ALAN WILSON
ATTORNEY GENERAL

October 2, 2023

The Honorable G. Murrell Smith, Jr.
Speaker of the House
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

Dear Mr. Speaker:

You have asked for our opinion regarding the proper interpretation by the Department of Revenue ("DOR") of its own regulation (7-403). By way of background, you state the following:

> I was informed that the Department of Revenue was changing its interpretation concerning the manner of providing alcohol at private events. Since this new interpretation will likely negatively impact our tourism industry and cause confusion as potential legal liability to those who hosts private events in our state, I am asking for your assistance.
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> Currently a person or group that has a private event has to comply with S.C. Code Section 61-6-1420(B) and Regulation 7-403. Section 61-6-1620(B) provides that "[a]lcoholic liquors may be possessed or consumed in separate and private areas of an establishment ... where specific individuals have leased these areas for a function not open to the general public." In 2003, the Department of Revenue promulgated regulation 7-403 that provides, in pertinent part, that "[w]hen a separate and private area of an establishment is leased by a specific individual or individuals for a function not open to the general public pursuant to Section 61-6-1620(B), the host or sponsor of said function, or the designated agent or representative of said host or sponsor must purchase and deliver to the leased area any alcoholic beverages to be possessed and consumed therein ... " The Department of Revenue has recently informed interested parties that going forward only the host or sponsor may purchase and deliver the alcohol to the leased area.
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> My first question to you is whether the Department of Revenue's new interpretation is consistent with the current regulation. As you can read, Regulation 7-403 allows someone who is a representative of the host or sponsor of a private event to purchase and deliver any alcohol. It seems obvious that someone, like a caterer or bartending service, who is directed by a host or sponsor to pick up and deliver alcoholic

> beverages to a private event would be the representative of the host who directed that activity and thereby comply with the current regulation. Is the new interpretation that limits to the host or sponsor the sole ability to pick up and deliver alcohol deleting representative from the existing regulation without going through the statutory requirements necessary to promulgate a new regulation and achieve that result?
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> My second question is whether the current regulation as interpreted by the Department of Revenue is impermissible as it amends Section 61-6-1420(B) rather than fills in necessary details. The purpose of regulation is to fill in the details necessary to carry out the legislature's will as evidenced in the enacted statute. Here the underlying statute is a broad legislative statement permitting alcoholic beverages in private areas not open to the general public. The question is whether the new agency interpretation undermines the clear intent of the General Assembly in allowing private functions to serve alcohol):,y mandating difficult means of pick up and delivery.
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> As you are aware, a fundamental rule in ascertaining legislative intent is that the legislature would never intend an absurd result. Unfortunately, the Department of Revenue's new interpretation of requiring the actual host or sponsor to pick up and deliver alcoholic beverages turns the statutory goal of permitting alcohol at private events into an absurdity with very costly consequences. In order to obtain the legislature's goal, we would have to assume that the legislature passed a law that would require the father of a bride from Texas whose daughter is to be married in Charleston or a trade association in Virginia that is hosting a conference for its members in Greenville to rent trucks once they arrived in South Carolina to pick up any alcohol they desired for their private receptions. Clearly that could not have been intended nor has the statutory scheme ever operated that way.

Law/Analysis

In Op. S.C. Att'y Gen., 1998 WL 993676 (December 8, 1998), we enunciated the broad power of the State in the regulation of alcohol. There, we stated the following:

> [p]ursuant to the Twenty-First Amendment of the United States Constitution, the states possess almost absolute power to prohibit or regulate alcoholic beverages. Wide latitude as to choice of the means to accomplish such prohibition or regulation is accorded to the state and its regulatory agencies. Op. Atty. Gen., February 27, 1985, referencing Oklahoma v. Burris, 626 P.2d 1316, 1317-18, 20 ALR 4th 593, 596 (Okla. 1980). Pursuant to its broad constitutional power, the transfer of beer within the State of South Carolina is highly regulated by the General Assembly. Op. Atty. Gen., July 3, 1991. In South Carolina, the" ... intended policy of the state relative to beer and wine is that of regulation rather than prohibition." See State v. Langley, 236 S.C. 583, 11 S.E.2d 308 (1960), cited in Op. Atty. Gen., Op. No. 4272 (February 26, 1976). The General Assembly is thus concerned "with promoting the fair and efficient distributors of beer throughout the state . . . and in providing the regulation of that distribution . . ." Op. Atty. Gen., May 20, 1991.

. . . .

> As part of its regulatory scheme, the General Assembly has constructed so-called a "three tier" scheme of regulation, regulating beer at the brewer, wholesale and retail level.

Section 61-6-1620(B) provides that "[a]lcoholic liquors may be possessed or consumed in separate and private areas of an establishment whether or not the establishment includes premises which are licensed pursuant to Sections 61-6-1600 or 61-6-1610, where specific individuals have leased these areas for a function not open to the general public." Pursuant to § 61-2-80, the State through the [Department of Revenue] "is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors [and] is authorized to establish conditions or restrictions which the department considers necessary. . . ." As we noted in Op. S.C. Att'y Gen., 2012 WL 469994 (January 6, 2012), the authority to regulate and enforce provisions of the South Carolina Code dealing with beer and wine [and alcoholic liquor] resides in the Department of Revenue. See also Op. S.C. Att'y Gen., 2019 WL 6445342 (November 14, 2019).

As your letter states, in 2003, pursuant to its authority, DOR promulgated Regulation 7-403, setting guidelines for enforcement of § 61-6-1620(B). Regulation 7-403(B), provides as follows:

> B. Purchase, Delivery and Possession of Alcoholic Beverages. When a separate and private area of an establishment is leased by a specific individual or individuals for a function not open to the general public pursuant to Section 61-6-1620(B), the host or sponsor of said function, or the designated agent or representative of said host or sponsor must purchase and deliver to the leased area any alcoholic beverages to be possessed and consumed therein and must remain constantly in actual possession of these beverages until such time as the function is concluded, at which time all alcoholic beverages must be removed from the leased area and taken to a location where they may be legally stored. Nothing contained herein shall prohibit the host or sponsor or his designated agent or representative from having other persons, whether employed by the licensee or employed by the host or his agent or representative, from mixing and serving alcoholic beverages belonging to the host of the party.

(emphasis added).

Following your opinion request, which informs us that DOR has possibly changed its interpretation of the Regulation, we inquired of the agency and sought a written statement regarding DOR's current interpretation. The agency then assured us in writing that it had not changed its interpretation of Regulation 7-403. It provided the following information, which was noted as reflecting the Department's "longstanding position":

Question: Does Regulation 7-403 permit a caterer (or other business) purchase or pick up beer, wine, or alcoholic liquor from a retailer and deliver it to a private function?

Answer: Yes, but only in very limited circumstances.

The following statement concerning delivery of alcohol does not constitute a new interpretation by the Department, but reflects the Department's longstanding position. See S.C. Code Ann. Regs.§ 7403 (effective June 27, 2003); SC Revenue futli11g # 12-3.

A person may only sell beer, wine, or liquor in accordance with Title 61, and must be licensed by the Department of Revenue to do so.[ ] In accordance with South Carolina's Three-Tier system of alcohol regulation, the Department issues a variety of licenses and permits to manufacturers, wholesalers, and retailers.[ ] Relevant to its question, the retail licenses generally fall into the following categories:

- Permanent
  Beer and wine permits[ ] – on premises consumption (e.g. restaurants); or off-premises consumption (retail store).[ ]
  Alcoholic liquor licenses[ ] – on premises consumption (liquor by the drink, limited to restaurants, hotels, or nonprofit organizations)[ ]; or off-premises consumption (retail store).[ ]

- Temporary:
  Beer and Wine Special Event Permit[ ]
  Liquor Special Event Permit (only for nonprofit organizations)[ ]

A person licensed by the Department under Title 61 may not sell and transfer possession of alcohol to a purchaser anywhere other than on the license holder's licensed premises.[ ] As a general rule, purchaser of beer, wine, and liquor must either (a) consume the alcohol on the premises where it was purchased, or (b) transport the alcohol off-premises to a location where it can be legally stored and consumed at a later date. The purchase/ultimate consumer of beer, wine, and liquor may not use a third party to transport or deliver the alcohol.

S.C. Code Reg. 7-403(B) provides a limited exception to this general rule. The Regulation permits the host or sponsor of a function not open to the general public (e.g. a wedding reception or other private gathering), or the designated agent or representative of said host or sponsor, to purchase and deliver to the function location any alcoholic beverages to be possessed and consumed therein. The Regulation provides additional conditions for this limited exception, including who must maintain actual possession of the alcohol during the function, who may mix or serve the alcoholic beverages, and how the alcohol must be stored once the function concludes.

> Title 61 does not authorize, and the Department does not issue, a "caterer's" permit or license. As DOR understands and uses the term, a "caterer" is a for-profit business that provides food or services (to include bartending services) at a function for a predetermined fee. In many instances, the caterer is otherwise unlicensed by the Department of Revenue. However, to the extent a caterer intends to purchase, sell, deliver, or serve beer, wine, and liquor in any fashion, it may only do so in accordance with the requirements of Title 61.
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> In some instances, a caterer could serve as the designated agent or representative of the host or sponsor of a private function as contemplated in Regulation 7-403. However, the caterer may not serve as the designated agent or representative of the host or sponsor if the caterer (a) holds a permanent retail license and (b) sold the alcoholic beverages to the host or sponsor. While the caterer may purchase the alcoholic beverages on behalf of the host or sponsor, it may only be reimbursed for its costs and may not charge the host a markup (which would constitute an illegal sale). Further, because Regulation 7-403 only applies for alcoholic beverages belonging to the host or sponsor, a caterer may not sell or serve its own beer, wine, or liquor at a private function.
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> Generally, a caterer may legally sell and serve alcohol at a ***private function*** only if: (1) it has obtained a permanent on-premises beer and wine permit or liquor by the drink license, and (2) the function and sale occur on the caterer's permanently licensed premises in a separate or private area of the establishment, (3) the function is not open to the general public, and (4) there is no charge or fee of any kind to attend the function.
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> In addition, a caterer may legally purchase, deliver, sell, and serve beer and wine at a ***public event***, including one that charges admission, fundraises, or has paid sponsorships, but only if the Department has issued a temporary Beer and Wine Special Event Permit to the appropriate party(s). Whether the Special Event Permit is issued to the caterer (such that the caterer is the license holder) or another party (the event organizer) depends on the specific facts of each event, including which party is responsible for selling tickets and collecting the admission fee or other consideration from the attendees, and whether the ticket price includes beer or wine. Caterers or other special event organizers are encouraged to contact the Department of Revenue's ABL Section with any questions about licensing a specific event.

It is the general rule, of course, that "[c]onstruction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Logan v. Leatherman, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986). In this instance, DOR's construction and policies and procedures are applicable. However, it is also a rule of interpretation that, while "the Court typically defers to the [agency's] . . . construction of its own regulation, where the plain language of the regulation is contrary to the [agency's] . . . interpretation, the Court will reject its interpretation." (citing authorities). Brown v. S.C. DHEC, 348 S.C. 507-515-16, 560 S.E.2d 410, 415 (2002). Most importantly, the agency must follow its own regulations. Triska v. DHEC, 282 S.C. 190, 194,

355 S.E.2d 531, 533 (1987). The agency's longstanding interpretation is entitled to considerable deference. Media Gen'l. Comms., Inc. v. S.C. DOR, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (2010).

As our courts have advised, "[w]here the Legislature has acquiesced in an agency's longstanding interpretation and does not, in express terms, change it, that interpretation will be deemed accepted as reasonable. Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (Ct. App. 1983). Any attempt to change the agency's continuous and longstanding interpretation is usually met with skepticism by the courts. Spencer v. S.C. Tax Comm'n., 281 S.C. 492, 495, 316 S.E.2d 386, 387-88 (1984), aff'd., 471 U.S. 82 (1985). As we stated in Op. S.C. Att'y Gen., 1979 WL 43073 (June 19, 1979),

> [i]t is axiomatic that '[a] valid rule or regulation duly promulgated by a public administrative agency is binding on the agency and on all those to whom its terms apply . . . ' 73 C.J.S. Public Administrative Bodies And Procedure, § 107 (1951). Also see Mace v. Berry, 225 S.C. 160, 81 S.E.2d 276 (1954); Faile v. South Carolina Employment Sec. Com'n., 267 S.C. 536, 230 S.E.2d 219 (1976); 1 Am.Jr.2d Administrative Law § 96 (1962).

Thus, ". . . if a state agency has followed the procedures in the promulgation of rules and regulations as set forth in § 1-23-10 et seq., . . . such duly promulgated rules and regulations have force and effect of law immediately upon going into effect." Id. Accordingly, DOR is bound by R. 7-403 and the plain meaning of its terms.

Conclusion

As we point out above, while courts give great deference to the administrative agency's construction of its own regulations, the plain language of that regulation will prevail. Moreover, the agency is bound by its regulations and it must follow them. If it wishes to change its regulation, it must go through the APA process. See § 1-23-10 et seq. Courts are highly skeptical of an administrative agency's sudden change in interpretation from its longstanding construction. Often, the court will not defer to or follow such a sudden change.

In this instance, DOR has assured us that it has not changed its construction of Regulation 7-403 and that such Regulation remains consistent with its interpretation over many years. Indeed, at our request, it has submitted its current position to us in writing. It is our understanding from DOR that it has stood by its longstanding interpretation of Regulation 7-403 and that it does so today. In particular, your concern regarding DOR's not heeding of the language "designated agent or representative" as contained in the Regulation apparently is not the case. Such position of DOR appears to be reasonable. We agree with the agency's longstanding interpretation of Regulation 7-403 submitted to us by DOR in writing.

Sincerely,

Robert D. Cook
Solicitor General