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RE: Rebuilding of Non-grandfathered Coastal Structures (MASGP 08-007-06)

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Dear Brad,

Below is the summary of research regarding the question you posed to the National Sea Grant Law Center about how other states have treated the rebuilding, repair, or maintenance of structures that pre-date the enactment of a state's permitting statute. As I understand it, you are particularly concerned with how states deal with the rebuilding of structures, which were in place when the permitting regime was enacted, but not "grandfathered" by the statute. The following information is intended as advisory research only and does not constitute legal representation of Georgia DNR or its constituents. It represents our interpretations of the relevant laws.

Grandfather Clauses

A grandfather clause is defined as "a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect."[1]

[1] Black's Law Dictionary 309 (2d pocket ed. 2001).

Due Process Considerations
In land use regulation, grandfather clauses may exempt pre-existing structures legally built before enactment of the regulation. Those seeking the inclusion of a grandfather provision in a land use regulation usually argue that the clause is necessary to avoid a violation of due process. The Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of property without due process of law.

It is not a due process violation to regulate land use, as long as the regulation substantially advances a government interest. A government violates a person's due process rights when its regulation of real property is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[2] More recently, the Supreme Court has held that substantive due process prohibits land regulation that does not substantially advance a government interest."[3]

In your situation, a grandfather clause was not included in the land use regulations. Legislatures do not have to include grandfather clauses. Land use regimes can, and do, change. Since it is within the legislature's power to regulate land use and the coastal permits in question substantially advance a state interest (protecting coastal resources), the absence of a grandfather clause should not prevent the law's application.

Grandfather clauses and discontinuance of use
In general, grandfather clauses allow continued occupancy and use of structures pre-existing the regulations. However, "[w]hen the nonconforming use is terminated, the protection of grandfathering is lost and resumption of the nonconforming use is not allowed."[4]

Example of grandfather clause after discontinuance/change/abandonment of use:
The Nationwide Permit (NWP) Program under the federal Clean Water Act has a grandfather clause. 33 C.F.R. 330.3 states

> *The following activities were permitted by NWPs issued on July 19, 1977, and, unless the activities are modified, they do not require further permitting:*
>
> *(a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which extended Section 404 jurisdiction to all waters of the United States. The phase-in dates were: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into*

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[2] *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).
[3] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).
[4] Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 700 (2003).

navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. (section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the DE had not asserted jurisdiction at the time the activity occurred, provided in both instances, there is no interference with navigation. Activities completed shoreward of applicable Federal Harbor lines before May 27, 1970 do not require specific authorization. (section 10)

In *United States v. Irizarry*,[5] Irizarry replaced a wooden structure, which was grandfathered, with another structure without obtaining a permit. The U.S. Army Corps of Engineers denied his request for an after-the-fact permit. The NWP under which Irizarry's property was grandfathered authorized him to repair, rehabilitate, or replace any previously authorized, currently serviceable structure. (The court found that the original structure was not serviceable, since the Secretary of Natural Resources had previously ordered the house removed due to the degree of deterioration that would require reconstruction.) Under its discretionary authority the Corps of Engineers had notified Irizarry that his grandfathered status had been revoked. The court found that the notification "was moot for the defendant had already removed the Grandfathered structure, therefore de facto there was then no grandfathered structure present to amend, suspend or revoke. If the structure no longer existed, defendant can hardly argue that the protection of the NWP persists." The court concluded, "Since the structure no longer existed, by action of defendant himself, the grandfather protection disappeared and ceased to exist, along with it the right to repair, rehabilitate and maintain the same; ergo, 'the Phoenix cannot rise from its ashes.'" The defendant was ordered to remove his house.

In states searched, findings indicate that state "grandfather" clauses regarding construction after the enactment of wetlands regulations only apply to instances in which landowner had received a prior permit or authorization for construction.

South Carolina

The Office of Ocean and Coastal Resource Management (OCRM) administers the South Carolina Coastal Zone Management Act. The OCRM's authority extends to wetlands within the state's coastal zone areas. The South Carolina Department of Health and Environmental Control oversees the state's Water Quality Certification Program that implements § 401 of the Clean Water Act and protects wetlands. Permits may not be issued when the proposed activity will have permanent, adverse effects on existing or designated uses.

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[5] 98 F. Supp. 2d 160 (D.P.R. 2000).

The regulations contain a "grandfather" clause for projects initiated before a certain date:

> *S.C. CODE ANN. § 48-39-130. Permits required to utilize critical areas.*
> *(C) Ninety days after July 1, 1977 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. Provided, however, that a person who has legally commenced a use such as those evidenced by a state permit, as issued by the Budget and 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. Any person may request the department to review any project or activity to determine if he is exempt under this section from the provisions of this chapter. The department shall make such determinations within forty-five days from the receipt of any such request.*[6]

In *South Carolina State Ports Authority v. South Carolina Coastal Council*,[7] the South Carolina State Ports Authority received state and federal permits for construction of new terminal facilities. Subsequently, the state's Coastal Management Act was enacted, creating the SC Coastal Council and prohibiting construction in critical areas. The Council attempted to reprocess the Authority's permits. The Authority filed an action, seeking a declaratory judgment that it was exempt under S.C. CODE ANN. § 48-39-130(C). The trial court held that the Authority's project was exempt under § 48-39-130(C), and the appellate court affirmed the decision, finding that the Authority had legally commenced a use and was entitled to an exemption.

Massachusetts

Massachusetts has a Wetlands Protections Act implemented by the Massachusetts Department of Environmental Protection. The obstruction, encroachment, alteration, or pollution of wetlands is forbidden. Permission to conduct activities in a wetland is obtained through a determination or order made by the Conservation Commission.[8] The DEP's regulations have a "grandfather" clause for projects initiated before a certain date:

> *(1) 310 CMR 10.01 through 10.10 and 310 CMR 10.51 through 10.60 shall take effect on April 1, 1983 and shall apply to all Notices of Intent filed on or after that date and any subsequent procedures related to such filings made on or after that date. 310 CMR 10.01 through 10.10 and 310 CMR 10.51 through 10.60 shall not apply to any Notice of Intent filed prior to the effective date of 310 CMR 10.00, or to any extensions of any Order of Conditions the Notice of Intent for which was*

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[6] *Available at* http://www.scstatehouse.net/code/t48c039.htm ; http://www.scdhec.net/environment/water/reg.htm .
[7] 270 S.C. 320 (S.C. 1978).
[8] http://www.mass.gov/dep/water/laws/regulati.htm#wl

filed prior to said effective date, except as otherwise provided in 310 CMR 10.05(4)(g) and 10.05(6)(h).

(2) The effective date of 310 CMR 10.21 through 10.37 is August 10, 1978. 310 CMR 10.21 through 10.37 shall not apply to any Notice of Intent filed prior to August 10, 1978, or to any extensions to an Order of Conditions when the Notice of Intent upon which such Order was based was filed prior to August 10, 1978.

(3) All proceedings and actions commenced under M.G.L. c. 131, 40 prior to the effective date of 310 CMR 10.00 shall remain in full force and effect under the prior applicable regulations, except as otherwise provided in 310 CMR 10.05(4)(g) and 10.05(6)(h).[9]

In *Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.*,[10] "The Department of Environmental Quality Engineering under the Wetlands Protection Act adopted a per se rule that prohibited approval of any proposal that would result in the loss of over 5,000 square feet of bordering vegetated wetlands. Before the new regulations went into effect, the department approved a developer's plans to construct a shopping mall on wetlands under a "grandfather clause" which guaranteed that all proceedings and actions commenced under the WPA prior to the new regulations' effective date would go forward to the case-by-case review authorized under the prior regulations. The state supreme court reversed, holding that the grandfather clause did not violate the DEQE's statutory mandate as set forth in the WPA. Rather, the grandfather clause was rationally related to the WPA because it provided for case-by-case review. Such grandfathering was reasonably justified by the WPA because it would limit administrative burdens to promote effective, efficient protection of the statutory interests." (Lexis Summary)

Connecticut

In *Paupack Dev. Corp. v. Conservation Comm'n*,[11] "The development corporation submitted an application for a wetlands permit to the conservation commission to allow for the construction of a single family home and other improvements on certain property owned by the development corporation. The conservation commission denied the permit. Conn. Gen. Stat. § 22a-40(a)(2) provided for construction of residential homes in wetlands as of right if (1) a building permit had been issued for the home, or (2) the construction was on an approved subdivision lot. requirement that either the building permit had been issued or the subdivision had been approved by a municipal zoning board prior to the earlier of (1) promulgation of regulations by the municipality implementing the statute, or (2) July 1, 1974. The regulation was later amended to read and further provided no residential home shall be permitted as of right pursuant to this

[9] 310 Mass. Code Regs. 10.10.
[10] 400 Mass. 658 (Mass. 1987).
[11] 229 Conn. 247 (Conn. 1994).

subdivision unless the permit was obtained on or before July 1, 1987. On subsequent appeal, the court reversed and remanded for a new trial limited to the issue of whether the denial of the application was supported by substantial evidence, holding that there was no as of right exemption from wetlands regulation pursuant to § 22a-40(a)(2) for construction of residential homes on subdivision lots existing prior to July 1, 1974, unless a building permit had been issued for such a subdivision lot prior to July 1, 1987." (Lexis Summary)

Virginia

In *Hanover County v. Bertozzi*,[12] "the county adopted new zoning ordinances that significantly changed the rural subdivision requirements for the county. However, they contained a 'grandfather clause' that permitted applications for final subdivision approval in accordance with the previous ordinances if they were submitted before the close of business on October 9, 1996. The developer submitted his applications for sections A through E of his subdivision on that day. He filed his applications for sections F and G the next day. The board of supervisors denied his applications for sections A through E because of his failure to record first division lots in accordance with an unwritten administrative rule. Upon review, the court reversed the trial court's finding that sections F and G were within the grandfather clause because the developer did not submit them before the close of business on October 9, 1996. The court reversed the findings as to sections A through E because the trial court did not conduct an evidentiary hearing with regard to whether or not the county's disapproval of the subdivision was properly based on the applicable ordinance, or was arbitrary and capricious. The court reversed the trial court's finding with regard to sections F and G of the developer's subdivision plats and entered judgment for the county. The court reversed the trial court's findings as to sections A through E and remanded the action to the trial court for an evidentiary hearing as to whether or not the county's disapproval was properly based on the applicable ordinance, or was arbitrary and capricious." (Lexis Summary)

Serviceability

Searches for state use of "serviceability" as a criteria were not successful.

In *Irizarry* case above, Irizarry replaced a wooden structure that was grandfathered under an NWP with another structure without obtaining a permit. The U.S. Army Corps of Engineers denied his request for an after-the-fact permit. The NWP under which Irizarry's property was grandfathered authorized him to repair, rehabilitate, or replace any previously authorized, currently **serviceable** structure. In that instance, the court found that the original structure was not serviceable, since the Secretary of Natural Resources had previously ordered the house removed due to the degree of deterioration that would require reconstruction.

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[12] 504 S.E.2d 618 (Va. 1998).

Section 404 of the CWA establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. Activities regulated under this program include fills for development, water resource projects (e.g., dams and levees), infrastructure development (e.g., highways and airports), and conversion of wetlands to uplands for farming and forestry.

Exemptions from § 404 requirements include the maintenance of existing serviceable structures, such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures. 33 U.S.C. 1344(f)(1)(B). However, the work performed cannot further impair waters of the United States. 1344(f)(2). Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

An example of state use of "serviceability" under § 404 was discovered in Owen v. Div. of State Lands.[13] "The landowners bought the subject property for the purpose of protecting wetlands. The only access to a portion of the property was over a road that crossed the marsh. When part of the road became submerged, the landowners sought to have it rebuilt. The DSL affirmed a cease and desist order that directed the landowners to stop fill activities until they obtained a permit for that work as provided in Or. Rev. Stat. 196.810(1)(a). The landowners appealed and claimed that the work was exempt from permit requirements under Or. Rev. Stat. 196.905(4)(b). The court agreed and reversed. The court disagreed that the road's lack of current serviceability precluded the work from constituting "maintenance" under 196.905(4)(b). It was not logical to conclude that "maintenance" always required a currently serviceable road. Serviceability was not the distinguishing feature between maintenance and reconstruction under the statute. The legislature apparently did not intend that the effect on wetlands of "maintenance" on a farm road be limited to the effect caused by the original construction of the road. The court found that the work involved constituted "maintenance" under the statute." (Lexis Summary.)

I hope you find this information useful. Please contact me at anytime if you have additional questions.

Sincerely,

Terra Bowling

Terra Bowling
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[13] 189 Ore. App. 466 (Or. Ct. App. 2003).