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The State of South Carolina



Office of the Attorney General

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November 20, 1990

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

Dear Chairman Hearn:

You have asked whether "the current law prohibits the sale of mini bottles on election day." I understand from our telephone conversations relating to your request that you are familiar with 1978 Op. Atty. Gen. No. 121 (June 20, 1978) wherein this Office responded to a similar question raised by C. Kenneth Powell, then Chairman of the Alcoholic Beverage Control Commission; thus, I will treat your inquiry as a request to revisit or overrule the 1978 opinion. In reviewing prior opinions of the Office of Attorney General, we will not set aside nor vacate Office opinions unless we find them to have been erroneously decided at the time of issuance or we believe that subsequent events dictate that the opinion should be modified. Op. Atty. Gen. (October 3, 1986).

I.

The 1978 opinion concluded that Section 61-13-380, South Carolina Code of Laws (1976) [Act 501 of 1978], by its express language, prohibited the sale of alcoholic beverages on statewide election days. We did not find any language within Section 61-13-380 which suggested that the General Assembly intended to exclude mini bottles from the proscriptive scope of Section 61-13-380. On the contrary, we concluded that "alcoholic beverages," in both its ordinary and technical meanings, included mini bottles. Additionally, we believed that the underlying legislative intent to prohibit alcoholic beverage sales on election days would be undermined if the prohibition did not extend to mini bottles.

Consistent with the State Supreme Court's instruction in Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970), we construed Section 61-13-380 with reference to Section 61-5-20, the general provisions that authorize the sale of mini bottles "between the hours of ten o'clock in the morning and two o'clock on the following morning" for nonprofits organizations, and "between the hours of ten o'clock in the morning and two o'clock the following morning," with the exception of Sunday, for business establishments. We determined that Section 61-5-20 (3) and (4) did not evince a legislative intent to authorize mini bottle sales on statewide election days or on other days declared by the Governor to constitute emergencies. But instead, we read this provision as simply providing the general enabling authority for sales of mini bottles during certain hours in normal or ordinary circumstances. We thus concluded that the specific provision relating to statewide election day sales in Section 61-13-380 was controlling as opposed to the general provisions found in Section 61-5-20 (3) and (4).

We further relied upon the fact that Section 61-13-380 was the later enactment. See 1978 Act 501. Finally, we realized that then extant Section 7-25-90 also prohibited the sale of mini bottles on election days, at least within one mile of voting precincts. This provision also underscored the State's concerns with alcoholic beverages being dispensed on election days. There is simply no basis to conclude that the 1978 opinion was erroneous at the time it was issued.

## II.

Several events have occurred subsequent to the issuance of the 1978 opinion. The General Assembly, in response to the opinion, repealed Section 7-25-90. See 1978 Act 632, Part II, Section 4. This action, therefore, repealed one of the critical statutes that supported the 1978 opinion's conclusion. Moreover, the General Assembly reenacted Title 61, Chapter 5, Article 1, of the 1976 Code [the mini bottle law]. See 1978 Act 586, Part II. This reenactment of the mini bottle law included the reenactment of Section 61-5-20 (3) and (4), which provides:

Notwithstanding any other provision of law, ...:

- (3) Nonprofit organizations with limited membership, ... may be licensed to sell alcoholic liquors and beverages in sealed containers of two ounces or less. Members or guests of members of such organizations may consume alcoholic liquors and beverages sold in such

containers upon the premises between the hours of ten o'clock in the morning and two o'clock on the following morning.

- (4) Except on Sunday, it shall be lawful to sell and consume alcoholic liquors and beverages sold in sealed containers of two ounces or less in any business establishment between the hours of ten o'clock in the morning and two o'clock the following morning....

The most significant intervening circumstance has been the Alcoholic Beverage Control Commission's continuous interpretation that the Alcoholic Beverage Control Act does not prohibit the sale of mini bottles on statewide election days. The Commission has, for at least thirteen years, interpreted Section 61-13-380 as being inapplicable to mini bottles. See, letter from the Executive Director of the Commission (May 5, 1990). The Executive Director advises that the Commission had earlier construed Section 61-5-20 as controlling and that this interpretation has been consistently followed for approximately thirteen years.

### III.

While it is doubtful that the repeal of Section 7-25-90 and the reenactment of Section 61-5-20 served to undermine the conclusion reached in the 1978 opinion, 1/ the courts would most probably defer to the Alcoholic Beverage Control Commission's continuous interpretation of Sections 61-13-380 and 61-5-20. The Commission is the specific governmental agency charged with administration and enforcement of these statutory provisions.

Construction 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, 297 S.C. 378, 377 S.E.2d 133 (S. C. App. 1989). Moreover, deference to the agency's interpretation is highlighted in those situations where the administrative

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1. See Op. Atty. Gen. (July 10, 1978) wherein we advised then Representative Jean Hoefer Toal that the reenactment of Section 61-5-20 would probably not serve to repeal or limit Section 61-13-380.

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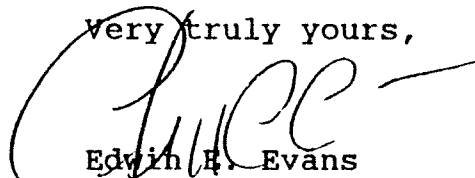
interpretation is longstanding and has been consistently followed. Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (S. C. App. 1983).

As earlier noted, we believe that the 1978 opinion reached the better reasoned conclusion. Most significantly in that regard, Section 61-13-380 addresses very specifically statewide election day sales of alcoholic beverages; on the other hand, no provision of the Mini Bottle Act expressly mentions election day sales. Cf. State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). Nonetheless, Sections 61-13-380 and 61-5-20, when read together, may suggest at least some ambiguity as to the legislative intent upon this matter; particularly, when the statutes are viewed with the rather confusing actions of the General Assembly that occurred in 1978. Accordingly, we are constrained to defer to the Alcoholic Beverage Control Commission's longstanding and consistent interpretation that Section 61-13-380 does not prohibit the sale of mini bottles on statewide election days.

Since the legislative intent here is not completely clear, the Commission may wish to seek legislation to clarify the confusion. Moreover, in light of this Office's 1978 opinion, the Commission may wish to review and revise its interpretation that Section 61-13-380 does not proscribe election day sales of mini bottles. In that regard, the court's required deference to the Commission's longstanding interpretation does not preclude prospective amendment by the Commission of this interpretation. McCoy v. U. S., 802 F.2d 762 (4th Cir. 1986). Of course, these are policy considerations that rest with the Commission, not this Office.

In summary, I advise that while we believe the better reading of Section 61-13-380 is that it operates to prohibit the sale of mini bottles on statewide election days; nonetheless, when this provision is read in conjunction with Section 61-5-20 and in light of the confusing legislative history, the legislative intent is not clear. Accordingly, we must defer to the Alcoholic Beverage Control Commission's longstanding interpretation that Section 61-13-380 does not preclude the sale of mini bottles on statewide election days.

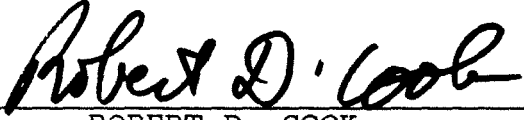
Very truly yours,



Edwin R. Evans  
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

A handwritten signature in black ink, reading "Robert D. Cook". The signature is written in a cursive style and is positioned above a horizontal line.

ROBERT D. COOK  
Executive Assistant for Opinions