

## The State of South Carolina



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November 17, 1993

The Honorable Harry F. Cato  
Member, House of Representatives  
115 Williams Road  
Travelers Rest, South Carolina 29690

Dear Representative Cato:

You had requested that this Office review S.731, as passed by the Senate, and advise you on questions of constitutionality, special legislation, and equal protection. You advised that referendums to permit Sunday sales of alcoholic beverages have been defeated twice in parts of Horry County; you have asked how S.731 would affect the matter -- whether an unincorporated area in Horry County would be required to wait until 48 months had lapsed since the last county referendum on Sunday sales?

S.731 is a bill which would authorize certain alcoholic beverage sales permits for Sunday sales to be issued to bona fide nonprofit organizations and business establishments, licensed under S.C. Code Ann. § 61-5-50, when such are located "east of the intercoastal waterway in a county where the annual accommodations tax collections exceed six million dollars, and in any land area between the intracoastal waterway and the Atlantic Ocean located in a county contiguous to such county ..." contingent on a successful referendum in the area.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Like H.3537, which we reviewed in an opinion dated May 25, 1993, S.731 is general in form, rather than on its face naming a particular area of the state to which it

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would apply if enacted; at least two counties are potentially affected, apparently. The bill contains no legislative findings as to why the described area is being singled out for special treatment, though (as stated with respect to H.3537) reasons may conceivably be advanced.

Article VIII-A of the State Constitution provides the relevant constitutional provisions on alcoholic beverages. Nothing contained in S.731 appears to violate the provisions of Article VIII-A.

Article III, § 34 prohibits the adoption of special laws. Subsection (IX) requires that "where a general law can be made applicable, no special law shall be enacted ... ." As observed, the language of S.731 is general, rather than special, in form. Subsection (X) requires the General Assembly to enact general laws but permits the General Assembly to enact special provisions in general laws. If the classification of locations "located east of the intercoastal waterway in a county where the annual accommodations tax collections exceed six million dollars, and in any land area between the intracoastal waterway and the Atlantic Ocean located in a county contiguous to such county" should be viewed as having a natural, logical, or rational relationship to the purpose of S.731, a court could very well uphold S.731 as not violative of Article III, § 34. On the other hand, if the classification should be viewed as arbitrary, bearing no relationship to the purpose of the bill, then a court could conclude that S.731 is special legislation. A court could take note that referenda to accomplish the same result (held pursuant to § 61-5-180) have been unsuccessful in parts of the affected area; if this legislative attempt should be viewed as a means to disregard the will of the electorate, a court could be inclined to find the classification in S.731 arbitrary and thus violative of Article III, § 34. (We point out again that the General Assembly has previously determined that a referendum would be the most appropriate means of gauging public sentiment on such an important issue, by enacting § 61-5-180; it seems anomalous that the General Assembly would ignore that public sentiment as expressed twice by unsuccessful referenda.)

A challenge to S.731 might also be raised under the Equal Protection Clause, U.S. const. amend. XIV. The requirements of equal protection are satisfied if: "(1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." Carll v. S.C.Jobs-Economic Development Authority, 284 S.C. 438, 445, 327 S.E.2d 331 (1985). As stated earlier, because the bill contains no legislative findings, it is difficult to assess the constitutionality thereof; it could be argued that other geographic areas of the state have an equally viable tourist industry, for example, and that those areas should be afforded similar treatment. No reason appears as to why the specified geographic area is being singled out for special treatment. Thus, there may well be equal protection problems with this bill.

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That the terms of S.731, if adopted, would be inconsistent with the requirements of § 61-5-180 would not render the bill unconstitutional or unenforceable by that fact alone. Because S.731 and § 61-5-180 relate to the same subject matter (licensure of establishments to sell alcoholic beverages), both would be considered to be in pari materia and must be considered together and harmonized if at all possible. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928). If the provisions of the two are inconsistent, the later enactment would prevail over the earlier one. Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943). Thus, if S.731 should be adopted in a form that is inconsistent with § 61-5-180, the terms of S.731 would likely be controlling and an exception to § 61-5-180 will have been created, assuming that S.731 would be found to be constitutional by a court considering the issues. However, as stated above, we believe that S.731 could be questioned on the basis of its constitutionality.

In response to your final inquiry, S.731 provides that "nothing in this section shall be construed to affect a referendum held pursuant to Section 61-5-180." It appears that the statutory scheme envisioned by S.731 would be in addition to the provisions of § 61-5-180, so that a referendum held pursuant to the scheme in S.731 if adopted would not affect previously-held referenda in Horry County. As observed in the preceding paragraph, if S.731 should be adopted in a form inconsistent with § 61-5-180, an exception to § 61-5-180 will have been created.

We trust that the foregoing has responded satisfactorily to your inquiry. Please advise if we may provide clarification or additional assistance.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*  
Patricia D. Petway  
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:



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