supreme Court in the Coastal Council case, as well as our prior opinions. Moreover, maintenance and renovations are necessary to maintaining an asset permitted prior to September 28, 1977, the effective date of the CZMA. Thus, for this reason also, these renovations are exempt from the requirement of a CZMA permit.

Sincerely,



Robert D. Cook
Solicitor General