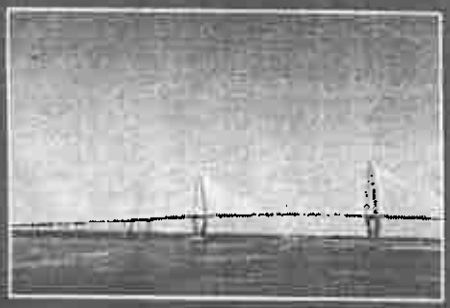
Jurisdictional Survey and Legal Authority Assessment



May 25, 2011

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EXECUTIVE SUMMARY

In late 2010, the Union Pier/Cruise Ship Ad Hoc Committee of the Historic Charleston Foundation (the Foundation) adopted a plan calling for (1) the City to manage the impact of cruise activities through enforceable ordinances; (2) the Foundation to monitor the quality of life impacts of cruise activities on the city, and (3) for the Foundation to support a community-driven planning process to determine the optimal redevelopment plan for Union Pier. After evaluating the alternatives for accomplishing these three objectives, the Foundation resolved first to undertake an assessment whether the City has the authority to regulate the proposed redevelopment of the northern portion of Union Pier as a cruise passenger terminal and to mitigate the off-site impacts resulting from a cruise passenger terminal. This Report is the result of that "initial phase," and is divided into three parts.

In the first, we assess the applicability of the City's current regulations on the proposed cruise passenger terminal at the northern end of Union Pier. In Part II, we survey the tools other jurisdictions are using to address the off-site impacts of cruise passenger terminals. And, finally, in Part III, we assess whether the City has the legal authority to further regulate the development of a cruise passenger terminal or to adopt new regulations mitigating the anticipated off-site impacts of a cruise terminal. A summation of our findings for each of the three parts is presented in this Executive Summary. The full evaluation and background analyses are included in the Report that follows.

Part I: *What City Regulations Would Apply Today?*

Our evaluation of current City regulations is somewhat preliminary in nature since final plans have not been submitted to the City by the State Ports Authority. However, unless significant deviations from the Ports Authority's 2010 Concept Plan are made, the applicability of the City's current regulatory scheme is unlikely to change significantly.

The northern end of Union Pier has a base zoning category of Light Industrial, or "LI," and is not located in the City's Accommodations or Tour Boat Overlay Districts. The intent of the LI zoning district is to permit "most commercial and low impact industrial uses which are compatible with surrounding commercial districts." More intense uses are not intended in LI districts, unless they comply with conditional use criteria and specific performance standards. A "cruise ship terminal" is not a specifically listed use in the LI district, either by-right or as a

conditional use or special exception. Although the Standard Industrial Classification System Manual, upon which the City's use categories are based, includes the category, "Deep Sea Transportation of Passengers," which would include cruise ship terminal land uses, that land use is not included in the City's Zoning Code.

If a cruise terminal were classified within the "catch-all" category of "transportation services, not elsewhere classified" – and assuming the terminal building amounts simply to a renovation of Building 322, and not the construction of an entirely new building – it would not be subject to review by the Board of Zoning Appeals or the Board of Architectural Review. Rather, the City's Technical Review Committee will review any proposed passenger terminal to ensure compliance with City generally-applicable regulations related to signage; landscaping; off-street loading; and setbacks, lot coverage, and other "bulk" requirements. According to the City, there are no express requirements related to the amount, location, or type of off-street parking that would be required for a cruise terminal or similar use in this district.

However, state statutes require that the location, character, and extent of the proposed cruise terminal, as a public project, are subject to Planning Commission review for consistency with the City's Comprehensive Plan. To our knowledge, public projects have not typically gone through this "consistency determination" process, but it appears required by § 6-29-540 of the state statutes. In addition, the City has the authority to assess reasonable impact fees on the redevelopment of Building 322 from a warehouse to a cruise passenger terminal, given the increased impact the new use would have on roads, public safety, solid waste and other municipal facilities. The City's current impact fee ordinance would need to be amended to do so.

Part II: *How Have Other Cruise Port Jurisdictions Addressed Cruise Terminals and Off-Site Cruise Impacts?*

Next, we surveyed the tools other jurisdictions are using to address off-site impacts from the operation of cruise passenger terminals. In Part II, we summarize our findings with respect to eleven of these jurisdictions, located along the east and gulf coasts, and include copies of their regulations as an Appendix to the Report. Most jurisdictions that regulate cruise terminal developments and their off-site impacts do so by applying compatibility criteria through traditional development review and zoning processes, like conditional uses or special exceptions. We found no jurisdiction that expressly limits the frequency of cruise ship visits or

cruise ship capacity. One jurisdiction limits the number of cruise ship berths and prohibits "home porting" types of calls, but in that case, manages its own port. Several jurisdictions have empanelled cruise advisory committees or implemented municipal review processes as a prerequisite to any expansion of cruise impact activities.

Part III: *May the City Enforce Reasonable Regulations on the Terminal Redevelopment and Off-Site Cruise Impacts?*

Finally; we have evaluated whether the City has the authority to adopt reasonable regulations related to the development of a cruise ship terminal and to mitigate the off-site impacts that result from this land use. Although this would be a case of first impression, court decisions related to this issue have provided some clear parameters within which there is legal support for city action. Those parameters are outlined here.

The City of Charleston enjoys broad home rule, police power, and express zoning authorities, which it has exercised historically to balance the impacts of major land uses within the City and its historic districts. Those authorities are not without boundaries, of course, particularly when there is potential overlap with state and federal interests and interstate commerce protections. However, the courts have left local governments significant room to exercise their traditional zoning and police powers to protect legitimate local interests, so long as these interests are balanced against state and federal interests in maritime commerce.

For purposes of this analysis, we have identified ten (10) general areas of potential regulation that have been used by other jurisdictions or that the City might use to regulate the development of a cruise passenger terminal or to mitigate off-site cruise impacts on the city. Since no definitive direction has been given by the legislature, Congress, or the courts on these specific areas, they are presented as a continuum, based generally on the likelihood of overlapping state and federal interests, and therefore the importance of evaluating those interests on a case-by-case basis, based on the principals set out in the case law.

The ten areas of regulation have been divided into two general categories. Those in Category I include:

1) Establishing a City Cruise Monitoring and Advisory Committee;
2) Imposing statutory impact fees to offset increased burdens on City facilities created by the conversion of Building 322 from a warehouse to a cruise passenger terminal;
3) Enforcing the same architectural standards the City currently applies within its historic districts to a cruise terminal redevelopment, through the Board of Architectural Review;
4) Requiring mandatory prerequisites to any increase in cruise intensity, including:
   a) Preparation by the Ports Authority of impact studies (incl., *e.g.*, traffic, quality of life, economic, historic resources, public facility capacity, and public amenities); and
   b) Public workshops, Cruise Monitoring and Advisory Committee evaluations, and hearing processes held by and before appropriate City boards and the City Council.
5) Adopting compatibility criteria and limits similar to those currently required for other high-impact conditional uses or special exceptions (incl., *e.g.*, traffic movement, circulation, and trip generation limits, mass transit coordination, parking restrictions, signage, height and bulk requirements, buffers and other compatibility measures); and
6) Enforcing reasonable limitations on noise and amplified sound.

The City currently regulates land use and development using these tools, which are well-established in South Carolina and generally consistent with the types of tools used in the other cruise port jurisdictions, surveyed in Part II. Those regulatory areas falling into Category II include:

1) Enforcing reasonable design restrictions limiting the number of berths;
2) Enforcing reasonable limitations on the frequency or timing of cruise ship visits;
3) Enforcing reasonable limitations on the types of calls (*e.g.*, car ferrying, origination vs. port-of-call); and
4) Enforcing reasonable limitations on maximum cruise passenger capacity.

These areas represent those less commonly used by other jurisdictions and which implicate a greater *potential* for federal and state limitations on municipal authority. However, it is important to note that the courts have long upheld the view that maritime matters are not subject to *exclusive* state or federal control, but rather may be regulated simultaneously by,

and in the interests of, federal, state, *and* local government. Therefore, while the Category II areas of regulation would require heightened awareness for state and federal limitations, reasonably-crafted regulations in each of these areas is not outright prohibited though any City ordinances in these areas should have a verifiable planning foundation and be evaluated on a case-by-case basis.

Finally, the City and the Ports Authority may craft a binding agreement addressing the manner in which the terminal will be developed and operated, in consideration of the long-term impacts the terminal is likely to have on the City. This alternative would give the City and the state the ability to tailor the terms governing this unique land use and property. In addition to the flexibility a negotiated agreement affords, once executed, it provides certainty for both the City and the state as to what existing or subsequent regulations will apply to the property over the duration of the agreement.

Although municipal regulation of cruise ship impacts would be a case of first impression, there is case law support for the authority to adopt reasonable and balanced regulations within the bounds of state or federal law. Ultimate defensibility, of course, will be determined according to the final language and basis of a particular ordinance. However, the guiding principles and recommendations set forth here allow the Foundation to evaluate the propriety of any regulatory approach proposed by others or to develop its own ordinance or agreement for consideration by the City and Ports Authority.

INTRODUCTION

The number of cruise ships in Charleston has grown in recent years. While there was an average of 46 ships visiting each year from 2001 to 2010, the Ports Authority estimates 89 will visit Charleston in 2011. The community has asked whether unlimited cruise activity will impact the character of our community. Is there a level at which cruise impacts would exceed Charleston's ability to maintain its historic character; a level at which the community's delicate balance would be threatened?

At a forum held by the Historic Charleston Foundation on May 9th of this year, tourism and planning experts from around the country suggested that these thresholds do exist and, if exceeded, can threaten the very thing that makes a place special. Jonathan Tourtellot, who established and ran National Geographic's Center for Sustainable Destinations, detailed impacts that, his studies indicate, port communities experience when cruise activities exceed what a community is able to absorb.

Residents and visitors alike are aware of the important role in Charleston's history our ports have played and will continue to play in our economy and our community. Without a doubt, the financial success of our ports depends on, among other things, a favorable economic climate. However, it also is true that *sustainable* economic development also requires regulatory predictability for industry, long-term community support, and the ability to maintain a balance between economic needs and quality of life; the quality of life that draws industry, residents, and visitors to Charleston in the first place. Indeed, Charleston's success as a historic destination with a durable economy stems, in part, from its ability over the years to recognize and maintain this important balance.

Sharing these concerns, the Historic Charleston Foundation, by resolution, has called upon the City to (1) apply its design standards to the development of the Ports Authority property at Union Pier as a cruise passenger terminal; and (2) implement immediately enforceable reasonable regulations of the cruise industry. There are a number of different approaches available to the City, were it to extend existing zoning and tourism standards to the emerging cruise ship component of the City's economy and visitor base. Some have been used in other places. Others would be tailored to reflect Charleston's unique character, size, and

thresholds and, in particular, the Union Pier's proximity to residential districts and Charleston's historic downtown.

This Report identifies regulatory approaches the City might consider to address the cruise terminal redevelopment, as well as the impacts on the city that result from the operation of a cruise passenger terminal (*i.e.*, "off-site cruise impacts"). In recent months, many in the community have weighed in. The Foundation, by commissioning this Report, has endeavored to evaluate, thoroughly and objectively, what legal bases exist for ensuring that this unique land use does not overwhelm the city's ability to maintain and protect exactly those qualities that make Charleston what it is.

This Report, first, sets forth the City's current regulatory framework as it likely would apply to the cruise passenger terminal, as proposed by the Ports Authority, if plans were submitted today. Second, we surveyed the types of regulations other port cities from Maine to Louisiana have applied to cruise activities. Finally, our legal assessment is set forth, outlining the areas of regulation within which the City may operate, from a legal point of view.

PART I: WHAT CITY REGULATIONS WOULD APPLY TODAY?

BACKGROUND

In recent years, the South Carolina State Ports Authority (the "Ports Authority") has expanded cruise ship operations at the current cruise ship passenger terminal located at the southern end of Union Pier on the Charleston peninsula. In September 2010, the Ports Authority finalized a "Concept Plan for Union Pier Waterfront," prepared by Cooper, Robinson, and Partners, which calls for the conversion of Building 322 on the northern end of Union Pier from a warehouse into a modern cruise ship passenger terminal. In addition to the new terminal, the Plan also calls for the redevelopment of the entire Union Pier property to incorporate various mixed use and public amenities.

Recently, the Ports Authority selected the national firm of CH2M Hill, along with several local partners, to facilitate the design and implementation of the new cruise passenger terminal and the terminal site at the northern end of Union Pier. The design component of the new terminal project is currently underway and, according to the Ports Authority, the project is scheduled to be completed by the third quarter of 2012.

The purpose of this overview is to evaluate whether and to what extent Charleston's Zoning Ordinances and other code provisions would apply to the redevelopment of the northern end of Union Pier and, specifically, the redevelopment of an existing warehouse, known as "Building 322," into a cruise passenger terminal. As of the date of this Report, the City had not received a proposed development or specific site plan for the Union Pier property. The ultimate applicability of current City regulations will depend on the specific development plan submitted. Charleston, as do many local governments in South Carolina, has a two-tier zoning scheme that applies a "base" zoning designation to all properties, as well as an "overlay" zoning to selected properties and land uses of special concern. The applicability of each is evaluated here.

BASE ZONING

The development, or redevelopment, of Union Pier is subject to the City's general zoning requirements. *City of Charleston v. South Carolina State Ports Authority*, 420 S.E.2d 497, 499 (S.C. 1992). However, state law provides that local government zoning "do[es] not require a state agency, department, or subdivision to move from facilities occupied on June 18, 1976, regardless of whether or not their location is in violation of municipal or county zoning ordinances." S.C. CODE § 6-29-770(B). Furthermore, state agency compliance with local building codes is not required given express state preemption on this point. S.C. CODE ANN. § 6-9-110(A)(1) ("A county, municipal, or other local ordinance or regulation which requires the purchase or acquisition of a permit, license, or other device utilized to enforce any building standard does not apply to a . . . state department, institution, or agency permanent improvement project, construction project, renovation project, or property"); *See City of Charleston*, 420 S.E.2d at 497 (acknowledging inapplicability of local building code compliance to SPA development).

The Union Pier property is located in the City's "Light Industrial" or "LI" zoning district, which:

> is intended to permit most commercial uses and low impact industrial uses which are compatible with surrounding commercial districts. More intensive industrial and manufacturing uses are permitted as conditional uses if the uses satisfy specific performance standards.

CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-201(q)

Uses not specifically permitted in a district are prohibited. CHARLESTON ZONING ORDINANCE (March 9, 2010), § 54-203(b). The list of permitted, special exception, conditional, and prohibited principal land-uses in LI Districts are contained in the "Table of Permitted Uses," located in Article 2, Part 3 of the Zoning Ordinance. CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-201(q) (2010)

Land uses listed as a special exception must be approved by the Board of Zoning Appeals, after complying with established criteria. Examples of some uses that currently require special exception approval (and the types of impacts regulated) include:

- Day care centers, accessory use (hours of operation, signage, plans for ingress/egress and loading/unloading, noise impacts, lighting), CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-206(e);
- Drive-thru ATMs (traffic and vehicular access), § 54-206(g);
- Gas stations (traffic and hours of operation), § 54-206(k);
- Homes for the elderly (population density); § 54-206(l);
- Stables (drainage, loading/unloading), § 54-206(p); and
- Sidewalk cafes (public safety and use of sidewalks), § 54-206(x).

Various uses permitted as "conditional uses," which require Zoning Administrator (or staff) approval include:

- Amusement parks, including "carnivals" (distance from residential neighborhoods, number of vehicles to be utilized for patrons and employees), CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-207(a);
- Business Park District (high traffic volumes prohibited), § 54-207(b);
- Day care center, primary use (proximity to residential neighborhood, parking requirements), § 54-207(f); and

- Manufacturing (noise levels, odor, size), § 54-207(i).

For the reasons that follow, it appears that under current City zoning ordinances, a cruise passenger terminal would not require special exception- or conditional use-levels of review.

City land use categories are based on the Standard Industrial Classification System (SIC) and SIC Manual. Among the uses allowed *"by-right"* are railroad transportation, terminal and joint terminal maintenance facilities for motor freight transportation; water taxis; marine cargo handling; towing and tugboat services; marinas; transportation by air; offices for arrangement of passenger transportation; offices for arrangement of transportation of freight and cargo; public automobile parking; transportation services, not elsewhere classified.

Uses allowed by *special exception* or as a *conditional use* include mini-warehousing/self-storage; outdoor storage; amusement and recreation services, not elsewhere classified; and outdoor shipping container storage.

Uses *expressly prohibited* include motor freight transportation and warehousing; services incidental to water transportation; transportation services; hotels, rooming houses, dormitories, camps, and other lodging; organizational hotels and lodging, not elsewhere classified; amusement and recreation services, except motion pictures; and miscellaneous amusement and recreation services.

There is no express listing of "cruise ship terminal," or a similar designation in LI. The SIC Manual includes a category: *"Deep Sea Transportation of Passengers, Except by Ferry,"* which it defines as "[e]stablishments primarily engaged in operating vessels for the transportation of passengers on the deep seas." While this is the SIC category most likely to capture a cruise ship terminal, it is not a category listed as permitted in the City's Zoning Ordinance. The "catch-all" category of "transportation services, not elsewhere classified," a by-right allowed use in LI, is defined in the SIC Manual as:

> Establishments primarily engaged in furnishing transportation or services incidental to transportation, not elsewhere classified. Included in this industry are stock yards that do not buy, sell, or auction livestock; sleeping and dining car operations not performed by railroads; and horse-drawn cabs and carriages for hire.
>
> - Cabs, horse-drawn: for hire

- Car loading
- Carriages, horse-drawn: for hire
- Cleaning railroad ballasts
- Dining car operations, not performed by line-haul railroad companies
- Freight car loading and unloading, not trucking
- Parlor car operations, not performed by line-haul railroad companies
- Pipeline terminal facilities independently operated
- Railroad car repair, on a contract or fee basis
- Sleeping car and other passenger car operations, not performed by
- Space flight operations, except government

Given the emphasis in this definition on land-based transportation industries and uses, it is unclear whether a cruise ship terminal is a permitted use under the City's current zoning. That will likely be subject to City interpretation. In any case, it does not appear that this land use is required to comply with any special exception or conditional use criteria. If allowed as a "by-right" permitted use, a final decision on compliance would be made by the Zoning Administrator and Technical Review Committee, without the need for a hearing before the Board of Zoning Appeals, as is the case with special exception uses, and without the need for satisfaction of additional standards set forth in the Zoning Ordinance, as is the case with conditional uses.

OVERLAY ZONING

In addition to base zoning, overlay zones govern certain structures and activities in Charleston. Of potential applicability as to cruise terminals, and the proposed Union Pier property, are the Tour Boat Overlay Zone and the Accommodations Overlay Zone. The northern end of Union Pier is not within either of these overlay zones. However, under City ordinance, tour boats and accommodations are allowed only within these overlays.

The intent of the Tour Boat Overlay Zone is "to restrict tour boat facilities on the peninsula to appropriate locations." CHARLESTON ZONING ORDINANCE (March 9, 2010)§ 54-221(a). A "tour boat facility" includes structures "for the purpose of embarking or disembarking of passengers for hire aboard boats for transportation to and from historic sites, or for the purpose of viewing, in Charleston harbor or the rivers or lands adjacent thereto." CHARLESTON ZONING ORDINANCE (March 9, 2010)§ 54-221(b). Whether this definition would encompass a

cruise ship is unclear. While cruise passengers likely do "view" while in Charleston Harbor, they likely are not engaged in transportation to and from historic sites.

For the purpose of determining the applicability of the Accommodations Overlay Zone, "accommodations" are broadly defined to include:

> *Commercial uses to provide living or sleeping units, for remuneration, to one or more individuals where the intended and/or usual occupancy would not exceed twenty-nine (29) consecutive days,* including hotels, motels, inns, bed and breakfasts, rooming and boarding houses, hostels, lodging units, resort units, condominiums, cooperatives, apartments, units that are included in a "Vacation Timesharing Plan" as defined in S.C. CODE ANN. § 27-32-10(7), and/or in a "Vacation Timesharing Lease Plan" as defined in S.C. CODE ANN. § 27-32-10(8), as each may be amended from time to time, *as well as any and all similar uses where the intended and/or usual occupancy is for periods not to exceed twenty-nine (29) consecutive days,* and residence club uses.

CHARLESTON ZONING ORDINANCE (March 9, 2010)§ 54-120 (emphasis added).

The criteria that apply to accommodations include the following, which must be approved by the Board of Zoning Appeals:

- the establishment of the proposed facility will not adversely affect the existing housing stock;
- The location of the facility will not significantly increase automobile traffic on streets within residential neighborhoods;
- the proposed use is otherwise in character with the immediate neighborhood;
- the location and design of the proposed facility will facilitate pedestrian activity and encourage transit system usage within the peninsula; and
- in making these findings, the Board of Zoning Appeals shall consider the following information to be provided by the applicant in a written assessment report to be submitted with the application:

- the number of existing housing units on the property to be displaced by type of unit (rental or owner-occupied; single-family, duplex or multi-family; occupied or unoccupied), by income range and by physical condition (sound, deficient, deteriorated or dilapidated);
- the effect of the displacement on the total available housing stock and on the housing stock of a particular type and income range in the service area;
- the number of vehicle trips generated by the facility and the traffic circulation pattern serving the facility and efforts made to minimize traffic impacts;
- the distance of the main entrance and parking entrance of the facility from a road classified as an arterial or collector road;
- the development pattern and predominant land uses within five hundred feet (500') of the facility;
- the proximity of residential neighborhoods to the facility;
- the accessory uses proposed for the facility and their impact on traffic generation and the existence of comparable uses within the service area;
- the demonstrated provision of off-street parking at the rate of two spaces for each three sleeping units;
- the presence of industrial uses and uses which use, store, or produce toxic or hazardous materials in quantities in excess of those specified by the EPA listing of toxic and hazardous materials, within five hundred feet (500') of the facility;
- the commitment to environmental sustainability and recycling;
- the distance of the facility from major tourist attractions;
- the distance of the facility from existing or planned transit facilities;
- the long term provision of on- or off-site parking for employees who drive vehicles to work;

- the location of the proposed facility will contribute to the creation of a diverse mixed-use community;
- the number of rooms in the facility; provided however that the number of rooms in a facility shall not exceed 50 in areas designated "A-1" on the zoning map; 180 in areas designated "A-2" on the zoning map; 225 in areas designated "A-3" on the zoning map; and 100 in areas designated "A-4" on the zoning map;
- the provision of shuttle bus service for hotels with 150 rooms or more located beyond the Peninsula area that are not served by DASH;
- the commitment to make affirmative, good faith efforts to see that construction and procurement opportunities are available to DBEs (disadvantaged business enterprise) and WBEs (women business enterprise) as outlined in Section 2-267 (D)(1), (2), and (3) of the Code of the City of Charleston;
- the commitment to make affirmative, good faith efforts to hire personnel, representative of the population of the Charleston community, at all employment levels.

Similar to the Tour Boat Overlay, it is unclear whether the Accommodations Overlay should apply to cruise ship accommodations. Certainly the off-site impacts are similar. Were it to be determined that the proposed cruise terminal or cruise activities are subject to these overlay requirements, the applicable overlay map would have to be amended to include the proposed cruise terminal property.

SETBACK AND OTHER BULK REQUIREMENTS

Setback, height, and other "bulk" requirements are applied according to a property's base zoning and, in the case of the Union Pier property, its Old City Height District designation of "WP." Specifically, additional regulations apply to the northern end of the Union Pier, given its "WP" designation, namely:

- No structure shall exceed the height of sixty (60) feet.
- The ground coverage of all structures on a lot shall not exceed twenty-five (25) percent of the lot area; "ground coverage" being defined as the sum of the areas

of the largest floor in each building. Ground coverage shall not include paved parking areas or staging areas.

- Notwithstanding the above, no portion of a structure, which structure is within fifty (50) feet of an existing building rated "exceptional" (Group 1) or "excellent" (Group 2) on the Historic Architecture Inventory adopted by Section 54-235 shall exceed the height of such existing building unless approved by the Board of Architectural Review. CHARLESTON ZONING ORDINANCE (March 9, 2010)§ 54-306(g)

Note that there are exceptions to Old City Height District regulations, including "[t]he *height* limitations of 54-306 shall not apply to church spires, belfries, cupolas, domes, *port cranes and movable passenger cruise boarding ramps not intended or used for human occupancy*, monuments, masts and aerials." CHARLESTON ZONING ORDINANCE (March 9, 2010)§ 54-308 (emphasis added) Though clearly some part of the port's ancillary facilities are exempt from the height requirement, structures themselves, including Building 322, would be subject to the height and lot coverage requirements. The City does not currently apply its height requirements against cruise ships docking within the Historic District.

OFF-STREET PARKING

Charleston's Zoning Ordinance also contains off-street parking requirements for specified uses, in order "to establish minimum requirements for off-street parking based on the typical needs of various types of land uses, the pattern of development in the city, and the physical characteristics of the land and environment in the Charleston area." CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-315. The parking requirement is triggered when any building is constructed, reused, enlarged or expanded based on Table 3.3 "Off-Street Parking Requirements" found in § 54-317. CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-316.

However, the City's table does not directly address a cruise ship passenger terminal or cruise ships themselves. The only industrial category is "Manufacturing, wholesale, or other industrial establishments not catering to retail trade." CHARLESTON ZONING ORDINANCE (March 9, 2010)§ 54-317 Two other categories could potentially encompass these structures and uses, namely, "Recreational Facilities" below Mount Pleasant Street and "Marinas." *See id.* For "Recreational Facilities" below Mount Pleasant Street, the table requires one (1) parking spot per eight (8) patrons "based on occupancy limit as determined by Building Code or based on

design capacity." Parking requirements for "Marinas" are either one (1) space per four (4) dry slips or one space per (2) wet slips.

It is therefore unclear that any parking requirements would be applied to a new terminal, whether related to a minimum – or maximum – amount of spaces required, its location in relationship to adjacent properties, or any requirements related to surface or structured facilities.

IMPACT FEES

Charleston currently imposes an environmental service and public safety impact fee against new development at the time a building permit is issued, and it would appear that redevelopment at Union Pier that involve an intensification of use would trigger payment of these fees. CHARLESTON, S.C., CODE § 2-271(b)(1)(e) ("*Development* means construction or installation of a new building or structure, or a change in use of a building or structure, any of which creates additional demand and need for public facilities designated to be funded, in whole or in part, by impact fees."). As for eligibility, the City's impact fee ordinance defines "developer" broadly so as to include state entities such as the Ports Authority. CHARLESTON, S.C., CODE § 2-271(b)(1)(d) (including "an individual or corporation, partnership, or other entity undertaking development.").

According to the City's impact fee ordinance, fees are assessed on both "residential" and "nonresidential" development. *See* CHARLESTON, S.C., CODE § 2-271(b)(4)(b) (for example, the public safety fee is imposed at "four cents ($0.04) per square foot of *nonresidential* development"). Therefore, it would appear that a cruise ship passenger terminal would constitute "nonresidential development" under Charleston's ordinance, thus constituting the type of development subject to the fees. However, since the category of "nonresidential" purports to capture all nonresidential uses, a conversion from a warehouse to a cruise passenger terminal may not be regarded as a change of use, triggering an impact fee, despite the resulting increased impact on city facilities.

However, most impact fee programs differentiate land uses in more detail than simply residential and nonresidential. This is the case due to the recognition that certain land uses create inherently more impacts than others. For example, a warehouse use generates less impact than a cruise ship terminal, based on numbers of people, traffic, etc. Though Charleston

does not presently recognize these distinctions in its impact free program, an updated impact fee study likely would reveal additional public facility costs that are not being captured today. In addition, non-residential uses impact roads, stormwater, water, and wastewater facilities, all of which may be addressed with impact fees. Finally, since the City currently collects impact fees at the time of building permit, and the state is not required to pull a building permit, the City would need to amend its impact fee ordinance to collect impact fees at another point in the development process.

AESTHETICS AND HISTORIC PRESERVATION

Even though the City's regulations related to building facades and preservation apply to the Union Pier property proposed for a cruise terminal, one of four additional criteria must be met to trigger review by the Board of Architectural Review. Although the City's final determination as to the applicability of BAR review will hinge on specific development plans after they are completed and submitted, based on the Concept Plan, we can assess, at least preliminarily, the potential applicability of these criteria. The four criteria are:

1. No structure which is within the Old and Historic District shall be erected, demolished or removed in whole or in part, nor shall the exterior architectural appearance of any structure which is visible from the public right-of-way be altered until after an application for a permit has been submitted to and approved by the Board of Architectural Review.

2. No structure, either more than 75 years old or listed in groups 1, 2, 3 and 4 on the historic inventory map adopted by 54-235, which is within the Old City District but outside of an Old and Historic Charleston District shall be demolished, removed in whole or part, or relocated until after an application for a permit has been submitted to the Board of Architectural Review and either has been approved by it or the period of postponement in the case of application for partial or total demolition hereafter provided for in 54-240, d., has expired.

3. The exterior architectural appearance of any structure, either more than one hundred years old or listed in Groups 1, 2, 3 and 4 on the historic inventory map adopted by 54-235, which is within the Old City District but outside of an Old and Historic District, and which is visible from the public right-of-way,

shall not be changed until after an application for a permit has been submitted to and approved by the Board of Architectural Review.

4. Within the Old City District no *new building* which will be visible from a public right-of-way upon its completion shall be erected until after an application for a permit has been submitted to and approved by the Board of Architectural Review. CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-232 (a) – (d) (emphasis added).

All of Union Pier is located within the Old City District (as opposed to the Old and Historic District) for purposes of BAR review. *See* "BAR BOUNDARIES MAP," *available at* http://www.charlestoncity.info/shared/docs/0/bar%20boundaries%20map.pdf. In addition, most of the structures (including Building 322 and the existing terminal building) on Union Pier are less than seventy-five (75) years old and not included on the historic inventory map. As a result, the first three triggers would be inapplicable to the anticipated plans for Union Pier, and specifically the renovation of Building 322. However, as to the fourth trigger, it is unclear whether the renovation of Building 322 – currently a simple warehouse – will be so substantial as to constitute a "new building," and thereby trigger BAR review under the fourth criteria.

SIGNAGE

The City of Charleston enforces detailed sign regulations in order to "... eliminate confusing, distracting and unsafe signs; assure the efficient transfer of information; and, enhance the visual environment of the city." CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-401 (emphasis added). These regulations do apply to any development or redevelopment activities on Union Pier. However, at this time the City does not impose its sign regulations on cruise ships, regardless of their proximity or impact on the historic districts.

MISCELLANEOUS

Charleston's Zoning Ordinance contains several other generally-applicable site regulations, in addition to those previously discussed. These include requirements for off-street loading, CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-321, tree protection, CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-325 *et seq.*, parking lot landscaping, CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-340 *et seq.* and landscape buffers. CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-344 *et seq.* According to City Staff, all of these requirements would be

applicable, barring any general or technical exception, to development or redevelopment activity on Union Pier.

APPLICABLE REVIEW PROCEDURES

TECHNICAL REVIEW COMMITTEE

Since the terminal redevelopment is unlikely to require a special exception or be subject to conditional use criteria, it appears, based on the Concept Plan, that the only City-level review that would occur is consultation with city staff members, sitting as the Technical Review Committee (TRC). TRC review is required when:

1. any new building(s) construction or site improvement(s) is undertaken on land within the City of Charleston, save repairs or renovations not exceeding the requirements of 54-604.a.2., which follows; or
2. any construction or renovation which results in the addition of two thousand (2,000) square feet of space to an existing structure; or
3. any construction or development which results in changes to traffic circulation and/or storm-water drainage systems onto or off of a site.

CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-604(a)(1) – (3)

Substantive requirements for this review are set forth in the Zoning Ordinance, and also in the official TRC manual, CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-606 and, in practice, most compliance issues are resolved between TRC and the applicant.

PLANNING COMMISSION

However, in addition, S.C. CODE ANN. § 6-29-540 requires local planning commissions to review public facilities and buildings for consistency with the Comprehensive Plan. Specifically, the law provides that:

> no new street, structure, utility, square, park, or other public way, grounds, or open space or public buildings for any use, whether publicly or privately owned, may be constructed or authorized in the political jurisdiction of the governing authority or authorities establishing the planning commission until the location,

> character, and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan of the community.

Id. (Exemptions are provided for "Telephone, sewer and gas utilities, or electric suppliers, utilities and providers, whether publicly or privately owned, whose plans have been approved by the local governing body or a state or federal regulatory agency, or electric suppliers, utilities and providers who are acting in accordance with a legislatively delegated right pursuant to Chapter 27 or 31 of Title 58 or Chapter 49 of Title 33.")

This review process does not authorize the Planning Commission to halt or condition development approval. Rather,

> In the event the planning commission finds the proposal to be in conflict with the comprehensive plan, the commission shall transmit its findings and the particulars of the nonconformity to the entity proposing the facility. If the entity proposing the facility determines to go forward with the project which conflicts with the comprehensive plan, the governing or policy making body of the entity shall publicly state its intention to proceed and the reasons for the action. A copy of this finding must be sent to the local governing body, the local planning commission, and published as a public notice in a newspaper of general circulation in the community at least thirty days prior to awarding a contract or beginning construction.

See id.

It would appear that the state's development of a passenger terminal would meet the threshold requirement for review by the City's Planning Commission.

CONCLUSION

Based on the Ports Authority's Concept Plan, the proposed cruise terminal on Union Pier is located in the "Light Industrial" zoning district and is not within the current Tour Boat or Accommodations Overlay zones. Though not listed expressly as a by-right, conditional or special exception, it is clear that, under current regulations, a cruise passenger terminal will not be subject to any conditional use or special exception review by the Board of Zoning Appeals.

The terminal would be subject to the City's generally-applicable bulk, parking lot landscaping, off-loading, tree protection, and landscape buffers would apply. In addition, review by the Planning Commission should occur to ensure compliance with the City's Comprehensive Plan. There do not, however, appear to be any applicable standards related to: off-street parking minimums or maximums; surface **vs.** structured parking; or Board of Architectural Review compliance. Also, the City would not apply its current impact fee ordinance against the redevelopment of Building 322.

Finally, neither the City's Zoning Ordinance nor its Code directly address the extent to which cruise activities can occur within the City, regardless of impact or proximity to other land uses or historic neighborhoods and districts. Charleston's codes do not regulate, for example, the frequency or timing of cruise visits, the number of passengers that can embark or debark in a given period of time, the impacts of cruise activities on public facilities, number of berths or simultaneous visits that may occur, or the types of visits. An evaluation of other cruise port cities reveals that some of these tools have been implemented in other jurisdictions. A survey of eleven (11) cruise ports on the east and gulf coasts follows, in Part II of this Report. Part III then evaluates whether the City has the legal authority to regulate the cruise ship terminal development or off-site cruise impacts under applicable South Carolina and federal laws.

PART II: HOW HAVE OTHER JURISDICTIONS ADDRESSED CRUISE TERMINALS AND OFF-SITE CRUISE IMPACTS?

BACKGROUND

As part of developing and evaluating alternatives for addressing the Union Pier cruise terminal development and for mitigating subsequent off-site cruise impacts, we looked to see what mechanisms other cruise port jurisdictions have used to address terminal developments and impacts. Specifically, we have reviewed eleven ports from the east coast of the United States and Gulf of Mexico, including:

- Bar Harbor, Maine
- Portland, Maine
- Boston, Massachusetts
- Baltimore, Maryland
- Norfolk, Virginia
- Jacksonville, Florida
- Cape Canaveral, Florida
- Miami, Florida
- Key West, Florida
- Tampa, Florida
- New Orleans, Louisiana

Although these jurisdictions provide a useful representation, none is like Charleston, particularly with respect to the proximity of the proposed cruise terminal on Union Pier to its historic districts and neighborhoods. Accordingly, some tools used in other jurisdictions may not be appropriate in Charleston. Conversely, the fact that other jurisdictions have not adopted a particular approach does not mean it should be ruled out for Charleston, if it is legally-supportable under South Carolina and applicable federal law. Therefore, by evaluating what has been done elsewhere, we have a starting point for further analysis and community discussion of what types of regulations may work in Charleston.

Reflecting the primary purpose of this Report, our survey focused on exploring the extent to which controls have been established and facilitated through land use regulation, including in the ten areas of:

1) Establishing a City Cruise Monitoring and Advisory Committee;
2) Imposing statutory impact fees to offset increased burdens on City facilities created by the conversion of Building 322 from a warehouse to a cruise passenger terminal;
3) Enforcing the same architectural standards the City currently applies within its historic districts to a cruise terminal redevelopment, through the Board of Architectural Review;
4) Requiring mandatory prerequisites to any increase in cruise intensity, including:
   a) Preparation by the Ports Authority of impact studies (incl., *e.g.*, traffic, quality of life, economic, historic resources, public facility capacity, and public amenities); and
   b) Public workshops, Cruise Monitoring and Advisory Committee evaluations, and hearing processes held by and before appropriate City boards and the City Council.
5) Adopting compatibility criteria and limits similar to those currently required for other high-impact conditional uses or special exceptions (incl., *e.g.*, traffic movement, circulation, and trip generation limits, mass transit coordination, parking restrictions, signage, height and bulk requirements, buffers and other compatibility measures);
6) Enforcing reasonable limitations on noise and amplified sound;
7) Enforcing reasonable design restrictions limiting the number of berths;
8) Enforcing reasonable limitations on the frequency or timing of cruise ship visits;
9) Enforcing reasonable limitations on the types of calls (*e.g.*, car ferrying, origination vs. port-of-call); and
10) Enforcing reasonable limitations on maximum cruise passenger capacity.

Beyond these measures, some ports charge fees against vessels or their passengers. However, federal law greatly limits the authority of non-federal entities to assess charges on vessels operating in federal waters, or their passengers, other than those needed to recoup port operational costs. *See* 33 U.S.C.A 5(b). Unlike Charleston, of course, jurisdictions that own

and operate their own port are not preempted from assessing additional passenger fees to cover certain of their port facility costs.

In addition to "direct" controls, we have also surveyed these jurisdictions with an eye towards which, if any, have instituted official community oversight, prerequisites for maritime infrastructure expansion, such as impact assessments and public input as conditions of expansion. Addressing the above issues may be accomplished by means other than regulations, for example, through mutual binding agreement or by inherent limitations in both maritime infrastructure and market conditions.

OUR FINDINGS – SUMMARIZED

The following summarizes the nature of the regulations found among the eleven representative jurisdictions.

- None limit the number of ports of calls on an annual, weekly, or daily basis.
- None limit the capacity of ships.
- Only Key West, which operates its terminal, limits the number of berths.
- Only Key West prohibits the "home porting" of cruise ships.
- Several jurisdictions require compatibility criteria for Cruise Terminals, including:
    - **Portland, Maine**
        - Eastern Waterfront Port Zone seeks to balance maritime activities with public interests.
        - To that end, Portland permits cruise terminals, but regulates various performance features including noise, lighting, aesthetic, and other quality of life issues.
        - Passenger support services (restaurants, etc.) are subject to various size and impact limitations.
    - **Boston**
        - South Boston Waterfront Interim Planning Overlay District balances local interests, including preservation of historic structures, with "the development of public waterborne transportation."

- This Overlay scheme subjects any development to a variety of controls and mitigation measures.

- **Baltimore**
  - Traffic study required for uses greater than 15,000 square ft.
  - List of required prerequisites for approval, including historic preservation.
- **Norfolk**
  - Though permitted by-right, the land use, "cruise ship pier, terminal" is subject to buffer and parking requirements.
- **Jacksonville**
  - Requires transportation concurrency evaluation (*i.e.*, determination of whether sufficient public facility capacity exists to accommodate new land uses) for industrial uses, including any proposed "Waterport/Marine Terminal."
- **Cape Canaveral**
  - charges impact fees, specifically for offsite sewage pumping from cruise ships, among other uses.
- **Miami**
  - Class II Special Permit required for any new structure in the SD-4 Waterfront Industrial District, including "passenger terminals."
  - This approval takes into account various compatibility criteria including traffic and parking.
- **Tampa**
  - As part of a comprehensive regulatory scheme for its "Channel District," Tampa has detailed design review criteria for "water transport" uses, which includes cruise ship facilities.
- **New Orleans**
  - Subject to state preemption, cruise boat uses are subject to various compatibility items, including compatibility with neighborhoods, buffers, and traffic.
  - In approving such conditional uses, conditions may be placed on said uses by City Council.

Several of the surveyed jurisdictions require local consultation, facilitation, and oversight mechanisms, including:

- Key West's detailed public engagement process required as a prerequisite for any "port expansion" at the Truman Waterfront Parcel.
- Norfolk's "cruise bureau," which serves as the primary liaison between the city and the cruise industry.
- Bar Harbor's standing Cruise Ship Committee, which oversees the cruise industry and reports to Town Council and the public.

The relevant sections of the codes from these eleven jurisdictions are included as an Appendix to this Report.

PART III: MAY THE CITY ENFORCE REASONABLE REGULATIONS ON THE TERMINAL REDEVELOPMENT AND OFF-SITE CRUISE IMPACTS?

BACKGROUND

Clearly, no regulatory devise should be adopted in Charleston, simply because it has been used in another cruise port. Similarly, none should be dismissed simply because it has *not* been used in other places. Rather, the Foundation has urged the City to consider and adopt only those regulations that, after careful evaluation and consideration, are determined by the community to protect Charleston's unique heritage, economy, and quality of life. No objective study or public process has been undertaken to evaluate the regulatory tools the City might consider to address the proposed cruise terminal redevelopment or ongoing off-site cruise impacts. However, given the potential magnitude of the terminal and its proximity to Charleston's historic downtown, the Foundation believed any such study should include a legal assessment of what *could* be done.

This Part III therefore evaluates whether the City has the authority to regulate, in any manner, the Ports Authority's development of a cruise passenger terminal at the northern end of Union Pier or of the off-site cruise impacts that result from the operation of a cruise passenger terminal, be it at the current location or another. Based on our evaluation that authority does exist, though where state and federal interests are explicitly implicated, regulations must be evaluated on a case-by-case basis. And, of course, other laws that governing any City ordinance – related, for example to takings, equal protection, etc. – must be observed as always. It should be noted as well, that we have not been provided contracts, binding obligations, or financial documents related to the Ports Authority or any cruise operators, which would give insight into the impact local laws may have. It should be noted as well, that we have not been provided contracts, binding obligations, or financial documents related to the Ports Authority or any cruise operators, which would give insight into the impact local laws may have.

For purposes of assessing the City's base authority to act fundamentally, we have evaluated the following ten (10) areas of regulation:

1) Establishing a City Cruise Monitoring and Advisory Committee;
2) Imposing statutory impact fees to offset increased burdens on City facilities created by the conversion of Building 322 from a warehouse to a cruise passenger terminal;
3) Enforcing the same architectural standards the City currently applies within its historic districts to a cruise terminal redevelopment, through the Board of Architectural Review;
4) Requiring mandatory prerequisites to any increase in cruise intensity, including:
   a) Preparation by the Ports Authority of impact studies (incl., *e.g.*, traffic, quality of life, economic, historic resources, public facility capacity, and public amenities); and
   b) Public workshops, Cruise Monitoring and Advisory Committee evaluations, and hearing processes held by and before appropriate City boards and the City Council.
5) Adopting compatibility criteria and limits similar to those currently required for other high-impact conditional uses or special exceptions (incl., *e.g.*, traffic movement, circulation, and trip generation limits, mass transit coordination, parking restrictions, signage, height and bulk requirements, buffers and other compatibility measures);
6) Enforcing reasonable limitations on noise and amplified sound;
7) Enforcing reasonable design restrictions limiting the number of berths;
8) Enforcing reasonable limitations on the frequency or timing of cruise ship visits;
9) Enforcing reasonable limitations on the types of calls (*e.g.*, car ferrying, origination vs. port-of-call); and
10) Enforcing reasonable limitations on maximum cruise passenger capacity.

This list represents those aspects of regulation most frequently used in other jurisdictions; identified as important by experts participating in the Foundation's 2011 Public Forum; or suggested by others in our community. Within each category are innumerable variations, of course. For example, limitations on the frequency of cruise visits could range from an annual to a weekly cap, or something else. Limitations on capacity could be restricted, for example, to just certain zoning districts. The function of a cruise advisory committee could include anything from simple monitoring to providing a recommendation to the City Council before additional cruise ship visits are approved. Therefore, as these categories are by

definition general, the ultimate defensibility of a particular approach must be evaluated based on the final wording, scope, and basis of a particular ordinance.

What follows is the analytical framework upon which the legal conclusions and recommendations set forth in this Part are based. It is hoped that the legal parameters set out here will be used to craft and evaluate effective regulations related to the terminal redevelopment and the manner in which cruise impacts will be managed in Charleston in the long-term. While there are no statutes or cases that expressly state the extent to which a South Carolina city may regulate in this area, state and federal laws and cases do provide guidance as to which regulatory tools are most likely to withstand legal scrutiny. If a specific ordinance or agreement is proposed, the guidance we have gleaned from these sources and summarized here, can be used to assess their defensibility and whether that action covers all areas within the City's power to address.

UNDERLYING MUNICIPAL POWERS

HOME RULE AND POLICE POWERS

Cities in South Carolina have home rule powers, *e.g. Hospitality Ass'n v. County of Charleston*, 464 S.E.2d 113 (S.C. 1995); meaning that their authorities are to be "liberally construed," and that mention in the state statutes of a particular power should not "be construed as limiting in any manner the general powers of such municipalities." S.C. CODE ANN. § 5-7-10. Under home rule, South Carolina cities may regulate in areas *other than* those the General Assembly or the Constitution proscribe. In addition, South Carolina municipalities posses broad police powers, which allow their elected bodies to "enact regulations, resolutions, and ordinances . . . respecting *any subject* which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government." S.C. CODE ANN. § 5-7-30 (emphasis added).

For example, in *Hospitality Ass'n*, the South Carolina Supreme Court held that:

> Although § 5-7-30 lists various specific powers possessed by municipalities, we hold that the broad grant of power stated at the beginning of the statute is not limited by the specifics mentioned in the remainder of the statute. To hold otherwise would directly contradict S.C. CODE ANN. § 5-7-10 (1976), which states

> that "the specific mention of particular powers shall not be construed as limiting in any manner the general powers of... municipalities." Further, a limited reading of § 5-7-30 is inconsistent with the liberal rule of construction mandated by Article VIII, § 17.

Hospitality Ass'n, 464 S.E.2d at 118. To get a sense of the scope of permissible municipal power, the following local ordinances have been upheld as valid on police power grounds despite the lack of explicit authority under state law:

1. Ordinance banning smoking in restaurants and bars, *Foothills Brewing Concern, Inc. v. City of Greenville*, 660 S.E.2d 264 (S.C. 2008);

2. Ordinance prohibiting commercial establishments allowing on-premises consumption of beer and wine from operating between hours of 2:00 A.M. and 6:00 A.M., Monday through Saturday, *Denene, Inc. v. City of Charleston* 574 S.E.2d 196 (S.C. 2002);

3. Imposing a city franchise fee on telephone company in exchange for using the public streets for poles, wires, and cables, *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 522 S.E.2d 804 (S.C. 1999);

4. Imposing a municipal transfer fee on conveyances of real property equal to 0.25% of purchase price to fund parks and recreational facilities, *C.R. Campbell Const. Co. v. City of Charleston*, 481 S.E.2d 437 (S.C. 1997);

5. Ordinance submitting proposed structures to aesthetic review, *Peterson Outdoor Advertising v. City of Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997); and

6. Ordinance raising funds by charging a 1% fee on the gross proceeds derived from the sale of food and beverages sold in establishments that maintain a license for the on-premises consumption of alcohol, beer or wine to offset the costs incurred by the city in providing police, fire, sewer, and other services in specified locations, *Hospitality Ass'n* 464 S.E.2d 113.

As to matters touching on maritime activities, the South Carolina Supreme Court recently held that Jasper County has the authority under § 4-9-25 (county government's equivalent of § 5-7-30) to build and maintain a public marine terminal on the Savannah River. *South Carolina State Ports Authority v. Jasper County*, 629 S.E.2d 624 (S.C. 2006). In addition, the Court has upheld ordinances regulating the launching and beaching of motorized watercraft

on public beaches, *Barnhill v. City of North Myrtle Beach*, 511 S.E.2d 361 (S.C. 1999), and prohibiting commercial vessels from using county boat landings. *Captain Sandy's Tours, Inc. v. County of Georgetown*, 423 S.E.2d 99 (S.C. 1992).

In fact, Charleston has employed its home rule powers in a number of innovative ways, including in such areas as: regulating gambling devices on vessels, CHARLESTON, S.C., CODE § 21-179(3) ("By enacting this section, the City of Charleston exercises its authority delegated to it pursuant to the S.C. CODE ANN. § 5-7-30 (1976)(the Home Rule Act) . . ."), and regulating abandoned watercraft, CHARLESTON CODE § 21-67(b) ("This division is adopted for the promotion of the public health, safety and welfare and general convenience, pursuant to the police powers of municipalities generated by state legislation, including the State Home Rule Act . . ."). Perhaps most significantly, Charleston's extensive tourism management regulations (Chapter 29, CHARLESTON, S.C., CODE) derive from home rule powers, as opposed to expressly authorized powers.

PLANNING AND ZONING POWERS

Furthermore, South Carolina Local Government Comprehensive Planning and Enabling Act of 1994 (the "Planning Act") establishes a comprehensive framework for the exercise of planning and zoning powers, *I'On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716 (S.C. 2000). That framework, in addition to other city authorities, may be applied anywhere within a city's corporate limits, § 6-29-330(A). The City currently exercises zoning and police power authorities over upland attachments that extend over the water. For example, the City's Tour Boat Overlay applies to "the use of land, the structures thereon, docks, wharfs, or other such appurtenances for the purpose of embarking or disembarking of passengers for hire aboard boats..." CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-221. Similarly, the City imposes minimum parking requirements on uplands associated with marinas, even though it does not regulate or permit marinas themselves. *Id.* at § 54-317. In recent years, the City reviewed and approved plans for Fleet Landing Restaurant and a residence, each of which extend beyond but are attached to city uplands. Of course, the City's history of exercising its authorities in this manner is consistent with the scope and intent of the police and zoning powers afforded to municipalities. ***See*** *e.g.*, § 21-67 (regulating abandoned watercraft).

Any other conclusion would have the irrational result of allowing private parties to avoid municipal laws simply by undertaking their activities at the end of a city pier, despite the potentially significant impact that activity has on land. Indeed, any City regulation on cruise activities would be a regulation of the use of uplands for a given purpose, not the regulation of how vessels may operate in Charleston Harbor, for example, *independent of* the impacts that occur when that vessel attaches to a City property. *See Barnhill* 511 S.E.2d at 361, 363 (South Carolina Supreme Court upholding a city ordinance restricting the times of day watercraft could be launched on or from a public beach and finding the regulated activity occurred "on the public beach," not on the water.)

The Planning Act goes on to set forth a non-exclusive list of valid zoning purposes including: "to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets," S.C. CODE ANN. § 6-29-710(A)(2); "to protect and preserve scenic, historic, or ecologically sensitive areas," *id.* at (A)(4); and "to further the public welfare in any other regard specified by a local governing body." *Id.* at (A)(8).

Within each zoning district, the following may be regulated:

1. The use of buildings, structures, and land;
2. The size, location, height, bulk, orientation, number of stories, erection, construction, reconstruction, alteration, demolition, or removal in whole or in part of buildings and other structures, including signage;
3. The density of development, use, or occupancy of buildings, structures, or land;
4. The areas and dimensions of land, water, and air space to be occupied by buildings and structures, and the size of yards, courts, and other open spaces;
5. The amount of off-street parking and loading that must be provided, and restrictions or requirements related to the entry or use of motor vehicles on the land;
6. Other aspects of the site plan including, but not limited to, tree preservation, landscaping, buffers, lighting, and curb cuts; and

7. Other aspects of the development and use of land or structures necessary to accomplish the purposes set forth throughout this chapter.

S.C. CODE ANN. § 6-29-720(A).

To accomplish these ends, the Planning Act sets forth a non-exclusive list of specific zoning techniques including "cluster development," "floating zone," "performance zoning," "planned development district," "overlay zone," and "conditional uses." S.C. CODE ANN. § 6-29-720(C). Finally, boards of architectural review administer those aspects of the zoning code related to "preservation and protection of historic and architecturally valuable districts and neighborhoods." S.C. CODE ANN. § 6-29-870(A).

The Planning Act also speaks to enforcement of zoning ordinances. Municipalities can enforce compliance "by means of withholding building or zoning permits . . . and the issuance of stop orders." S.C. CODE ANN. § 6-29-950(A). Further, "[a] violation of any ordinance adopted pursuant to this chapter is a misdemeanor." *Id.* In order to correct a violation:

> [T]he zoning administrator . . . municipal or county attorney . . . or an adjacent or neighboring property owner . . . may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land.

Id. at 6-9-80 (A).

Charleston's existing code provides that the city or "any property owner, who would be damaged by such violations" may enforce zoning ordinances by way of, "in addition to other remedies, institute injunction, mandamus, or other appropriate action." CHARLESTON ZONING ORDINANCE (March 9, 2010) § 54-905, -950(a). Critically, as it relates to the enforcement of zoning ordinances against state agencies, under the Planning Act, "[t]he governing body of a county or municipality whose zoning ordinances are violated by the provisions of this section may apply to a court of competent jurisdiction for injunctive and such other relief as the court may consider proper." S.C. CODE ANN. § 6-29-770(H). Since § 6-29-770(A) requires state entities to comply with local zoning, this remedy would appear to be available as against the state's violation of a zoning provision. Indeed, that is how the state Supreme Court held in a 1992 case

involving the Ports Authority. *See City of Charleston* 420 S.E.2d at 497, 499 ("the Ports Authority must comply with local zoning ordinances; and, if the Ports Authority refuses to comply, the City may seek injunction through the Circuit Court."), *but see* S.C. CODE ANN. § 6-29-770(D) (prohibiting local government application of zoning to a state property resulting in state need "to move from facilities occupied on June 18, 1976.")

Given the City's broad home rule and police powers, as well as its express authorities to regulate land use through planning and zoning, it appears that the City of Charleston has the underlying authority to regulate the impacts of port properties on the City, that result from cruise activities. Though never addressed by the courts directly, it is unlikely the General Assembly intended to freeze municipalities from exercising their otherwise valid authorities to regulate water dependent uses of property, regardless of the significance of the impact. *See, e.g.*, S.C. CODE ANN. § 6-29-720(A) (providing zoning authority to regulate with respect to land, water, and air space). In fact, as discussed, the City already is doing so, consistent with its zoning authorities and the police power.

To take an example, if the City were to limit frequency or times during the year a waterfront property may accommodate cruise ships, those limitations would apply to the use of the land, in a limited area of the City, not on how often or when cruise ships may navigate or operate in the waters off Charleston or may dock in other locations. This is consistent with the statutory authority of the City to regulate the use and density of land within designated zoning districts. *See id.* The limitation is upon a waterfront property owner to use the property in a way that the City and its nearby neighborhoods are able to reasonably absorb. *See also Barnhill,* 511 S.E. 2d at 363 (distinguishing preempted activities "on navigable waters" from "regulation on the public beach."). The City's Tour Boat Overlay accomplishes a similar purpose: to limit a particular water-dependent use to appropriate areas of the City.

POTENTIAL LIMITATIONS ON LOCAL AUTHORITY

Nonetheless, even when a city has the underlying authority to act, there may be areas where the General Assembly, Congress, or the Constitution prohibits its exercise of an otherwise valid authority. This is known as state or federal preemption. Similarly, though along a different analytical line, local government cannot exercise its powers in a way that discriminates against or unduly burdens out-of-state commerce, under the federal Commerce

Clause. While the courts have identified some areas where local governments may not act – including in the area of maritime commerce – the courts have historically reserved to local governments the authority to regulate in areas of land use and zoning, even where such regulations touch upon or overlap with federal interests. Potential state and federal limitations on the City's authority are evaluated in the next three (3) sections.

STATE PREEMPTION

Although Charleston has considerable authority to reasonably regulate land use impacts through its home rule, police power, and zoning authorities; state laws ultimately are supreme and may in some cases "preempt" local laws. The question then is whether state law, and the Ports Authority Enabling Act, in particular, preempts any and all regulation by the City related to the terminal redevelopment or the mitigation of off-site cruise impacts.

The following statutory provisions indicate the nature and extent of the legislature's intent as to the Ports Authority's powers and mission:

- "Through the [Ports Authority], the State may engage in promoting, developing, constructing, equipping, maintaining, and operating the harbors or seaports within the State," S.C. CODE ANN. § 54-3-110;
- "The [Ports Authority] is created as an instrumentality of the State for the accomplishment of the following general purposes: . . . (9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports," § 54-3-130;
- "A member of the board of directors shall discharge his duties as a director, including his duties as a member of the committee: . . . (3) in a manner he reasonably believes to be in the best interests of the [Ports Authority]. As used in this chapter, best interests means a balancing of the following: (a) achieving the purposes of the [Ports Authority] as provided in § 54-3-130 . . . (d) consideration given to diminish or mitigate any negative effect port operations or expansion may have upon the environment, transportation infrastructure, and quality of life of residents in communities located near existing or proposed port facilities," § 54-3-80;

- "[The Ports Authority] [s]hall have the powers of a body corporate, including the power . . . to make contracts," § 54-3-140(1); [m]ay acquire, construct, maintain, equip, and operate wharves, docks, ships, piers . . . warehouses and other structures . . . [and] shipping facilities and transportation facilities," § 54-3-140(3); and [m]ay promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities," § 54-3-140(14);

- "[The Ports Authority] shall have general supervision in the port of Charleston of all wharves, warehouses, and terminal facilities . . . and shall examine them and keep itself informed as to their condition and the manner in which they are operated, with reference to the security and accommodation of the public and the compliance with all provisions of law applicable thereto," § 54-3-410;

- "[The Ports Authority] shall have jurisdiction over the harbor and bay of Charleston and the rivers and creeks flowing therein, may preserve peace and good order in said bay and harbor and shall make such regulations as it may see fit not repugnant to the laws of the land, for the regulation and government of vessels entering said port and waters so as to provide for their safe and convenient use thereof and for the protection and preservation of said bay, harbor, rivers and creeks from injury by means of deposit of ballast and other materials, the creation of obstructions or for any other cause whatsoever," § 54-3-810; and

- "The [Ports Authority] may levy and collect from all vessels entering into and using the port of Charleston such fees and harbor or port charges, not inconsistent with the law, as, in its discretion, may be necessary to pay the harbor master and port wardens for the services required of them and to defray the necessary expenses attendant upon the execution of the duties devolved upon it under this article in relation to the regulations for the safety and convenience of vessels entering said port and waters, or any of them." § 54-3-840.

In *South Carolina Ports Authority v. Jasper County*, the South Carolina Supreme Court stated that there are three types of state preemption that can deprive a local government of the authority to act in a given area: (1) express, (2) implied field, and (3) implied conflict. 629 S.E.2d at 627-28 (S.C. 2006). "Express preemption occurs when the General Assembly declares

in express terms its intention to preclude local action *in a given area*." *Id.* at 628 (citing *Wrenn Bail Bond Service, Inc., v. City of Hanahan,* 515 S.E.2d 521 (S.C. 1999)) (emphasis added). Where express preemption is found, "no other enactment may touch upon *the subject* in any way." *Id.* at 522 (citing *Town of Hilton Head Island v. Fine Liquors, Inc.*, 397 S.E.2d 662 (S.C. 1990)) (emphasis added). In *South Carolina State Ports Authority*, the Court found that statutes authorizing the Ports Authority to engage in *broad* powers relative to harbors and ports (*see* S.C. CODE ANN § 54-3-110) and to exercise *plenary* authority to advance waterborne commerce (*see* § 54-3-130(9)) did not expressly preempt local governments from condemning land to develop a marine terminal. The broad grants of authority recognized in the Ports Authority Enabling Act do not contain language that appears to expressly preempt all potential areas, or "subjects," of local regulation of cruise terminal developments or off-site cruise impacts. *South Carolina State Ports Authority,* 624 S.E.2d at 628.

"Under implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers *the subject* so as to occupy the field or when the subject mandates statewide uniformity." *Id.* at 628 (S.C. 2006) (citing *Denene, Inc.* 574 S.E.2d at 196) (emphasis added). As with express preemption, where implied preemption is found, City ordinances may not govern the subject. *Id.* at 628-29; *See Wrenn Bail Bond Service, Inc.*, 515 S.E.2d at 522. Where field preemption is alleged, courts have construed the applicable statute as a whole, as opposed to isolated phrases, even where the state agency is authorized to act comprehensively in a given field. *South Carolina State Ports Authority,* 629 S.E.2d at 629 (S.C. 2006); *see also, Bugsy's v. City of Myrtle Beach*, 530 S.E.2d 890, 893 (S.C. 2000) (regulating the location video poker mach nes not preempted).

As with express preemption, the *scope* of an alleged preemptive statute will be evaluated by the courts in an implied field preemption analysis. For example, in *Bugsy's v. City of Myrtle Beach,* state law provided that "[n]o municipality may limit the number of machines within the boundaries of the municipality." *Id.* (citing S.C. CODE ANN. § 12-21-2720(B) (Supp. 1998)). The Court rejected the claim that this express limitation on the *number* of video poker machines, even in the context of the state's "comprehensive scheme regulating many aspects of video poker machines" impliedly barred the application of local zoning as to the *location* of video poker machines. *Id.* The Court stated that "the scheme does not manifest an intent to prohibit any other enactment from touching on video poker machines." *Id.* In other words, the Court, having determined that preemption applied to certain matters, nevertheless held that

the scope of field preemption did not reach zoning, which sought to deal with locational issues, an issue left open by state law. It appears then that, in order to have impliedly preempted a field of local regulation, a state statute must show the General Assembly has preempted a specific, rather than a general, area of local regulation.

In fact, it appears the Ports Authority's power to govern *all* aspects of terminal developments and associated impacts has been limited by statute and case law interpretation, *see, e.g.*, S.C. CODE ANN. § 54-3-410; *City of Charleston*, 420 S.E.2d at 499 (holding development on Ports Authority property not exempt from local zoning), and contemplated to be exercised principally as to activities on the water, *see, e.g.*, S.C. CODE ANN. § 54-3-810, *but see, Aakjer v. City of Myrtle Beach*. 694 S.E.2d 213 (S.C. 2010) (finding Myrtle Beach's helmet laws preempted as the need for statewide uniformity for motorcycle travelers between South Carolina jurisdictions was "plainly evident").

A second recognized form of "implied" preemption is known as "conflict" preemption. This arises where a state and a local law are irreconcilable and for which compliance with both cannot be accomplished. *See e.g., Foothills Brewing Concern, Inc.*, 660 S.E.2d at 264 (upholding an ordinance prohibiting smoking in locations in addition to those places set forth by the South Carolina Clean Indoor Air Act). "As a general rule, 'additional regulation to that of State law does not constitute a conflict therewith.'" *Denene, Inc*, 574 S.E.2d at 199 (S.C. 2002) (citing *Town of Hilton Head Island*, 397 S.E.2d at 664 (S.C. 1990) (quoting *Arnold v. City of Spartanburg*, 23 S.E.2d 735, 740 (1943)). Rather, in order for there to be conflict between state and local law:

> [B]oth must contain either express or implied conditions which are inconsistent and irreconcilable with each other. Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.

Id. (quoting *McAbee v. Southern Ry. Co.*, 164 S.E. 444, 445 (1932)).

Courts generally are reluctant to find conflict preemption unless the face of the state statute and the local ordinance present a *specific* and irreconcilable conflict. *Denene, Inc,*. 574 S.E.2d at 196 (upholding an ordinance that prohibited on-premises alcohol consumption between 2:00 A.M. and 6:00 A.M., Monday through Saturday, despite state law prohibition only between 12 A.M. Saturday and sunrise Monday morning); *see also Barnhill*, 511 S.E.2d at 364-

65 (finding City regulation of activities "on the public beach" not in conflict with state regulation of "watercraft on navigable waters").

A court likely would not find there to be preemptive conflict between the Ports Authority Enabling Act itself and reasonable, local regulation of cruise terminal development and off-site cruise impacts, since local regulation would be seen as additional, non-conflicting regulation, allowing for simultaneous compliance with both state and local law. As the Supreme Court has pointed out, it is not enough for local action "to complicate or burden the [Ports Authority]," instead, where "compliance with both is possible . . . [there is no] conflict with the [Ports Authority] Enabling Act." *South Carolina State Ports Authority*, 629 S.E.2d at 630. Furthermore, even though such regulations may "touch upon" the areas the Ports Authority is authorized to operate within, those limitations could be reconciled with the statutory powers and responsibilities of the Ports Authority. In other words, the Ports Authority's compliance with both its Enabling Act and reasonably-drawn, balanced local laws would be possible.

Finally, and along the lines of conflict preemption, Art. VIII, sec. 14, of the state constitution has been found to prohibit local government action when to do so would completely "set aside" the structure and administration of state government. This principal has been analyzed by the courts in the context of preemption and similarly, has required a specific irreconcilable conflict between a local requirement and a state law or function. In the *City of North Charleston v. Harper,* the state Supreme Court invalidated a city ordinance that required municipal judges to impose a thirty-day sentence for simple possession of marijuana, even though state law provided for a range of specific penalties for this particular crime, including simply paying a fine: 410 S.E.2d 569 (S.C. 1991). However, this case appears distinguishable; first, because the holding turned on express language in Art VIII, sec. 14 prohibiting local governments from setting aside state "criminal laws and the penalties and sanctions in the transgression thereof." Given the specific nature of this statutory provision, the resulting conflict was overt and irreconcilable because North Charleston's ordinance imposed a single, specific penalty to the exclusion of those expressly set out by statute for the same crime. Second, the North Charleston penalty conflicted, not with a generalized grant of power to a government official, but with a specific criminal penalty, the parameters of which were expressly established by state law.

Town of Hilton Head Island v. Coalition of Expressway Opponents, involved an ordinance that would have put to popular vote the decision whether to build a toll road on Hilton Head Island. 415 S.E.2d 801 (S.C. 1992). The Court overturned the ordinance because it "sets aside the structure and administration of the statewide highway scheme by attempting to limit the authority granted to the SCDHPT to consider the collection of tolls as a method of financing the construction of state roads." *Id.* at 805. However, as in *Harper*, this case involved a city ordinance that conflicted with a specific state power conferred by the legislature to use toll roads as a method of financing road construction. *Id.* Hilton Head's ordinance would have precluded the state's exercise of an expressly stated power, similar to the criminal provision at issue in *Harper*.

South Carolina State Ports Authority v. Jasper County, involved a challenge to Jasper County's attempt to develop and operate a marine cargo terminal. 629 S.E.2d 624 (S.C. 2006) Finding the County's actions were not barred by Article VIII, § 14, the Court distinguished *Town of Hilton Head Island v. Coalition of Expressway Opponents*, and held that:

> County's Ordinance and Resolution do not "set aside" the structure or administration of developing ports or terminals because as previously explained, that function does not rest exclusively with the state government and does not require statewide uniformity. *Cf. Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992) (an ordinance is defective under Article VIII, 14 because it attempted to limit the authority granted to the Department of Highways by state law).

Id. at 631-32.

Moreover, the Court held that the Ports Authority Enabling Act and the County action "are consistent because the provisions are silent on the issue of whether public entities may develop a terminal on the Savannah River." *Id.* at 632. Finally, the Court held that the Ports Authority Enabling Act and the County action were consistent with the general law of the state. *Id.*

The cases discussing the "set aside" doctrine indicate that reasonable City regulations could be tailored to meet this constitutional limitation simply by ensuring that they are

consistent with the Port Authority's ability to operate under its enabling statutes. In other words, it cannot be said that *any* limitation on the level of cruise impacts that may be imposed on the city, for example, "sets aside" the Ports Authority's functions, particularly since the Ports Authority's purpose under its Enabling Act is to run a statewide port system and the cruise component of that system is quite small. This would seem to deem reasonable limitations mitigating its impacts in Charleston, or in just a part of Charleston, even less likely to be regarded as impermissibly "setting aside" the Ports Authority's purpose.

Based on our review of the cases and the Ports Authority Enabling Act, it appears that the regulatory areas considered here have not been expressly preempted by the General Assembly and could be tailored so as not to create an irreconcilable conflict with the Ports Authority's Enabling Act. *See Peoples Program for Endangered Species, et al. v. Sexton*, 476 S.E.2d 477, 480 (SC 1996) (upholding Mt. Pleasant's animal control ordinance because it did not run contrary to state and federal permitting requirements, but simply "regulate[d] the conditions under which" permitted activities could be conducted in the town).

FEDERAL PREEMPTION

In addition to state preemption, local ordinances also can be preempted by federal law. The Supremacy Clause in Article VI of the United States Constitution establishes the principle for federal preemption:

> This Constitution, and the laws of the United States which shall be made in Pursuance therefore; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. (citing U.S. CONST. art. VI, cl. 2.); *see*, e.g., *City of Cayce v. Norfolk Southern Ry. Co.*, Op. No. 26925 (S.C. 2011).

Where the line is drawn between those areas reserved to federal regulation and those in which state – and therefore, local – governments may operate, must be determined on a case-by-case basis, by comparing a particular ordinance and a particular federal law. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 1999, n.8 (1996) (noting that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is

readily discernable in our admiralty jurisprudence."). Of course, in this case, no specific city ordinance has been proposed.

Therefore, for these purposes, we have evaluated a range of cases involving local regulations alleged to have encroached impermissibly upon federal laws, in order to assess whether *any and all* local regulations related to the development of a cruise terminal or to the mitigation of off-site cruise impacts are likely to be preempted by federal law. These cases highlight the federal laws that have been adjudicated; in addition to others our review indicated may cover this area. There may be others, of course, and a final determination as to the likelihood of federal preemption precluding local action will have to be made based on the nature and scope of the particular ordinance and a particular federal law. Among the laws we have reviewed, are:

- Regulation of navigable waters, 33 U.S.C.A. §§ 1 et seq.
- Navigation rules for harbors and rivers, 33 U.S.C.A. §§ 151 et seq.
- Anchorage grounds & harbor regulations, 33 U.S.C.A. §§ 471 et seq.
- The Ports and Waterways Safety Act, 33 U.S.C.A. §§ 1221 et seq.
- The International Navigation Rules, 33 U.S.C.A. §§ 1601 et seq.
- Harbor development, 33 U.S.C.A. §§ 2231 et seq.
- Administration of shipping laws, 46 App. U.S.C.A. §§ 3 et seq.
- Clearance and entry, 46 App. U.S.C.A. §§ 91 et seq.
- Use of foreign vessels in United States ports, 46 App. U.S.C.A. §§ 316 et seq.
- Vessels and seamen, 46 U.S.C.A. §§ 2101 et seq.
- Operation of vessels, generally, 46 U.S.C.A. §§ 2301 et seq
- Inspection and regulation of vessels, 46 U.S.C.A. §§ 3301 et seq.
- Carriage of passengers, 46 U.S.C.A. §§ 3501 et seq.
- Recreational vessels; federal preemption, 46 U.S.C.A. §§ 4306 et seq.

- Licenses and certificates of registry, 46 U.S.C.A. §§ 7101 et seq.
- Standards for foreign tank vessels, 46 U.S.C.A. § 9101.
- Foreign and Intercoastal Voyages, 46 U.S.C.A. §§ 10301 to 10317, 10321
- Development of water transportation, 49 U.S.C.A. § 303a.
- General jurisdiction (water transportation), 49 U.S.C.A. § 13521.
- Federal authority over interstate transportation, 49 U.S.C.A. § 14501.

In addition to these statutes, federal preemption jurisprudence also acknowledges the nation's longstanding and indisputable interest in regulating national and international maritime commerce to promote uniformity and efficiency. *See United States v. Locke*, 529 U.S. 89, 108-109. (2000). Nonetheless, the courts have recognized areas within which local governments may act, despite federal regulatory presence, even in areas related to maritime and international commerce. *See, e.g., UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1193-94 (9th Cir. 2007). In particular, State and local powers have been upheld, particularly in areas traditionally regulated by the states, despite significant simultaneous federal regulatory presence. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). As the Fourth Circuit put it: "[m]aritime matters ... are not fields subject to exclusive federal control ... To the contrary, federal law respects both our system of dual sovereignty and the important regulatory interests of the states;" *Casino Ventures v. Stewart*, 183 F. 3d 307, 310 (4th Cir. 1999); and further that "[t]he State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Id.* at 311. (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 374 (1959).

As with state preemption, there are three ways in which federal preemption can occur. While the terminology and rules applicable to the federal preemption analysis are similar to those applicable to the state analysis, federal preemption differs in some important respects. These are examined here. Express preemption, under federal law occurs "where Congress makes its intent to preempt state law explicit in statutory language." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 429 (2002). As under the state analysis, express preemption is not likely to be found under a federal analysis unless there is clear and direct language preempting local regulation as to a particular subject of regulation. *Id.*

Federal implied *field* preemption occurs "where state law regulates conduct in a field that Congress intends for the federal government to occupy exclusively." *Id.* In areas traditionally governed by the states, a presumption *against* preemption and *in favor of* local authority has been recognized. *See Medtronic, Inc.*, 518 U.S. at 485 ("we 'start with the assumption that the historic police powers of the States were *not* to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)). However, this presumption will not be made if the area is one in which the federal government has historically regulated. Therefore, whether a presumption in favor of local regulation will be applied will depend, in part, on whether a reviewing court were to evaluate a City regulation, related to the terminal redevelopment and off-site cruise impacts, as one deriving from historical zoning and police powers or as overreaching into areas traditionally reserved to federal control, like navigation. In any case, in order to prevail, a challenge would have to prove that the City's regulations "*actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." *Pacific Merchant Shipping Assn. v. Goldstene*, 2011 WL 1108201 (9th Cir. 2011) (quoting *PMSA v. Aubry*, 918 F.3d 1409, 1422 (9th Cir. 1990)).

Finally, implied *conflict* preemption occurs "where there is an actual conflict between state and federal law." *City of Columbus*, 536 U.S. at 429. Conflicts occur "where it is 'impossible for a private party to comply with both state and federal requirements,'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002). Conflict arguments have prevailed, for example, where local laws completely exclude federally-approved vessels from operating in state waters, *see, e.g., Waste Management Holdings, Inc. v. Gilmore* 252 F.3d 316 (4th Cir. 2001), but, on the other hand, these arguments have failed where local laws simply placed limitations on vessel operations and have not *precluded* a vessel or owner from "plying its trade," *see, e.g., UFO Chuting of Hawaii, Inc.*, 508 F.3d at 1189.

Examples of cases where no conflict was found include:

- *Huron Portland Cement, Co.*, 362 U.S. at 448 (upholding the application of Detroit's smoke abatement ordinance to federally licensed vessels because it required "no more than compliance with an orderly and reasonable scheme of community regulation [and] [t]he ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage.").

- *Ray v. Atlantic Richfield Co.*, 435 U.S. at 179-80 (upholding State tug-escort requirement for oil tankers because it did not "appear from the record that the requirement impedes the free and efficient flow of interstate and foreign commerce, for the cost of the [escort] is less than one-percent per barrel of oil and the amount of oil processed at Puget Sound refiners has not declined as a result . . . ")

- *UFO Chuting of Hawaii, Inc*, 508 F.3d at 1189 (upholding state law limiting operation of federally licensed vessels off the coast of Maui during five months out of the year to protect endangered whales because state law has not "completely excluded" licensees and licensees "presented no evidence that it is wholly economically infeasible to operate its business with the five-month ban . . .").

- *Goldstene*, 2011 WL 1108201 at *22 (upholding California Vessel Fuel Rules because "compliance is not technically impossible or even especially difficult;" plaintiff "failed to show that the required fuel is unavailable or otherwise would adversely affect ship operations;" and "any increased cost, although estimated at approximately $30,000 per vessel call, would appear to be relatively small in comparison with the overall cost of a trans-Pacific voyage . . . as well as the increased costs eventually passed on to the ultimate customer . . .").

Examples of cases where courts have found conflicts include:

- *Gibbons v. Ogden*, 22 U.S. 1 (1824) (invalidating a state law that gave Livingston and Fulton an exclusive license to operate in New York waters to the exclusion of other federal licensees).

- *Seacoast Products, Inc.* 431 U.S. at 283 (invaliding state law that excluded nonresident, federal licensees from fishing the Chesapeake Bay because it violates the "indisputable" precept that "no State may completely exclude federally licensed commerce.")

- *Waste Management Holdings, Inc. v. Gilmore* 252 F.3d at 316 (invalidating state law that completely excluded federally-licensed barges from transporting any type or amount of solid waste in three Virginia rivers)

- *Young v. Coloma-Agaran*, 340 F.3d 1053, 1057 (9th Cir. 2003) (invalidating state natural resources law that imposed a use permit program for Hanalei

> Bay, which was capped at five permits, because it completely excluded federal licensees and "effectively rendered it impossible for the [licensees] to comply with both federal and state law in order to ply their trade.").

These cases indicate that local laws that completely exclude federally-licensed or -approved vessels from operating in state waters may be preempted. However, in *UFO Chuting of Hawaii, Inc.* 508 F.3d at 1193-94, reasonable local regulations were held not to conflict with federal law because they only limited the time of year the vessels could operate. The Court held that this neither amounted to a complete exclusion nor made it impossible for a licensee to ply its trade – the rule established by *Coloma-Agaran*. The Court reached this conclusion because "UFO has presented no evidence that it is wholly economically infeasible to operate its business with the five-month ban," *id.* at 1194, even though the Court recognized "there may be a point at which a seasonal ban such as this makes it impossible for a federal licensee to ply its trade . . . [a] longer ban or a ban on a different type of maritime business could result in such an economic impact to the licensee as to make operation of its business wholly infeasible." *Id.* at 1194.

After our review of federal laws most likely to govern in this area, it does not appear that any and all efforts by the City to reasonably regulate the terminal redevelopment and potential off-site cruise impacts would be preempted by federal law. In fact, it appears the City would enjoy a presumption *against* federal preemption, since City regulations in this area derive from the exercise of traditional local police and zoning powers. If a word of caution is in order, it would be with respect to a City ordinance regulating directly navigation or cruise ship design or operations, so as to completely exclude a federally-licensed ship from state waters or to otherwise make it impossible for a federally-licensed cruise operator to "ply its trade." *See id.; Compare Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (Ports and Waterways Safety Act [PWSA] preempted, among other things, state regulation of tanker vessel design and safety standards and tanker vessel size limits). Nonetheless, it would seem that reasonable limitations on where or how often cruise ship visits occur, based on a demonstrated harm to the City were there no limitations, can be crafted without having such a prohibitive impact, particularly where adequate alternative times and locations are available. Therefore, unless a supreme federal law is identified that preempts each and every aspect of City regulation, it cannot be said that all municipal regulation of the terminal redevelopment or of off-site cruise impacts is preempted by federal law.

DORMANT COMMERCE CLAUSE

Under the "Commerce Clause," Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. Therefore, the U.S. Supreme Court has long recognized the "Dormant," or "Negative," Commerce Clause; a legal doctrine limiting, though not prohibiting, state regulation of interstate commerce. *E.g. City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Two categories of cases arise under the Dormant Commerce Clause. The first deals with laws that impermissibly *discriminate against* out-of-state commerce, and the second, with laws that unduly *burden* interstate commerce.

To get a sense of what generally constitutes a discriminatory state or local law, consider the following cases:

- *Granholm v. Heald* 544 U.S. 460 (2005) (Michigan statutes prohibiting out-of-state wineries from shipping wine directly to in-state consumers, but permitting in-state wineries to do so if licensed, unlawfully discriminated against interstate commerce);
- *Oregon Waste Systems, Inc., v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 18 (1994) (imposition of a $2.50 per ton surcharge on in-state disposal of solid waste generated in *other* states, with a $0.85 per ton surcharge on disposal of waste generated *within* Oregon, unlawfully discriminated against interstate commerce); and
- *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (an excise tax exemption for *okolehao*, a brandy distilled from the root of an indigenous shrub of Hawaii, discriminated against interstate commerce).

Impermissible discrimination occurs when state or local laws, motivated primarily by interests of economic protectionism, expressly discriminate against out-of-state commerce for the benefit of in-state interests. *See, e.g. Granholm v. Heald*, 544 U.S. at 460. However, unless it is clearly motivated by a desire to favor state industry, a facially-neutral ordinance generally will not be found to unlawfully discriminate against out-of-state commerce, even if the only parties affected are out-of-state actors. *See e.g., Exxon v. Governor of Maryland*, 437 U.S. 117, 125 (1978); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981). Even if a law is discriminatory, it may survive a Commerce Clause challenge, if it can be shown that it

"advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

Dormant Commerce Clause violations also can occur where state, or local, governments impose regulations that "unduly burden" interstate commerce. To assess whether an individual ordinance violates this prong of the Dormant Commerce Clause, the courts engage in a balancing test, which provides that local regulations that apply:

> *'evenhandedly'* to local and out of state goods and providers but incidentally burden interstate commerce will be struck down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Wood Marine Service, Inc. v. Harahan, 858 F.2d 1061, 1065-65 (5th Cir. 1988) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Clearly, Commerce Clause claims turn on the facts of a given case and the nature of a given ordinance. The courts, in most of these cases, have weighed the importance of demonstrating the public purpose behind the law against its likely burden on interstate commerce. For example, in *UFO Chuting of Hawaii*, 508 F.3d at 1189, the 9th Circuit rejected a Commerce Clause claim challenging Hawaii's prohibition on parasailing for five months out of the year. The court held that this prohibition was non-discriminatory, both facially and in effect, and that the state interest in protecting endangered whales justified the seasonal operational limitations on private boat operators.

In *Wood Marine Service, Inc. v. Harahan*, the City of Harahan, Louisiana amended its zoning ordinance limiting maritime uses along a portion of the city's historic, commercial waterfront area, 858 F.2d 1061. Rejecting a Commerce Clause claim, the Court first balanced Harahan's valid local concerns against the effects on interstate commerce, and noted that:

> [t]he history of Harahan's zoning ordinance demonstrates that the Board of Aldermen reasonably concluded the curtailment of further commercial development of the batture would further the community's interest in maintaining the city's residential quality.

Id. at 1066.

Given Harahan's legitimate public interest in regulating land use in this matter, the court further rejected the argument that Harahan's locational limitations on shipping activities created an "undue burden" on interstate commerce, noting that, even though "alternative routes will have to be found for the interstate shipment of construction material into Louisiana does not establish the existence of a burden upon interstate commerce." *Id.* at 1064.

On the other hand, in *Pike*, the U.S. Supreme Court found an Arizona health regulation, which required all cantaloupes grown in the state to be shipped in crates, placed an impermissibly excessive burden on interstate commerce. *Pike*, 397 U.S. 137. A resident farmer, and frequent shipper into California, brought suit claiming that his business would suffer nearly $700,000 in damages, because the regulation would force him to build his own packing facility or contract to an existing facility. The Court recognized the validity of the state's interest under the regulation, but found, in that instance, that the resulting burden on interstate commerce was excessive. *Id.*

Courts will evaluate whether a given ordinance creates an unlawful "burden" on commerce, according to the facts and the ordinance in each case, and may consider whether the local interests could have addressed with less impact on interstate commerce. *See Pike*, 397 U.S. at 142 ("the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."). Nonetheless, the Dormant Commerce Clause, and the cases interpreting it, leaves room for reasonable municipal regulations in this area where those local interests are demonstrated and impacts on commerce do not result or are only incidental in relation to a demonstrated local benefit.

LEGAL ASSESSMENT

In order to evaluate the authority of the City to adopt a future City ordinance regulating cruise terminal development or off-site cruise impacts, we have divided the ten areas of regulation into two general categories. While no precise line can be drawn, we felt it useful for analytical purposes, to make some general distinctions. The ten areas are listed again here, for convenience:

1) Establishing a City Cruise Monitoring and Advisory Committee;
2) Imposing statutory impact fees to offset increased burdens on City facilities created by the conversion of Building 322 from a warehouse to a cruise passenger terminal;
3) Enforcing the same architectural standards the City currently applies within its historic districts to a cruise terminal redevelopment, through the Board of Architectural Review;
4) Requiring mandatory prerequisites to any increase in cruise intensity, including:
   a) Preparation by the Ports Authority of impact studies (incl., *e.g.*, traffic, quality of life, economic, historic resources, public facility capacity, and public amenities); and
   b) Public workshops, Cruise Monitoring and Advisory Committee evaluations, and hearing processes held by and before appropriate City boards and the City Council.
5) Adopting compatibility criteria and limits similar to those currently required for other high-impact conditional uses or special exceptions (incl., *e.g.*, traffic movement, circulation, and trip generation limits, mass transit coordination, parking restrictions, signage, height and bulk requirements, buffers and other compatibility measures);
6) Enforcing reasonable limitations on noise and amplified sound;
7) Enforcing reasonable design restrictions limiting the number of berths;
8) Enforcing reasonable limitations on the frequency or timing of cruise ship visits;
9) Enforcing reasonable limitations on the types of calls (*e.g.*, car ferrying, origination vs. port-of-call); and
10) Enforcing reasonable limitations on maximum cruise passenger capacity.

The ten areas of regulation are listed generally in the order of those least likely to involve state or federal interests, to those most likely to do so. For those most likely to implicate state and federal interests, greater caution would be exercised so that the City avoids impinging on areas prohibited or preempted by state or federal law. In these areas, it is more critical that the City be able to verify the local interest being accomplished and that any impacts on port or cruise vessel operations be "reasonable," by balancing local interests against federal laws.

CATEGORY I

Category I includes the first six areas of regulation, each of which is consistent with the City's existing zoning scheme; derive from well-established regulatory authorities; and touch the least upon the Ports Authority's jurisdiction or countervailing federal interests, if they do so at all. In addition, these tools are directed at off-site impacts of land-based activities, as is common with a number of land uses in Charleston today.

1) Establishing a City Cruise Monitoring and Advisory Committee;
2) Imposing statutory impact fees to offset increased burdens on City facilities created by the conversion of Building 322 from a warehouse to a cruise passenger terminal;
3) Enforcing the same architectural standards the City currently applies within its historic districts to a cruise terminal redevelopment, through the Board of Architectural Review;
4) Requiring mandatory prerequisites to any increase in cruise intensity, including:
    a) Preparation by the Ports Authority of impact studies (incl., *e.g.*, traffic, quality of life, economic, historic resources, public facility capacity, and public amenities); and
    b) Public workshops, Cruise Monitoring and Advisory Committee evaluations, and hearing processes held by and before appropriate City boards and the City Council.
5) Adopting compatibility criteria and limits similar to those currently required for other high-impact conditional uses or special exceptions (incl., *e.g.*, traffic movement, circulation, and trip generation limits, mass transit coordination, parking restrictions, signage, height and bulk requirements, buffers and other compatibility measures); and
6) Enforcing reasonable limitations on noise and amplified sound.

Based on our evaluation of the City's underlying authorities, and of any state or federal limitations on those authorities, legal support is strong for each of these six areas of regulation. The City currently regulates land use and development using these tools, which are well-established authorities under state statute and case law. *See, e.g.*, S.C. CODE ANN. § 6-29-710 (zoning purposes include: "to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets," "to protect and preserve scenic, historic, or ecologically sensitive areas," and "to further the public welfare in any other regard specified

by a local governing body."); *see also*, S.C. CODE ANN. § 6-29-720. The City's objectives in regulating in these areas, were it to do so, would be consistent with traditional zoning authorities allowing mitigation of impacts related to:

- traffic and pedestrian circulation;
- mass transit and shuttle routes;
- compatibility with adjacent residential and commercial districts;
- public facility capacity;
- design and aesthetic impacts;
- historic and cultural resources;
- on- and off-street parking and loading;
- local economy and tourism; and
- resident and business quality of life.

Furthermore, legislative decisions by city councils in South Carolina enjoy a presumption of validity; meaning that, once a legislative decision is made, upon challenge, a court "cannot insinuate [its] judgment into a review of the city council's decision but must leave that decision undisturbed if the propriety of that decision is even 'fairly debatable.'" *Harbit v. City of Charleston*, 675 S.E. 2d 776, 780 (Ct. App. 2009 (quoting *Knowles v. City of Aiken*, 407 S.E.2d 639, 642 (S.C. 1991)). In *Barnhill*, for example, which upheld a North Myrtle Beach ordinance limiting the times of day during which jet skis could be launched from a public beach, the South Carolina Supreme Court noted that it "found no precedent requiring that a restriction on access to navigable water be the least restrictive means of regulating in order to pass muster as reasonable regulation. 'Reasonable" in the context of other constitutional challenges has been defined simply as rationally related to a legitimate legislative purpose." 511 S.E. 2d at 364.

In addition, since these six areas of regulation generally address the initial development of the terminal itself, as opposed to cruise operations directly, the likelihood of state or federal preemption, or of implicating the Dormant Commerce Clause, is much lower than with Category II areas. In fact, the South Carolina Supreme Court has expressly held that state agencies, including the Ports Authority, are subject to local zoning requirements, *City of Charleston*, 420 S.E. 2d at 499, *see also*, S.C. CODE ANN. § 6-29-770(A), and the federal courts have upheld reasonable local regulations that merely extend existing, generally-applicable zoning schemes to water-dependent land uses. *See, e.g., Wood Marine Service, Inc.* 858 F.2d at

1066 (requiring mere rational basis review under Commerce Clause challenge upon showing that ordinance imposed *no* burden on interstate commerce).

CATEGORY II

Category II represents four areas of regulation that, though designed to mitigate the same zoning impacts as the first six, have not been used widely and for which there is little direct statutory or case law guidance. In addition, these tools, though intended to address the off-site impacts of port activities, may appear on their face to regulate more directly, waterside and ship operations themselves, *see, also,* S.C. CODE ANN. § 5-7-140 (related to the geographic jurisdiction of municipalities), and therefore are more likely to encounter state and federal interests if not properly tailored.

1) Enforcing reasonable design restrictions limiting the number of berths;
2) Enforcing reasonable limitations on the frequency or timing of cruise ship visits;
3) Enforcing reasonable limitations on the types of calls (*e.g.*, car ferrying, origination vs. port-of-call); and
4) Enforcing reasonable limitations on maximum cruise passenger capacity.

As discussed above, court decisions related state and federal preemption and the Commerce Clause have been notably fact-dependant and none have addressed these types of regulations, specifically with respect to the cruise industry. In addition, our jurisdictional survey of eleven cruise port cities, in Part II, found no other jurisdiction that limits the frequency, size, or capacity of cruise ships by ordinance, though one, the City of Key West, regulates the number of cruise ship berths (to one) and the type of calls allowed (no home-porting or car ferries allowed); though the City of Key West manages its own port.

Therefore, since the Category II areas of regulation touch more directly upon the port and cruise ship operations themselves, establishing the legitimate zoning purposes for regulating in this manner will be important to ensure no *impermissible* intrusions on state, federal, or interstate commerce interests result, since the courts have upheld the exercise of reasonable zoning powers within the realm of maritime commerce and port operations. *See e.g., City of Charleston*, 420 S.E.2d at 499 (holding that the Ports Authority must comply with

local zoning ordinances); *Huron Portland Cement,* 362 U.S. at 448 (upholding a smoke abatement ordinance as applied to federally-licensed vessels).

On the state preemption front, the Ports Authority Enabling Act neither expressly preempts nor appears to result in an irreconcilable conflict with a reasonable regulation fixing a threshold on the frequency, types, size, or capacity of cruise ships or which limits the number of cruise ship berths. As to whether regulations of in this category would be field preempted or prohibited under Art. VIII, sec. 14 of the state constitution, will depend ultimately on the reasonableness of the regulation proposed. However, so long as reasonable thresholds are established, which do not prohibit the Ports Authority from complying with its general statutory directives, then implied preemption also is unlikely to be found. *See Town of Hilton Head,* 415 S.E. 2d 801 (overturning local ordinance that would have "set aside" a power specifically conferred upon a state agency).

As to federal preemption, while some cases have found local actions to be preempted, *see e.g., Douglas v. Seacoast Products, Inc.,* 431 U.S. 265 (1977) (Virginia preempted from excluding non-resident, federal licensees from fishing the Chesapeake Bay); and others not, *see e.g., Ray,* 435 U.S. at 179-80 (upholding state regulation because it did not impede "the free and efficient flow of interstate and foreign commerce, for the cost [to comply] is less than one-percent per barrel of oil and the amount of oil processed at Puget Sound refiners has not declined as a result . . . "), we have not found a statue, rule, or law that appears to preclude *any or all* local limitations on number of berths, frequency of visits, or types of calls. Rather, it appears that reasonable, balanced regulations of this type could be tailored to avoid preemption by federal law.

On the other hand, the courts have found that the regulation of the size and design of *tanker* ships has been preempted by federal law, *see Ray,* 435 U.S. at 163-64, indicating an increased risk that, in fact, size and design requirements related to cruise vessels similarly may be preempted, if the result is to completely exclude federally-licensed vessels from operating. However, reasonable restrictions on the size of vessels, *based on passenger capacity* and, therefore, demonstrated elevated, harmful impacts on the City, may be defensible. At the very least, a limitation on the capacity of cruise vessels should be limited in geographic scope, through zoning, so that any exclusion resulting from a maximum capacity threshold is limited to perhaps just the historic district, leaving open other reasonable alternatives for larger ships. A

final determination as to federal preemption would depend on the specific ordinance as drawn and a particular federal law alleged to preempt it.

Finally, Category II regulations are more likely than Category I's to *implicate* – though not necessarily *violate* – the Dormant Commerce Clause, simply because they would relate more directly to port and vessel operations. Nonetheless, as noted, the courts have upheld reasonably-drawn laws applied against maritime vessels or commerce. *Pacific Merchant Shipping Assn.*, 2011 WL 1108201 *22 (upholding California Vessel Fuel Rules because "compliance is not technically impossible or even especially difficult;" plaintiff "failed to show that the required fuel is unavailable or otherwise would adversely affect ship operations;" and "any increased cost, although estimated at approximately $30,000 per vessel call, would appear to be relatively small in comparison with the overall cost of a trans-Pacific voyage . . . as well as the increased costs eventually passed on to the ultimate customer . . .").

The *Wood Marine* case discussed previously is informative. In that case, local ordinances prohibited the loading and unloading of certain construction materials within the city, 858 F.2d at 1063, such that vessels engaged interstate commerce were required to find alternative sites for loading and unloading these materials. The court held that even the preclusion of this type of maritime activity did not amount to a burden on interstate commerce, because interstate vessels still could operate at alternative sites within the state of Louisiana. *Id.* at 1065. This case would support a reasonable limitation on the frequency, types, and capacity of cruise ships to a particular terminal (a much less onerous result than the complete *preclusion* in the *Wood Marine* case), particularly if alternative sites exist. *Id.* (noting that the Commerce Clause protects interstate markets, not particular firms). It is unknown to what extent those alternatives exist today.

In sum, while Category II regulations may implicate state and federal limitations more than Category I's, there does appear to be support for reasonable, balanced regulations on the frequency and type of cruise visits and the number of berths at a given location. As noted, however, direct limitations on the size or capacity of cruise ships are more likely to implicate federal limitations and therefore a more substantial foundation should be established showing the urgency of the local interests to be protected.

Though Category I and Category II powers are not unlimited, *any and all* action by local government does not appear to be precluded, even in areas that also are regulated by the state

or federal governments. *Casino Ventures*, 183 F. 3d at 310; see also, S.C. CODE ANN. § 54-3-410; *City of Charleston*, 420 S.E.2d at 499. As discussed, however, potential state and federal limitations on city authority are largely a question of "balance," or, to put it in legal terms, a question of "reasonableness." *See, e.g., Barnhill*, 511 S.E 2d at 364. The courts upholding local actions that have overlapped areas of state or federal jurisdiction, have done so because the local government acted *reasonably* within the context of countervailing state and federal interests. *See e.g., Granholm*, 544 U.S. at 489.

GUIDING PRINCIPLES

Several key principles have emerged that would guide the development of a City ordinance that would help maintain a balance between valid local concerns and any overlapping state or federal interests.

> **Verify the off-site land use impacts that an unrestricted cruise terminal would have on the City's residents, businesses, economy, historic and cultural resources, public facilities, and other quality of life factors.**

In short, the defensibility of any City regulations in this area will depend, to some degree, on whether a court views the regulations as traditional exercises of the police power and zoning laws, which permissibly "touch upon" state and federal areas of regulation, or the reverse. *See, e.g., Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 ("the courts start with the assumption that the historical *police powers* of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress").

This is important, because, under state law, municipal zoning regulations carry a presumption of validity and the City generally does not have the burden of proving the foundation or rationale for its legislative actions. *See, e.g., Bob Jones Univ., Inc. v. City of Greenville*, 133 S.E.2d 843, 847 (1963). This also is the case under some federal analyses, for example, if no burden on interstate commerce is found, for purposes of Commerce Clause review, the courts will defer to local government and will not second guess their rationale, so long as reasonably conceivable reasons exist. As the court put it in the *Wood Marine* case:

> The history of Harahan's zoning ordinance demonstrates that the Board of Aldermen reasonably concluded the curtailment of further commercial

> development of the batture would further the community's interest in maintaining the city's residential quality. Harahan was not required to outline the year of study and discussion that went into the ordinance for the court. The ordinance freezes private commercial development at its present stage, preserving the status quo and thus logically protecting Harahan's existing neighborhoods.

Wood Marine, 858 F.2d at 1066.

However, in other circumstances, that burden may shift to the local government, for example, where it is determined that a local regulation *does* burden interstate commerce, local government then has the burden of substantiating its legitimate purpose. *Wood Marine*, 858 F.2d at 1066 (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444-45, (1978)). Notably, in *Pike*, the court noted that "the extent of the burden [on interstate commerce] that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

Since it is unclear how a court would ultimately decide a case involving a City regulation of cruise activities, particularly those most related to waterside activities (i.e., Category II areas of regulation), by establishing a foundation for its regulatory action, the City will be better prepared to defend an ordinance against claims of state or federal preemption or Commerce Clause violations. In addition, a documented foundation to support regulation of cruise impacts would support its basis as a traditional zoning function within the scope of the historic police and zoning powers as well. *See e.g., Pacific Merchant Shipping Assn.*, 2011 WL 1108201 at * 10 (recognizing the presumption *against* preemption, in *favor of* state authority, where the state's regulation falls within traditional state police power functions). The might "substantiate" the legitimate purposes of regulations addressing port redevelopments or off-site cruise impacts by conducting impact studies, receiving expert opinions, evaluating the effects of cruise activities on other destination communities, or simply through evaluation of data measuring impacts that currently are occurring as a result of cruise activities.

For example, it might demonstrate the potential harmful impacts on the City of a completely unregulated cruise passenger terminal by showing the impacts on nearby historic neighborhoods and commercial districts when cruise ships are in port. Or, perhaps, it might

show the long-term impacts on historic communities where the level of cruise passenger activity exceeds the ability of the community to absorb the resulting impacts. Certainly, Charleston's historic district is well-established and the community's economic reliance on its protection is another area that may be threatened by an excessive level of cruise activity.

While the off-site impacts related to the anticipated terminal redevelopment or potential cruise impacts may be apparent to the community today, they may not be to a reviewing court in the future. Therefore, the City should take necessary steps to establish that the scope, intent, and effect of any regulations are directed to off-site land use impacts associated with the cruise terminal and not, for example, and inaccurately, an attempt to regulate commerce directly or to limit or prohibit *all* Ports Authority or ship operations. This preliminary foundation is particularly important with respect to direct restrictions on cruise ship activities, including frequency of visits, numbers of berths, types of calls, or ship capacity, for example (areas designated as Category II, above), since these areas are most likely to implicate state and federal laws.

Take into account the operational needs of the Ports Authority under its statutory directives and the ability of federally-licensed vessels and operators to "ply their trade."

This balancing principle would help the City defend against state and federal preemption and Commerce Clause claims. *See, e.g., Huron Portland Cement*, 362 U.S. at 448 (upholding a smoke abatement ordinance as applied to federally-licensed vessels because, among other things, it required "no more than compliance with an orderly and reasonable scheme of community regulation [and did] not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage"). If, for example, the City were to consider a mandatory limit on the frequency or timing of cruise ship visits – whether annually, monthly, weekly, or daily – it should evaluate the impact of those restrictions on the ability of the Ports Authority to operate under it statutory directives. *See e.g., Town of Hilton Head*, 415 S.E. 2d 801 (overturning local ordinance that would have "set aside" a power specifically conferred upon a state agency). In addition, impacts – or "burdens" – on interstate commerce should be evaluated, so that the result of a City regulation is not to exclude completely a federally-licensed vessel from operating in state waters. *See, e.g., Waste Management Holdings, Inc.* 252 F.3d at 316 (invalidating state law that completely excluded federally licensed

barges from transporting any type or amount of solid waste in three Virginia rivers). As noted, above, we have not been privy to any contracts, binding obligations, or financial documents related to the Ports Authority, or any cruise operators, which may offer insight into operational constraints that would limit local laws.

Despite the potential limitations on local powers, as discussed, the courts have upheld reasonable zoning standards that, for example, incidentally impact on interstate commerce. *See, e.g., Huron Portland Cement*, 362 U.S. 440 (holding Detroit's smoke abatement ordinance did not violate Commerce Clause because (1) ordinance was non-discriminatory, and (2) the local interest in promoting health outweighed the relatively slight burden on commerce). It simply will be important that the impact on port and cruise operators be balanced against the city's legitimate interests, for example, by limiting the applicability of the most restrictive regulations to given areas of the City or the Port of Charleston. For example, were the City to establish limits on the passenger capacity of cruise ships docking at Union Pier, those limits should take into account whether alternatives exist that would allow larger vessels to operate, for example, by docking at alternative locations. Or, for another example, an *annual* limitation on the frequency of visits may have a different impact on port operations and commerce, than would a *weekly* limit.

> **Any regulations should be directed at off-site impacts on the city, made generally-applicable to all cruise operators, and consistent with the City's historic comprehensive zoning and regulatory scheme.**

The courts have, of course, upheld local restrictions directly restricting maritime activities and commerce despite significant federal oversight in the area. *See, e.g., UFO Chuting of Hawaii, Inc.*, 508 F.3d 1189. Indeed, it is the cruise ship that ultimately creates most off-site impacts, by docking at waterfront properties, and, presumably, the more times it visits, for example, the greater those impacts are expected to be. Nonetheless, demonstrating the nexus between waterside activities and the resulting off-site impacts on land and the City, will support City action.

Finally, any City regulation of off-site cruise impacts should be consistent with the City's existing zoning and regulatory schemes; treating cruise impacts and impacts created by similar land uses similarly. *See, e.g., Huron Portland Cement*, 362 U.S. 440 (upholding a smoke abatement ordinance, because among other things, it required "no more than compliance with

an orderly and reasonable scheme of community regulation ..."). For example, other visitor-driven activities in the City create impacts on the City's transportation, historic, residential, and other resources and interests. Since those impacts traditionally have been closely regulated by the City, there is a history of applying reasonable standards upon land uses having potentially detrimental impacts on the City's quality of life and resources. Any regulations applied to mitigate off-site cruise impacts should be an extension of that existing, generally-applicable framework. *See, e.g., Wrenn Bail Bond*, 515 S.E.2d 521, 522 (upholding Hanahan's business license ordinance against a preemption claim because it applied generally to all businesses, not just bail bondsmen, which licensing was expressly preempted by statute).

LAND DEVELOPMENT AGREEMENTS

In addition to the regulatory powers available to the City, the City and the Ports Authority may enter an interlocal agreement governing the proposed redevelopment of Union Pier, including "development agreements," expressly provided for by state statute. Development agreements are voluntary, bilateral contracts between a property owner and the local government, addressing matters related to the development of land, the provision of public facilities, the mitigation of off-site impacts, and the period during which subsequently-adopted regulations could *not* be applied by the local government against a development subject to a development agreement. Development agreements are governed procedurally and substantively by the South Carolina Local Government Development Agreement Act. S.C. CODE ANN. § 6-31-10 *et seq*. Properties subject to development agreements under the statute must contain at least twenty-five (25) acres of highlands. *Id*. § 6-31-40. The appeal of a development agreement is the flexibility developers and communities enjoy in crafting project-specific "rules of the game" and, once executed, the certainty against most subsequently-adopted regulations and other challenges.

Section 23-20 of the Charleston City Code provides expressly for this approach and, specifically anticipates that the parties to a land development agreement may include another governmental entity. *See* CHARLESTON, S.C., CODE § 23-20(b)(1). Furthermore, under the Ports Authority's Enabling statutes, it is authorized to take reasonable steps to "diminish or mitigate any negative effect port operations or expansion may have upon the environment, transportation infrastructure, and quality of life of residents in communities located near existing or proposed port facilities." S.C. CODE ANN. § 54-3-80.

The benefits of entering into an agreement include:

- tailoring all agreed-to restrictions to the particular needs of the cruise terminal and, similarly, to limit their application to only those aspects of port development and operations that create off-site impacts of concern (*e.g.* cruise operations versus cargo).
- agreements as to which existing and future regulations of the City apply to the terminal, which would address the uncertainty related to the applicability of current regulations, as discussed in Part I.
- the ability of the City and the Ports Authority to negotiate terms acceptable to this likely unique circumstance, based on the interests of each entity.
- for the Ports Authority, the ability to proceed against the background of stable, predictable terms.
- periodic review of the terms of the agreement, so that the City and the Ports Authority could amend terms if changes or circumstances warrant, based on specified criteria in the agreement.
- the opportunity to address commitments regarding the second phase of the Union redevelopment.

While perhaps viewed as not as "binding" as a zoning ordinance, development agreements require review by the Planning Commission and adoption by ordinance of the City Council, for both their original adoption and any subsequent amendment.

CONCLUSION

Though a final determination by the City would have to be made after final development plans are submitted, it appears today that the proposed development of the northern portion of Union Pier as a cruise passenger terminal would be allowed by-right, and would not be subject to conditional use or special exception review by the Board of Zoning Appeals. Although, other generally-applicable City regulations would apply and, it appears, review by the Planning Commission to evaluate the terminal's consistency with the City's Comprehensive Plan would be required as well. Also, there are no current regulations limiting