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# The State of South Carolina



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## Office of the Attorney General

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May 31, 1988

William A. McInnis, Secretary  
State of South Carolina  
State Budget and Control Board  
Post Office Box 12444  
Columbia, South Carolina 29211

Dear Mr. McInnis:

On behalf of the State Budget and Control Board, you have requested the opinion of this Office with respect to an issue arising in two separate situations which has the potential to recur. Prior to creation of the Coastal Council within the Coastal Zone Management Act, Sections 48-39-10 et seq. of the Code of Laws of South Carolina (1976), the Budget and Control Board issued permits for certain activities to be conducted within navigable tidal waters of this State. You have asked, generally and with respect to each of the two situations, whether the jurisdiction of the Budget and Control Board has been superseded in areas in which the Coastal Council was given jurisdiction by the Coastal Zone Management Act in 1977.

### Ashley River Marina permit

The State of South Carolina, through the Budget and Control Board, granted Permit Number 71-47 to Frederick A. Smith on May 6, 1971 for construction or excavation below the usual high water mark in accordance with a permit application filed with the Army Corps of Engineers. The permit was modified or amended and reissued on January 6, 1975 and August 31, 1975. 1/ These permits were issued prior to the existence of the Coastal Council. You have asked which agency would now have jurisdiction over these permits: the Budget and Control Board or the Coastal Council.

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1/ The Ashley Marina Association appears to be Mr. Smith's successor in interest in this project.

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Chicago Bridge and Iron permit

The issues in this situation are slightly more complicated than in the Ashley River Marina situation. The Budget and Control Board issued Permit Number 73-86 to Chicago Bridge and Iron Company on November 4, 1976, subject to the issuance of a permit from the Army Corps of Engineers, for certain work to be done in the Colleton River of Beaufort County.

The Army Corps of Engineers issued its permit 77-3A-046 for the project, subject to the condition that

Prior to the start of any type of construction activity under this permit, the applicant will file with the applicable local government offices a restrictive covenant on the land indicated on Sheets 1 and 6 of the amended permit application as a buffer zone, approximately 140 acres so as to retain it in its natural condition in perpetuity. ...

This condition was met by filing a document entitled "Restrictive Covenants" with the Beaufort County Clerk of Court on or about July 13, 1977. The findings on page 1 so provide in relevant part:

WHEREAS, it is the desire of the undersigned [Chicago Bridge & Iron Company] that the one hundred forty (140) acres hereafter described shall be set aside, preserved and protected forever in its natural state, subject only to the Department of the Army Permit remaining in force and the work under the permit not being prohibited or restrained by judicial process... .

The Company then covenants that the 140 acres shall be subject to certain restrictions, among them:

1. These restrictive covenants are placed upon the land in accordance with the Department of the Army's Permit issued to Chicago Bridge & Iron Company, dated February 16, 1977. These restrictive covenants are real covenants and shall run with the

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land forever and in perpetuity subject only to the continued existence of the permit and construction under the permit not being prohibited or restrained by judicial process. These restrictive covenants shall be binding on all parties or persons claiming ownership or legal interest under Chicago Bridge & Iron Company.

This condition is further referenced in the second condition, which subjects the 140 acres to the rights of ingress and egress and for easements for public utilities, subject to the terms as expressed above. No subdivision of the 140 acres was to occur, and no industrial or commercial activity was to be conducted thereon.

The permit issued by the Budget and Control Board lapsed and was not renewed. Test pilings were driven in the Colleton River but the industrial facility contemplated by the permit was never constructed. The Army Corps of Engineers permit has also been abandoned. By a document filed October 27, 1987 entitled "Abandonment of Permit and Restrictive Covenants," Chicago Bridge and Iron Company purported to abandon the Army Corps of Engineers permit and also the previously agreed-upon restrictive covenants.

You have asked whether the restrictive covenants have continued to exist in spite of the purported abandonment and further, which agency would now have jurisdiction over these permits.

#### Coastal Zone Management Act

Prior to adoption of Act No. 123 of 1977, the Coastal Zone Management Act, the Budget and Control Board, working with the Water Resources Commission and the Board's Division of General Services, issued permits for activities (i.e., construction or excavation) in critical areas of the State's navigable, tidal waters. Section 21 of Act No. 123, codified as Section 48-39-210 of the Code, provides:

Ninety days after the effective date of this act [July 1, 1977] the [Coastal] Council shall be the only state agency with authority to permit or deny any alteration

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of utilization within the critical area <sup>2/</sup> except for the exemptions granted under Section 13(D) [Section 48-39-130(D)] and such application for a permit shall be acted upon within the time prescribed by this act.

Clearly, ninety days after July 1, 1977, the Coastal Council would have jurisdiction, as the sole state agency, over the permitting process, from the outset, with respect to the critical areas of the State. Your question, however, relates to permits which had already been granted by the Budget and Control Board and what subsequent authority either the Board or the Coastal Council may have as to the previously-issued permits. It should be noted that all state permits under consideration herein have expired and are no longer in effect.

By an opinion dated February 15, 1978, enclosed, this Office concluded "that the Budget and Control Board is without authority to consider permit revisions or modifications now that the Coastal Council has complete permitting authority in this regard." As to permits granted by the Budget and Control Board which would have been in effect during the time when the Coastal Zone Management Act was becoming effective, the court in South Carolina State Ports Authority v. South Carolina Coastal Council, 270 S.C. 320, 242 S.E.2d 225 (1978), stated:

The provision (commonly called the Grandfather Clause) in Section 13(C) [Section 48-39-130(C)] says that any person who has legally commenced a use is exempt. ... This act is prospective. I cannot accept the contention of the Coastal Council that they are authorized to review all of the

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<sup>2/</sup> Section 48-39-10(J) defines "critical area" to be any of the following: "(1) coastal waters, (2) tidelands, (3) beaches and (4) primary ocean front sand dunes."

From a letter dated April 20, 1988 from Paul S. League, Chief Counsel of the Water Resources Commission, to Richard Kelly of the Division of General Services of the Budget and Control Board, it appears that the Beaufort County property lies within the critical area under jurisdiction of the Coastal Council. Similar representations have been made as to the Ashley River Marina property. These facts are assumed for purposes of this opinion. The ultimate determination of these facts may well remain with the appropriate administrative agency or the courts.

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State permits previously issued by the Budget and Control Board. The statute does not provide, and it would be disruptive and prohibitively retroactive for the Coastal Council to reopen these past valid State actions. The act contemplated that normal development would continue while the permitting authority shifted [from the Budget and Control to the Coastal Council] and the planning program evolved.

Id., 270 S.C. at 325-26.

From this case, it is clear that the Coastal Council would not have had jurisdiction in an instances in which a permit issued by the Budget and Control Board was still in effect. The Coastal Council could not reopen a permit which had been validly granted by the Budget and Control Board. In the two cases under consideration herein, however, none of the permits issued by the Budget and Control Board are still in force and effect. Due to the language of Section 48-39-210 of the Code, if a permit were to be sought today, the Coastal Council would be the sole State agency to consider the permit application.<sup>3/</sup> Thus, due to the circumstances presented herein, this Office concludes that if any State agency has any authority over these matters, that agency would be the Coastal Council.

Finally, you have advised by your letter of May 11, 1988 that Chicago Bridge and Iron Company

wishes to know the State's position as to the continued existence of certain restrictions associated with a permit issued earlier by the Board (and a federal permit also) and, initially, whether the Board, the Coastal Council or another entity has authority to act on this question on behalf of the State.

As to the continued existence of certain restrictions set forth in the document entitled "Restrictive Covenants," an opinion of this Office would be improvident because this very question is in litigation or litigation appears to be imminent.

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<sup>3/</sup> Again, for purposes of this opinion, we must assume that the properties in question are located within the "critical area."

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Further, we understand that at least two title insurance companies have apparently recognized that a cloud to a marketable title to the property may exist and have recommended clarification in the form of a declaratory judgment action. A judicial determination of the facts of the matter, as well as the intentions of the grantor, would undoubtedly be the best means for resolving the dispute among the various parties. 4/

Again, assuming the property in question lies within the critical area as defined by the Coastal Zone Management Act and further assuming that the State maintains an interest in the property in question, for many of the reasons set forth above, the Coastal Council would possess the authority to act on this question on behalf of the State with respect to the 140 acres in question. As stated above, the interest of the Budget and Control Board expired at the end of three years after the date of issuance of the permit, or November 4, 1979. Section 48-39-210 of the Code now vests exclusive jurisdiction of such matters in the Coastal Council. And, as noted in the opinion of this Office dated February 15, 1978, we have previously concluded that complete permitting authority has passed to the Coastal Council from the Budget and Control Board with respect to critical areas. Thus, it is our opinion that the Coastal Council would have jurisdiction in this matter.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/an  
Enclosure

REVIEWED AND APPROVED BY:

  
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Robert D. Cook  
Executive Assistant for Opinions

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4/ It might also be argued that a conservation easement has been created. See Section 27-9-10 et seq. of the Code. This determination would most appropriately be made by a court, as well.