

The State of South Carolina



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September 16, 1987

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Dear Buford:

You have asked generally the effect the repeal of an enabling statute has upon the regulations that have been promulgated pursuant thereto. In the memorandum attached to your request letter you referenced 1980 Op. Atty. Gen. 56 wherein this office concluded that "the enactment into law of a bill both repealing the statutory authority for a body of regulations and denying their enforcement, effectively repeals those regulations." Id. We caution that the conclusion reached therein should not be read as controlling in every situation since the question essentially becomes one of legislative intent and, thus, each statutory change would have to be individually analyzed in order to reach a conclusion as to the validity of the previously promulgated regulations. Nonetheless, there are considerations that provide some guidance in trying to determine legislative intent in this context.

First, regulations promulgated by executive agencies generally fall into three broad categories:

- (1) Procedural regulations;
- (2) Interpretative regulations; and
- (3) Legislative or substantive regulations.

SHIPLEY SOUTH CAROLINA ADMINISTRATIVE LAW at 4-4, 4-5; 73 CJS Public Administrative Law and Procedure, § 87; Davis Administrative Law (2nd Ed.) § 7:8; Faile v. South Carolina Employment Security Commission, 267 S.C. 536, S.E.2d 219 (1976). A legislative or substantive regulation carries the force of law and after promulgation becomes an integral part of the regulatory statute. Faile, supra. In order to promulgate and enforce legislative or

substantive regulations, an executive agency must possess specific delegated authority. Piedmont and Northern Railway Company v. Scott, 202 S.C. 207, 24 S.E.2d 353 (1943); SHIPLEY, supra, at 4-7. If this express authority were repealed, the validity of the agency's duly promulgated legislative regulations may well be impacted. On the other hand, the promulgation of procedural¹ and interpretative regulations² is generally not dependent upon an express statutory delegation of authority but instead is within the inherent authority of an agency. SHIPLEY, supra at 4-4, 4-5. Accordingly, the repeal of an enabling statute that expressly provided the authority to promulgate regulations will often times have no impact upon the agency's authority to promulgate interpretative or procedural regulations.

With regard to the repeal of a statute it is often said that the repeal has the effect of blotting out the statute completely as if it had never existed and of putting an end to all proceedings under it. Vaughan v. Kalyvas, _____ S.C. _____, 342 S.E.2d 617 (S.C.App. 1986); Sutherland Statutory Construction, (4th Ed.) § 23.33. However, for the reasons noted hereinafter we do not believe that the repeal of the specific enabling authority would of necessity cause a repeal of the duly promulgated regulations in every instance. The primary guidepost to determining the effect of the repeal is the intent of the legislature, South Carolina Mental Health Commission v. May, 226 S.C. 108 83 S.E.2d 713 (1954), and, of course, all rules of statutory construction, including those that particularly relate to repeals, are subservient to the one that legislative intent must prevail. State v. Harris, 268 S.C. 117, 232 S.E.2d 231 (1977).

The South Carolina authorities have recognized that in those instances where the General Assembly has repealed legislation and then reenacted a substantially similar provision, it evinces an intention to continue such provision in force without interruption. South Carolina Mental Health Commission v. May, supra; Demas v. Convention Motor Inn, 268 S.C. 186, 232 S.E.2d 724 (1977). With specific regard to whether finally promulgated regulations may retain their validity after the repeal of the specific enabling authority, the Indiana court in Allen v. State of Indiana, 467 N.E.2d 1210 (Ind.App. 1984), determined that this rule of statutory construction served to support the agency regulations that were promulgated pursuant to an enabling provision that was subsequently repealed and replaced with a similar authority.

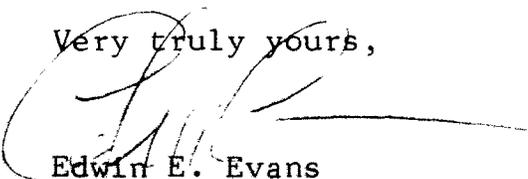
¹ A procedural regulation defines the method by which an agency will carry out its functions. Shipley, supra at 4-4.

² An interpretative regulation interprets, clarifies or explains the statutes or regulations under which the agency operates. Young v. South Carolina Department of Highways and Public Transportation, 287 S.C. 108, 336 S.E.2d 879 (S.C.App. 1985).

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In addition, our Court has held that the presumption is "that repeal of a statute does not invalidate the accrued results of its operative tenure." City of Myrtle Beach v. Richardson, 280 S.C. 167, 311 S.E.2d 922 (1984); 82 CJS Statutes § 435; (Repeal of a statute will not affect acts performed under the repealed law) 82 CJS, supra at § 434. Thus, we advise that whether finally promulgated legislative regulations that have become an integral part of the regulatory law retain their validity subsequent to the repeal of the corresponding enabling authority is ordinarily dependent upon the legislative intent.

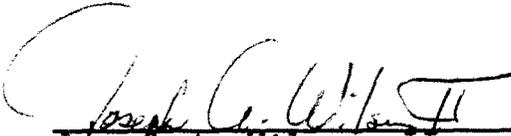
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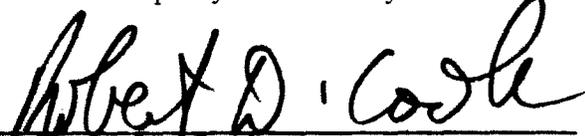

Edwin E. Evans
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³ Ordinarily, regulations are finalized only after legislative review pursuant to the South Carolina Administrative Procedures Act. See § 1-23-120 of the South Carolina Code.

REVIEWED AND APPROVED BY:


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