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The State of South Carolina

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May 1, 1990

The Honorable Joyce C. Hearn
Chairman
South Carolina Alcoholic Beverage
Control Commission
1205 Pendleton Street
Columbia, South Carolina 29201

Re: ABC Regulations 7-11 and 7-55

Dear Ms. Hearn:

You have asked the opinion of this Office whether South Carolina Code R7-11 and R7-55 (1976 as amended) impermissibly conflict with Section 61-3-440[1]/ insofar as these regulations define "grounds in use" as those

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

You suggest that the current Commission believes this regulatory definition of "grounds in use" may impermissibly restrict the in-

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1. Section 61-3-440 generally proscribes the issuance of any retail liquor license if the place of business is located 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 a municipality.

tended scope of Section 61-3-440.

Statutes such as Section 61-3-440 are common in state liquor regulatory schemes, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 74 L.Ed.2d 297, 305 n. 7, 103 S.Ct. 505 (1982). These statutes appropriately provide a zone of protection around churches and schools to insulate diverse centers of religious and educational enrichment from the hustle and bustle of the alcohol trade. Id., 74 L.Ed.2d, at 303. The United States Supreme Court in Larkin held that "plainly schools and churches have a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor." Id., 74 L.Ed.2d, at 303. The South Carolina statutory provisions suggest these same goals and purposes. Additionally, these types of statutes are liberally construed in favor of the restrictions and in favor of the places or institutions that they are designed to protect. 48 C.J.S., Intoxicating Liquor, § 96.

Section 61-3-440 provides for measurement of the distance by computing the shortest route of ordinary pedestrian or vehicular traffic along a public thoroughfare from the nearest point of the grounds in use as part of the church, school or playground. Although "church," "school" and "playground" are defined by statutory language, I believe these statutory definitions are included solely for the purpose of identifying the types of institutions or establishments subject of the statute's protection and, thus, the General Assembly did not statutorily define the phrase "grounds in use as part of" a church, school or playground. The Commission promulgated R7-11 and R7-55 [hereinafter the Regulation]2/ to define this statutory phrase as

> grounds immediately surrounding the building or buildings which provide ingress or egress to such building or buildings and does not extend to the grounds surrounding the church which may be used for beautification, cemeteries, or any purpose other than such part of the land as is necessary to leave the public thoroughfare and to enter or leave such building or buildings.

This type of regulation is what is commonly known as an interpretive rule.

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2. R7-11 and R7-55 contain essentially identical language. R7-11 appears as part of the article regulating sale and consumption (mini-bottle) licenses and R7-55 is located with those provisions generally governing liquor licenses.

> An interpretive rule is a rule which is promulgated by an administrative agency to interpret, clarify or explain the statutes or regulations under which the agency operates.

Young v. South Carolina Department of Highways and Public Transportation, 287 S.C. 108, 112, 336 S.E.2d 879 (S.C. App. 1985). The courts of this state hold that "interpretive rules are 'entitled to great respect by the courts but [are] not binding on them.' Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 540, 230 S.E.2d 219, 221 (1976)." Young, 287 S.C., at 112. Moreover,

> [c]onstruction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons.

Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986); Welch v. Public Service Commission, ___ S.C. ___, 377 S.E.2d 133 (S.C. App. 1989). And 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. Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (S.C. App. 1983).

The 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.

In light of this legislative and administrative history and with due regard for these well established rules of statutory con-

struction, I do not believe that the courts would find the Regulation to be void as inconsistent with the statute. This 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. Moreover, I do not suggest that the present Commission's belief that the statute should be applied more broadly than suggested by the Regulation is not a reasonable interpretation of Section 61-3-440,3/ but again, such speculation is irrelevant since the courts would be constrained to defer to the construction embellished in the Regulation.

I emphasize 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. [Cite omitted.] This determination of suitablity 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, §§ 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

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3. Various cases annotated at 48 C.J.S. Intoxicating Liquors, § 97, recognize a number of different methods for measurement adopted by regulatory bodies to implement similar statutory proscriptions. Some of these cases suggest that property line to property line is the appropriate method of measurement while others suggest that door-to-door measurement is appropriate.

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).

CONCLUSION

In conclusion, I doubt that the courts of this state would conclude that Alcoholic Beverage Control Commission Regulations R7-11 and R7-55 impermissibly conflict with Section 61-3-440 of the South Carolina Code. On the other hand, I advise that the Commission is not constrained to issue licenses to all liquor outlets located beyond three hundred or five hundred feet from any church, school or playground since the issuance of a liquor license involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact on the community where it is to be situated. Moreover, although R7-11 and R7-55 most likely have the force and effect of law, the Commission is authorized to amend or repeal the Regulations pursuant to its continuing rule making power.

Please let me know if I may provide further assistance.

Sincerely yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

ROBERT D. COOK
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