SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

INFORMATION NOTE No. 19/2014

THE TC DOES NOT ALLOW AUTONOMOUS COMMUNITIES TO AUTHORISE HOTEL CONSTRUCTION ON LAND DECLARED TO BELONG TO THE PUBLIC DOMAIN

The Spanish Constitutional Court (TC) has partly upheld the appeal lodged by the Government against Andalusian Parliament Act 21/2007, of 18 December, on the Legal and Economic Regime of Andalusian Ports. The Plenary Meeting declared the unconstitutionality of Articles 4.b) and 16.3, which empower the Government Council of said Autonomous Community to authorise the construction of hotels on land declared to belong to the "*public coastal domain"*, which is State-owned. However, the TC endorses the constitutionality of Articles 16.2 and 20.3 provided that their interpretation follows the Court's ruling. The judgment, where Pedro González-Trevijano acted as Reporting Judge, was approved by the majority of the Plenary Meeting. Judge Luis Ignacio Ortega included his particular dissenting vote.

The judgment establishes that, according to the Coast Act, regional ports serve a double purpose given their location on State-owned land declared to belong to the public domain. Therefore, although Autonomous Communities are competent in matters related to port services, the exercise of this competence must comply with the Coast Act. Said Coast Act regulates the competences that the State must undertake in order to ensure "*the preservation of the physical and legal integrity of the land/coast public domain*".

From this standpoint, the judgment declares the unconstitutionality of Articles 4.b) and 16.3 of the questioned rule, which they grant the Government Council of the Regional Government of Andalusia the power to authorise "(…) *any occupation and use of public land located on the coast which, as an exception, may be intended for hotel use".* Both articles are unconstitutional because they contradict the Coast Act, which is part of "*basic state legislation*".

Article 32 of the Coast Act states that "*the occupation of public coastal areas must only be allowed for any activities or facilities which, due to their nature, cannot be located elsewhere".* It expressly excludes any hotel activity, to which Article 25 of the Act refers. Said Article 25 prohibits "*buildings for residential use or accommodation"* in the "*protected easement (100 metres inland from the innermost limit of the coast)"*. The same article empowers the Council of Ministers, "*exceptionally and for duly accredited public utility reasons"*, to authorise the construction on that land of hotels, as well as industrial facilities, if their location on the coast is appropriate for *"justified economic reasons"*.

According to TC doctrine, *"limits on this use"*–including the prohibition to construct buildings for residential use or accommodation- *"which Article 25 of the Coast Act includes within the public coastal domain and its protection easement, are intended to preserve the natural value and landscape of this public coastal domain, which is why these limits*

constitute basic rules enacted further to Articles 149.1.1 and 23 of the Spanish Constitution (CE)". The same must apply to the "*exceptional authorisation granted to the Council of Ministers"*. Therefore *"as a result, any hotel use, i.e. residency or accommodation, is prohibited in the public coastal domain pertaining to Autonomous Communities and its protection easement, without prejudice to any special authorization exclusively entrusted to the Council of Ministers".*

The TC has denied, as alleged by the regional representatives, that the foregoing provisions "*merely replaced"* the Council of Ministers with the Government Council of the Regional Government of Andalucía. "*Which in fact is happening*", says the judgment "*Is that the State is disregarded with respect to a set of competences which, as stated, are of an exclusive nature, by virtue of the basic provisions established in Article 140.1.23 CE".*

The Plenary Meeting also decides that the judgment cannot interpret these provisions, thereby avoiding an unconstitutionality declaration and their subsequent nullity, as "*the contradiction [between the regional rule and the Coast Act] is obvious" .*Moreover, both articles "*generally"* efer to port areas pertaining to the public domain "*with no exception whatsoever allowing an interpretation that the regional authorisation for hotel use is limited to port areas where it may be acceptable given their nature as adjacent land that does not constitute public coastal domain and is not encumbered with a protection easement".*

The Judge Luis Ignacio Ortega focuses his particular dissenting vote on this last point, stating that the existing contradiction between the challenged rule and the Coast Act could have been solved "*interpretatively"* given the fact that there are "*other assets in said port area of the public domain"* where state competence would not be infringed.

The Plenary Meeting dismisses the appeal regarding Articles 16.2 and 20.3 of the challenged Act. The judgment explains that both precepts "*merely allow the performance, within the port area of the public domain, of use compatible with port activity"* (cultural, sports, educational, recreational, fairs, shows and other commercial non-port activities that encourage an economic and social equilibrium in ports) "*provided that they are included in the relevant Plan for Use of Port Areas or, if incompatible with ordinary port activity, last no longer than three months".* As a consequence, the provisions comply with the Coast Act insofar as it is clear that the "*compatible use referred to in any case excludes residential use or accommodation, which are hereby explicitly declared unconstitutional".*

Madrid, 5 March 2014.