



ALAN WILSON
ATTORNEY GENERAL

January 6, 2012

The Honorable William G. Herbkersman
Member, House of Representatives
434-B Blatt Building
Columbia, SC 29211

Dear Representative Herbkersman:

In a letter to this office you have requested an opinion concerning whether a proprietor may operate a brew-on premises facility or home winemakers' center in South Carolina. You have also asked us which State agency would regulate such a facility.

Law/Analysis

As you note in your letter, the United States Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (the "TTB") has addressed home winemakers' centers and brew-on-premises facilities. Specifically, federal law allows consumers to make their own beer and wine for personal use. See 26 U.S.C. §§ 5051 (c) (2), 5053 (e) [exempting beer produced by adults "for personal or family use and not for sale"]; 26 U.S.C. §5042 (a) (2) [exempting wine produced by adults "for personal or family use and not for sale"]. We note the TTB has expressly recognized a wide array of activities that the brew-on-premises business or home winemakers' center may undertake. For detailed information about the applicability of federal guidelines to a particular operation of a brew-on-premises facility or home winemakers' center, you should address your inquiries to the TTB.

TTB's "Beer" guidelines and "Frequently Asked Questions" ("FAQs")¹ for brew-on-premises facilities which are not TTB-qualified breweries provide that:

[p]roprietors . . . of "Brew-on-Premises" facilities may: furnish space, brewing equipment, ingredients, bottling supplies, and advice and expertise to consumers. . . . They may also provide certain assistance to consumers including. . . . Cleaning, maintenance and repair of equipment, Climate and temperature control, Disposal of spent grain and waste, Quality control (including laboratory analysis and tasting. . .)

¹These FAQs are posted on the TTB website. The FAQs were last revised in 2003.

Additionally:

[p]roprietors . . . may not: [p]rovide assistance to, or on behalf of, customers in the production, storage, or packaging of beer . . . [or] [p]roduce or provide non-taxpaid beer to customers or prospective customers for sampling purposes. . . . Operation of a [brew-on-premises] business in a manner contrary to the [these guidelines] may cause the facility to be considered a brewery . . .

The TTB guidelines and FAQs further provide that adults [*i.e.*, persons at least twenty-one years of age] "home brewing" at a brew-on-premises facilities, subject to certain guidelines as to the quantity that can be produced, ". . . may remove their beer for personal or family use, including use in organized affairs, exhibitions, or competitions (such as homemaker's contests or tastings); . . . may collaborate with other adults in the production of beer at a [brew-on-premises facility] provided they are not considered a corporation or an association; and . . . may not produce beer for sale or offer their beer for sale." See 27 C.F.R. §§25.205 through 25.207. The TTB advises that adults using these facilities "should note that owners and employees of [brew-on-premises facilities] are limited in the assistance they may provide customers [and that] [i]t is the responsibility of [brew-on-premises] customers to carry out the activities that are required to brew, store, and package beer."

As for home winemakers' centers, TTB's "Wine" guidelines and FAQs essentially mirror those for brew-on-premises facilities. See 27 C.F.R. §24.75. Additionally, the TTB states that these home winemakers' centers "must never 'cross the line' to commercial production or sale of wine."

Significantly, we note the TTB states in its "Beer" FAQs that "[p]roprietors of [brew-on-premises facilities] must operate the [brew-on-premises facility] in compliance with State and local laws. The provision to produce beer for personal or family use and without payment of a tax at a [brew-on-premises facility] under [the above Codes] does not authorize production of beer by adults, or operation of a [brew-on-premises] business, in violation of any State or local law." The TTB's "Wine" FAQs similarly provide that the operator of a home winemakers' center "must learn and comply with any permit, license or tax requirements of State and local law and conduct operations in compliance with State and local law." Additionally, the TTB states: "[i]f State and local rules impose different requirements or limitations than the federal rules . . . , the stricter rules and limits should be applied." The TTB guidelines thus do not authorize the production of beer or wine that is contrary to State or local law. The TTB therefore directs operators to contact their individual States' alcohol control boards to assure compliance with State and local laws.

With this caveat in mind, we note that South Carolina law regulating beer and wine is located in Chapter 4 of Title 61 of the South Carolina Code. Generally, pursuant to S.C. Code Ann. §61-2-80:

[t]he State, through the [South Carolina Department of Revenue (the "DOR")], is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors, is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit, and occupies the entire field of beer, wine, and liquor regulation except as it relates to hours of operation more restrictive than those set forth in this title.

Clearly, the DOR is charged with the authority to regulate and enforce provisions of the South Carolina Code dealing with beer and wine. See also §61-4-70 [the DOR “has sole and exclusive power to issue all licenses, permits, and certificates” authorizing the sale of beer, wine, or liquor].

We were unable to find statutes or regulations which specifically address brew-on-premises facilities or home winemakers’ centers in South Carolina. We note, however, that the DOR issued a 1995 advisory opinion considering brew-on-premises operations in which businesses sell beer ingredients, and rent the equipment and space necessary to the public to brew and bottle their own beer for personal consumption. These businesses would also provide technical expertise and advice during the brewing and bottling process. The operators of these businesses would neither brew beer for sale to the public nor to other businesses. Addressing this type of business, the DOR acknowledged “[t]here is no law prohibiting brew-on-premises operations in South Carolina.” S.C. Revenue Ruling #95-3 (1995). In rendering its advisory opinion, the DOR considered §61-4-1510 (formerly §61-9-1220),² which states:

[b]efore a person constructs, maintains, or operates a brewery or winery as provided by the provisions of this article, the person must apply to the [DOR] for a permit. The application must be in writing in a form the [DOR] prescribes. Except as otherwise provided in this section, the applicant must pay a biennial permit tax of two hundred dollars upon each brewery and on each commercial winery to be established and operated. The permit tax must be paid to and collected by the [DOR] before a permit is issued. Permits as provided by the provisions of this section expire as mandated by Section 61-2-120. No refund may be made to a dealer who ceases business after obtaining a permit.

The DOR continued by noting §61-4-1530 (formerly §61-9-1250) provides that: “[a] person who operates a brewery or winery without a permit or after his permit has been canceled by the [DOR] is guilty of a misdemeanor . . .”

Further in the advisory opinion, the DOR noted that the term “brewery” was not defined in the South Carolina Code. However, it referred to The Second College Edition of the American Heritage Dictionary, p. 207, which defines “brewery” as “an establishment for the manufacture of malt liquors.” We note that Webster’s New World Dictionary, p. 176, defines “brewery” as “an establishment where beer, ale, etc. are brewed” 5A Words & Phrases, p. 341, states: “[a] brewery is a building and its appurtenances especially adapted to the manufacture of beer.” [citing Mugler v. Kansas, 123 U.S. 623 (1887)].

Where the Legislature chooses not to define a term in a statute, courts will interpret the term in accordance with its usual and customary meaning. Adoptive Parents v. Biological Parents, 315 S.C. 535, 446 S.E.2d 404 (1994); City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). As this office has consistently noted:

²Chapter 9 of Title 61 was amended by 1996 S.C. Acts No. 415, §1.

[o]ne of the primary rules in the construction of a statute is that the words used therein should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation. Brewer v. Brewer, 242 S.C. 9, 129 S.E.2d 736 (1963). It is a well-settled principle of law that "[c]onstruction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons." Logan & Associates v. Leatherman, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986).

Ops. S.C. Atty. Gen., December 6, 2010; March 25, 1985.

The DOR stated in its advisory opinion that, "even though the brew-on-premises operation will not be selling beer, it will be operating a brewery . . ." The DOR thus concluded that, pursuant to §61-4-1510, "a permit must be obtained from the [DOR] before initiating construction of the brewery [and] operators of the [brew-on-premises] facility must maintain a permit the entire time the business is in operation."³

Although not binding, a court, as well as this office, will generally give great deference to the opinion of a state agency's interpretation of a statute of which it is charged with the duty and responsibility of enforcing. Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836 (2003); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 26, 579 S.E.2d 334 (Ct. App. 2003). Furthermore, "in our opinions, we do not second-guess an agency's policy decisions and interpretations of its own enabling statutes; we generally will leave such review to the courts." Ops. S.C. Atty. Gen., August 16, 2006; September 8, 2005. Accordingly, we give great deference to the DOR's interpretation of the term "brewery" in its advisory opinion as it applies to the issuance of permits for brew-on-premises facilities. We find no compelling reason to deviate from DOR's interpretation in the 1995 advisory opinion.

Similarly, we note that home winemakers' centers typically are places where individuals pay fees to use space and equipment to make wine for personal use. Wine is not sold to the public or other businesses. As with the term "brewery," a "winery" is not defined in the South Carolina Code, but we note that §61-4-1500 relates the term "winery" as being a place for the production of beverages (wines). In The Second College Edition of the American Heritage Dictionary, p. 1384, "winery" is defined as "[a] winemaking operation." Webster's New World Dictionary, p. 1630, defines "winery" as "an establishment where wine is made." See also Op. S.C. Atty. Gen., September 13, 1977 [using the term winery in its ordinary sense, we opined that a "warehouse" used only for storage after the production of wine would not qualify as a "winery" and would thus not have to be licensed as such]. Utilizing the term "winery" in its ordinary sense, we believe that a home winemakers' center would be operating a winery under South Carolina law, and that a home winemakers' center would also be subject to the DOR's permit requirements.

³The DOR also discussed in its advisory opinion whether a brew-on-premises operation would be subject to taxes imposed under §§12-21-1020 through 12-21-1030. However, the application of tax provisions is beyond the scope of your opinion request.

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Conclusion

The DOR is given exclusive authority to regulate beer and wine, including the operation of a brewery or winery, in this State. Giving great weight to the DOR's interpretation of South Carolina law in its 1995 advisory opinion, and based on our own analysis of the applicable law, we believe that a proprietor of a brew-on-premises facility or a home winemakers' center would be required to obtain a permit from the DOR prior to operating such a facility. However, we are unable to address the operation of any particular brew-on-premises facility or home winemakers' center, because to do so would require us to evaluate and determine factual issues regarding the operation of an individual facility, which is beyond the scope of an opinion of this office. See Op. S.C. Atty. Gen., April 6, 2006 ("[T]he investigation and determination of facts are matters beyond the scope of an opinion of this office"). This office is only able to provide an interpretation of relevant law. We were unable to find any State regulations governing brew-on-premises facilities or home winemakers' centers *per se*. Cf. TTB's FAQs.⁴ However, given the significant regulatory authority that has been given to the DOR regarding the administration of provisions of the South Carolina Code dealing with beer and wine, we suggest a proprietor contact the DOR (Alcohol Beverage Licensing) regarding permit requirements for the operation of such a facility.⁵ We believe the DOR to be in the best position to make a determination of whether or not to issue a permit based upon the operation of a particular facility.⁶ This office will defer to the DOR in this regard. See Op. S.C. Atty. Gen., September 8, 2005 ("[I]t has been our longstanding policy in the issuance of opinions to defer to the administrative agency charged with the enforcement of a particular area of law").

If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

⁴In addition to the TTB's guidelines referenced above, we found at least two states with regulations addressing brew-on-premises facilities. See 804 Ky. Admin. Regs. 4:340; R.I. Code R. 11-4-14:1.

⁵We contacted the DOR and were informed that the operator of a brewery or winery is required to submit a Form ABL-902 application for an in-state brewery or winery. See §§61-2-90, -100.

⁶We were also informed that a proprietor may request a formal opinion from the DOR's Office of General Counsel regarding the operation of a particular brew-on-premises facility or home winemakers' center.