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# OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 15, 1996

The Honorable Donny Wilder
Member, House of Representatives
102 Horseshoe Lane
Clinton, South Carolina 29325

Re: Informal Opinion

Dear Representative Wilder:

You have asked for an opinion regarding the method used "to measure the distance between a school, church or playground and a place of business which sells alcohol." You further indicate that

> [t]he Alcoholic Beverage Licensing Division of the Department of Revenue and Taxation has provided me with a copy of the regulation currently in use .... I'm not sure this complies with the legislative intent.

## Law / Analysis

Your question is answered by Op. Atty. Gen., Op. No. 90-40 (May 1, 1990). There we addressed the question of whether ABC Regulations R7-11 and R7-55 (1976 as amended) impermissibly conflict with Section 61-3-440 insofar as these regulations define "grounds in use" as

> grounds immediately surrounding the building or buildings which provide ingress or egress to such building or buildings and does not extend to grounds surrounding the church which may be used for beautification, cemeteries, or



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> any other purpose other than such part of the land as is necessary to leave such building or buildings.

Section 61-3-440 provides as follows:

> [t]he Commission shall not grant or issue any license provided for in this chapter, Chapter 7 and Article 3 of Chapter 13, if the place of business is within three hundred feet of any church, school or playground situated within a municipality or within five hundred feet of any church, school or playground situated outside of a municipality. Such distance shall be computed by following the shortest route of ordinary pedestrian or vehicular travel along the public thoroughfare from the nearest point of the grounds in use as part of such church, school, or playground, which, as used herein, shall be defined as follows:
>
> (1) "Church," an establishment, other than a private dwelling, where religious services are usually conducted;
>
> (2) "School," an establishment, other than a private dwelling where the usual processes of education are usually conducted; and
>
> (3) "Playground," a place other than grounds at a private dwelling, which is provided by the public or members of a community for recreation.
>
> The above restrictions shall not apply to the renewal of licenses existing on July 10, 1960 or to locations then existing.

The 1990 opinion characterized the ABC Regulations as "what [are] commonly known as interpretive rule[s]." An interpretive rule, it was pointed out, "is a rule which is promulgated by an administrative agency to interpret, clarify or explain the statutes or regulations under which the agency operates", are held by the courts to be entitled to "'great respect'" by the courts. We noted that "in those situations where the

administrative interpretation has been formally promulgated as an interpretive regulation or has been consistently followed, this required deference is highlighted and the administrative interpretation is entitled to great weight."

This historical background and legal effect of the Regulation was described as follows in the opinion:

> [t]he subject Regulation was originally promulgated in its present form (with the exception of nomenclature changes) in July 1968. See, South Carolina Code of Laws, Alcoholic Liquor Regulation No. 33 (1962, 1975 Cum. Supp.). Importantly as well, subsequent to the Commission's promulgation of the regulation, the General Assembly enacted Section 61-5-50(c) (1972 Act No. 1063) wherein Section 61-3-440 was specifically incorporated by reference and without any attempt to change this critical underlying statutory language. Section 61-5-50(c) was reenacted in 1986 without any change to the pertinent underlying language. See, 1986 Act No. 469, Section 2. When, as here, the General Assembly reenacts a statute that underlies an administrative interpretive regulation, the reenactment gives the administrative interpretation the force and effect of law. McCoy v. U.S., 802 F.2d 762 (4th Cir. 1986). Again, Section 61-3-440 was first reenacted by express reference approximately four years after the Commission promulgated the regulation and thereafter the statutory language was again reenacted approximately eighteen years after the regulation was initially promulgated.

Based upon this reasoning, the 1990 opinion of Mr. Evans did not believe "that the courts would find the Regulation to be void as inconsistent with the statute." However, we stressed that "[t]his is not to say that the Commission's Regulation captures the only reasonable interpretation of the subject language or that the courts would have adopted the same interpretation as did the Commission if they were not confronted with the 1968 interpretation and the statute's history." Furthermore, we emphasized that

> ... the Commission is not legally frustrated in implementing its opinion of the proper zone of protection for churches, schools, and playgrounds. First, "[t]he existence of a

> statutory restriction [upon the issuance of a liquor license] expressed in terms of a specific distance, does not limit the discretion of the licensing authorities, and a license may be denied even though the [protected] institution is located beyond that distance." 48 C.J.S., supra, § 96, at 450. Our Court has said with respect to liquor licenses,
>
> > [i]n determining whether a proposed location is suitable, ABC may consider any evidence adverse to the location. ... This determination of suitability is not solely a function of geography. It involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact on the community wherein it is to be situated. Schudel v. S.C. A.B.C. Commission, 276 S.C. 138, 142, 276 S.E.2d 308, 310 (1981); 48 C.J.S., Intoxicating Liquors, ss 118-119, 121 (1981).
>
> Kearney v. Allen, 287 S.C. 324, 338 S.E.2d 335 (1985).
>
> Second, although the Regulation most probably carries the force and effect of law since the underlying statutory provision has twice been revisited by the General Assembly, the Commission is still authorized to amend or repeal the regulation pursuant to its continuing rule making power. McCoy v. U.S., 802 F.2d 762 (4th Cir. 1986).

Thus, the 1990 opinion fully responds to your question by concluding that the Regulations are not in conflict with Section 61-3-440. I am enclosing a copy thereof for your information.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an
Enclosure