The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3660

January 15, 1990

The Honorable Henry L. Jolly, Commissioner
South Carolina Real Estate Commission
Capitol Center, AT&T Building
1201 Main Street, Suite 1500
Columbia, S. C. 29201

Dear Commissioner Jolly:

As you have been made aware, your letter of December 12, 1989 to Attorney General Medlock has been referred to me for response. In that letter, you mentioned an opinion issued by this Office on April 7, 1987 concerning the Real Estate Commission's authority to regulate the advertising practices of proprietary schools of real estate. You also cited the case of City of Columbia v. Board of Health and Environmental Control, 292 S.C. 535, 355 S.E.2d 536, (1987), an opinion issued by the S. C. Supreme Court on, or around, April 27, 1987. You then ask whether City of Columbia affects the April 7, 1987 opinion with respect to the Commission's authority to approve the advertising practices and general operation of proprietary schools of real estate.

A review of the April 7, 1987 opinion indicates that the dispositive issue therein was whether the statutory authority granted to the Commission to "approve" institutions such as proprietary schools of real estate (see: 1976 S. C. Code, Section 40-57-100(2)(c)), could be read to mean that the Commission was empowered to "regulate" the advertising practices of such schools. The opinion concluded that the statute did not grant to the Commission such regulatory authority.

Ultimately, as in most cases involving the interpretation of a statute, the issue was resolved on the basis of a determination of legislative intent. And, in accordance with a basic principle of statutory construction, the words used by the legislature were given their plain and ordinary meaning, without resort to subtle or forced construction for the purpose of limiting or expanding the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899, (1988).

Therefore, in the April 7, 1987 opinion, the word "approve" was given its plain and ordinary meaning commonly found in law, i.e. "to confirm"; to "ratify"; "to sanction"; "to pronounce good"; "to think or judge well of." 3A Words and Phrases, "Approve". While these terms clearly permit the Commission to pass judgement upon the quality of institutions such as proprietary schools of real estate, it would seem to require a "forced construction" to construe such terms so as to permit the Commission to regulate the advertising practices of such institutions.

A close reading of City of Columbia reveals that the statutory scheme under review in that case granted broad and pervasive power to DHEC to "take all action necessary or appropriate to secure to this State the benefits of the Federal Clean Water Act...." City of Columbia, supra, at p. 537. Given the elasticity of the statutes governing the authority of DHEC in City of Columbia, the decision of the Supreme Court is easily understood. Thus, while City of Columbia may stand for the proposition that the delegation of authority to an administrative agency charged with protecting the public health and welfare should be liberally construed, it should be noted that the statutory language reviewed by the Court contained ample indicia of legislative intent to delegate the contested authority to DHEC. Therefore, it does not appear that City of Columbia should be read to mean that an agency may assume powers which have not been conferred upon it by the legislature, through either an express grant of authority or by necessary implication from an express grant. Piedmont and Northern Ry. v. Scott, 202 S.C. 207, 24 S.E.2d 353, (1943).

In the matter at hand, the word "approved" stands as the primary indicator of the parameters of the legislative

grant of authority to the Commission. Even in light of the City of Columbia mandate, it would appear that a delegation of the authority "to approve of" is a substantially different concept from a delegation of the authority "to regulate". Where a statute uses a word having a well-recognized meaning in law, the presumption is that the legislature intended to use the word in that sense. Smalls v. Weed, 293 S.C. 364, 360 S.E.2d 531, (1987). Accordingly, this Office concludes that the holding of the S. C. Supreme Court in City of Columbia does not affect the determination reached in the April 7, 1987 opinion that the legislature has not granted to the Commission the authority to regulate advertising by proprietary schools of real estate.

Having reached the conclusion that the Commission does not have legislative authority to regulate the advertising practices of institutions such as proprietary schools of real estate, it must be noted that the Commission is expressly empowered to approve of, or conversely, to disapprove of such institutions. This authority is consistent with the general statutory purpose of ensuring that licensees of the Commission are qualified to engage in permitted activities. See: 40-57-90, Code.

Pursuant to the provisions of Section 40-57-100(1), Code, prospective licensees must first stand and pass an examination prescribed by the Commission. By the provisions of Section 40-57-100(2)(c), one of the methods through which a prospective licensee may qualify to be examined is for such person to receive the required instruction in "an institution, organization or association approved by the Commission." Clearly, it is the intention of the legislature that the Commission scrutinize and approve of an institution before it permits a person who received instruction at that institution to be examined.

Having been clothed with the authority to approve of such institutions, the Commission is further clothed with such implied authority as may be necessary for it to effectively carry out the duty with which it is charged. Carolina Water Service, Inc. v. S. C. Public Service Commission, 272 S.C. 81, 248 S.E.2d 924 (1978), cited in City of Columbia at p. 538. Consequently, the Commission may lawfully take such action as it deems necessary to effectively discharge its approval authority.

Logically, such action would seem to include the establishment of standards or guidelines by which the Commission intends to measure the quality of institutions applying for approval. The Commission would have to utilize some "measuring stick" as approval could not be granted "in a vacuum"; moreover, institutions would thereby be advised beforehand of the standards which must be met in order to obtain the Commission's approval.

Further, the Commission could require institutions desiring approval to submit such material as may be necessary to show that the Commission's standards or guidelines have been met. Obviously, the Commission could not pass judgement upon the qualifications of institutions if it did not have some means of apprising itself of those qualifications.

In addition, the Commission could confer on an institution a certificate or other credential evidencing its approval; thereby freeing the Commission from having to review the qualifications of an institution each time a "graduate" of the institution applied to be examined. Also, prospective "students" would thereby have some means of identifying those institutions already approved by the Commission.

Also, the Commission could impose on institutions requesting approval such costs and fees as would be necessary to defray the costs incurred by the Commission in the review and approval process.

Finally, the Commission could withdraw or revoke its approval when institutions fail to meet the required standards. In this regard, approval could be granted on a year-to-year, session-to-session or other time-incremental basis.

The aforementioned activities do not represent a complete enumeration of such acts as could lawfully be undertaken by the Commission pursuant to its express approval authority. However, it would seem that such activities would be sufficiently connected to the Commission's approval authority so as to come within the "implied powers" principal enunciated by the S. C. Supreme Court in Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d

564 (1948), and reiterated by the Court in Carolina Water Service, Inc., supra and City of Columbia, supra.

Consequently, this Office concludes that the determination reached in the opinion dated April 7, 1987 is not affected by the decision of the S. C. Supreme Court in City of Columbia, supra. However, the Commission has express statutory authority to approve of institutions such as proprietary schools of real estate before permitting "graduates" of such institutions to be examined for licensure. Consistent with Beard-Laney, Inc. and other precedent cited hereinabove, the Commission may undertake such activities as may be necessary to effectively carry out the duties with which it is expressly charged.

I trust that you will find the foregoing information to be responsive to your inquiry. Please let me know if I can be of further assistance.

Very truly yours,

Wilbur E. Johnson

Wilbur E. Johnson
Assistant Attorney General

WEJ/fc
REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

Donald J. Zelenka

Donald J. Zelenka
Chief Deputy Attorney General