



Republika ng Pilipinas
KAGAWARAN NG KATARUNGAN
Department of Justice
Manila

ELC-L-7C16-_____

7 March 2016

Hon. Jose Luis M. Alano
Executive Director
National Coast Watch Council Secretariat

Dear Hon. Alano:

This refers to your request for opinion on the validity of Provincial Ordinance 28 (PO28), series of 2015, entitled "An Ordinance for the Provincial Coast Watch Surveillance and Environment Monitoring System in the Province of Zambales." Specifically, you wish to know:

1. Whether or not the Provincial Government of Zambales has the authority and mandate under existing laws to establish a maritime surveillance system independently from and without due regard to the mandates and functions of national agencies;
2. Whether or not a local government unit can validly exercise the State's authority under pertinent provisions of Section 3 of Part II of the UN Convention on the Law of the Sea pertaining to innocent passage by foreign ships in the Territorial Sea of the Philippines; and
3. Whether or not the fees and charges collected pursuant to PO28 (the "Additional Fees") are a form of levy or tax not falling within the limitations under Section 133(e) of the Local Government Code, or if the same are circumscribed by Memorandum Circular No. 2011-151 of the Department of Interior and Local Government (DILG).

BACKGROUND

The Province of Zambales (the Province) adopted PO28 to "upgrade the monitoring capacity and facilities of the Province over its territorial waters to international standards for national and local security, prevention of maritime crime and transportation of illegal substances, the improvement of port operations, and the maintenance and improvement of the maritime air environment of the Province."¹ In summary, PO28 provides for:

¹ PO28, Sec. 2.

1. The implementation of a coast watch² surveillance and monitoring system in all ports and provincial waters³ of the Province.⁴
2. The acquisition of said coast watch surveillance and monitoring system from Xanatos Marine Ltd. (Xanatos), a private Canadian company, which offered it at no cost and capital to the Province.⁵ By virtue of a Memorandum of Agreement (MOA) signed by the Province and Xanatos on 13 April 2015, Xanatos was commissioned to:
 - a. Establish all the monitoring sites in different strategic parts of the province;
 - b. Ensure the efficient operation and maintenance of the system;
 - c. Prepare a daily monitoring report for the Governor or his official representative;
 - d. Ensure confidentiality of all reports, data, and monitoring documentation;
 - e. Prepare monthly billings for all shipping agents covered by this project;
 - f. Maintain close coordination with the Office of the Governor as to documentation and operation; and
 - g. Establish, appoint and empower its local representative, Xanatos Philippines Corporation, for the sole purpose of maintaining proper coordination between the parties, particularly on matters pertaining to billing and accepting payments.⁶
3. The imposition of the Additional Fees (which result from the use of the coast watch system) on top of the usual and standard shipping fees prescribed by law.⁷
 - a. The Additional Fees are covered by Recommendation V-102 on "The application of 'User Pays' principle to Vessel Traffic Services" of the International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA Recommendation).
 - b. The Additional Fees will be collected by the Province through Xanatos.
 - c. The net profit, after deducting expenses, fees and taxes, will be divided between the Province and Xanatos, in accordance with the MOA.⁸

² Sec. 4(1) of PO28 defines "coast watch" as the "monitoring of territorial waters by the use of state-of-the-art equipment for the real time observation of sea traffic, events, activities and operations of these waters."

³ Sec. 4(5) of PO28 defines "provincial waters" as "a belt of coastal waters extending from 15km to 100km from the baseline (usually the mean low-water mark) of a coastal state."

⁴ PO28, Sec. 3.

⁵ PO28, Sec.5.

⁶ PO28, Sec. 7.

⁷ PO28, Sec. 8.

⁸ PO28, Sec. 10.

SUMMARY

Based on the documents submitted to this Department, we opine that PO28 is invalid and legally infirm as it violates the 1987 Constitution, Republic Act (RA) No. 7160 (the Local Government Code),⁹ RA No. 9993 (Philippine Coast Guard Law of 2009),¹⁰ Presidential Decree No. 857,¹¹ as amended by Executive Order (EO) No. 513, s. 1978¹² and EO No. 159, s. 1987 (Providing for the Creation/Reorganization of the Philippine Ports Authority),¹³ and EO No. 57, s. 2011 (Establishing a National Coast Watch System).

We directly respond to your queries and further opine that: **First**, PO28 usurps powers and functions that have already been allocated to the Philippine Coast Guard (PCG), the Philippine Ports Authority (PPA), and the National Coast Watch Council (NCWC) under the various laws and issuances that created them. The Province is thus neither authorized nor mandated to exercise such powers. **Second**, the Province improperly exercised the State's authority under Section III, Part II of the UNCLOS, given that PO28 violates Article 26 (Charges which may be levied on foreign ships) of the same. **Finally**, PO28 does not fall within the limitations set by Section 133(e) of RA No. 7160 and DILG Memorandum Circular No. 2011-151 because the Additional Fees imposed by PO28 relate to vessels passing through provincial waters and not on the goods or merchandise carried by such vessels, as contemplated by these issuances.

DISCUSSION

At the outset, we note that the provisions of PO28 indicate that it is a provincial ordinance that imposes a fee¹⁴ or charge¹⁵ for both revenue and regulatory purposes. As such, it must comply with the procedural requirements of hearing,¹⁶ posting¹⁷ and

⁹ An Act Providing for a Local Government Code of 1991.

¹⁰ An Act Establishing the Philippine Coast Guard as an armed and uniformed service attached to the Department of Transportation and Communications, thereby repealing Republic Act No. 5173, as amended, and for other purposes.

¹¹ Providing for the reorganization of port administrative and operation functions in the Philippines, revising Presidential Decree No. 505 dated 11 July 1974, creating the Philippine Port Authority (PPA), by substitution and for other purposes.

¹² Reorganizing the PPA.

¹³ Reverting to the PPA its corporate autonomy, ensuring the rapid development of ports or the port system directly under it, and authorizing it to execute port projects under its port program.

¹⁴ Sec. 131(l) of RA no. 7160 defines "fees" as a charge fixed by law or ordinance for the regulation or inspection of a business activity.

¹⁵ Sec. 131(g) of RA No. 7160 refers to "charges" as pecuniary liability, as rents or fees against persons or property.

¹⁶ Sec. 187, RA No. 7160.

¹⁷ Sec. 59, RA No. 7160.

publication.¹⁸ No less than the Supreme Court has acknowledged and upheld these requirements.¹⁹

Since provinces are generally allowed to issue such type of ordinance under the 1987 Constitution²⁰ and RA No. 7160,²¹ it is presumed to be valid,²² unless it can be shown that it fails to meet the substantive and formal requirements for validity established by the Supreme Court.²³

In this regard, it appears that PO28 is invalid and legally infirm in that it violates the Constitution and existing laws and regulations.

1. PO28 contradicts Section 2, Article II of the Constitution (the Incorporation Clause)²⁴ insofar as it violates Article 26, Section 3, Part II of the UNCLOS

Under the doctrine of incorporation, the Philippines is bound by generally accepted principles of international law, which are automatically considered as part of our own laws.²⁵ One such principle is *pacta sunt servanda* – that international agreements must be performed in good faith as they create legally binding obligations on parties.

When the Philippines ratified the UNCLOS in 1984, it agreed to be bound by its provisions, including Article 26, Section 3, Part II which states:

"Art. 26. Charges which may be levied upon foreign ships.

(1) No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

¹⁸ Sec. 188, RA No. 7160.

¹⁹ See, for example, *Ferrer v. City Mayor Bautista* (G.R. No. 210551, 30 June 2015); *Figuerras v. Court of Appeals* (G.R. No. 119172, 25 March 1999); and *Reyes et al. v. Court of Appeals* (G.R. No. 118233, 10 December 1999).

²⁰ Sec. 5, Art. X, 1987 Constitution; It provides that "Each local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local governments."

²¹ Sec. 132 and Sec. 186, RA No. 7160.

²² *Ferrer v. City Mayor Bautista et al.*, G.R. No. 210551 (30 June 2015).

²³ In *Legaspi v. City of Cebu* (G.R. No. 159110, 10 December 2013), the Supreme Court said that for an ordinance to be valid, it must not only be within the corporate powers of the local government unit to enact and must be passed according to the procedure prescribed by law, it must also conform to the following substantive requirements: (1) must not contravene the Constitution or any statute, (2) must not be unfair or oppressive, (3) must not be partial or discriminatory, (4) must not prohibit but may regulate trade, (5) must be general and consistent with public policy, and (6) must not be unreasonable.

²⁴ Sec. 2, Art. II of the 1987 Constitution provides: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

²⁵ *Tanada v. Angara*, G.R. No. 118295 (2 May 1997).

- (2) Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination."
(Emphasis supplied.)

PO28 is a clear contravention of Article 26 because it imposes fees and charges on foreign ships passing through the territorial waters of Zambales even though no specific services have been rendered to the ship. PO28 only establishes a coast watch surveillance and monitoring system for the general benefit of the Province.

2. PO28 contradicts Section 5, Article X of the Constitution, in relation to Section 129 and Section 130(d) of RA No. 7160

PO28 stipulates that the net profit generated from the fees and charges imposed on ships passing through provincial waters will be divided between the Province and Xanatos. This contradicts the mandatory directive in the Constitution²⁶ and RA No. 7160²⁷ that all fees and charges shall accrue exclusively to the local government imposing the same.

3. PO28 violates Section 130(c), in relation to Section 170, of RA No. 7160.

Section 130(c) of RA NO. 7160 requires that "the collection of local taxes, fees, charges and other impositions shall in no case be left to any private person." PO28, which delegates the billing and collection of the Additional Fees to a private Canadian firm (Xanatos), clearly violates this legal provision. By law, such duty belongs to the local treasurer or the latter's duly authorized deputies.²⁸

4. PO28 usurps powers and functions that have already been allocated to the Philippine Coast Guard (PCG), the Philippine Ports Authority (PPA), and the National Coast Watch Council (NCWC) under various laws and issuances that created them

PO28 is also defective in that it contravenes RA No. 9993 (Philippine Coast Guard Law of 2009),²⁹ Presidential Decree No. 857,³⁰ as amended by Executive Order

²⁶ Sec. 5, Art. X, 1987 Constitution.

²⁷ Sec. 129 provides that: "Each local government unit shall exercise its power to create its own sources of revenue and to levy taxes, fees, and charges subject to the provisions herein, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local government units."

²⁸ Sec. 170 of the RA No. 7160.

²⁹ An Act Establishing the Philippine Coast Guard as an armed and uniformed service attached to the Department of Transportation and Communications, thereby repealing Republic Act No. 5173, as amended, and for other purposes.

(EO) No. 513, s. 1978³¹ and EO No. 159, s. 1987 (Providing for the Creation/Reorganization of the Philippine Ports Authority),³² and EO No. 57, s. 2011 (Establishing a National Coast Watch System),³³ insofar as it permits the Province (through the Sangguniang Panlungsod) to usurp or prevent the exercise of powers exclusively vested in the PCG, PPA and NCWC, respectively, viz:

- a. PCG's power to "coordinate, develop, establish, maintain and operate aids to navigation, vessel traffic system, maritime communications and search and rescue facilities within the maritime jurisdiction of the Philippines."³⁴
- b. PPA's power to "prescribe rules and regulations, procedures and guidelines governing the establishment, construction, maintenance, and operation of all other ports, including private ports in the country,"³⁵ in relation to fulfilling the country's obligations under the International Convention on the Safety of Life at Sea (SOLAS), the International Regulations for Preventing Collisions at Sea (COLREGS), and the International Ship and Port Facility Code (ISPS Code).
- c. NCWC's power to "provide strategic direction and policy guidelines for NCWS maritime security operations, and multinational and cross-border cooperation on maritime security; harmonize and coordinate the roles and relationships of different government agencies, pursuant to their mandates, relative to the policy direction of maritime security and governance framework as may be determined by the Council; and exercise overall jurisdiction and direction over policy formulation, implementation and coordination with other government agencies, experts and organizations, both foreign and local, on all maritime issues affecting the country."³⁶

The Province usurped/prevented the exercise of the aforementioned powers when, without prior consultation or coordination, it entered into a MOA with Xanatos to implement a surveillance and monitoring system in its provincial

³⁰ Providing for the reorganization of port administrative and operation functions in the Philippines, revising Presidential Decree No. 505 dated 11 July 1974, creating the Philippine Port Authority, by substitution and for other purposes.

³¹ Reorganizing the Philippine Ports Authority.

³² Reverting to the Philippine Ports Authority its corporate autonomy, ensuring the rapid development of ports or the port system directly under it, and authorizing it to execute port projects under its port program.

³³ Establishing a National Coast Watch System, providing for its structure and defining the roles and responsibilities of member agencies in providing coordinated inter-agency maritime security operations and for other purposes.

³⁴ Sec. 3(f), RA No. 9993.

³⁵ Sec. 6(a)(iii), PD No. 857.

³⁶ Sec. 3(a),(e),(g), EO No. 57.

waters, impose fees and charges in relation thereto, and establish penalties in case of non-payment.

The list of constitutional and statutory contraventions listed above indicates that PO28 is legally infirm, especially in light of the following pronouncements of the Supreme Court in *Batangas CATV v. Court of Appeals*³⁷ –

"It is a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state. **An ordinance in conflict with a state law of general character and statewide application is universally held to be invalid.** The principle is frequently expressed in the declaration that municipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law or repugnant to the general policy of the state. **In every power to pass ordinances given to a municipality, there is an implied restriction that the ordinances shall be consistent with the general law.**"³⁸ (*Emphasis supplied.*)

The underlying reason for this view is that LGUs merely form part of the whole; that the policy of ensuring the autonomy of local governments was never intended by the drafters of the 1987 Constitution to create an *imperium in imperio* and install an intra-sovereign political subdivision independent of a single sovereign state.³⁹

Notwithstanding the foregoing, we note that PO28 does not violate Section 133(e) of RA No. 7160, inasmuch as this provision only refers to a prohibition against "taxes, fees, and charges and other impositions upon goods carried into or out of, or passing through, the territorial jurisdictions of local government units in the guise of charges for wharfage, tolls for bridges or otherwise, or other taxes, fees, or charges in any form whatsoever upon such goods or merchandise."⁴⁰ Stated differently, Section 133(e) is inapplicable here, considering that PO28 imposes fees and charges on *vessels* passing through provincial waters, and not on the goods or merchandise being carried by such vessels.⁴¹

PO28 is also not covered by DILG Memorandum Circular No. 2011-151,⁴² which enjoins local chief executives "to refrain from enforcing any existing ordinance authorizing the levy of fees and taxes on inter-province transport of goods, regulatory fees from passengers in local ports, and other additional taxes, fees or charges in any form upon

³⁷ G.R. No. 138810 (29 September 2004).

³⁸ *Supra*.

³⁹ *Supra* at note 22.

⁴⁰ Sec. 133(e), RA No. 7160.

⁴¹ The Supreme Court made a similar clarification in the case of *Palma Development Corporation v. Municipality of Malangas* (G.R. No. 152492, 16 October 2003).

⁴² Suspension of LGU Imposition and Collection of Fees and Taxes (12 October 2011).

transporting goods and passengers" and to "cause the immediate repeal of the ordinance imposing the above cited fees and taxes."⁴³ Said Memorandum Circular does not contemplate a prohibition on the imposition of taxes, fees or charges on vessels in relation to the implementation of a coast watch surveillance and monitoring system.

We trust that this is useful.



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⁴³ *Supra.*