

3434 L. Gray

The State of South Carolina



Office of the Attorney General

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March 10, 1989

The Honorable David L. Thomas
District No. 8 - Greenville County
23 Wade Hampton Boulevard
Greenville, South Carolina 29609

The Honorable Dave C. Waldrop, Jr.
District No. 40 - Newberry County
Box 813
Newberry, South Carolina 29108

Dear Senator Thomas and Representative Waldrop:

Your recent request to this Office for an opinion has been referred to me for response. As I understand your request, you have inquired as to the constitutionality of proposed legislation to amend S.C. Code Ann. §56-15-330 (1976). [A copy of the proposed Bill is attached for your convenience.] Your inquiry concerns that specific portion of the proposed Bill which would be codified as §56-15-300(B)(1)&(2) and would read as follows:

(B)(1) A temporary motor vehicle dealer's license may be issued to a dealer, as defined in this section, to have tent sales or sales at temporary locations away from his established place of business. The fee for the temporary license is one hundred dollars, and it may be issued only for seventy-two hours. No dealer may purchase more than four temporary licenses in any one year. A temporary license applies to only one dealer operating in a temporary location and is not transferable to another dealer or location.

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(2) A temporary license may be issued only to a dealer who is a member of the South Carolina Automobile and Truck Dealers Association or a dealer who has paid South Carolina taxes on the gross proceeds of the sales of his business for at least ten years.
[Emphasis in original.]

While this Office may comment on constitutional issues, only the courts may actually declare an act unconstitutional. See, e.g., S.C. Att'y Gen. Op., Oct. 14, 1988.

That portion of the proposed Bill which would be codified as §56-15-330(B)(2) restricts issuance of a temporary license "only to a dealer who is a member of the South Carolina Automobile and Truck Dealers Association or a dealer who has paid South Carolina taxes on the gross proceeds of the sales of his business for at least ten years." These restrictions raise various potential constitutional issues.

A challenge pursuant to the equal protection clauses of the United States Constitution and the South Carolina Constitution could be raised. See U.S. Const. Amend. 14 and S.C. Const. art. 1, §3. The requirements of equal protection are satisfied if the classification bears a reasonable relation to the purpose sought to be effected, members of the class are treated alike under similar circumstances and conditions, and the classification rests on some reasonable basis. GTE Sprint Communications Corp. v. Pub. Serv. Comm'n of South Carolina, 288 S.C. 174, 341 S.E.2d 126 (1986)(analyzing U.S. Const. Amend. 14 and S.C. Const. art. 1, §3). In Smith v. Smith, 291 S.C. 420, 424, 354 S.E.2d 36, 39 (1987)(citing Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 331 S.E.2d 335 (1985)), the South Carolina Supreme Court stated:

In determining whether a statute violates the equal protection clauses of state and federal constitutions, we must give great deference to the classification passed by the legislature, and the classification will be sustained against constitutional attack if it is not plainly arbitrary and there is "any reasonable hypothesis" to support it.

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The restrictions in the cited provisions of the proposed Bill must meet the requirements espoused in GTE Sprint Communications Corp. v. Pub. Serv. Comm'n of South Carolina, supra, and Smith v. Smith, supra, to survive such a constitutional attack based on equal protection grounds.

In addition, a constitutional attack could be raised pursuant to the due process clauses of the federal and state constitutions. See U.S. Const. Amend. 14 and S.C. Const. art. 1, §3. "Due process of law" requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property. State v. Brown, 178 S.C. 294, 182 S.E. 838, appeal dismissed, 298 U.S. 639 (1936) (analyzing U.S. Const. Amend. 14). Substantive due process means state action which deprives a person of life, liberty, or property must have a rational basis; the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary. Hamilton v. Bd. of Trustees of Oconee County School Dist. 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984). On due process and equal protection challenges, a court is not entitled to further scrutinize reasonable measures unless some "fundamental right" is implicated for due process purposes or "Suspect classification" appears for purposes of equal protection. Washington By and Through Washington v. Salisbury, 279 S.C. 306, 306 S.E.2d 600 (1983). Similarly, everyone has the right to work and earn a living, by any lawful calling and pursue any legitimate trade, occupation, career, business, or profession. 16A C.J.S. Constitutional Law §494. The right of a citizen to engage in lawful business, to make contracts, and to dispose of his property is not absolute; it is subject to regulation and control by the State in the exercise of its police power, but that power may be exercised only for the protection of the public in its health, safety, morals, or general welfare. Stone v. Salley, 244 S.C. 531, 137 S.E.2d 788 (1964). The reasonableness of the restrictions in the cited provisions of the proposed Bill would be at issue in a constitutional challenge based on these grounds.

Even more significantly, the South Carolina Constitution prohibits its delegation of the power to legislate to private persons or corporations. See Eastern Federal Corp. v. Wasson, 281 S.C. 450, 316 S.E.2d 373 (1984); State v. Watkins, 259 S.C. 185, 191 S.E.3d 135, vacated 413 U.S. 905, conformed to, 262 S.C. 178, 203 S.E.2d 429, appeal dismissed, 418 U.S. 911 (1972). A strong argument could be made that the language in the proposed Bill which would be codified at §56-15-330(B)(2) and restricts dealers, in part, to those who are members of the South Carolina Automobile and Truck Dealers Association impermissibly delegates legislative power to a

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private corporation. Moreover, if this requirement concerning membership in the South Carolina Automobile and Truck Dealers Association were struck down by a court as being constitutionally infirm, the alternative language concerning dealers who have paid certain South Carolina taxes would still raise equal protection concerns about this provision.

In summary, concerning the proposed Bill, serious constitutional concerns are raised by its language and provisions. Consequently, a potential constitutional challenge after enactment of the Bill could be successful.

In addition, you have raised the question of whether S. C. Code Ann. §§56-15-310 through 56-15-360 (1976 & 1988 Supp.), as those sections presently exist, are constitutional. It is our conclusion they are.

The General Assembly, in 1983, enacted Article 3 of the Motor Vehicle Code, which was codified as §§56-15-310 through 56-15-360. These sections require a license before a person may engage in the business of acting as a dealer or wholesaler of motor vehicles. Various procedures, including procedures for application, are established. Section 56-15-330, requiring dealers and wholesalers to maintain an "established place of business", provides in pertinent part:

No dealer may be issued or allowed to maintain a motor vehicle dealer's license unless:

- (1) The dealer maintains a bona fide established place of business for conducting the business of selling or exchanging motor vehicles which must be the principal business conducted from the fixed location.... A bona fide established place of business ... includes a permanent, enclosed building or structure.... A bona fide established place of business does not mean a residence, tent, temporary stand, or other temporary quarters.

Apparently, you are particularly concerned with the constitutionality of this requirement of §56-15-330.

It is well recognized that statutes enacted by the General Assembly will be given every presumption of constitutionality. A legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond reasonable doubt. Gentry v. Taylor, 192 S.C. 145, 5 S.E.2d 857 (1940); Conner v. Charleston High School Dist., 191 S.C. 412, 4 S.E.2d 431 (1939).

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Pursuant to the police power and in harmony with federal and state constitutional provisions, a state may require a license to engage in a particular occupation. Frost v. Railroad Commission of the State of California, 271 U.S. 583, 595 (1926); New Motor Vehicle Board of California v. Fox, 439 U.S. 96 (1978).

Cases have concluded that statutes such as §56-15-330, which require a dealer or wholesaler of motor vehicles, as a condition for the issuance of a license, to maintain an established place of business at a fixed location (rather than, for example, a tent or temporary stand), are within the State's police power and are constitutional. These cases appear better reasoned than those cases which reach a contrary conclusion.

In Ohio Motor Vehicles Dealers Board v. Central Cadillac Company, 471 N.E.2d 488 (Ohio 1984), the Ohio Supreme Court concluded with regard to the requirement that motor vehicle sales be made from a fixed location or an established place of business that:

[t]he state has a legitimate public interest in restricting dealer activities to their licensed locations. Such a restriction provides meaningful assurance that the continuing warranty and service obligations that follow the sale of a vehicle will be met by a dealer who can be located. Moreover, by confining dealers to their licensed locations, the state is better able to supervise this regulated industry and to assure that the requirements imposed by law are being met.

471 N.E.2d at 490.

Similarly, in ABC Auto Sales v. Marcus, 255 Wis. 325, 38 N.W.2d 708 (1949), the Wisconsin Supreme Court, in upholding the constitutionality of requiring a permanent location for the sale of automobiles, stated:

By virtue of the express requirement in the statute in relation to an applicant's ownership or leasing of a permanent building with the facilities prescribed, and the provision therein that "such place shall not mean residence, tents or temporary stands" it is evident that the legislature had in mind the necessity of established permanence and stability of an applicant and his business in order to eliminate or minimize the evils and mischief of the "fly by night" operator. In this respect the legislation in question

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is evidently based upon the same principle as legislation which requires transient merchants or peddlers to be licensed; and the constitutionality of which is well established.

38 N.W.2d at 711.

In addition, the Attorney General of Texas has found that a Texas statute which restricts the sale of vehicles by dealers that do not operate from a permanent location is constitutionally valid. The Attorney General of Texas concluded that

[t]he distribution and sale of new motor vehicles in this State vitally affects the general economy of the State and the public interest and welfare of its citizens. It is the policy of this State and the purpose of this act to exercise the States' police power to insure a sound system of distributing and selling new motor vehicles through licensing and regulating the manufacturers, distributors, and franchised dealers of those vehicles to provide for compliance with manufacturer's warranties, and to prevent frauds, unfair practices, discriminations, impositions, and other abuses of our citizens.

Tex. Att'y Gen. Op. # JM-721 (Jun. 16, 1987) (citing V.T.C.S. art. 4413(36), §1.02).

There is authority to the contrary. In Hertz Corp. et al. v. Motor Vehicle Commission et al., Franklin Circuit Court, Division II, No. 84-CI-1390 (Ky., 1987), the Court struck down regulations restricting off-site automobile sales. Such restrictions concerning off-site sales were deemed by the Court to "represent an exercise of arbitrary power ... and are unnecessary and unreasonable restraint on private business." Slip Op. at 8-9. See also, New Jersey Used Car Trade Association v. Magee, 1 N.Y. Super. 371, 61 A.2d 751 (1948) (provisions of code requiring dealers in used automobiles to establish and maintain a permanent building of not less than 1,000 square feet unconstitutionally interferes with the ownership of private property and the conduct of business).

Nevertheless, we are persuaded that §56-15-330 is constitutional. Cases upholding the validity of similar provisions are well reasoned and set forth sound policy reasons for enacting such statutes. Moreover, every reasonable presumption in favor of constitutionality must be afforded the statute. We believe that a

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court would, for these reasons, conclude that §56-15-330 is constitutionally valid.

Sincerely,

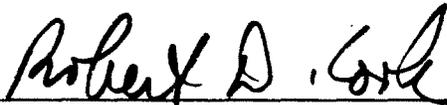


Samuel L. Wilkins
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SLW:sds

Attachment

REVIEWED AND APPROVED BY:



ROBERT D. COOK
EXECUTIVE ASSISTANT FOR OPINIONS