

5374 Liberty

The State of South Carolina



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August 30, 1994

The Honorable Harry R. Askins
Member, House of Representatives
314A Blatt Building
Columbia, South Carolina 29211

Dear Representative Askins:

You have inquired as to the authority of the State Fire Marshal in several regards. The questions posed are as follows:

1. Does the State Fire Marshal have the authority under §23-9-40, S.C. Code of Laws Ann. 1976, to order a temporary ban on the use of fireworks when the Marshal determines that conditions are a threat to personal safety or property?

Section 23-9-40, generally confers upon the State Fire Marshal enforcement authority for laws and ordinances of the State in several particulars. Two of these areas concern the prevention of fires and the use of combustibles and explosives. The Marshal's authority is limited by this statute to the enforcement of existing laws or ordinances. Typically, where a statute confers some authority upon a State official to do some act or carry out some responsibility, that authority would be specifically limited to that language contained in the enabling legislation. Edisto Aquaculture Corp. v. S.C. Wildlife and Marine Resources Dept., ___ S.C. ___, 426 S.E.2d 753 (1993); Captain's Quarters Motor Inn v. S.C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991).

This statute does not clearly confer upon the State Fire Marshal the authority to issue any order or temporary ban. Other statutes confer upon the Marshal authority to take emergency measures or issue orders of an immediate nature. Section 23-9-70 allows the Marshal to order the immediate removal of a structural defect that is liable to fire and therefore a safety threat.

Devin Lott

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Section 23-9-160 provides similar authority and allows the Marshal to enter or evacuate premises, and take other emergency measures. Section 23-9-180 prevents the Marshal's emergency orders so enacted from being stayed by a court prior to a hearing.

Any reasonable doubts as to the existence of an implied power in an agency should be resolved against the exercise of such authority.

2 Am Jur 2d Administrative Law §62.

Without such an express grant of authority by the legislature to issue a ban on legal fireworks (exclusive of a properly promulgated regulation), the State Fire Marshal would not have the power to enact such a temporary order under the authority of Section 23-9-40.

2. Does the State Fire Marshal have the authority under Regulation 19-305.8 to prevent the ignition and discharge of fireworks by issuing an order to cease and desist such ignition or discharge when conditions are such that this activity would be a threat to personal safety and property?

We do not read this regulation as authorizing the Marshal to "issue an order". This regulation defines specific instances where the use of fireworks will be deemed a violation of the Fire Marshal's rules and regulations. Indeed, the Fire Marshal would have to derive his authorization to issue an order to cease and desist from a legislative enactment. In other words, we do not see how the Marshal could use his own regulation (19-305.8) to enable him to issue an order.

3. Does the State Fire Marshal have the authority under §23-35-140, S.C. Code of Laws Ann., 1976, as amended, to promulgate a regulation creating a temporary ban on the use of fireworks when the Fire Marshal determines that certain conditions are a threat to personal safety and property?

Section 23-35-40 enables the State Fire Marshal to issue broad rules and regulations involving the "storage, transportation, sale and use of permissible fireworks" (Emphasis added). The Fire Marshal is given authority by this section to issue a regulation concerning these areas where it may be necessary to protect lives and property. This statute gives the State Fire Marshal this authority not withstanding other provisions of law.

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In our opinion the State Fire Marshal may issue a regulation ordering a temporary ban on the use of fireworks where the State Fire Marshal has a reasonable and specific basis for finding that the discharge or use of fireworks under specified conditions would be necessary to protect lives and property. Cf. Jasper County Tax Assessor v. Westvaco Coop. 305 S.C. 346, 409 S.E.2d 333 (1991); Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972).

This opinion presupposes that the Fire Marshal determines that within a specified geographic area and within a enumerated time period that conditions exist which would make the discharge of fireworks dangerous to persons and property. We do not read this statute as allowing the Fire Marshal to obviate State law allowing the use and discharge of fireworks in a general manner.

While we think that the State Fire Marshal does have the authority to issue regulations as described above, without the benefit of a more specific subject matter or a proposed regulation, it is difficult to predict what a court of competent jurisdiction might determine as to the legality of a certain regulation.

I hope this provides the clarification which you have requested.

With my kindest regards, I am

Very truly yours,

Cameron B. Littlejohn

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

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