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The State of South Carolina

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May 25, 1993

The Honorable Harry F. Cato
Member, House of Representatives
418-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Cato:

By your letter of April 22, 1993, you have inquired as to the constitutionality of H.3537, a bill which would allow Sunday sales of alcoholic beverages without passage of a local referendum in any area located east of the intercoastal waterway in a county where the annual accommodations tax collections exceed six million dollars. Your concerns are that the legislation may apply only to a small area of the state and that another statute would be circumvented (S.C. Code Ann. § 61-5-180), which statute requires that the voters approve such Sunday sales through a referendum. We would advise that the bill is of questionable constitutionality.

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.

A review of H.3537 shows that it is general in form, rather than on its face naming a particular area of the state to which it would apply if enacted. The bill does not contain any legislative findings as to why the particular area is being singled out for special treatment, though reasons may conceivably be advanced.

Request Letter

Article VIII-A of the State Constitution provides the relevant constitutional provisions on alcoholic beverages. Nothing contained in H.3537 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 noted, the language of H.3537 is general in form rather than special. 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 "east of the intercoastal waterway in a county where the annual accommodations tax collections exceed six million dollars" should be viewed as having a natural, logical, or rational relationship to the purpose of H.3537, a court could very well uphold H.3537 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 H.3537 is special legislation. A court could take note that referenda to accomplish the same result have been unsuccessful in 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 H.3537 arbitrary and thus violative of Article III, § 34. (We further point out 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 H.3537 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.

That the terms of H.3537, 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 H.3537 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 H.3537 should be adopted in a form that is inconsistent with § 61-5-180, the terms of H.3537 would likely be controlling and an exception to § 61-5-180 will have been created, assuming that H.3537 would be found to be constitutional by a court considering the issues. However, as stated above, we believe that H.3537 is of doubtful constitutionality.

We hope that the foregoing will be of assistance to you. If you desire clarification or additional assistance, please advise.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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