

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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Appellant Case No. 2014-000847

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Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control ..... Appellants,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control..... Respondents.

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**APPELLANTS' RETURN TO RESPONDENTS' JOINT MOTION TO STRIKE AND REQUEST FOR JUDICIAL NOTICE, OR IN THE ALTERNATIVE, FOR LEAVE TO SUPPLEMENT THE RECORD ON APPEAL**

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*Attorneys for the Appellants*

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**SC Court of Appeals**

Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and the South Carolina State Ports Authority (“SPA”) have moved the Court to strike a portion of Appellants’ (hereafter, the “Community Groups”) Amended Brief that references a letter from the U.S. Army Corps of Engineers (“Corps”) to SPA (attached hereto as Exhibit A), on the basis that the letter is dated after the Administrative Law Court (“ALC”) issued its summary judgment order.

The motion should be denied. The information contained in the letter – specifically, the Corps’ directive to SPA requiring it to obtain an individual permit for construction of its new cruise terminal – is relevant to the Court’s understanding of the cruise terminal permitting process and, in particular, the ALC’s erroneous speculation that SPA would *not* have to obtain an individual permit. Because the Corps’ letter confirms that the ALC’s speculation is and was completely erroneous, the Community Groups request that the Court take judicial notice of the Corps’ letter and the legal reality that SPA must obtain an individual permit from the Corps to construct its new cruise terminal. In the alternative, the Community Groups move the Court for leave to supplement the record on appeal, pursuant to Rule 212(b), SCACR, to include the Corps’ August 12, 2014 letter.

### **ARGUMENT**

The reality that SPA must obtain an *individual* federal permit for its proposed terminal defines the legal process by which SPA’s request for state and federal authorizations must be noticed, analyzed, and evaluated pursuant to binding requirements. The ALC’s decision below hinged on its speculation that SPA would not need an individual federal permit, but would instead perhaps be eligible to receive federal *nationwide* general permit coverage for its proposed cruise terminal. Specifically, the ALC rejected a motion by the Community Groups to set aside

SPA's state authorizations – a Critical Area Permit and Coastal Zone Consistency Certification (“CAP-CZCC”) – for its proposed cruise terminal because those authorizations lacked a third, distinct authorization: a federal Clean Water Act Section 401 Water Quality Certification. Pursuant to DHEC's regulations, where an applicant like SPA is applying for an *individual* federal permit, the 401 Water Quality Certification must be evaluated and issued simultaneously and in parallel with the other state authorizations. S.C. Code Ann. Regs. 61-101(A)(7)-(8).

The CAP-CZCC issued by DHEC for SPA's project did not include the required 401 Certification because SPA was at that time proceeding under color of a federal nationwide general permit for maintenance projects, rather than an individual federal permit. As DHEC knew, however, SPA's nationwide permit authorization was under challenge as unlawful in the United States District Court for the District of South Carolina. Moreover, that authorization was indeed declared unlawful and set aside. *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 12-2942, 2013 WL 6488282, at \*16 (D.S.C. Sept. 18, 2013). Along with SPA's unlawful federal nationwide permit went DHEC's grounds for not including a 401 Water Quality Certification decision in its CAP-CZCC.

Accordingly, the Community Groups brought this reality to the ALC's attention and requested that the ALC set the facially incomplete CAP-CZCC aside. The ALC erroneously rejected that request, reasoning that SPA could potentially obtain another nationwide permit authorization from the Corps in the future, which could cure the lack of an individual 401 Certification. *See* Order Den. Pet'rs' Mot. to Vacate, 6, Dec. 20, 2013.

That rationale, as well as the other inconsistent arguments embraced by the ALC for upholding a fundamentally flawed and patently unlawful permit, are now on appeal. This Court should take notice of the Corps' letter, which was written after the ALC's decision, because it

confirms *that there is no possibility that the Corps will authorize SPA's project under a nationwide permit* – a main basis for the ALC's ruling. The Corps' letter was not available to be included in the record before the ALC because it was not issued until after the ALC rejected the Community Groups' motion seeking to set aside SPA's state authorizations for lack of a 401 Certification. Moreover, inasmuch as the Corps' letter was written by a federal agency and directed to a party in this case (SPA), neither its authenticity nor its content are subject to dispute. Indeed, SPA and DHEC concede as much in their motion, not attacking the letter's provenance or substance, but only the fact that the Corps' letter did not appear in the record below. They do not, and could not, contest the authenticity of the letter or the meaning of its very plain terms.

“An appellate court can take judicial notice of something that was not before the trial court if it is indisputable.” *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (S.C. Ct. App. 2011); *see also Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E.2d 194, 297 (S.C. Ct. App. 1984); *cf.* Rule 201(b), SCRE (“A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). That the Corps will not consider SPA's project for nationwide permit coverage and is instead requiring SPA to apply for an individual permit is indisputable: the Commander of the Corps' Charleston District informed SPA that the Corps would “require an individual permit for the proposed project.” Letter from John T. Litz, U.S. Army Commander and District Engineer, Corps to Jim Van Ness, SPA, Aug. 12, 2014. As the Corps is the federal agency authorized to issue the relevant permit, there is no question as to the accuracy or validity of the letter or the source itself. Thus, the fact that the Corps is requiring an individual permit for the proposed project is accurately and readily

determined by reading the Corps' August 12, 2014 letter, and may be judicially noticed by the Court.

In the alternative, the Community Groups move the Court for leave to supplement the record on appeal to include the Corps' August 12, 2014 letter. *See* Rule 212(b), SCACR. Supplementation is appropriate here because, as discussed above, the reality that SPA must obtain an individual permit is essential to an accurate review of the ALC's ruling on the validity of SPA's CAP-CZCC.

None of the precedent cited by Respondents in their motion to strike prevents the Court from either taking judicial notice of the fact that SPA is required to obtain an individual permit or allowing the Community Groups to supplement the record on appeal. Specifically, none of the precedent cited addresses the situation where an indisputable matter of public record directly relevant to resolution of an appeal has developed and would assist the Court to properly understand the actual reality surrounding SPA's permit, and the gross incorrectness of the ALC's application of the requirements governing DHEC's noticing, evaluating, and issuing of the three separate authorizations at issue in this case. The imaginary "issues of fact" hypothesized by the ALC in denying the Community Groups' law-based motion were illusory when made, but the Corps' letter confirms that they are a null set. The only reason the Corps' letter was not presented to the ALC is that it did not exist at the time. It exists now, and its authenticity, authority, and relevance are indisputable.

For the foregoing reasons, the Community Groups respectfully request that the Court take judicial notice of the Corps' letter and the fact that SPA must obtain an individual permit for construction of its proposed cruise terminal, or in the alternative, grant the Community Groups leave to supplement the record on appeal to include the Corps' August 12, 2014 letter.

Respectfully Submitted,



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*Attorneys for the Appellants*

Charleston, SC

November 14<sup>th</sup>, 2014

# **Exhibit A**



**DEPARTMENT OF THE ARMY**  
CHARLESTON DISTRICT, CORPS OF ENGINEERS  
69-A HAGOOD AVENUE  
CHARLESTON, SOUTH CAROLINA 29403-5107

Regulatory Division

Mr. Jim Van Ness  
South Carolina State Ports Authority  
Post Office Box 22287  
Charleston, South Carolina 29413-2287

Dear Mr. Van Ness:

I am writing in response to your letter dated July 23, 2014, and received on July 29, 2014, requesting that the U.S. Army Corps of Engineers, Charleston District (Corps) commence review on remand of the South Carolina State Ports Authority's application for proposed renovations to an existing building on Union Pier Terminal (UPT) known as Building 322, in order to relocate the Passenger Terminal operations on UPT from the current location at Building 325 to Building 322.

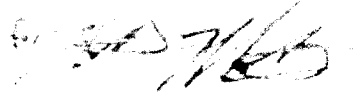
Based on information available to my office at this time, the Corps believes the proposed modification of the cruise terminal facilities at UPT, including additional pilings and proposed changes to Building 322, is consistent with the terms and conditions of Nationwide Permit #3 (NWP #3). However, in order to address the environmental concerns cited in the U.S. District Court's Order and remand, dated September 18, 2013, the Corps has concluded that the public interest in this case merits an expanded review process not generally available in an authorization under NWP #3. Accordingly, I am exercising my discretionary authority under 33 C.F.R. 330.1(d) to require an individual permit for the proposed project.

The first step in this process will be the issuance of a Public Notice. The following information is required to prepare and distribute this notice: 1) any updates to your permit application, such as the additional details in the permit drawings attached to the Critical Area Permit and Coastal Zone Consistency Determination dated December 18, 2012, for the proposed project; 2) a list of adjacent property owners; and 3) a list of authorizations required by other Federal, State, or Local agencies for the work, including all approvals received or denials already made.

In addition, we recommend that you provide all readily available information that may be helpful in describing the proposed project. For example, the proposed project has received substantial media attention regarding potential impacts to air quality, historic properties, and roadway traffic in the vicinity of the existing marine cargo and passenger terminal. Providing information about these issues will help inform the Corps' public interest review and will also inform interested parties about the proposed project.

Your cooperation in the protection and preservation of our navigable waters and natural resources is appreciated. In all future correspondence concerning this matter, please refer to our file number SAC 2003-13026. A copy of this letter is being forwarded to certain State and/or Federal agencies for their information. If you have any questions concerning this matter, please contact Mr. Nat Ball at 843-329-8044, or toll free at 1-866-329-8187.

Sincerely,



John T. Litz  
Lieutenant Colonel, U.S. Army  
Commander and District Engineer

Copy Furnished

South Carolina Department of Health  
and Environmental Control  
Office of Ocean and Coastal  
Resource Management  
1362 McMillan Avenue, Suite 400  
Charleston, South Carolina 29405

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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Case No. 13-ALC-07-056-CC  
Appellant Case No. 2014-000847

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Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough  
Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne  
Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston  
Communities for Cruise Control..... Appellants,  
vs.

South Carolina State Ports Authority and South Carolina Department of Health and  
Environmental Control..... Respondents.

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CERTIFICATE OF SERVICE


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I hereby certify that on this date I served the foregoing Appellants' Return to Respondents' Joint  
Motion to Strike by placing copies of same in the U.S. Mail addressed to:

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Charleston, SC  
November 14, 2014

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**SC Court of Appeals**

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November 14, 2014

Honorable V. Claire Allen  
Deputy Clerk, Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Preservation Society of Charleston v. DHEC  
Appellate Case No. 2014-000847

Dear Ms. Allen:

Enclosed please find the original and seven copies of Appellants' Return to Respondents' Joint Motion to Strike, filed on behalf of Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control.

Please file-stamp the additional copy of the Motion and return it to me in the self-addressed, stamped envelope provided.

Thank you very much for your kind cooperation and assistance.

Very truly yours,



J. Blanding Holman  
Attorney for Appellants

Cc: All Counsel of Record

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**SC Court of Appeals**

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