

March 24, 1986

 GGM

DIGEST

RELEASED

An addition to the Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, is to be constructed by a contractor selected by the Federal Aviation Administration (FAA) of the Department of Commerce, pursuant to 49 U.S.C. App. § 1348(b). Under the State of Minnesota Building Code, the City of Farmington has enforcement duty for state building standards, including building permit issuance and inspection, for new construction within the City. It also collects a building permit fee. Under the Property Clause (Article IV, § 3, cl. 2) and the Supremacy Clause (Article VI, cl. 2) of the U.S. Constitution, neither the FAA nor the contractor is required to obtain a building permit, pay the fee for its issuance, or otherwise comply with state regulation of the construction in view of the overriding authority granted under the Federal statute. See cases cited.



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D.C. 20548

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RELEASED

B-199838

March 24, 1986

The Honorable Bill Frenzel  
Member, United States  
House of Representatives  
8120 Penn Avenue South  
Room 445  
Bloomington, Minnesota 55431

Dear Mr. Frenzel:

In your letter of June 6, 1985, you refer to the planned construction of an addition to the control wing of the Minneapolis Air Route Traffic Control Center (ARTCC), located at Farmington, Minnesota. You indicate that the City of Farmington is in doubt as to whether the Federal Aviation Administration (FAA), Department of Commerce, is responsible for payment of the City's building permit fee for the construction project.

Previously, the City had submitted a claim for payment by FAA of a building permit fee incident to the expansion of the Center in 1972. In decision B-199838, October 20, 1981, we held that the claim was barred because it was not received in our Office within 6 years after it first accrued. The decision did not address the question of the Federal Government's liability for the building permit fee.

In view of the foregoing, you ask the following questions:

- "1) Must the FAA secure a building permit from the City of Farmington, or is that the sole responsibility of the contractor?;
- "2) What, if any, responsibility does the FAA have in the payment of the building permit fee in the event that the contractor does not secure a permit?;
- "3) Can the FAA begin construction without first securing a building permit from the City of Farmington?;

- "4) If the City of Farmington cannot secure payment for the building permit from the FAA, nor the contractor, does the City have the power to issue a stop order on construction? (The City is concerned that a federal agency may not have to adhere to a state regulation)."

In our opinion, for the reasons stated below, neither the FAA nor its contractor is required to obtain a building permit from the City of Farmington, Minnesota for the addition to the Minneapolis ARTCC.

#### BACKGROUND

The land upon which the Minneapolis ARTCC stands was acquired for this purpose by the Federal Government with full title under its power of eminent domain and the owners were paid for the property, under a 1961 order of the United States District Court, District of Minnesota.

On April 15, 1985, the Great Lakes Region of FAA issued a solicitation for offers to construct an addition to the ARTCC building in accordance with FAA building specifications. The addition is essentially an expansion of an existing control room which is located in a restricted, secure area and is not accessible to the public. The solicitation provided that, "The contractor shall be responsible for obtaining all permits from state, county, or local authorities before starting the job." It also incorporated by reference section 52.236-7 Federal Acquisition Regulation, which is applicable to fixed price construction contracts and provides:

"The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work." (Emphasis added.)

Section 1348(b), Title 49, Appendix, U.S. Code (1982), provides that--

"The Secretary of Transportation is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities \* \* \* and (4) to provide necessary facilities and personnel

for the regulation and protection of air traffic. \* \* \*

FAA is the cognizant agency within the Department of Transportation for these purposes.

The State of Minnesota Building Code -

"\* \* \* governs the construction, reconstruction, alteration, and repair of state-owned buildings and other structures to which the code is applicable." [The Code is to] "\* \* \* provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort, and security of the residents of this state and provide for the use of modern methods, devices, materials, and techniques which will in part tend to lower construction costs." M.S.A. § 16B.59.

"The state building code applies statewide and supersedes the building code of any municipality. \* \* \* All municipalities shall adopt and enforce the state building code with respect to new construction within their respective jurisdictions. \* \* \*"

"Municipalities may provide for the issuance of permits, inspections, and enforcement within their jurisdictions \* \* \*." M.S.A. § 16B.62.

To defray the costs of administering the State Building Code, a surcharge is imposed on all permits issued by municipalities for construction covered by the Code. M.S.A. § 16B.70.

ANALYSIS

Absent consent or cession, a state retains jurisdiction over Federal lands or property within its territory until (or unless) the Congress enacts legislation specifically dealing with such lands or property under the Property Clause of the U.S. Constitution. Kleppe v. New Mexico 426 U.S. 529, reh. den. 429 U.S. 873 (1976). (The Property Clause provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Article IV, § 3, cl. 2). When there is such Federal legislation, however,

it overrides conflicting state laws, pursuant to the Supremacy Clause of the U.S. Constitution (Article VI, cl. 2\* \* \*).  
Id. at 543.

The Minneapolis ARTCC stands on land owned by the United States upon which there are no specific reservations or requirements imposed by the prior owners or by the State of Minnesota. Since the land is located in Minnesota, it is subject to the state's laws except when they conflict with or are preempted by Federal law.

Under 49 U.S.C. app. § 1348(b),<sup>X</sup> the FAA is empowered to establish, operate, maintain, and improve air-navigation facilities, whenever necessary. Incident to this authority, the agency engaged a contractor to build an addition to the Minneapolis Air Route Traffic Control Center. In doing so, FAA determined the nature of the addition, and the contractual requirements to carry them out. The FAA's contracting officer, through its resident engineering staff, supervised the construction of the addition. At the same time, the Minnesota State Building Code requires that municipalities adopt and enforce the State Building Code for new construction for "structures to which the code is applicable," within their respective jurisdictions. The Code requires building permits and inspections to determine compliance with state building standards.

In United States v. Town of Windsor, Connecticut,<sup>X</sup> 765 F.2d 16, (2d Cir. 1985) the Town of Windsor was enjoined from enforcing the permit and fee provisions of the Connecticut Basic Building Code with respect to construction by a private contractor at the Department of Energy's Knolls Atomic Power Laboratory. The land, over which the Federal Government did not have exclusive jurisdiction, was the site of expansion of the facility undertaken under DOE's general construction authority.

The Court of Appeals said that application of the Supremacy Clause requires that the local interest in applying the building code to the private contractor who is constructing a Government facility must be weighed against the Federal Government's need to be free from local constraints. That project was classified and the FAA facility in question was closed to the public. The Court found that enforcement of the permit requirement against the contractor would have the same effect as directly enforcing a provision of the building code against the Government. It also found a strong Government interest against and a relatively weak Town interest for the enforcement of the permit requirement for the contractor. Finally, since the purpose of the permit fee, "at least,

theoretically, is to defray the cost of enforcing the substance of the Code", the Court held that the Town could not collect the fee from the contractor.

Applying the above discussed principles, we think that enforcement of the Minnesota State Building Code against the FAA would constitute an attempt to regulate the Federal Government's activities without its consent. Application of the State Building Code requirement to obtain and pay for a building permit to the private contractor building an addition to the Minneapolis ARTCC amounts to direct enforcement of State building code standards against the U.S. Government. For example, a stop work order directed to the contractor would halt completion of the project as surely as if the order were served on the FAA.

As the U.S. Court of Appeals, Second Circuit, indicated in Town of Windsor, <sup>supra</sup>, determining whether the Code is applicable to a private contractor in such circumstances depends on a balancing of the relative interests of the Government and the municipality. In that case, the Court stated:

"These buildings are not like a V.A. hospital or public housing project which members of the public would be expected to use. If they were, the Town's interest in protecting the public by enforcing public safety rules would at least be understandable. However, these buildings are part of a classified project which is closed to the public. \* \* \*" (P.19)

The addition to the control wing at the Minneapolis Air Route Traffic Control Center is to house a new computer system which will help to improve the safety of air traffic. While not specifically a "classified" project, as in the Windsor case, the expanded control room at the ARTCC will be restricted, secured area which, as in Windsor, would not be accessible to the general public and does not raise a state or local interest in enforcement of safety rules.

The strong interest of the Federal Government in swiftly completing a vital air traffic control project must be measured against the Town of Farmington's inspection of a facility not designed for public use. In this case, it is our view that the contractor is not required to comply with the Minnesota Building Code which is not applicable to the structure to be constructed. Consequently, the fee for issuance of a building permit may not be properly collected from the contractor.

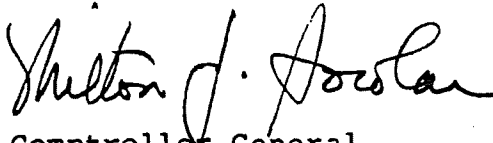
## CONCLUSIONS

For the reasons discussed above, the answers to your numbered questions are as follows:

1. Neither the FAA nor its contractor can be legally required to obtain a building permit from the City of Farmington.
2. It follows that the FAA is not responsible for paying for the permit fee whether or not the contractor were to obtain a building permit. (Even if it were to be found appropriate in a subsequent court decision to collect a building permit fee, under the fixed price construction contract between FAA and the contractor, the latter is solely responsible for the payment of any necessary permit and inspection fees.)
3. Since the FAA cannot legally be required to obtain a building permit from the City of Farmington, it may begin construction without first securing such a permit.
4. In view of the Constitution's Supremacy Clause, the City of Farmington's issuance of a stop order for the construction at the Minneapolis ARTCC would amount to interference with the Secretary of Transportation's statutory authority under 49 U.S.C. app. § 1348(b) to establish and maintain such air-navigation facilities as he finds necessary. A stop order would therefore be legally ineffective.

Unless you notify us otherwise, this opinion will be available for distribution after 30 days.

Sincerely yours,

*for*   
Comptroller General  
of the United States

STATES

Federal-state conflicts

License, permits, etc. fees