

The State of South Carolina

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September 3, 1992

The Honorable Irene K. Rudnick
Member, House of Representatives
Post Office Box 544
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Dear Representative Rudnick:

As you are aware, your letter of July 15, 1992 to Attorney General Medlock was referred to me for response. In that letter, you asked for this Office's opinion on the validity of emergency regulations promulgated on or around June 25, 1992, by the South Carolina Residential Builders Commission. The synopsis filed along with the emergency regulations indicates that the regulations were the most recent attempt by the Commission to respond to amendments made by the Legislature to the Commission's enabling statutes.

Chapter 59 of Title 40 of the 1976 S. C. Code of Laws, Ann., shows that, effective July 1, 1990,¹ the Commission's enabling statutes were substantially amended to, among other things, provide for the classification, registration and certification of residential specialty contractors. Shortly, thereafter, the Commission promulgated the first of a series of emergency regulations intended to address the revisions to its statutes.²

The first set of emergency regulations was filed with the S. C. Legislative Council on July 17, 1990. The statement filed along with the regulations indicates that the regulations were required "so that the Commission, building officials, and

¹ 1990 Act No. 595.

² Section 40-59-120, Code, empowers the Commission to promulgate "reasonable regulations as may be necessary" to effectuate the provisions of Chapter 59.

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residential builders and specialty contractors may comply with Act R. 735 (sic), issue licenses, registrations, certifications and building permits, and conduct residential and specialty contracting construction in South Carolina."³ Pursuant to the provisions of Section 1-23-130(a), Code, this set of regulations was renewed by the Commission on December 14, 1990. However, the regulations were not permanently promulgated; consequently, they expired, and were no longer effective, as of March 15, 1991.

On July 24, 1991, the Commission filed another set of emergency regulations with the Legislative Council. The statement filed along with the regulations indicated that: "Emergency regulations were filed and renewed in 1990, but final regulations were not approved by the Legislature. Consequently, these emergency regulations are required so that the Commission, building officials, and residential builders and specialty contractors may comply with Act R. 735 (sic), issue licenses, registrations, certifications and building permits, and conduct residential and specialty contracting construction in South Carolina."⁴ This set of emergency regulations was not permanently promulgated or renewed; thus, the regulations expired on, or around, October 22, 1991.

The Commission's third attempt to conform its regulations to the new statutory requirements was made on December 16, 1991, when the agency again filed emergency regulations with the Legislative Council. The statement filed along with this set of regulations recited, in part, that:

"Despite its good faith efforts, the Residential Builders Commission was unable to obtain legislative approval, during the 1991 session, to its final regulations intended to prescribe procedures, requirements and fees for its licensing of residential builders, and its registration and certification of residential specialty contractors as mandated by law."

"The availability of adequate procedures, guidance and funding is imperative to an orderly and efficient implementation and administration of the directed licensing, registration and

³ See: Document No. 1324, S. C. State Register, Volume 14, Issue 8.

⁴ See: Document No. 1410, S. C. State Register, Volume 15, Issue 8.

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certification processes; and an absence of such presently place residential builders, specialty contractors, building officials and consumers alike at substantial risk in the achievement of statutory compliance and the goals and objectives sought therefrom. Accordingly, these emergency regulations are adopted to provide the procedures, guidance and funding now required."⁵

Ultimately, the Commission was unable to achieve the permanent promulgation of the third set of emergency regulations during the 1992 legislative session. The provisions of Section 1-23-130(a), Code, prohibited the renewal of this set of emergency regulations; consequently, the regulations expired on, or around March 16, 1992.

The expiration of the third set of emergency regulations left the Commission without any permanent regulations which conformed to its statutes. In view of this fact, and its view of its judgment that an emergency situation remained in existence, the Commission, on June 25, 1992, filed with the Legislative Council the set of emergency regulations about which you inquire in your letter. The language of the statement filed with these regulations was similar to the language of the statement appended to the regulations filed on December 16, 1991, except that the more recent statement referred to the Commission's inability to obtain legislative approval of the regulations during the 1992 session.⁶

As can be seen from the information set forth above, the Commission has promulgated successive sets of emergency regulations in an effort to insure that its regulatory scheme is consonant with, and sufficiently interpretive of, its enabling statutes. However, the Commission, to date, has been unable to obtain legislative approval of any of the emergency regulations as permanent regulations.

There does not appear to be any provision of 1976 S. C. Code, Ann., 1-23-10, et seq., or any reported judicial interpretation of those statutes, which would prohibit an agency from promulgating a series of emergency regulations in order to address an emergency situation which, in the agency's good faith determination, is ongoing. See: Shipley, S. C. Administrative Law, 2nd Edition, Chapter 4. Of course, the "life" of an emergency regulation is

⁵ See: Document No. 1463, S. C. State Register, Volume 15, Issue 12.

⁶ See: Document No. 1532, S. C. State Register, Volume 16, Issue 7.

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prescribed by the provisions of Section 1-23-130(a), Code. That is, the regulation would expire after ninety days if it is promulgated while the General Assembly is in session; and, may be renewed for an additional ninety days if it is promulgated while the General Assembly is not in session and the first ninety-day period of effectiveness expires while the General Assembly is not in regular session.

Accordingly, this Office concludes that the emergency regulations promulgated by the Commission on June 25, 1992 are presently in effect. Those regulations, including provisions regarding registration fees, would remain in effect until on, or around, September 24, 1992. At that point, the regulations would be renewable for an additional ninety days. The regulations would then finally expire unless they were permanently promulgated by the Commission.

The conclusion reached herein should not be taken to mean that an agency may blithely circumvent prescribed rulemaking requirements through the simple device of promulgating a succession of emergency regulations. The agency must make a finding of imminent peril to public health, safety or welfare and may be required to set forth the specific facts and reasons underlying its findings. 73 CJS, Public Administrative Law and Procedure, Section 103. Moreover, the agency must comply with all other requirements and procedures made applicable by law to the agency or its regulations. See: 1981 Op. S. C. Atty. Gen., No. 81-77.

I trust that you will find the foregoing information to be responsive to your inquiry. Please contact me if I can be of further assistance.

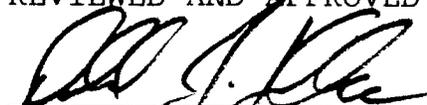
Very truly yours,



Wilbur E. Johnson
Assistant Attorney General

WEJ/fc

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